The New Standing Problem and Its Legislative Solution

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*ABSTRACT: Recent Supreme Court decisions have tightened standing doctrine. These decisions endanger innumerable statutes that allow for "statutory damages," i.e., damages in a fixed amount that a plaintiff may recover without proving actual damages. This Article explores how Congress could use a device known as a "*qui tam *action" to provide plaintiffs with the equivalent of statutory damages in cases that would be barred by the Supreme Court's new standing restrictions. The Article examines this mechanism in detail and defends it against attacks that would likely arise if Congress put it to work. The Article explains that* qui tam *plaintiffs would have standing because the* qui tam *mechanism allows the United States, which always has standing to enforce federal law, to delegate its standing to private plaintiffs. The Article also defends* qui tam *actions against the assertion that they improperly interfere with the President's Article II authority.* Qui tam *actions, the Article concludes, would be an effective legislative workaround for the Supreme Court's newly restrictive standing doctrine.*

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INTRODUCTION

The Supreme Court has long used standing doctrine to keep disfavored plaintiffs out of federal court, but recently it took things to a new level. In *TransUnion LLC v. Ramirez*,[1] the Court held that some plaintiffs lacked standing to bring an action for monetary relief expressly authorized by Congress.[2] The Court's continued tightening of standing doctrine poses a problem that demands a solution. This Article discusses a *legislative* solution.

For decades, standing doctrine has posed an obstacle to activists who seek to use federal courts as instruments of social reform. When such parties attempt to promote enforcement of the federal Constitution or federal laws, they must demonstrate a connection to the claims that they bring—most importantly, they must show that the allegedly unlawful actions that they challenge injure them.[3] Over time, the Supreme Court has become increasingly stringent in describing the quality that a plaintiff's injury must have.[4]

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

2. *Id.* at 2200–01.

3. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

4. The Court early insisted that the plaintiff's injury must be "some direct injury suffered or threatened." Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923). Later, the Court required the injury to be "distinct and palpable," a phrase first applied to standing doctrine in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and subsequently added that the injury must be "concrete and particularized," a phrase first used in *Duke Power Co. v. Carolina*

The saga of standing doctrine may be viewed in three stages. For a long time, the Court's standing decisions concerned parties who brought suit without specific authorization by Congress. Parties turned away for lack of standing were typically those that sought to enforce the federal Constitution,[5] or else those that attempted to enforce other federal law via general statutes such as the Administrative Procedure Act.[6]

In the 1990s, however, the Court turned things up a notch when it made clear that its efforts to keep certain matters out of federal court targeted not merely legal activists, but Congress itself. The Court denied standing even in a case in which Congress had expressly authorized plaintiffs to sue.[7] Although the Court recognized that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'"[8] the Court nonetheless restrained Congress's ability to authorize suits in federal court.[9]

Most recently, the Court's decisions have taken the matter to yet another new level. Over the last few years, the Court has not merely constrained Congress's ability to authorize suit for the injunctive relief usually sought by legal activists. The Court has constrained Congress's ability to authorize suits seeking *monetary* relief. In particular, the Court has now called into question the important and longstanding congressional practice of allowing "statutory damages" for certain violations of law.[10] Statutory damages are damages of a statutorily specified amount, which a plaintiff may recover without showing actual damages. Statutes allowing for statutory damages have a pedigree that stretches back to the First Congress.[11]

Nevertheless, the Supreme Court recently refused enforcement to a statutory damages provision on the ground that it authorized suit by plaintiffs who lacked standing.[12] The Court's newly tightened standing doctrine endangers

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Environmental Study Group, Inc., 438 U.S. 59, 80, (1978), and "actual or imminent," a phrase first applied to standing doctrine in *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). For more on the progression of standing doctrine, see *infra* Part I.

5. *E.g.*, *Frothingham*, 262 U.S. at 479, 488 (holding that a plaintiff who has not suffered "a direct injury" may not challenge a government spending program on the ground that it violates the Tenth Amendment); United States v. Richardson, 418 U.S. 166, 167–68, 170 (1974) (holding that a taxpayer may not challenge the failure to publish the Central Intelligence Agency's budget as a violation of the Statements and Accounts Clause).

6. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 734, 741 (1972) (holding that an environmental organization lacked standing to challenge development in a national forest).

7. *Defs. of Wildlife*, 504 U.S. at 576–77.

8. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (alteration in original) (quoting *Warth*, 422 U.S. at 500); *see also Defs. of Wildlife*, 504 U.S. at 578 (confirming this principle).

9. *See Defs. of Wildlife*, 504 U.S. at 576 (holding that the courts may not dispense with standing requirements, whether they "act on their own, or at the invitation of Congress").

10. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204–07 (2021).

11. *E.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (imposing damages of fifty cents per sheet for copyright infringement).

12. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); *TransUnion*, 141 S. Ct. at 2204.

innumerable provisions for statutory damages. It means that Congress will be able to authorize a plaintiff to bring a federal suit for statutory damages only if the plaintiff has suffered what the courts are willing to recognize as an injury. The Court indicated that Congress's judgment in this regard may be "instructive,"[13] but it also indicated that "[Congress] may not simply enact an injury into existence,"[14] and it suggested that the most important consideration "is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[15] The Supreme Court's decisions have significantly hampered Congress's ability to authorize enforcement of federal law. It is time for Congress to assert itself. Some scholars have already challenged the legal reasoning of the recent standing cases.[16] These attacks have merit, and of particular interest is the question whether a plaintiff's interest in a lawsuit must stem from a presuit injury, as opposed to a reward that the plaintiff could obtain at the suit's end.[17] But it seems doubtful that the Supreme Court will be swayed by explanations of why it erred as a matter of legal doctrine.[18] What is needed, and what this Article provides, is a *legislative* solution to the Supreme Court's narrowing of standing doctrine.

A legislative solution is possible. To be sure, standing doctrine derives from Article III of the Constitution, which Congress cannot override.[19] Although the Supreme Court recognizes that statutes may create standing where none existed before,[20] the recent doctrine, as noted above, imposes limits on Congress's ability in this regard.[21] Statutes that simply and straightforwardly confer rights and authorize lawsuits may not have their intended effect.

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13. *TransUnion*, 141 S. Ct. at 2204.

14. *Id.* at 2005.

15. *Id.* at 2200, 2204.

16. *See generally* Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349 (criticizing as "lawless" the Court's transformation of the injury-in-fact test from an effort to expand the category of those entitled to bring suit into an effort to achieve the opposite effect); Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269 (2022) (discussing how *TransUnion* could dramatically change standing principles and cause many federal statutes to become unenforceable); Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729 (2022) (demonstrating how the approach already employed to determine whether a statute creates an individual right serves as a limiting principle to prevent the congressional manipulation the *TransUnion* majority feared); Jacob Phillips, TransUnion*, Article III, and Expanding the Judicial Role*, 23 FEDERALIST SOC'Y REV. 186 (2022) (arguing that *TransUnion* undermines Congress's authority to legislate and does not protect the executive as it claims to, thus frustrating the separation of powers); JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 175–85 (2021) (proposing a new standard for standing that is "more historically defensible").

17. *See infra* Section II.A.

18. *See infra* Section II.A.

19. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–78 (1992).

20. *Id.* at 578.

21. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204–05 (2021).

However, that does not mean that Congress is without recourse. There is a mechanism available that Congress could immediately put to work in the service of standing: the *qui tam* action.[22] Although this form of action is uncommon today, it is an ancient and established suit form by which Congress may authorize private parties to sue on behalf of the United States. Congress could use this suit form to authorize suits that would have the same effect as the suits blocked by the Supreme Court's recent standing decisions. The key insights that support this innovation are, first, that the United States always has standing to enforce federal law, and, second, that the United States can effectively delegate its standing to private parties via the *qui tam* mechanism.[23] The use of *qui tam* actions would also capitalize on the Supreme Court's recent emphasis on the use of history in determining the validity of legislative enactments.[24]

The proposed use of *qui tam* actions would not be without controversy. The Supreme Court recently decided a *qui tam* case, and although the case involved only a question of statutory interpretation, three Justices who issued separate opinions used the case as an opportunity to express doubt about the constitutionality of *qui tam* actions.[25] These Justices questioned whether the power given to private plaintiffs by *qui tam* statutes is consistent with Article II's vesting of the "executive Power" in the President.[26] However, as this Article shows, the *qui tam* action should survive this constitutional attack as well as others.[27]

The Supreme Court's sharp curtailment of Congress's authority to authorize plaintiffs to seek monetary remedies urgently necessitates consideration of whether there are mechanisms Congress could use to continue to make such

22. *See infra* Section II.B.

23. I have previously explored how Congress could use the *qui tam* mechanism in the service of parties whom it wants to allow to bring suit against state defendants. Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 564–69 (1995) [hereinafter *State Sovereign Immunity*]; Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 73–94 (1999) [hereinafter *Suits Against States*]. For others' thoughts about the use of *qui tam* actions to overcome standing issues, see generally Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); SCOTT R. ANDERSON, REVISITING STANDING DOCTRINE: RECENT DEVELOPMENTS, POLICY CONCERNS, AND POSSIBLE SOLUTIONS 49–53 (2022). For a defense of *qui tam* actions against constitutional attack, see generally Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989). For other, related suggestions about *qui tam* actions, see generally Peter Ormerod, *Privacy Qui Tam*, 98 NOTRE DAME L. REV. 267 (2022); and Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020).

24. *E.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022) (emphasizing "reliance on history to inform the meaning of constitutional text"); *see infra* Section II.B.2.i.

25. *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1737 (2023) (Kavanaugh, J., concurring); *id.* at 1740–43 (Thomas, J., dissenting). Justice Barrett joined Justice Kavanaugh's concurring opinion. *Id.* at 1737 (Kavanaugh, J., concurring).

26. *Id.* at 1740–43 (Thomas, J., dissenting) (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020)); *id.* at 1737 (Kavanaugh, J., concurring).

27. *See infra* Sections II.B.2–.3.

remedies available. This Article provides a detailed exploration of the *qui tam* mechanism and defends it against attacks that would likely arise if Congress put it to work.

Part I of this Article provides some background on standing and explores the new problem created by the Supreme Court's most recent decisions. Part II explores a mechanism by which Congress could, if it wanted to, overcome those decisions and provide relief for plaintiffs currently barred from access to federal court.

I. THE NEW STANDING PROBLEM

The restrictions of standing doctrine are familiar and need be only briefly reviewed here. This Part provides a brief review of standing. It highlights the Supreme Court's most recent restrictions, which are the main subject of the Article.

Article III of the Constitution vests the federal courts with "[t]he judicial Power."[28] It provides that this power shall extend to nine specified categories of "Cases" and "Controversies."[29] Although Article III does not expressly contain a standing requirement, the Supreme Court has interpreted it to impose one. The Court has held that Article III requires that the plaintiff in a federal lawsuit must have suffered an injury in fact, "fairly traceable to the . . . allegedly unlawful" actions of the defendant, and "likely to be redressed by" a favorable court decision.[30] Standing doctrine also has numerous additional requirements, subtleties, and refinements,[31] but this Article is concerned primarily with the main requirements—particularly injury in fact.

The Supreme Court has never comprehensively defined injury in fact. Indeed, it has stated that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition."[32] It even added that "[i]n many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."[33]

Over time, the Supreme Court has tightened the injury-in-fact requirement so that it poses more and more of an obstacle to suit. The Court early insisted that a plaintiff's injury must be "some direct injury suffered or threatened."[34]

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28. U.S. CONST. art. III, § 1.

29. *Id.* art. III, § 2.

30. *E.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).

31. Standing doctrine also requires that parties assert their own rights, not the rights of others, *id.*, although there are exceptions to this requirement. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 192–94 (1976) (permitting assertion of third-party rights). It requires that a party not raise a "generalized grievance." *E.g.*, United States v. Richardson, 418 U.S. 166, 175 (1974). And, it requires that the plaintiff be "within the zone of interests" of the statute allegedly violated. *E.g.*, Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 488 (1998).

32. *Allen*, 468 U.S. at 751.

33. *Id.* at 751–52.

34. Massachusetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 488 (1923).

This requirement then accrued additional details over the years. The Court later held that the injury must be "distinct and palpable,"[35] and subsequently added that it must also be "concrete and particularized."[36] The statement that the injury must be "suffered or threatened" was later tightened to require that the injury be "actual or *imminent*."[37]

But for purposes of this Article, the main feature of the continual tightening of standing doctrine is how the Court has tightened up with regard to Congress's ability to confer standing on potential plaintiffs. For this purpose, the Court's decisions may be divided into three stages.

A. STAGE ONE: SUIT WITHOUT SPECIFIC CONGRESSIONAL AUTHORIZATION

First, for many years, the Supreme Court's constraints on standing doctrine worked against parties that sought enforcement of the Constitution[38] or federal law through a general vehicle such as the Administrative Procedure Act.[39] In these cases, Congress had not specifically authorized the suit. The difficulties in determining who had standing were emblematic of our haphazard system for seeking judicial review, which arose without centralized planning, as parties attempted to challenge allegedly unlawful government behavior using forms of action developed for different purposes.[40] Standing doctrine emerged as the courts determined which parties were entitled to bring such challenges.

Cases from this period gave rise to the well-recognized differentiation between parties subject to regulation and parties who would benefit from

35. This phrase was first applied to standing doctrine in *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

36. This phrase was first used in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978).

37. This phrase was first applied to standing doctrine in *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added).

38. *E.g.*, *Frothingham*, 262 U.S. at 479–80, 488 (holding that a plaintiff who has not "some direct injury" may not challenge a government spending program on the ground that it violates the Tenth Amendment); United States v. Richardson, 418 U.S. 166, 176–78 (1974) (holding that a taxpayer may not challenge the failure to publish the Central Intelligence Agency's budget as a violation of the Statements and Accounts Clause).

39. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 734, 741 (1972) (holding that an environmental organization lacked standing to challenge development in a national forest).

40. As Justice Jackson observed:

> [The French] recognized from the beginning that controversies between the citizen and an official, in the performance of his duty as he saw it, involved some different elements and considerations than the contest between two private citizens over private matters. They invested the Conseil d'Etat with jurisdiction over regulatory bodies and recognized that *droit administratif* was a different matter than private law, as to which the Cour de Cassation was the high court.
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> But the United States and England have backed into the whole problem rather than face it.

ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 46 (1955) (footnote omitted).

stricter enforcement of regulation.[41] Any person or entity subject to government control invariably has standing to challenge it.[42] If a law, regulation, or other form of government compulsion (backed up by some legal sanction) forbids someone from doing something that they wish to do, or requires them to do something they do not wish to do, they certainly have standing to challenge the lawfulness of the government obligation that impacts their behavior.[43]

Parties who would benefit from stronger enforcement of some governmental requirement, but who are not themselves subject to it, are in a less favorable position. A party claiming that the government is regulating someone else with insufficient stringency must show an interest in the regulation. That party is required to show a personal injury from the lack of enforcement.[44]

Sierra Club v. Morton[45] is a classic example illustrating the standing principles from this period. When the federal government proposed to open the Mineral King Valley within Sequoia National Forest to development, the Sierra Club sued to block the development.[46] The Sierra Club claimed that the development would violate various federal statutes.[47] However, the Sierra Club was not itself subject to the allegedly violated constraints; rather, it wanted improved enforcement of them. Also, Congress had not specifically authorized parties such as the Sierra Club to sue to enforce the constraints; the Sierra Club sued under the general provisions of the Administrative Procedure Act.[48] The Court held that such a plaintiff must show an injury in order to bring suit.[49]

Throughout this period, however, no one doubted the ability of Congress to confer standing by statute. The Supreme Court recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[50] *Havens Realty Corp.*

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41. *See* Sunstein, *supra* note 16, at 371. Here, "regulation" is used in the larger sense of government restraints on conduct, which may take the form of statute, regulation, or other order.

42. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992); Sunstein, *supra* note 16, at 370; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

43. As parenthetically noted, the government requirement must be backed up by some legal sanction. If the government imposes a requirement but provides no penalty for violation of the requirement, then even one subject to the requirement lacks standing to challenge it. California v. Texas, 141 S. Ct. 2104, 2113–15 (2021). Indeed, even if a statute imposes a criminal penalty for certain behavior, but the statute has fallen into a state of desuetude (i.e., in practice it is never enforced), those subject to the penalty lack standing to challenge it. Poe v. Ullman, 367 U.S. 497, 504–06 (1961).

44. *See* Sunstein, *supra* note 16, at 371.

45. Sierra Club v. Morton, 405 U.S. 727, 727 (1972).

46. *Id.* at 729–30.

47. *Id.* at 730 n.2.

48. *Id.* at 730.

49. *See id.* at 739–40.

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

v. Coleman provides an example.[51] In that case, "tester" plaintiffs, who sought to determine whether realtors were complying with the Fair Housing Act, sought information from realtors about available housing.[52] They received different information depending on the race of the tester, and they brought suit for violation of the act.[53]

The Court held that those plaintiffs who had received false housing information had standing to sue the realtors, even though they may have approached the realtors expecting to receive false information, and even though they may have had no intention of putting any truthful information they might have received to any use.[54] In the absence of the statute, the defendants might have prevailed on the ground that the plaintiffs who received false information were not injured, as they would not have done anything with truthful information.[55] The Court held, however, that because Congress had conferred on the plaintiffs a *right* to receive truthful information, a violation of that right was necessarily an injury.[56] Such decisions showed that Congress may create standing even where it would not otherwise exist.

B. STAGE TWO: SUIT WITH SPECIFIC CONGRESSIONAL AUTHORIZATION

The 1992 case of *Lujan v. Defenders of Wildlife*[57] initiated a second stage in the Court's use of standing to keep cases out of federal court. In this stage, the Court rejected the standing even of some plaintiffs expressly authorized to sue by act of Congress. This stage showed that Congress's power to create standing is not unlimited.

Defenders of Wildlife concerned the requirement of the Endangered Species Act ("ESA") that all government agencies, in consultation with the Secretary of the Interior, ensure that their actions are not likely to jeopardize the continued existence of any listed species.[58] The Secretary of the Interior along with the Secretary of Commerce adopted a regulation determining that this requirement did not apply to actions taken by agencies in foreign countries.[59] The plaintiffs challenged this regulation as unlawful.[60]

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51. Havens Realty Corp. v. Coleman, 455 U.S. 363, 363 (1982).

52. *Id.* at 368.

53. *Id.* at 368–69.

54. *Id.* at 374.

55. *See* Sunstein, *supra* note 16, at 361 ("Without any statute, testers could not possibly have standing.").

56. *Havens Realty*, 455 U.S. at 373–74.

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

58. 16 U.S.C. § 1536(a)(2) (2018). A species is "listed" if it is on the list of "endangered" or "threatened" species promulgated by the Secretary. *Id.* § 1533(a).

59. *Defs. of Wildlife*, 504 U.S. at 558–59.

60. *Id.* at 559.

The Court held that the plaintiffs had not demonstrated that the regulation would cause them the requisite injury that could give rise to standing.[61] Although the plaintiffs had alleged that they had traveled to foreign countries (Egypt and Sri Lanka) to view endangered animals that would be affected by projects to which U.S. agencies were contributing funding, and that they desired to do so again, they had not shown *when* they were likely to travel to these places again.[62] Accordingly, the Court held, they could not show that any injury to them was "actual or imminent."[63] A plurality of the Court also held that the plaintiffs had not demonstrated that any injury they suffered was caused by the challenged regulation, because they could not show that in the absence of funding from U.S. agencies the challenged projects would be halted.[64] These parts of the opinion were merely applications (if perhaps particularly stringent applications) of established standing concepts.

The distinctive point about *Defenders of Wildlife*—the point that marked a new stage of standing doctrine—was that the ESA contains a "citizen suit" provision that authorizes "any person" to sue to enjoin any violation of the statute.[65] In light of *Havens Realty*, which indicated that Congress may create standing by statute, one might have imagined that if Congress authorizes any person to sue, then any person may sue. The Court held, however, that because standing requirements derive from Article III of the Constitution, Congress may not direct courts to disregard them.[66] Even where Congress authorizes "any person" to sue, a suitor must satisfy the constitutional standing requirements.[67] Because the plaintiffs lacked injury, they could not sue even though Congress had authorized "any person" to sue.

Defenders of Wildlife thus showed that standing requirements may bar an action specifically authorized by Congress. But the full scope of its holding was unclear. Although the Court disallowed the suit, it reaffirmed the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[68] Thus, the case shows that Congress can sometimes, but not always, create standing that would not otherwise exist.

So, what exactly was wrong with the ESA's citizen-suit provision? The Court seemed particularly concerned that the ESA was an attempt "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts."[69] The Court's opinion

61. *Id.* at 565–71.
62. *Id.* at 563–64.
63. *Id.* at 564.
64. *Id.* at 568–71.
65. *Id.* at 571–72.
66. *Id.* at 576–78.
67. *Id.* at 571–72, 576–578.
68. *Id.* at 578 (alteration in original) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
69. *Id.* at 577.

suggested that whatever Congress may do, it may not authorize every member of the public to sue simply to vindicate "the public interest in proper administration of the laws."[70] To allow that, the Court held, would allow the courts to invade the President's authority to "take Care that the Laws be faithfully executed" and would allow the judicial branch to assume a position of authority over coequal branches.[71] Courts, the Supreme Court emphasized, are not supposed "to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'"[72] Previously, the Supreme Court had held that courts may not do this on their own.[73] Now, and distinctively, the Court held that courts may not do this even "with the permission of Congress."[74]

Still, this limitation was not completely clear. As Professor Cass Sunstein remarked at the time, if the opinion were "[r]ead for all it [was] worth," it would have invalidated all statutes in which Congress "attempted to use the 'citizen-suit' device as a mechanism for controlling unlawfully inadequate enforcement of the law."[75] But it was not clear that the Court had really gone that far. Justice Kennedy's concurring opinion suggested the potential for a more limited reading.

Justice Kennedy suggested that perhaps Congress simply had not gone about things the right way. His opinion noted that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," but said that "[i]n exercising this power . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[76] This somewhat cryptic statement suggested that Congress might still be able to create a broad public right to proper enforcement of the ESA, but that for such a right to serve as the basis for a federal lawsuit, Congress would, at a minimum, have to create it expressly. Congress's provision that any person could *sue* under the ESA would not, by itself, be taken to imply that every person has a *right* to proper enforcement of the ESA. Still, Justice Kennedy's concurring opinion might (somewhat optimistically) be read to leave room for a different result if Congress expressly provided by statute that everyone had a right to have the government obey the ESA, a violation of which would constitute an injury.[77]

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70. *Id.* at 576.

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

72. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

73. *E.g.*, *Allen*, 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

74. *Defs. of Wildlife*, 504 U.S. at 577.

75. Sunstein, *supra* note 23, at 165.

76. *Defs. of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring).

77. *See* Chemerinsky, *supra* note 16, at 276 (discussing *Defenders of Wildlife* and noting that "[s]ometimes . . . a federal law authorizes suits to enforce its provisions, but the underlying right is found to be missing"); Sunstein, *supra* note 23, at 201 (referring to Justice Kennedy's opinion as "somewhat ambiguous"); *id.* at 231, 234 (suggesting that Congress might have satisfied Justice Kennedy had it expressly provided a right to plaintiffs or expressly defined plaintiffs' injury).

C. STAGE THREE: SUITS FOR MONETARY RELIEF

Whatever room might have remained for such an understanding of Congress's authority over standing was, however, subsequently eliminated. The Court further circumscribed Congress's power over standing in two recent cases. These cases concern "statutory damages," that is, damages in a specified amount, which a statute allows a plaintiff to collect upon proving that a defendant has violated the statute, even if the plaintiff does not prove that the violation caused the plaintiff any actual damages (or proves actual damages that are less than the available statutory damages).

These cases mark the beginning of a third stage of standing stringency. They show unequivocally that standing doctrine may prevent Congress from conferring standing on a plaintiff by statute. Indeed, they show that standing doctrine may interfere with Congress's authority to authorize a plaintiff to sue not only for the kind of injunctive relief commonly at issue in standing cases, but even for monetary relief.

This development is surprising. The Supreme Court has frequently said that the essence of standing doctrine is to determine whether the plaintiff has a "stake" in the case before the court.[78] It has also said that "nothing so shows a . . . stake in a dispute's outcome as a demand for dollars and cents."[79] One might think, therefore, that a plaintiff's monetary interest in the outcome of a lawsuit would always suffice for standing. Nonetheless, these most recent cases show that even a monetary demand, on a claim specifically authorized by Congress, may not suffice to create standing.

The first such case to reach the Court was *Spokeo, Inc. v. Robins*.[80] The case concerned the Fair Credit Reporting Act ("FCRA"), which, among other things, requires any "consumer reporting agency" that creates "consumer reports" to "follow reasonable procedures to assure maximum possible accuracy of" such reports.[81] The FCRA provides that anyone "who willfully fails to comply with any requirement" of the FCRA "with respect to any consumer is liable to that consumer [for] . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000."[82] The latter phrase is a typical statutory damages

78. *E.g.*, Warth v. Seldin, 422 U.S. 490, 498–99 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." (emphasis omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))); United States v. Richardson, 418 U.S. 166, 173 (1974) ("The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.'" (alteration in original) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968))).

79. Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019).

80. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1540 (2016).

81. 15 U.S.C. § 1681e(b).

82. 15 U.S.C. § 1681n(1)(A).

provision; it authorizes recovery of an amount of damages set by statute whether or not the plaintiff can show actual damages.

Spokeo, the defendant, operates a web-based "people search engine."[83] A visitor to Spokeo's website can type in "a person's name, a phone number, or an e-mail address" and get information about that person based on database searches.[84] The plaintiff, Robins, learned that Spokeo was posting inaccurate information about him, including incorrect information about his age, marital status, employment status, and educational level.[85] He brought a class action in federal district court on behalf of all persons as to whom Spokeo had posted similarly inaccurate information,[86] and he sought the maximum statutory damages of $1,000 for each plaintiff.[87] As the plaintiff alleged that the class contained millions of members,[88] an award of one thousand dollars for each such member would have amounted to billions of dollars in total.

The district court dismissed the case for lack of standing, on the ground that merely posting incorrect information about someone, even in violation of the FCRA, is not by itself an injury.[89] The court of appeals, however, reversed.[90] The court of appeals noted that the plaintiff alleged that Spokeo was posting inaccurate information about him, which meant that the case concerned an alleged violation of "*his* statutory rights."[91] Moreover, Congress, by passing the FCRA, had "elevate[d]" the interests protected by the statute to the status of legally cognizable injuries.[92]

However, the Supreme Court, without deciding whether the plaintiff had standing, determined that the court of appeals had not applied the correct standing test. The correct test, the Court noted, requires a plaintiff's injury to be "concrete and particularized."[93] For the first time, the Court made clear that these are two separate requirements.[94] The court of appeals's observation that the plaintiff's complaint concerned wrongful information about the plaintiff showed that the plaintiff's injury was "particularized," but not that it was "concrete."

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83. *Spokeo*, 136 S. Ct. at 1544.

84. *Id.*

85. *Id.* at 1546.

86. *Id.* at 1544.

87. Complaint at 14, Robins v. Spokeo, Inc., No. 10-cv-05306, 2010 WL 11240827 (C.D. Cal. July 20, 2010), *rev'd*, 742 F.3d 409 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016).

88. *Id.* at 6.

89. Robins v. Spokeo, Inc., No. 10-cv-05306, 2011 WL 597867, at *1–2 (C.D. Cal. Jan. 27, 2011).

90. Robins v. Spokeo, Inc., 742 F.3d 409, 414 (9th Cir. 2014).

91. *Id.* at 413.

92. *Id.*

93. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

94. *Id.*; *see* Chemerinsky, *supra* note 16, at 278 ("[N]ever before had the Court treated these as two distinct requirements.").

What, then, is the content of the requirement that an injury be "concrete"? The Court's opinion was somewhat cryptic. First, the Court held that in order to be "concrete," an "injury must be 'de facto'; that is, it must actually exist."[95] However, the Court also indicated that "concrete" is not the same as "tangible." Intangible injuries, the Court said, may be concrete.[96] The Court further indicated that history and the judgment of Congress play important roles in determining whether an injury is concrete. History is relevant "[b]ecause the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice."[97] Accordingly, the Court said, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[98] Moreover, the Court said, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[99]

The Court did not apply its test to resolve the case definitively. Having given the guidance described above, it remanded the case to the court of appeals for decision.[100] This resolution left the doctrinal implications of the case less than fully clear, but it was clear at least that Congress's ability to confer standing by statute was not unlimited.

The Court's other recent case on statutory damages, *TransUnion LLC v. Ramirez*,[101] clarified the limits on Congress's ability to confer standing. *TransUnion* also concerned the FCRA.[102] The case arose when plaintiff Sergio Ramirez attempted to buy a car.[103] When the car dealership checked the plaintiff's credit with TransUnion, a credit agency, TransUnion reported that Ramirez's name matched a name on a federal government "watch list" of terrorists, drug traffickers, and other serious criminals.[104] Ramirez was not the same "Sergio Ramirez" whose name was on the list, but TransUnion's practice was to report any person whose first and last names matched those of someone on the list, without checking any other information.[105] The car dealer refused to sell Ramirez a car.[106]

95. *Spokeo*, 136 S. Ct. at 1548.
96. *Id.* at 1549.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1550.
101. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2190 (2021).
102. *Id.* at 2200.
103. *Id.* at 2201.
104. *Id.* at 2201, 2209.
105. *Id.* at 2201, 2215.
106. *Id.* at 2201.

Ramirez, asserting that TransUnion had violated the FCRA's duty to "follow reasonable procedures to assure maximum possible accuracy" in its reports, sued TransUnion.[107] The district court certified a class of persons whose files at TransUnion indicated that their names matched a name on the watch list.[108] The parties later stipulated that the class contained 8,185 members, and that the reports of 1,853 of those members were disseminated by TransUnion to third-party businesses.[109] After trial, "[t]he jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages[,] for a total award of more than $60 million."[110] The district court entered judgment on the verdict, and the court of appeals affirmed.[111]

The Supreme Court, however, held that not every member of the class had standing to sue.[112] Citing *Spokeo*, the Court reiterated that each member of the plaintiff class must have suffered a "concrete" injury,[113] and that in determining whether an injury was "concrete," a "court[] should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[114] While this inquiry, the Court said, "does not require an exact duplicate in American history," neither is it "an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[115]

The Court noted that Congress's views on the question "may be 'instructive.'"[116] This formulation was, however, a downgrade from *Spokeo*'s

107. 15 U.S.C. § 1681e(b). Ramirez also claimed that TransUnion had violated two other duties imposed by the FCRA. *TransUnion*, 141 S. Ct. at 2202. The FCRA requires consumer reporting agencies to disclose to consumers, upon request, "[a]ll information in the consumer's file at the time of the request," 15 U.S.C. § 1681g(a)(1), and to provide, with each written disclosure made to a consumer, a summary of consumer rights prepared by the Consumer Financial Protection Bureau ("CFPB"). *Id.* § 1681g(c)(2). After his experience at the car dealership, Ramirez requested his file from TransUnion. *TransUnion*, 141 S. Ct. at 2201. TransUnion sent him his credit file with the required statement of rights from the CFPB, but without the information that his name matched a name on the watch list. *Id.* The next day, TransUnion sent Ramirez a letter informing him that his name matched a name on the watch list, but without the required statement of rights. *Id.* at 2201–02. Ramirez asserted that the first mailing violated the duty to provide "all" information in his file, and the second violated the duty to include the statement of rights with each written disclosure. *Id.* at 2202.

108. *TransUnion*, 141 S. Ct. at 2202. Only those who had received a notice from TransUnion that this information was in their file (similar to the second notice received by Ramirez) were in the certified class. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2200.

113. *Id.* at 2204 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016)).

114. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

115. *Id.*

116. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

statement that Congress's view "*is* . . . instructive and important."[117] Moreover, the Court added that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III."[118]

Having given this guidance, the Court (unlike in *Spokeo*) went on to resolve the standing of the members of the plaintiff class. The Court held that those class members whose reports had been disseminated by TransUnion to third-party businesses had a concrete injury and therefore had standing to sue.[119] These class members, the Court held, had suffered an injury that bore a "close relationship" to the injury suffered by plaintiffs bringing a traditional defamation action.[120] The Court acknowledged that defamation actions traditionally required a plaintiff to show that the defendant had disseminated *false* information about the plaintiff, whereas the information disseminated by TransUnion about each plaintiff (that the plaintiff's name matched the name of someone on the watch list) might be technically true.[121] But the Court, reiterating that an exact historical duplicate is not required, held that "the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement."[122]

However, the Court held that the remaining 6,332 class members, whose files at TransUnion contained the misleading information that their names matched names on the government's watch list, but whose files had never been disseminated by TransUnion to third-party businesses, lacked standing to sue because they had suffered no concrete injury.[123] Their injury was not, the Court held, sufficiently analogous to the injury suffered by traditional defamation plaintiffs, because publication of defamatory information was an essential element of the traditional action for defamation.[124] TransUnion's merely maintaining misleading information about a person in the person's file, without disseminating it to third parties, the Court held, "causes no concrete harm."[125]

TransUnion, even more than *Spokeo*, shows that the Court's newly tightened standing doctrine has real bite. Suits for monetary relief have been the stuff of judicial business for centuries. As noted earlier, one would naturally

117. *Spokeo*, 136 S. Ct. at 1549 (emphasis added).
118. *TransUnion*, 141 S. Ct. at 2205.
119. *Id.* at 2208–09.
120. *Id.* at 2209.
121. *Id.*
122. *Id.*
123. *Id.* at 2209–10, 2212–13.
124. *See id.* at 2209–11.
125. *Id.* at 2210.

think that a plaintiff who had a monetary interest in the outcome of a suit would certainly pass the standing barrier.[126]

Moreover, Congress has passed innumerable statutes that authorize statutory damages without the need for a plaintiff to prove actual damages. Such statutes go back to the First Congress. In 1790, for example, Congress authorized a monetary award of fifty cents per sheet for copyright infringement.[127] This fixed penalty applied to *undistributed* infringing copies,[128] which, one might argue, cause no real injury to the copyright holder.

Similar provisions for statutory damages are strewn throughout the U.S. Code today. In addition to the FCRA, such statutes include, for example, the Fair Debt Collection Practices Act, which prohibits the use of any false or deceptive representation or means to collect or attempt to collect any debt, and which authorizes statutory damages for violations of this prohibition.[129] The Fair and Accurate Credit Transactions Act prohibits the printing of more than five digits of a credit-card number on a transaction receipt and authorizes statutory damages for violations.[130] The modern Copyright Act, like its earliest predecessors, authorizes statutory damages for infringements.[131] Many other examples might be cited.[132] Common-law actions requiring no proof of actual damages are also of ancient lineage.[133]

Thus, for the Court to prohibit Congress from authorizing actions for monetary damages in cases where a plaintiff may not be able to show actual damages is a highly significant restriction. It threatens the validity of innumerable statutory provisions. The Court's new standing doctrine interferes with a common and important form of damages that Congress wants plaintiffs to have available. The restriction on statutory damages is a problem.

Of course, as a policy matter, one might or might not agree with any given provision for statutory damages. In some cases, the application of a statutory damages provision may seem inappropriately harsh. For example, when the advent of file-sharing services gave rise to widespread infringement of copyrights

126. *See supra* notes 78–79 and accompanying text.

127. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25.

128. *Id.*

129. *See* 15 U.S.C. §§ 1692e, 1692k; Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 939–40 (7th Cir. 2022) (holding that the plaintiff lacked standing to invoke the act's statutory damages provision).

130. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n(a)(1)(A); Thomas v. TOMS King (Ohio), LLC, 997 F.3d 629, 639–40 (6th Cir. 2021) (holding that plaintiff lacked standing to invoke statutory damages provision).

131. 17 U.S.C. § 504(c).

132. *See* Chemerinsky, *supra* note 16, at 285–86.

133. *E.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807, 817, 2 Wils. K.B. 275, 291 ("[N]o man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all . . . ."); RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (AM. L. INST. 1965) (providing that intrusion on land is actionable even if it is "so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment").

in songs, the Recording Industry Association of America sued individuals for statutory damage awards that could have been as much as $150,000 per song,[134] which certainly seemed like rather a large penalty for the conduct involved. Moreover, even if one believed that a given statutory damages award, such as a $1,000 award for an individual violation of the FCRA, were a reasonable penalty that created an appropriate incentive for compliance with the statute's requirements, one might still regard the prospect of a class action recovery in the billions of dollars as unreasonable.

However, the wisdom of any given provision for statutory damages is not the point. The purpose of standing doctrine is not to save society from unwise penalty provisions. Some protection in that regard is found elsewhere in the Constitution.[135] For present purposes, the relevant consideration is that Congress, at the time it passed each of the statutes involved, determined that statutory damages were an appropriate remedy for violation of the statute. The Supreme Court's use of standing doctrine to impose restrictions on such damages is thwarting the will of Congress.

II. THE LEGISLATIVE SOLUTION

As described above, the Supreme Court's new and aggressive use of standing doctrine to close avenues of relief that Congress has tried to provide poses a problem. But what is the solution? Several scholars have already tried to provide the usual kind of doctrinal response, which explains the error of the Court's new standing cases. These responses have merit.[136] But it seems all too likely that they will not lead to desirable change. This Article therefore focuses on a potential legislative solution to the problem posed by the Court's new standing doctrine.

A. DOCTRINAL SOLUTIONS

The Court's recent tightening of standing doctrine has certainly not gone unnoticed. Scholars have explored some of the difficulties with the Court's opinion in *TransUnion*.[137] As discussed below, the doctrinal attacks on *TransUnion* have merit. Also noted below, however, is that these attacks are unlikely to change the Court's direction.

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134. *See* 17 U.S.C. § 504(c); Frank Ahrens, *Music Industry Sues Online Song Swappers*, WASH. POST (Sept. 9, 2003), https://www.washingtonpost.com/archive/politics/2003/09/09/music-industry-sues-online-song-swappers/4c91a4e0-8948-424c-98c7-c84e0c3af3c6 [https://perma.cc/8GRV-GJCN].

135. *See* U.S. CONST. amend. VIII (prohibiting "excessive fines"); *cf.* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 585–86 (1996) (holding that the Due Process Clause imposes limits on punitive damage awards).

136. *See infra* Section II.A.

137. *See* sources cited *supra* note 16. Professor James Pfander's book—evidently written before *TransUnion*, although they appeared in the same year—explores the difficulties with *Spokeo*. *See* PFANDER, *supra* note 16, at 175–85.

1. Attacking the Application of the Injury Requirement

Some scholars have decried the Court's determination that newly created congressional rights must be tested by examining whether they have a "close relationship" to harms traditionally recognized as sufficient to support a cause of action. These scholars have pointed out, rather indignantly, that Congress has long created rights that have no common-law analog, and that plaintiffs have long brought suit for invasion of these rights.

Professor Erwin Chemerinsky notes, for example, that the common law did not recognize the right to be free of discrimination based on race, sex, religion, or sexual orientation, that it did not recognize environmental harms, and that it provided no right not to engage in child labor.[138] Nonetheless, as to all of these matters, it is routine today for a plaintiff to bring suit based on violations of statutorily created rights.[139] The "fundamental flaw" in *TransUnion*, Chemerinsky concludes, is its failure to recognize that "Congress, by statute, should be able to create rights sufficient for standing and that are enforceable in federal courts."[140]

Similarly, Professor Cass Sunstein regards *TransUnion* as "disturbing and lawless."[141] He regards "the idea that Congress lacks broad power to create legal rights, and to grant people causes of action to vindicate them," as "preposterous."[142] He concludes ("[o]nce more, with feeling")[143] that the Court should make clear that "Congress has the authority to create 'new rights of action that do not have clear analogs in our common-law tradition.'"[144]

In a somewhat different vein, Professor Elizabeth Beske suggests that what the Court needs is a better test than "concreteness" for distinguishing those cases in which Congress has successfully authorized suit from those in which it has not.[145] She rightly observes that the Court's test, which focuses primarily on whether a congressionally created cause of action bears a "close relationship" to traditional causes of action, provides no clear principle that explains why Congress can create an action that omits some requirements of analogous common-law actions (e.g., the requirement of falsity in traditional defamation actions), while other common-law requirements are indispensable (e.g., the requirement of publication in traditional defamation actions).[146] She suggests that the Court should have drawn on the test it uses to determine when Congress has created a private right of action, which asks whether the

138. Chemerinsky, *supra* note 16, at 287.

139. *Id.* at 286–90.

140. *Id.* at 286.

141. Sunstein, *supra* note 16, at 374.

142. *Id.*

143. *Id.* at 374 n.136.

144. *Id.* at 374 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

145. Beske, *supra* note 16, at 733–37.

146. *Id.* at 766–67.

statute contains rights-creating language, which turns in part on whether the statute's focus is on the benefitted class or on the regulated party.[147] Applying this analysis, Beske maintains, would have better sorted out the claims that should have been allowed in *Spokeo* and *TransUnion* from those that should not.[148]

Still other scholars focus on the oddity that because *Spokeo* and *TransUnion* turned on standing and did not invalidate the substantive liability created by the FCRA, they lead to the curious result that plaintiffs may still enforce that liability—but only in state courts![149] State courts, not being bound by Article III, do not have to conform to federal concepts of standing.[150] Accordingly, it would appear that plaintiffs may still bring FCRA actions in state court.

2. Attacking the Injury Requirement Itself

The above analyses attack the Supreme Court's application of the "injury" requirement in *TransUnion*. They assert that Congress should have the ability to confer legal rights, invasion of which should constitute a sufficient injury for standing purposes. These analyses correctly point out a flaw in the Court's application of standing doctrine's injury requirement in *TransUnion*. Another attack, however, brings out an even more fundamental flaw with the injury requirement. The problem lies not merely in the way the Court applied the injury requirement in *TransUnion*, but with the requirement itself.

The fundamental flaw is the Court's insistence that a plaintiff's interest in a federal lawsuit can arise only by virtue of a prelawsuit injury. This principle makes little sense as a matter of theory,[151] and it is also belied by actual judicial practice.[152] Even accepting that a plaintiff must have an individualized interest in a lawsuit,[153] that interest may, as a matter of both theory and practice, arise from the benefit that the plaintiff may gain at the *end* of the lawsuit, regardless

147. *Id.* at 778–81; *see, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 288–89 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981))).

148. Beske, *supra* note 16, at 783–85.

149. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1211–12, 1231–34 (2021); Jacob L. Burnett, Essay, *A Bug or a Feature?: Exclusive State-Court Jurisdiction over Federal Questions*, 170 U. PA. L. REV. ONLINE 147, 148–50 (2022).

150. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (explaining "that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law").

151. *See infra* Section II.A.2.i.

152. *See infra* Section II.A.2.ii.

153. The requirement that the plaintiff must have any "stake" at all in litigation may be questioned. *See, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 480–82, 530 (1994) (arguing that plaintiffs were historically permitted to bring actions in which they had no individual interest). The point here is that even if this requirement is accepted, the "stake" need not arise exclusively from a prelawsuit injury.

of whether that award compensates the plaintiff for a prelawsuit injury.[154] A prelawsuit injury should not be, and in fact is not, the *sine qua non* of standing.

i. Standing Based on an End-of-Suit Award, in Theory

The Supreme Court, as noted earlier, has stated that the function of the injury requirement is to ensure that the plaintiff has a "stake" in the litigation.[155] According to this theory, a plaintiff who has suffered a concrete, particularized injury (or who is imminently in danger of suffering such an injury), will have a stake in the litigation that will incentivize the plaintiff to litigate vigorously.[156] The plaintiff's personal stake will "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[157]

A prelawsuit injury is not, however, necessary to give the plaintiff a stake that will incentivize vigorous litigation. Such a stake may arise just as much from a benefit that the plaintiff could gain at the *end* of the litigation as it can from an injury that the plaintiff suffered *prior* to the litigation. If the plaintiff would gain something from a successful lawsuit, that potential gain provides the plaintiff with a personal stake in the outcome and a motivation to succeed regardless of whether or not the gain would compensate the plaintiff for a prelawsuit injury.

Moreover, as also noted earlier, "nothing so shows a . . . stake in a dispute's outcome as a demand for dollars and cents."[158] When Congress authorizes a plaintiff to recover a monetary award upon showing that a defendant violated a federal statute, the plaintiff has a dollars-and-cents interest riding on the lawsuit's outcome. Economically speaking, it makes no difference to the plaintiff whether the money that the plaintiff could obtain from a successful suit would compensate the plaintiff for some prelawsuit injury or not. If

154. *See Suits Against States*, *supra* note 23, at 92 (making this argument based on one of the historical examples discussed in Section II.A.2.ii, *infra*); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1393–1402, 1451–53 (2015) (providing a detailed exploration of cases that historically proceeded without adverse parties and suggesting a "reformulation of the current standing test in matters of noncontentious jurisdiction"); PFANDER, *supra* note 16, at 40–47, 175–85 (exploring cases that historically proceeded without adverse parties and suggesting that standing doctrine should turn on whether the plaintiff has a "litigable interest" rather than an "injury in fact").

155. *See supra* note 78 and accompanying text; *see also* Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) ("[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has a 'personal stake in the outcome.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

156. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970); *see also* United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc., 517 U.S. 544, 556 (1996) (holding that the third prong of the three-pronged associational standing test is prudential, not constitutional, as the first two prongs sufficiently ensure "adversarial vigor in pursuing a claim").

157. *Baker*, 369 U.S. at 204.

158. Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019).

success in the lawsuit would yield the plaintiff, say, $1,000, then the plaintiff has a $1,000 interest in the suit whether or not the plaintiff suffered $1,000 worth of injury prior to the suit.[159]

Indeed, a simple thought experiment shows that the plaintiff's "stake" in any lawsuit really arises from the prospect of gain at the end of the suit, not from any prelawsuit injury that the plaintiff may have suffered. Imagine two potential plaintiffs, A and B. Potential plaintiff A suffered an injury at the hands of potential defendant X, but for whatever reason, it is one hundred percent clear that a suit by A against X would be unsuccessful (perhaps the statute of limitations has unequivocally expired, or X has been through bankruptcy and received an unequivocally proper discharge of whatever obligation X might owe A). Meanwhile, potential plaintiff B has suffered no injury from anyone, but some law (perhaps state law, which is not subject to Article III standing requirements) permits B to sue potential defendant Y and receive $1,000,000 if successful. Which potential plaintiff is likelier to bring suit and litigate vigorously? Obviously, the answer is B. A, although injured, would have no motivation to bring a suit that could yield no benefit; B, although uninjured, has a strong motivation to sue Y to receive a potentially bountiful award.

Accordingly, to the extent that the purpose of standing is to ensure that the plaintiff has a stake in litigation, there is no reason why the stake *must* arise from a prelawsuit injury. A plaintiff is motivated to sue by the prospect of a recovery. That prospect may exist whether or not the plaintiff suffered a prelawsuit injury. A law conferring a right to recover on a plaintiff (such as a law providing for statutory damages) gives the plaintiff as much stake in the resulting case as a prelawsuit injury.

ii. Standing Based on an End-of-Suit Award, in Practice

Suits by plaintiffs who have suffered no prelawsuit injury, but who stand to gain something from a successful suit, are not merely theoretical. Actual judicial practice permits such suits. There are several categories in which such

159. The point here is reminiscent of a point that was famously at issue in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 1 (1842), namely, whether a purchaser of a negotiable instrument could be said to have given value for the instrument if he did not give the seller money for the instrument, but only released the seller from the seller's obligation to pay a preexisting debt to the buyer. *Id.* at 4. As the Court correctly observed, "it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument." *Id.* at 20. Of course, *Swift* was subsequently overruled for other reasons, see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938), but its observation that receiving new money and being relieved of prior obligations are economically equivalent remains sound. *See* U.C.C. § 3-303(a)(3) (AM. L. INST. & UNIF. L. COMM'N 2002) (providing that "[a]n instrument is issued or transferred for value if . . . the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person"); Weyant v. Phia Grp. LLC, 556 F. Supp. 3d 310, 322 (S.D.N.Y. 2021).

suits were traditionally permitted, some such suits persist today, and the Supreme Court itself has approved some of them.[160]

This is particularly important given that the Supreme Court has suggested that the standing requirement confines the judicial power to "cases and controversies" that would traditionally have been recognized as proper judicial business.[161] If only cases in which the plaintiff suffered a prelawsuit injury were traditionally considered proper judicial business, then perhaps we would be stuck with the prelawsuit injury requirement regardless of whether it makes theoretical sense. If that really were the tradition, then one who wished to object to the previous Section would say that the traditional, prelawsuit injury requirement must be satisfied even though, economically speaking, any benefit that a plaintiff might gain from a successful lawsuit would have the same impact on the plaintiff whether or not it compensated the plaintiff for a prelawsuit injury.

In fact, however, courts traditionally permitted several categories of suits in which the plaintiff suffered no prelawsuit injury. For example, in *Tutun v. United States*,[162] the Supreme Court approved federal jurisdiction over naturalization proceedings, which at the time took the form of a lawsuit against the United States.[163] The plaintiff in such a lawsuit has suffered no antecedent "injury," but stands to gain the benefit of naturalization if the action is successful. Despite the lack of prelawsuit injury, and although the postlawsuit benefit the plaintiff would gain was not even economic, the Court approved the matter as within the Article III judicial power. It said, "[w]henever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status."[164]

Similar reliance on a benefit to be gained at the end of a case, rather than an injury that occurred prior to the commencement of the case, may be seen in "prize" and "salvage" cases, that is, cases in which a plaintiff who had captured or helped to save a ship at sea claimed their reward. The plaintiff in such a case might have suffered no injury (and certainly no injury caused by a wrongful action of the defendant, as standing law normally requires),[165] but

160. I noted one of the categories discussed below in *Suits Against States*, *supra* note 23, at 92, and discussed its significance with regard to standing doctrine's injury requirement. Professor Pfander explores the categories discussed below in his study of the adverseness requirement and discusses their significance with respect to standing in Pfander & Birk, *supra* note 154, at 1393–1402, 1451–53; and PFANDER, *supra* note 16, at 40–47, 175–85.

161. *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

162. Tutun v. United States, 270 U.S. 568, 568 (1926).

163. *Id.* at 568–69.

164. *Id.* at 577; *see Suits Against States*, *supra* note 23, at 92; Pfander & Birk, *supra* note 154, at 1393–1402; PFANDER, *supra* note 16, at 40.

165. *E.g.*, California v. Texas, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and

stood to gain a reward at the end of the case.[166] Such cases were commonly heard in federal courts (sitting as courts of admiralty) in earlier periods.[167] Indeed, salvage claims are still heard in federal courts today, including claims brought by plaintiffs who have suffered no apparent prelawsuit injury.[168] Again, they show that a plaintiff can have standing based on the prospect of receiving an award from the litigation even if that award does not compensate the plaintiff for a prelawsuit injury.[169]

Similarly, federal courts have long considered (and still consider today) cases in which a plaintiff claims title to abandoned property found by the plaintiff,[170] particularly at sea, as such claims fall within the federal courts' admiralty jurisdiction.[171] Again, in such cases, the plaintiff has suffered no prelawsuit injury, and certainly no injury caused by any wrongful action of the defendant—indeed, there may not even *be* a defendant, as these cases often proceed in rem against the found property.[172] Such suits, however, proceed uncontroversially. The reason must be that the plaintiff stands to gain from a favorable judgment.

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likely to be redressed by the requested relief.'" (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006))). The defendant in a prize or salvage case may have done nothing wrongful.

166. Salvors, in the process of saving ships, often expose themselves to the *risk* of injury, and such risk is a factor in determining the size of the salvage award. *E.g.*, The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869). But there is no requirement that salvors expose themselves to such a risk to receive a salvage award. The saved ship must have faced a "marine peril," *The "Sabine,"* 101 U.S. 384, 384 (1879), but there is no requirement that that peril cause danger to the salvor. *See, e.g.*, The Alamo, 28 F. 312, 313 (C.C.S.D. Fla. 1886) (awarding salvage even though the salvors' services "involved no unusual risk of property, peril of life or limb, nor expense, courage, gallantry, nor heroism").

167. PFANDER, *supra* note 16, at 42–46; Pfander & Birk, *supra* note 154, at 1368–70.

168. *E.g.*, New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F. Supp. 2d 101, 105 (D. Mass. 2003). The court in that case awarded salvage to salvors who observed that the defendant's boat, although docked at a marina, was dangerously taking on water. *Id.* at 106–07, 120. The salvors boarded the boat, pumped it out, and took other steps to save it. *Id.* at 106–10. The salvors were not injured (and even their exposure to the risk of injury was "minimal"), but no one questioned their standing to recover salvage from the boat's owner. *Id.* at 117; *see also* PFANDER, *supra* note 16, at 46–47 (explaining the requirements for modern-day salvage cases and that they do not require an adverse party for a court to establish jurisdiction).

169. One might try to argue that salvors have suffered a prelawsuit injury. One might argue that once salvors have saved a boat, the owner owes them a salvage award, and their injury is the owner's failure to pay them this award. However, the owner's refusal to pay a salvage award is not an element of a salvage claim. The salvor need only prove that the salvaged boat faced a marine peril, that the salvor voluntarily rendered service to save it, and that the service was wholly or partly successful or "contributed to such success." *New Bedford Marine Rescue, Inc.*, 240 F. Supp. 2d at 112 (quoting *The "Sabine,"* 101 U.S. at 384).

170. *E.g.*, Peabody v. Proceeds of Twenty-Eight Bags of Cotton, 19 F. Cas. 39, 39 (D. Mass. 1829) (No. 10,869); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 333 (5th Cir. 1978); Odyssey Marine Expl., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 727 F. Supp. 2d 1341, 1343 (M.D. Fla. 2010).

171. Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980).

172. *See, e.g.*, *Odyssey Marine Expl.*, 727 F. Supp. 2d at 1349 (noting "the lack of an opposing party").

Pre-*TransUnion* judicial practice, therefore, concurs with theory in recognizing that a plaintiff's standing may arise from a potential benefit that a plaintiff may receive at the end of a lawsuit, whether or not the benefit compensates the plaintiff for a prelawsuit injury. It is true that the Supreme Court rejected an argument along these lines in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[173] a case that will be examined more closely below.[174] In that case, the Court said that standing cannot rest on "an interest that is merely a 'byproduct' of the suit itself."[175] But the cases that the Court relied on for this proposition did not support it. Those cases held that in a case in which a plaintiff would otherwise lack standing, standing could not rest on a statute that would allow the plaintiff, if successful, to recover attorney's fees or costs.[176] There is an obvious distinction between such a stake, which arises from the possibility of recovering costs *collateral* to the suit, and the stake arising from statutory damages, which are the *primary object* of the suit.

Thus, despite its frequent repetition, the notion that a federal plaintiff *must* have a preexisting injury is incorrect. Both theory and actual, traditional practice show that it is sufficient that the plaintiff, if successful, will gain something from the lawsuit.[177] Such a postlawsuit gain gives the plaintiff a stake in the suit that supports standing just as much as a prelawsuit injury. Accordingly, a statute that provides a monetary recovery for a plaintiff who shows that a defendant has violated the law necessarily confers standing on the plaintiff.

3. The Inadequacy of Doctrinal Attacks

It is possible that some of these attacks on the Court's recent standing decisions will have some influence. Perhaps the Court will desire to step back from the new precipice onto which it has taken standing doctrine. After all, *TransUnion* was 5 to 4, as Justice Thomas, who is usually one of the stricter Justices on standing issues, wrote the dissenting opinion. It would only take a switch of one vote to change matters.

But it seems unlikely that the Court will switch anytime soon. *TransUnion* was no casual decision. The Court had had the statutory damages issue in its sights ever since *Spokeo*. The briefs in the two cases fully explained the trouble

173. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772–73 (2000).

174. *See infra* Section II.B.2.

175. *Stevens*, 529 U.S. at 773; *see* ANDERSON, *supra* note 23, at 52 (accepting the Supreme Court's holding on this point).

176. *See Stevens*, 529 U.S. at 773 (first citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998); and then citing Diamond v. Charles, 476 U.S. 54, 69–71 (1986)).

177. Professor Pfander, who, as his book title suggests, comes at the issue primarily via investigation of whether Article III litigation must truly be between adverse parties, observes that his research also undermines the supposed Article III standing requirement. PFANDER, *supra* note 16, at 175. He suggests that instead of asking whether the plaintiff has suffered an "injury in fact," the inquiry should be "whether the plaintiff has a 'litigable interest.'" *Id.*

that would follow from limiting Congress's ability to create rights and authorize damages for infringement of those rights. The Justices in the majority were hardly in the dark about what they were doing to longstanding traditions of actions resting on grounds that were unavailable at common law. Accordingly, while it is worthwhile to contemplate the legal flaws in the Court's new standing decisions, what is really needed is something that could provide some practical relief from them.

B. THE LEGISLATIVE SOLUTION

What is really needed is consideration of potential *legislative* solutions. It is important to recognize that even in the face of the Supreme Court's restrictive standing decisions, there are still things that Congress may do to authorize the kinds of suits that were prohibited in *TransUnion*. This Section considers techniques that Congress could employ if it desires to achieve these goals, even assuming that the Supreme Court refuses to retreat from its current standing doctrine.

Let us imagine, therefore, that Congress desires to find some way to allow plaintiffs to obtain statutory damages in cases in which such plaintiffs would lack standing under *TransUnion*. The discussion below will focus specifically on the FCRA, which is the statute that was at issue in *Spokeo* and *TransUnion*. What would work for the FCRA would likely work for any statute that provides for statutory damages, and indeed, Congress could probably pass one statute that would fix the statutory damages problem for all statutes. But for purposes of discussion, it is simplest to work with a specific example. In addition, it would probably be strategically better for Congress to try to fix the statutory damages issue with regard to one statute before attempting a universal fix that would work for all statutes. Therefore, the discussion below describes how Congress might amend the FCRA to provide for statutory damages, notwithstanding *TransUnion*.

The most promising avenue for repairing the damage done by the Supreme Court's recent standing decisions would be for Congress to provide for statutes such as the FCRA to be enforced via *qui tam* actions. *Qui tam* actions, in which a statute authorizes a private party to sue on behalf of that party and the United States, enable the federal government to assign to private parties its own standing to enforce federal law. Such actions could overcome the standing problem that private parties would face in a lawsuit brought solely on their own behalf.

At this point, some readers are thinking, "*qui tam* actions—of course!"[178] Others are thinking, "wait, what?"

178. *Qui tam* actions are well known to the segment of the bar that deals with them. The use of *qui tam* actions to address problems posed by restrictive Supreme Court doctrines has been discussed before. *See supra* note 23 and accompanying text. I suggested their use to address problems posed by state sovereign immunity doctrine. *State Sovereign Immunity*, *supra* note 23, at 556–64. Professor Sunstein suggested the potential use of *qui tam* actions as a cure for the

Although *qui tam* actions were once a common device for the enforcement of federal law, they are unusual today. The concept of a private party suing on behalf of the United States seems jarring. Many readers may know little about this kind of suit. Accordingly, this Section provides a review of this traditional form of action.[179] It then explores in detail why *qui tam* actions would overcome the standing problem that now bedevils some actions for statutory damages.[180] It addresses another important constitutional issue that might be raised regarding this form of action.[181] Finally, it also addresses certain mechanical and logistical details about how the proposed *qui tam* suits would work in practice.[182]

1. What Is a *Qui Tam* Action?

"*Qui tam*" is a Latin term. It means little by itself.[183] It is short for the more daunting phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who pursues this action on our Lord the King's behalf as well as his own."[184]

A *qui tam* action is an action in which a private party brings suit on behalf of both that party and the United States.[185] The suit is brought against a party that has allegedly violated federal law. The private party bringing the suit is known as the "relator" or, particularly in older usage, the "informer."[186] The action is styled "*United States ex rel. [Relator] v. [Defendant]*."[187]

Of course, private parties do not normally have the authority to bring a suit on behalf of the United States. By statute, litigation on behalf of the United States is normally "reserved to officers of the Department of Justice, under the direction of the Attorney General."[188] But the statute so providing

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standing problem posed by *Lujan v. Defenders of Wildlife*, which prohibited citizen-suit actions seeking *injunctive* relief. Sunstein, *supra* note 23, at 232–33.

179. *See infra* Section II.B.1.

180. *See infra* Section II.B.2.

181. *See infra* Section II.B.3.

182. *See infra* Section II.B.4.

183. Google Translate renders it as "who so." Translation of *Qui Tam* from Google Translate, GOOGLE TRANSLATE, https://translate.google.com [https://perma.cc/L8X8-BESG] (change the language in first box to Latin by clicking the drop-down menu; then type the words *qui tam* in the first box to search the English translation).

184. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000). The phrase is also translated as "who as well for the king as for himself sues in this matter." United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 184 n.5 (5th Cir. 2009) (quoting *Qui Tam Action*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

185. *E.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541–42, 541 n.4 (1943); Marvin v. Trout, 199 U.S. 212, 225 (1905); Caminker, *supra* note 23, at 341–42.

186. This article will use the term "relator" except when referring to language in older statutes, cases, or other documents.

187. *E.g.*, *Marcus*, 317 U.S. at 537.

188. 28 U.S.C. § 516.

contains the caveat "[e]xcept as otherwise authorized by law,"[189] which leaves room for the possibility that a statute might authorize someone else to sue on behalf of the United States.[190]

Qui tam statutes do just that. The traditional language of a *qui tam* statute provided that any person who committed specified wrongful action would "forfeit" a specified penalty and that a specified portion of the penalty would go "to the informer" and the rest "to the use of the United States."[191] Some such statutes added that the forfeiture might "be recovered by action of debt"[192]; others simply stated the penalty to be forfeited and how it would be distributed between the relator and the United States without specifying the form of action by which it was to be recovered.[193] The effect of this language was to authorize the relator to initiate suit on behalf of the relator and the United States,[194] to manage all aspects of the suit,[195] and to receive the statutorily specified share of any proceeds of the suit.

Who exactly is this "relator" or "informer"? Most *qui tam* statutes did not require this party to have any particular relationship to the action. The relator, under the most common kind of *qui tam* statute, could be any person who

189. *Id.*

190. Numerous statutes authorize other federal officials, particularly the general counsels of the independent agencies, to litigate certain actions on behalf of the United States. *See, e.g.*, 52 U.S.C. § 30107(a)(6) (authorizing the Federal Election Commission to "initiate . . . , defend[,] . . . or appeal any civil action in the name of the Commission . . . through its general counsel"). The unusual feature of a *qui tam* statute is that it authorizes a private party to bring suit on behalf of the United States.

191. *E.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102.

192. *E.g.*, *id.*; Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125.

193. *See, e.g.*, Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137–38.

194. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court said that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." *Id.* at 541 n.4. More recently, appellate courts have declined to infer, from the mere statement in a federal statute that an informer is entitled to a share of the proceeds of a suit under the statute, that the statute authorizes an informer to *institute* such a suit. For example, in *Bauer v. Marmara*, 774 F.3d 1026 (D.C. Cir. 2014), the D.C. Circuit characterized the *Marcus* footnote as "dictum" and declined to permit a *qui tam* suit under the Neutrality Act, which provides that vessels that violate the Act "shall be forfeited, one half to the use of the informer and the other half to the use of the United States." *Id.* at 1030, 1035 (quoting 18 U.S.C. § 962); *see also* Conn. Action Now, Inc. v. Roberts Plating Co., Inc., 457 F.2d 81, 83–84, 90 (2d Cir. 1972) (declining to permit a *qui tam* action under the Rivers and Harbors Act of 1899, which provides that violators of the Act shall be fined, with "one-half of said fine to be paid to the person or persons giving information which shall lead to conviction"). Thus, today, a *qui tam* statute must probably specify expressly that it authorizes suits by private *qui tam* relators or informers.

195. United States v. Griswold, 26 F. Cas. 42, 43–44 (D. Or. 1877) (No. 15,266) ("Although the United States is the plaintiff, [the relator] is its authorized representative."). A *qui tam* statute may place limits on the relator's authority. For example, some *qui tam* statutes have required the consent of the "district attorney" (the equivalent of a modern U.S. Attorney for a judicial district) for the withdrawal or discontinuation of a *qui tam* suit. *Id.* at 44. But where not so limited, the relator manages the action. *Id.*

brought the statutorily authorized action. As the Supreme Court has noted, "[t]he right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."[196] This common kind of *qui tam* statute thus deputizes any member of the public to bring the action on behalf of the United States.

Although *qui tam* statutes are rare today, they have a "long tradition" of use in English and American law.[197] *Qui tam* actions were "in existence for hundreds of years in England, and in [the United States] ever since the foundation of our Government."[198] They developed in England near the end of the thirteenth century,[199] and they continued to exist there until 1951.[200] They also "appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution."[201] The American colonies passed several statutes authorizing *qui tam* actions, and the First Congress passed "a considerable number of [such] statutes."[202]

Over time, *qui tam* statutes fell out of use, perhaps because they are "subject to abuse."[203] Problems arose, for example, when relators brought actions seeking penalties for obsolete offenses.[204] Today, only a few *qui tam* statutes remain in federal law.[205]

The most notable *qui tam* statute today is the False Claims Act ("FCA").[206] This statute, first enacted in 1863,[207] prohibits (among other things) presenting a false or fraudulent claim for money or property to an officer or employee of the United States for payment or approval.[208] It provides that any person who does so is liable to the United States for a civil penalty of between $5,000 and $10,000 "plus 3 times the amount of damages" the United States sustains because of the false claim.[209]

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

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

198. *Marvin*, 199 U.S. at 225.

199. *Stevens*, 529 U.S. at 774.

200. *Id.* at 776.

201. *Id.*

202. *Id.* For some early federal *qui tam* statutes, see sources cited *supra* notes 191–93 and *infra* notes 245–51. For citations to colonial *qui tam* statutes, see *Stevens*, 529 U.S. at 776 (citing Act of Sept. 10, 1692, 1st Assemb., 4th Sess. (N.Y. 1692), *reprinted in* 1 COLONIAL LAWS OF NEW YORK 279, 281 (1894)); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1273–74 (2018) (citing *qui tam* statutes from colonial Connecticut, Maryland, Massachusetts, New Hampshire, and New Jersey).

203. *Stevens*, 529 U.S. at 775.

204. *Id.*

205. *See id.* at 768.

206. 31 U.S.C. § 3730(b).

207. *Stevens*, 529 U.S. at 768.

208. *See* 31 U.S.C. § 3729.

209. *Id.* § 3729(a)(1).

The *qui tam* provision of the FCA authorizes private persons to bring a civil action for a violation of the FCA on behalf of the person and the U.S. government.[210] Such a private relator who initiates a *qui tam* action under the FCA is entitled to between fifteen and thirty percent of the proceeds of the action.[211] Pursuant to this provision, private parties, including private parties who have no relation to the allegedly false or fraudulent claim involved, may initiate FCA cases on behalf of the government.

The evident advantage of the FCA's *qui tam* provision is that it provides an incentive for private parties who know about frauds committed against the federal government to bring actions that can expose the fraud and save the federal government money—sometimes, big money. A relator bringing such an action might, for example, be an employee of the defendant who learned in the course of their employment that the defendant was defrauding the United States.[212] The *qui tam* provision enlists the public to ferret out and pursue fraud committed against the government.

In light of certain questionable suits brought by *qui tam* relators under the FCA,[213] Congress amended the FCA in 1986 to provide, among other things, that after a relator initiates suit under the FCA, the government has a specified period of time during which it may decide to take over and conduct the action.[214] If the government elects to take over the action, the relator's share of the recovery is reduced.[215] Only if the government elects not to take over the action does the relator continue to conduct the action.[216] In such cases the relator's share of the proceeds is greater.[217] However, as is discussed further below, traditional *qui tam* statutes, such as those passed by the First Congress, did not provide this option for the government to take over a *qui tam* action; they authorized the relator to conduct the action whether government officials liked it or not.[218]

Thus, although *qui tam* actions are not common today, they are a longstanding, traditional form of action. Practice stretching back for

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210. *Id.* § 3730(b)(1).

211. *Id.* § 3730(d).

212. For example, the *qui tam* action in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), was brought by a former employee of the defendant. *Id.* at 770.

213. Although, as explained in the text above, the purpose of the FCA's *qui tam* provisions is to encourage private parties to expose frauds being committed against the government, prior to the 1986 amendments the FCA was susceptible of certain abuses. For example, sometimes a *qui tam* relator would bring suit against a party whom the government had already indicted for fraud. *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545–48 (1943). In such a case, the relator may have played no role in exposing the fraud, but the Supreme Court held that the statute permitted the action nonetheless. *Id.*

214. 31 U.S.C. § 3730(b)(2).

215. *Id.* § 3730(d).

216. *Id.* § 3730(c)(3).

217. *Id.* § 3730(d).

218. *See infra* Section II.B.4.v.

centuries permits Congress to authorize private parties to sue on behalf of the United States.

Accordingly, let us imagine that Congress desired to use this form of action to restore the enforceability of statutory damages under the FCRA to plaintiffs who would be blocked from seeking such damages by *TransUnion*'s standing ruling. Congress could accomplish this goal by replacing the language of the FCRA provision that allows for statutory damages, which currently states that any person who willfully fails to comply with any requirement of the FCRA with regard to any consumer is *liable* to that consumer for between $100 and $1,000, with language that says that such a willful violator shall *forfeit* a specified sum of money and that a specified percentage of the amount forfeited would go to the relator, with the rest going to the United States. This language would authorize a *qui tam* action against willful violators of the FCRA for the specified amount. The following Sections explore how this form of action would cure the problems created by *Spokeo* and *TransUnion*.

2. *Qui Tam* Actions and Article III Standing

Changing the FCRA's remedial provision from a liability statute to a forfeiture statute, enforceable via a *qui tam* action, would ensure that the plaintiff has standing to sue.[219] This follows from two key points: first, the United States always has standing to enforce federal law, and second, the United States may delegate its standing to *qui tam* relators.

The United States, when it is statutorily authorized to enforce federal law, always has standing to do so, whether or not a defendant's unlawful action injures the United States in a proprietary sense.[220] This is because the United States always has a sovereign interest in the enforcement of federal law. The United States routinely enforces civil and criminal law in cases in which it has not suffered the kind of injury that would give rise to standing in a case brought by a private party.[221] The United States may enforce federal law in cases in which the defendant's unlawful action injured only private parties,[222]

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219. In addition to the arguments presented below, one could also argue that *qui tam* relators have Article III standing based on the view of standing taken in Section II.A.2.ii, *supra*, namely, that a lawsuit may proceed in which the plaintiff suffered no prelawsuit injury, if the plaintiff stands to gain a benefit at the end of the action. Indeed, *qui tam* actions, on this view, provide another historical example of actions that proceeded on this basis. This Section, however, shows how *qui tam* relators have proper standing even under the Supreme Court's current standing doctrine, including the prelawsuit injury requirement.

220. *See* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.11 (3d ed. 1998) ("Standing to pursue the general interests of the public is easily recognized when federal officials responsible for enforcing specific statutory schemes bring suit under the aegis of the statute.").

221. *See id.* ("[N]o harm has been done by the habit of framing the issue as one of standing. It must be clear, however, that this standing issue is not to be answered by invoking the formulas propounded in private standing cases.").

222. United States v. Raines, 362 U.S. 17, 27 (1960) (holding that Congress may, by statute, authorize the United States to sue to protect private constitutional rights); Martin v. Tango's

or even in cases in which there was no "injury" at all in the sense usually required to give a private plaintiff standing.[223]

Some confusion on this point may arise from cases in which the United States asserts authority to enforce federal law in the absence of statutory authorization. It is sometimes said that "the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief."[224] But whatever difficulty such cases may pose, there is no standing problem when Congress by statute expressly authorizes the federal government to enforce federal law.[225]

Moreover, the United States is permitted to delegate its standing to *qui tam* relators who initiate suit on its behalf. The Supreme Court addressed this point in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[226] The case arose when a relator brought a *qui tam* action against an agency of the state of Vermont under the FCA.[227] The state defendant asserted that as a matter of statutory interpretation, the FCA should not be understood to apply to state defendants, and that if the FCA did permit *qui tam* actions against state defendants, it was unconstitutional.[228] After taking the case, the Supreme Court *sua sponte* ordered the parties to brief the question of whether a private party could have Article III standing to litigate claims on behalf of the government.[229] In response, the state asserted that the relator lacked standing.[230]

The Supreme Court, however, upheld the plaintiff's standing.[231] The Court determined that "[t]he FCA [could] reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the

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Rest., Inc., 969 F.2d 1319, 1324 (1st Cir. 1992) (holding that the Secretary of Labor may sue for enforcement of the Fair Labor Standards Act, even with regard to an employee who is an "involuntary plaintiff" and who supported management at trial).

223. *E.g.*, United States v. Greenberg, 835 F.3d 295, 306 (2d Cir. 2016) (holding that in a fraud prosecution, the government is not required to prove that the intended victims of the fraud were actually injured); Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1322 (2014) ("Under current law, the executive may assert in court the federal government's sovereign interests without satisfying the injury, causation, or redressability requirements that the judiciary applies to other actors."); Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 587 (2015) ("Standing doctrine requires private litigants to show a concrete, imminent, and personal injury-in-fact traceable to the defendant and redressable by a judicial remedy. Yet the doctrine does not require the same showing from government litigants." (footnote omitted)).

224. United States v. San Jacinto Tin Co., 125 U.S. 273, 285 (1888).

225. *E.g.*, *Raines*, 362 U.S. at 27 ("[W]e think it perfectly competent for Congress to authorize the United States to be the guardian of th[e] public interest in a suit for injunctive relief.").

226. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000).

227. *Id.* at 770.

228. *Id.*

229. Miscellaneous Order, 528 U.S. 1015 (1999).

230. Supplemental Brief for Petitioner, *Stevens*, 529 U.S. 765 (No. 98-1828), 1999 WL 1101312, at *4–6.

231. *Stevens*, 529 U.S. at 777–78.

relator.[232] The Court observed that it had routinely entertained suits by assignees and subrogees of parties that would have had standing to sue on their own.[233] It concluded "that the United States'[s] injury in fact suffices to confer standing on [the relator]."[234]

The Court added that this conclusion was "confirmed . . . by the long tradition of *qui tam* actions," described above.[235] Tradition is pertinent to the standing inquiry because the Court has held that Article III's limits on justiciability (of which standing doctrine is a part) should be understood to limit the federal judicial power to matters that were traditionally regarded as appropriate for judicial resolution.[236] The long tradition of *qui tam* actions in federal practice, including their use by the First Congress, is "well nigh conclusive" on the question of whether they are the kind of cases that the Framers would have expected courts to resolve.[237]

Because the federal government always has standing to enforce federal law, and because it can delegate that standing to a private *qui tam* relator, a statute authorizing *qui tam* actions for enforcement of the FCRA's statutory damages would solve the standing problem posed by *TransUnion*.

Having said that, however, two potential objections must be considered. The first is that the Supreme Court's "assignment" theory could be limited to cases in which the United States suffers a proprietary injury. The second is that the use of *qui tam* actions might be seen as an end-run around the standing barrier of *TransUnion*.

i. Proprietary Injuries v. Sovereign Injuries

The first potential objection is that when the Supreme Court upheld a relator's standing in *Stevens* based on an assignment theory, the case was one in which the United States *had* suffered the kind of injury in fact that would have given rise to standing on behalf of a private plaintiff. The relator in *Stevens* alleged that the defendant's false claims caused "the Government to disburse more . . . money than [the defendant] was entitled to receive."[238] Thus, the United States had allegedly suffered a classic, pocketbook injury.

The Court's opinion alluded to this point and suggested that there was a distinction between this "proprietary injury"[239] and "the injury to [the federal government's] sovereignty arising from violation of its laws."[240] The latter, the Court parenthetically noted, "suffices to support a criminal lawsuit by the

232. *Id.* at 773.
233. *Id.* at 773–74.
234. *Id.* at 774.
235. *Id.*
236. *Id.*
237. *Id.* at 777.
238. *Id.* at 770.
239. *Id.* at 771.
240. *Id.*

Government."[241] But, the Court observed, in an action brought by a *qui tam* relator, the relator must have his own standing, and this standing cannot arise solely from the relator's interest in obtaining a share of the penalty that might result from the lawsuit.[242] That interest, the Court said, gives the relator a concrete stake in the outcome of the litigation, but such a stake cannot confer standing if it is "unrelated to injury in fact."[243]

One might argue, therefore, that in *Stevens* the relator had standing only because "the assignee of a claim has standing to assert the *injury in fact* suffered by the assignor."[244] That is, one might argue that the holding is limited to cases where the United States suffered an injury of a kind that would suffice to create standing for a private party and does not extend to a case in which the United States's injury was solely to its sovereign interest. The latter kind of injury, one might argue, supports only a case on behalf of the United States and is not assignable to a private party.

This argument, however, does not give sufficient weight to the other point mentioned by the Court in *Stevens*, namely, the longstanding tradition of *qui tam* actions. That tradition is not limited to statutes authorizing *qui tam* actions in cases in which the United States suffered a proprietary injury. The First Congress and other early Congresses enacted statutes authorizing *qui tam* actions in cases in which the only interest of the United States would have been in the enforcement of federal law.

For example, the First Congress imposed a monetary penalty on any person harboring a runaway mariner[245] and authorized *qui tam* actions for collection of this penalty.[246] The harboring of a runaway mariner would not have caused monetary injury to the United States. The United States would have had a sovereign interest in such a case, not a proprietary one. Nonetheless, the First Congress saw no barrier to the use of *qui tam* actions for such cases. The First Congress similarly authorized *qui tam* actions to collect other penalties that did not involve any proprietary injury to the United States. These included penalties imposed on ships' masters who failed to enter into a written contract with the mariners on their ships,[247] penalties imposed on copyright violators,[248] penalties imposed on United States marshals who failed

241. *Id.*

242. *Id.* at 772.

243. *Id.*

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

245. Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133. At the time, mariners who had signed a contract to work on a ship were not permitted to leave their jobs during the term of the contract. Jonathan M. Gutoff, *Fugitive Slaves and Ship-Jumping Sailors: The Enforcement and Survival of Coerced Labor*, 9 U. PA. J. LAB. & EMP. L. 87, 92–93 (2006). Federal law provided for the forced return of mariners who attempted to jump ship. *Id.* at 93.

246. Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133.

247. *Id.* § 1, 1 Stat. at 131.

248. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25.

to carry out their duties in connection with the federal census,[249] and penalties on those who stole property of another while within a place subject to the exclusive jurisdiction of the United States.[250] Other early Congresses authorized similar actions.[251]

Thus, it is clear that the *qui tam* tradition was not limited to cases in which a relator sued to collect a penalty imposed on a party that had injured the United States in a proprietary sense. Relators also sued to collect penalties imposed for violations of federal law in which the United States had only a sovereign interest.

In *Stevens*, the Supreme Court, as noted earlier, determined that the history of *qui tam* actions was "well nigh conclusive" as to "whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to . . . the judicial process.'"[252] The Court remarked that the history, "[w]hen *combined* with the theoretical justification for relator standing discussed earlier [i.e., assignment of the United States's injury in fact], . . . leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing."[253] This remark suggests that the Court might not regard the history as sufficient by itself. But the Court's standing jurisprudence is premised on the view that Article III, in providing that the judicial power shall extend to specific "Cases" and "Controversies," was necessarily referring to the kinds of cases and controversies that were familiar to the Framers. History shows that these actions included *qui tam* actions in which a relator brought suit to collect a penalty for the United States, whether that penalty was for an action that caused the United States a proprietary injury or merely offended the United States's sovereign interest in having its laws obeyed. It is hard to see how Article III of the Constitution could compel the federal courts to reject a form of action that has been in continuous use ever since the founding of the nation.

Indeed, the use of *qui tam* actions would mesh nicely with the Supreme Court's recent emphasis on history in constitutional interpretation. For example, in *New York State Rifle & Pistol Association, Inc. v. Bruen*,[254] in which the Court considered a Second Amendment challenge to state gun laws, the Court emphasized the importance of "reliance on history to inform the

249. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102.

250. Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 112, 116.

251. *See, e.g.*, Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (imposing penalties, recoverable by *qui tam* action, on those who assisted the slave trade in specified ways); Act of Apr. 7, 1798, ch. 28, § 7, 1 Stat. 549, 550 (same); Act of Feb. 20, 1792, ch. 7, §§ 5, 25, 1 Stat. 232, 234, 239 (imposing penalty, recoverable by *qui tam* action, for obstructing the mails); Act of May 8, 1794, ch. 23, §§ 5, 25, 1 Stat. 354, 358, 365 (same); Act of Mar. 2, 1799, ch. 43, §§ 3, 24, 1 Stat. 733, 733, 740 (same).

252. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777 (2000) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

253. *Id.* at 777–78 (emphasis added).

254. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022).

meaning of constitutional text."[255] Here, history strongly shows that Article III permits *qui tam* actions, both in cases where the United States has suffered a proprietary injury and those in which it has a sovereign interest in law enforcement. A Court that insists on the primacy of history in constitutional interpretation should accept *qui tam* actions given their solid historical basis.[256]

ii. Artificial End-Run?

The *qui tam* suits suggested here might also be attacked as being too clever by half. Such suits, critics would suggest, would be an obvious end-run around the rule of *TransUnion*. If *TransUnion* bars a suit, can Congress really instruct a court to hear a suit which amounts to much the same thing? To do so, one might argue, would permit Congress to do indirectly that which it cannot do directly. Some might argue that Congress should not be able to evade the Supreme Court's ruling in *TransUnion* based on a technicality, and neither should it be permitted to contrive actions with the specific goal of getting around what the Supreme Court has said is a standing problem.[257] The answer, however, is that it is commonplace for standing to turn on minute, technical differences in the structure of cases, and it is also routine for lawsuits to be designed, perhaps even contrived, with standing in mind.

As to the first point, consider, for example, that in the seminal case of *Sierra Club v. Morton*, the Sierra Club was held not to have standing to challenge development in Mineral King Valley based on the allegation that it "ha[d] exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,"[258] but when it later amended its complaint to allege that some of its members *used* Mineral King Valley for recreational purposes, it was permitted to bring the same claims that the standing problem had previously barred.[259] A slight change in the allegations of the plaintiff's complaint made all the difference to the outcome. Similarly, activists were not permitted to bring a direct challenge to Connecticut's statute prohibiting the use of contraception, on the ground that the statute had fallen into a state of desuetude and was never enforced in practice,[260] but when the same activists arranged to be prosecuted—even going so far as recruiting patients to go directly to the police after receiving family planning services at their clinic—they successfully raised

255. *Id.*

256. *Cf.* ANDERSON, *supra* note 23, at 53 (noting that "the factor that has weighed more heavily in favor of *qui tam* actions' constitutionality than any other is historical practice").

257. *Cf.* Ormerod, *supra* note 23, at 328 (noting that *qui tam* proposals might be objected to as "exotic and unprecedented").

258. Sierra Club v. Morton, 405 U.S. 727, 735 n.8 (1972).

259. Sierra Club v. Morton, 348 F. Supp. 219, 220 (N.D. Cal. 1972); David Sive, *Environmental Standing*, NAT. RES. & ENV'T, Fall 1995, at 49, 52; Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 497 n.297 (1974).

260. Poe v. Ullman, 367 U.S. 497, 508–09 (1961).

the same challenge to the contraceptive statute, in the famous case of *Griswold v. Connecticut*.[261]

Even in cases in which the official ruling is that a minute detail did *not* matter for standing purposes, some Justices may express the view that it should. *Sprint Communications Co. v. APCC Services, Inc.* provides a good example.[262] In that case, operators of payphones assigned certain claims that they had against providers of long-distance phone service to "aggregators," who brought the claims on their behalf.[263] The contract between the payphone operators and the aggregators provided that the aggregators would remit one hundred percent of the proceeds of such lawsuits to the operators.[264] Thus, although the aggregators would receive a fee for their services, that fee did not depend on the outcome of the suits.[265]

Because of this fee arrangement, the defendants argued that the aggregators lacked standing, inasmuch as they had no interest in the outcome of the suit.[266] The Court held, however, that the aggregators had standing, based on the strong historical practice of permitting assignees to sue.[267] In addition, the Court remarked that it would be unwise to depart from that history, because any bar to the kind of suit presented could be easily evaded by simply changing the contract between the operator and the aggregator to grant the aggregator a tiny interest in the proceeds of the suit, such as "a dollar or two."[268]

However, Chief Justice Roberts, dissenting for himself and three other Justices, seemed untroubled by the thought that such a minute difference in the facts could make a difference in the outcome. He said:

> Perhaps it is true that a "dollar or two," would give respondents a sufficient stake in the litigation. Article III is worth a dollar. And in any case, the ease with which respondents can comply with the requirements of Article III is not a reason to abandon our precedents; it is a reason to adhere to them.[269]

Thus, four Justices saw no difficulty in having standing turn on a tiny, technical detail of the case. Significantly, these were the Justices who took a stricter view with regard to standing (at least in that case), which suggests that

261. Griswold v. Connecticut, 381 U.S. 479, 480, 485–86 (1965); *see* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 97–98, 98 n.150 (2007) (providing details as to how the *Poe* and *Griswold* cases arose).

262. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 305 (2008)(Roberts, C.J., dissenting).

263. *Id.* at 271–72.

264. *Id.* at 272.

265. *Id.*

266. *Id.* at 274.

267. *Id.* at 274–75.

268. *Id.* at 289.

269. *Id.* at 305 (Roberts, C.J., dissenting) (citation omitted).

at least some votes could be shifted in favor of standing by changing the technical structure of a case.

As to the suggestion that *qui tam* actions of the kind suggested here would evidently be contrived for standing purposes, there is nothing wrong with that. Cases are contrived for standing purposes all the time. Activists who desire to challenge some law or regulation frequently seek out and recruit plaintiffs who have standing to bring the challenge.[270] The Supreme Court also recently confirmed the longstanding principle that a plaintiff may deliberately stand in harm's way for the purpose of suffering an injury that gives rise to standing.[271] Thus, there is no rule against deliberately structuring a case so as to satisfy standing requirements.

Indeed, more broadly, there is nothing wrong with using a legitimate means to obtain a goal that cannot be attained by some other means. Suppose a driver desires to turn left at an intersection but faces a "No Left Turn" sign. If the driver proceeds through the intersection and then makes three right turns that take the car to the same place that a left turn would have taken it, does the law condemn the driver for having done indirectly something the law forbade the driver to do directly? Of course not. The driver has used legal means to achieve a goal while avoiding illegal means. Similarly, *qui tam* actions are not to be condemned simply because they are a legal means of achieving a result that cannot be achieved through certain other means.

In short, the *qui tam* mechanism should solve the standing problem posed by cases such as *TransUnion*. If Congress desired to restore the ability of plaintiffs to seek statutory damages even if they have not suffered the kind of injury that the Supreme Court would recognize as sufficient to permit them to do so, Congress could accomplish this goal by providing that a defendant who violated the FCRA would owe a civil penalty to the United States that could be collected by a relator in a *qui tam* action. Such a relator should have standing whether or not the United States would have suffered a proprietary injury, and even though the action might appear to be a contrivance designed to get around the standing problem.

3. *Qui Tam* Actions and Article II

The previous Section showed how *qui tam* actions could solve the Article III problems posed by cases such as *TransUnion*. Such actions would also, however, likely be attacked on Article II grounds. An Article II attack on *qui*

270. *See generally In re* Primus, 436 U.S. 412 (1978) (holding that nonprofit organizations that engage in litigation as a form of political expression have a First Amendment right to solicit potential plaintiffs).

271. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1647 (2022) (holding that standing may be based on an injury that "could be described in some sense as willingly incurred"); *see* Evers v. Dwyer, 358 U.S. 202, 203–04 (1958) (same).

tam actions has been brewing for decades, particularly after the Court noted, but reserved, the argument in *Stevens*.[272]

The Vesting Clause of Article II provides that "[t]he executive Power shall be vested in a President of the United States of America."[273] Proponents of "unitary executive theory" argue that the unqualified language of this clause vests the President with *all* of the federal government's executive power, not merely some of it.[274]

Everyone recognizes, of course, that the executive branch will be made up of many officers, and the President will not personally exercise the executive power in all cases. But adherents of unitary executive theory maintain that the Vesting Clause prohibits Congress from vesting federal executive power in government officers whom the President cannot supervise and control.[275] These adherents would argue that vesting executive power in private parties would be even worse,[276] and that the power to bring a lawsuit on behalf of the United States must count as an executive power.

In addition, the Take Care Clause of Article II provides that the President "shall take Care that the Laws be faithfully executed."[277] This Clause as well has been said to constrain the judicial power. In both *TransUnion* and *Defenders of Wildlife*, the Supreme Court held that it must ensure that Congress does not permit the judicial power to be used in a way that transfers the President's power over execution of federal law to the courts.[278]

In *Stevens*, the Supreme Court, as discussed above, approved *qui tam* actions despite the argument that the relator plaintiff lacked Article III standing, but it included a footnote indicating that it was not deciding whether *qui tam* actions violated Article II, as the defendant had not raised that argument.[279] Although appellate courts have upheld *qui tam* actions against Article II challenge since then,[280] the Supreme Court has not returned to the issue. However, the issue was mentioned by individual Justices in the recent *qui tam* case of *United States ex rel. Polansky v. Executive Health Resources,*

272. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

273. U.S. CONST. art. II, § 1, cl. 1.

274. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705 (Scalia, J., dissenting).

275. *E.g.*, *id.* at 708–09; Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211–12 (2020) (Thomas, J., concurring in part and dissenting in part).

276. *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (stating that delegation to private persons is "legislative delegation in its most obnoxious form"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) ("[D]elegation of legislative power [to private trade or industrial associations or groups] is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

277. U.S. CONST. art. II, § 3.

278. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021); Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).

279. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

280. *E.g.*, United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 804–07 (10th Cir. 2002); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753, 758 (5th Cir. 2001) (en banc).

Inc.[281] Although that case involved only a question of interpretation of the FCA, three Justices, in two separate opinions, expressed doubt about the constitutionality of *qui tam* actions.[282] Justice Thomas, in his dissenting opinion, said that "[t]he FCA's *qui tam* provisions have long inhabited something of a constitutional twilight zone."[283] He observed that "[t]he entire 'executive Power' belongs to the President alone,"[284] and he asserted that, therefore, "executive functio[n][s]" can be carried out only by "Officers of the United States."[285] *Qui tam* relators, Justice Thomas pointed out, are not such officers.[286]

Once again, however, the long history of *qui tam* actions provides a strong rebuttal to the argument. Article II provides that the executive power shall be vested in the President, but it does not define the executive power. Article II says that the President shall take care that the laws be faithfully executed, but it does not define that phrase either. History is therefore likely to play a vital role in determining what powers Article II vests exclusively in the President, beyond the authority of Congress to place elsewhere.[287]

The significance of the history to the Article II argument is strongly parallel to its significance to the Article III argument. Article III vests federal courts with "[t]he judicial Power"[288] and says that that power shall extend to specified categories of "Cases" and "Controversies,"[289] but it does not define these terms. The Supreme Court has therefore looked to history to illuminate what the Framers and the founding generation would have understood to be "Cases" and "Controversies" suitable for resolution by "the judicial Power."[290] Similarly, because Article II vests the President with "[t]he executive Power"[291]

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

282. *Id.* at 1737 (Kavanaugh, J., concurring) (joined by Justice Barrett); *id.* at 1740–43 (Thomas, J., dissenting).

283. *Id.* at 1741.

284. *Id.* (alteration in original) (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020)).

285. *Id.* (first alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 138–40 (1976)).

286. *Id.*

287. The Supreme Court has relied on history in deciding the scope of presidential power. *See, e.g.*, *Seila L. LLC*, 140 S. Ct. at 2197, 2201–02 (relying on history in determining the scope of the President's removal authority); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505–06 (2010) (same). Lower courts have relied on history in addressing the specific question of whether *qui tam* actions are consistent with Article II. *See* United States *ex rel.* Cimzhca, LLC v. UCB, Inc., 970 F.3d 835, 847 (7th Cir. 2020) ("[*Qui tam* actions'] ancient pedigree, . . . together with their widespread use at the time of the Founding, suggests that the False Claims Act as a whole is not in imminent danger of unconstitutionally usurping the executive power."); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 752 (5th Cir. 2001) ("[I]t is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute.").

288. U.S. CONST. art. III, § 1.

289. *Id.* art. III, § 2.

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

291. U.S. CONST. art. II, § 1.

and charges the President to "take Care that the Laws be faithfully executed"[292] but does not define either phrase, history should illuminate how Article II would have been understood. Just as the long history of *qui tam* actions, including their use by the First Congress, suggests that such actions are proper exercises of the judicial power given by Article III, it similarly suggests that they are consistent with Article II's vesting of the executive power in the President.

Indeed, even some strong proponents of unitary executive theory recognize that *qui tam* actions are an historical fact that must be reconciled with the theory. Justice Scalia, for example, in his blistering dissent in *Morrison v. Olson*, in which he argued that Congress could not vest prosecutorial power in an "Independent Counsel" whom the President did not fully control,[293] was careful not to cast doubt on *qui tam* actions. He relied on the assertion that the functions of the Independent Counsel were functions that historically had been exercised "never by the legislature, never by the courts, and always by the executive,"[294] but he added the qualification, "if conducted by government at all."[295] Evidently, Justice Scalia was leaving room for the kind of private enforcement of federal law that historically occurred via *qui tam* actions.[296] Similarly, Professors Steven Calabresi and Saikrishna Prakash, in their article arguing for a unitary executive theory that contains "no caveats" and "no exceptions," say only "that *qui tam* actions are rather problematic."[297] They allow that such actions may perhaps be understood as "an extremely limited exception to the rule of presidential control."[298]

Justice Thomas questioned the significance of this history. He asserted that "'[s]tanding alone, . . . historical patterns cannot justify contemporary violations of constitutional guarantees,' even when the practice in question 'covers our entire national existence and indeed predates it.'"[299] He noted that not every statute enacted by the First Congress was constitutional.[300] And he argued that courts should take particular care in using history to assess

292. *Id.* art. II, § 3.

293. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

294. *Id.* at 706.

295. *Id.*

296. *Cf.* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–73 (1992) (noting carefully that the case was not "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

297. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 661, 664 (1994).

298. *Id.* at 661.

299. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (citation omitted).

300. *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

Article II challenges to practices inherited from the British system, which did not provide for separation of powers as our Constitution does.[301]

These arguments, however, understate the strength of *qui tam* actions' historical pedigree. Not only have such actions existed for centuries (longer than the United States, as Justice Thomas noted), and not only were they used by the First Congress, but their constitutionality was taken for granted long into our nation's history. While the Supreme Court formally reserved the issue of the consistency of *qui tam* actions with Article II in *Stevens*, in other cases it has spoken of such actions in terms that would be difficult to reconcile with any holding that *qui tam* actions are unconstitutional, or even that they are of doubtful constitutionality. For example, in *Marvin v. Trout*,[302] the Supreme Court considered a state *qui tam* statute that authorized recovery of money lost by gambling.[303] The Court approved the action even though the plaintiff was not the party that had lost the money, noting that "[t]o say that [the state statute] must be limited to a provision allowing a recovery of the money by the one who lost it, would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions."[304] The Court evidently regarded the prospect of such a holding as absurd. This is hardly the language one would expect to see if there were any doubt about *qui tam*'s constitutionality.

Moreover, in *United States ex rel. Marcus v. Hess*,[305] the Court considered arguments against allowing suits by private parties in the name of the government.[306] The relator in that case brought suit under the FCA only after the defendant had already been indicted for fraud.[307] The government claimed that the FCA should be interpreted not to permit *qui tam* actions in such a case.[308] As noted earlier, the purpose of the FCA's *qui tam* provisions is to enlist the assistance of relators in ferreting out fraud against the United States.[309] A suit in which the relator played no role in discovering such fraud, but merely took advantage of publicly available information contained in an indictment, would not fulfill this purpose. In rejecting this argument, the Court said:

> It is said that effective law enforcement requires that control of litigation be left to the Attorney General [and] that divided control is against the public interest . . . . But the trouble with these arguments

301. *Id.* at 1741–42.
302. Marvin v. Trout, 199 U.S. 212 (1905).
303. *Id.* at 224–25.
304. *Id.* at 225.
305. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 537 (1943).
306. *Id.* at 546–48.
307. *Id.* at 539, 545.
308. *Id.* at 545.
309. *See supra* note 212 and accompanying text.

> is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.[310]

Thus, the Court expressly rejected an argument that federal litigation had to be conducted by the Attorney General. Strictly speaking, the argument rejected was only one of statutory interpretation, not constitutionality. But if suits by private *qui tam* relators were unconstitutional, one would have expected that that point would, at least, have been mentioned. If *qui tam* actions were really unconstitutional, one would have expected the Court to interpret the statute so as to disallow them. Indeed, if such suits were even *arguably* unconstitutional, one would have expected the Court to interpret the statute so as to avoid the constitutional question.[311] The Court's failure even to mention the possible constitutional conflict between *qui tam* actions and Article II suggests that the Court saw no such conflict.

Moreover, it was not only the Court that said nothing about the potential Article II issue. The issue also went unmentioned in Justice Jackson's dissenting opinion. Justice Jackson, although acknowledging that the literal language of the FCA permitted the suit at hand, argued that the statute should nonetheless be interpreted to bar the suit, because Congress could not have "intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication."[312] Surely, if the true rule were that no *qui tam* relator could *ever* bring suit under the FCA, because suits by relators are unconstitutional, Justice Jackson would at least have mentioned this point. Thus, both history and precedent strongly suggest that *qui tam* actions are consistent with Article II's statement that the executive power shall be vested in the President. The significance of this history arises not merely from the fact that the government has permitted relators to bring suit on behalf of the United States for centuries. It arises not merely because the First Congress and subsequent Congresses evidently regarded such suits as consistent with Article II. It arises also because the Supreme Court itself considered such suits well into the twentieth century without giving even a hint that they gave rise to any Article II problem, and indeed, to the contrary, evincing considerable solicitude for such suits. It would be quite a surprise to learn that both Congress and the courts have been wrong to permit these actions this whole time.

Finally, as Justice Thomas himself hints, even if, notwithstanding their extensive history, *qui tam* actions are held to be incompatible with the President's Article II powers, this problem should impact only the ability of a

310. *Marcus*, 317 U.S. at 547 (footnote omitted).

311. *See* Caminker, *supra* note 23, at 363–64.

312. *Marcus*, 317 U.S. at 558 (Jackson, J., dissenting).

qui tam relator to sue on behalf of the United States.[313] *Qui tam* relators, remember, sue on behalf of themselves *and* the United States, and *Stevens* determined that a *qui tam* statute effects a partial assignment of the United States's claim in a case to the relator.[314] Even if the relator cannot represent the United States, the relator should still be able to pursue the claim that the relator owns by virtue of assignment. Legal claims may, in general, be assigned,[315] and if Congress chooses to assign a claim (or a portion of a claim) owned by the United States to a private party, the private party then owns that claim (or portion) and can sue on it.[316]

4. Further Important Details

The previous Sections have addressed the main issues that would be raised by the use of *qui tam* actions to address the standing problem created by *TransUnion*. Other issues would, however, also arise. These issues would include matters such as who could serve as the relator, the division of the proceeds of a *qui tam* action between the relator and the United States, the division of authority over such actions, how defendants would be protected from duplicative liability, how the *qui tam* provisions would dovetail with provisions for statutory damages that are allowed by *TransUnion*, and how class actions would proceed. This Section addresses these issues. The short answer is that all of these issues could be taken care of statutorily.

i. Permitted Relators

A potential difficulty with the use of *qui tam* actions for the enforcement of statutory damages provisions concerns who would be permitted to bring

313. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1740–42 (2023) (Thomas, J., dissenting) ("Under *Stevens*' partial-assignment theory, it is not immediately clear that the Government may dismiss *the relator's* interest in a *qui tam* suit, even assuming that the relator's representation of the *United States'* interest is unconstitutional.").

314. *See supra* text accompanying note 232.

315. *E.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285 (2008) (recognizing "courts have long found ways to allow assignees to bring suit").

316. *Id.* ("Lawsuits by assignees, including assignees for collection only, are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777 (2000))). Justice Thomas asks where Congress gets the power to assign claims. *Polansky*, 143 S. Ct. at 1742 (Thomas, J., dissenting). But this is easily found (as Justice Thomas himself suggests) in the Necessary and Proper Clause or in Article IV's Property Clause, which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.* (quoting U.S. CONST. art. IV, § 3, cl. 2). A chose in action is a form of property. *E.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest . . . ."). Even in the absence of a statute so specifying, the United States has the same rights in its property as any private property owner. *E.g.*, Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850). Since private parties may assign their claims, there can be no doubt of Congress's right to enact a statute providing for the assignment (or partial assignment) of a claim owned by the United States.

suit. Traditionally, most *qui tam* statutes authorized anyone to serve as the relator.[317] Most such statutes did not require that the relator have any relation to the action in question.[318] Granting the right of action to "the first common informer"[319] serves the useful purpose of promoting enforcement of a law by allowing anyone who knows of a violation to bring an enforcement action. But if Congress's goal were to allow parties currently blocked by *TransUnion* to receive statutory damages, authorizing such actions by "the first common informer" would not serve that purpose. If anyone could sue as *qui tam* relator and walk off with the proceeds, the action would serve to deter violations by the defendant, but it would not provide compensation for the plaintiff whom Congress was trying to protect with a statutory damages provision.

However, this problem is easily solved. Although most traditional *qui tam* statutes allowed anyone to serve as the relator and granted the relator a portion of the proceeds, notwithstanding that the relator had no other interest in or relationship to the action, some early *qui tam* statutes followed a different pattern. They specified that the portion of the proceeds that did not go to the United States would go to the party affected by the statutory violation, who in some cases had to be the party bringing the *qui tam* action. For example, an early copyright statute that allowed statutory damages for copyright violations, to be recovered in a *qui tam* action, provided for the damages to be distributed "the one moiety [half] thereof to the author . . . who shall sue for the same, and the other moiety thereof to and for the use of the United States."[320] An early tariff statute provided that if any customs officer demanded or received any amount other than the duty provided by law, he would forfeit the sum of $200, "for the use of the party grieved."[321] English law also provided for some *qui tam* actions that had to be brought by an allegedly aggrieved party.[322]

Thus, history shows that *qui tam* actions may be limited to the parties whom Congress desires to protect. They do not have to be opened to anyone who cares to sue. Congress may require that the *qui tam* relator be the party whom Congress desires to receive the proceeds, or Congress may simply provide (as in the tariff statute mentioned above) that the aggrieved party shall receive the proceeds, which would remove the incentive for any other party to sue.

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

318. *See, e.g.*, *id.* ("The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.").

319. *Id.*

320. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125.

321. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45.

322. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–87.

ii. Division of the Proceeds

Many traditional *qui tam* statutes provided for the relator to collect half of the proceeds of the lawsuit, with the other half going to the United States.[323] If Congress used this division for the statute proposed here, then the relator would receive only half of the statutory damages that Congress intended the relator to have. For example, if Congress made the statutory damages currently provided by the FCRA (a sum between $100 and $1,000) into a penalty recoverable by a *qui tam* action and allowed half to the relator, the relator would collect only between $50 and $500.

Of course, this would not be the end of the world for the relator. Statutory damages are significant primarily in cases in which the plaintiff cannot prove actual damages, so their amount is necessarily arbitrary. Collecting $500 is better than nothing, and in a class action of the *TransUnion* type that amount would still be multiplied by a large number of plaintiffs. Moreover, the defendant would still pay whatever full amount of whatever penalty the court imposed, so the deterrent effect of the penalty would be maintained.

But if Congress desired the relator to collect more, there would be ways for Congress to accomplish that goal. First, Congress could retain the fifty-fifty split of the proceeds between the relator and the United States but double the penalty. That would provide the relator with the same recovery as the current statutory damages provision. Of course, it would also double the liability of the defendant. That might be regarded by some as desirable, as it would increase the deterrent force of the statute. If, however, Congress believed that the current statutory damages amounts provide the optimal amount of compensation and deterrence, doubling them would be undesirable.

The other option would be to alter the division of the penalty between the relator and the United States. While a fifty-fifty split was the most common division provided by traditional *qui tam* statutes, that division is not sacred. The modern FCA, as noted above, provides for the relator to receive between fifteen and thirty percent of the proceeds.[324] Other divisions have been used, including giving the *entire* amount of the proceeds to the relator.[325]

The last-mentioned division, that of giving the relator the entire proceeds of the lawsuit, would have the effect of perfectly mimicking the awards under the current provision for statutory damages. By providing for a statutory penalty equal to the statutory damages currently allowed to be recovered in a *qui tam* action in which the relator retains the entire proceeds, Congress could ensure that the *qui tam* suits would have the same economic effect as current suits for statutory damages. Thus, this division would be ideal if Congress

323. *E.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125; Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133.

324. 31 U.S.C. § 3730(d).

325. *E.g.*, Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45.

believes that the current statutory damages provision provides the perfect amount of compensation and deterrence.

Having said that, a one hundred–zero split of the proceeds between the relator and the United States might be needlessly provocative. Such a division would starkly highlight the functional equivalence between the *qui tam* action and the statutory damages action for which it would be a substitute. It might cause a court to question why the *qui tam* action could be permitted if the action for statutory damages were not.

Such a question would have an answer. The answer would be that if the defendant owes a penalty to the United States, the United States may dispose of that penalty as it pleases. The defendant has no interest in what happens to the penalty after the defendant pays it. If, for example, a *qui tam* statute provided the traditional fifty-fifty split of the penalty between the relator and the United States, but then separately provided that once the United States collected its share of the penalty, it would give that share to the relator, that would be no business of the defendant's.

Some current statutes do, in fact, permit the United States to collect penalties from defendants who violate the federal rights of others and distribute those penalties to the parties whose rights were violated. Such a system is used, for example, in the Fair Labor Standards Act, which permits the Department of Labor to sue employers who are not paying their employees the minimum wage, collect the minimum wages not paid, and distribute them to the employees.[326] It should make no difference if a *qui tam* statute achieves a similar result in one step instead of two. Indeed, in *Marvin v. Trout*, the Supreme Court said that "[t]here can be no doubt of the right of the Government to give the whole instead of a moiety of the forfeiture to the informer."[327]

Thus, giving one hundred percent of the penalty to the relator should pass constitutional muster. Still, to avoid needless provocation, and to assuage those Justices who believe that a standing case can turn on what happens to the last dollar of the recovery,[328] it would probably be better to limit the relator's share to, say, ninety percent of the proceeds, with the United States getting the rest.

iii. Coordinating with Actions for Statutory Damages

TransUnion did not prohibit all actions for statutory damages under the FCRA. It prohibited only actions by plaintiffs who had not suffered what the

326. For example, in *Solis v. Texas*, 488 F. App'x 837 (5th Cir. 2012), the court held that this method could be used even where the employer was a state. *Id.* at 839. The court noted that "[a] suit by the Secretary of Labor under the FLSA is a suit in the public interest, notwithstanding the fact that the money obtained passes to private individuals." *Id.*

327. Marvin v. Trout, 199 U.S. 212, 226 (1905).

328. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 305 (2008) (Roberts, C.J., dissenting).

Court regarded as a sufficient Article III injury.[329] Once a plaintiff has suffered such an injury, there appears to be no barrier to the FCRA's provision of a statutory penalty. The Court did not suggest that the penalty must be limited to the amount of actual damages that the plaintiff can prove, and it seems clear that the Constitution imposes no such limitation, as such a limitation would be inconsistent with the many statutes providing for double, treble, or other damages that are greater than the amount of damages that a plaintiff proves,[330] as well as the common law's allowance of punitive damages.

Accordingly, a provision for enforcement of the FCRA via *qui tam* actions would have to allow for those cases in which the existing statutory damages provision is adequate. Presumably, Congress would not want to compel defendants to pay the statutory damages that they would currently owe under the FCRA plus an equal amount to be distributed as a *qui tam* penalty. But this could be easily taken care of by drafting the *qui tam* provision appropriately. A plaintiff could sue both as an ordinary plaintiff and as a *qui tam* relator; the statute could allow the claims to proceed together[331]; and the plaintiff's recovery could be limited to the greater of whatever the plaintiff is entitled to under the statutory damages provision or the *qui tam* provision.

iv. Protection Against Duplicative Liability

Qui tam actions in which the relevant statute provides that any person may sue on behalf of the United States raise the potential problem of duplicative liability. If any person may serve as the relator, what happens if two or more relators bring suit regarding the same unlawful conduct by the defendant? Allowing both to recover would subject the defendant to duplicative liability for the same conduct.

However, the *qui tam* actions proposed herein would not raise this problem. The proposed statute would limit suit to the party whose rights under the statute were violated and direct the recovery to that party. The risk of duplicative suits arises from *qui tam* statutes that allow any person to serve as the relator, with no requirement that the relator have any involvement with the facts of the lawsuit. That would not be the case here.

Moreover, even if the problem were raised, an easy solution would be available. The statute authorizing the *qui tam* action would simply prohibit duplicative suits. The modern FCA bars such actions by providing that once a person brings *qui tam* suit under it, no other person "may . . . bring a related action based on the facts underlying the pending action."[332] The *qui tam* statute proposed here could contain a similar provision. Such a prohibition

329. *See supra* notes 122–25 and accompanying text.

330. *E.g.*, 15 U.S.C. § 15(a) (providing treble damages for antitrust actions); 29 U.S.C. § 216(b), (e) (providing double damages for violations of the Fair Labor Standards Act).

331. *Cf.* FED. R. CIV. P. 18, 20 (permitting joinder of claims and parties).

332. 31 U.S.C. § 3730(b)(5).

would follow the longstanding practice that "[t]he right to recover the penalty or forfeiture granted by statute is frequently given to the *first* common informer who brings the action."[333]

v. Government Control

As amended in 1943, the FCA allows suits by *qui tam* relators, but it authorizes the Attorney General to take over such suits.[334] A *qui tam* relator under the FCA must file suit in camera, and the complaint "remain[s] under seal for at least 60 days, and [cannot] be served on the defendant until the court so orders."[335] During this sixty-day period (which may be extended for good cause),[336] the government, represented by the Attorney General, may choose to intervene and take over the action,[337] in which case the government "ha[s] the primary responsibility for prosecuting the action, and [is not] bound by . . . act[s] of the [relator]."[338] In such cases, the relator's share of the action's proceeds is reduced.[339]

The 1943 amendments were adopted to address certain problems that had arisen under the FCA. For example, in *United States ex rel. Marcus v. Hess*,[340] the Supreme Court allowed an action to proceed under the FCA even though the defendants, prior to the filing of the action, were criminally indicted for the fraud that formed the basis of the action.[341] That gave rise to the specter of relators profiting from actions in which they had conducted no investigation and unearthed no information but were merely piggybacking on work done by the government. The Department of Justice suggested that many such suits were brought.[342]

The Department of Justice also noted that when the FCA was first passed in 1863, the Department did not exist.[343] The development of the Department gave the government the capacity to pursue fraud claims on its own and lessened the need for *qui tam* actions.[344] *Qui tam* actions, the Department felt, often interfered with the government's ability to prosecute fraud cases.[345] The 1943 amendments addressed these issues by requiring a relator to be an

333. Marvin v. Trout, 199 U.S. 212, 225 (1905) (emphasis added).

334. 31 U.S.C. § 3730(a)–(b).

335. *Id.* § 3730(b)(2).

336. *Id.* § 3730(b)(3).

337. *Id.* § 3730(b)(2).

338. *Id.* § 3730(c).

339. *Id.* § 3730(d).

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

341. *Id.* at 545.

342. S. REP. NO. 78-291, at 2 (1943).

343. *Id.*; *see also* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122 (2014) ("The Department of Justice (DOJ) was created in 1870 . . . .").

344. S. REP. NO. 78-291, at 2.

345. *Id.* at 3.

"original source" of the information upon which the FCA suit is based and by giving the Attorney General the right to intervene and take over FCA actions as described above.

Thus, modern *qui tam* actions under the FCA are subject to the government's authority to take over the action, pushing the relator to the sidelines. In upholding *qui tam* actions against various constitutional challenges, particularly the claim that such actions invade the President's powers under Article II, some courts have relied on these provisions.[346] These opinions suggest that some courts might question the constitutionality of a statute that authorizes *qui tam* actions which the government has no ability to control.

To avoid this problem, Congress might, of course, choose to include similar provisions in the *qui tam* statute proposed here. Congress could authorize the government to take over *qui tam* actions filed under the FCRA. Such a provision could, however, empower government officials to thwart the purpose of allowing such *qui tam* actions. If the administration were hostile to consumer suits of the kind the FCRA authorizes, it could intervene in *qui tam* suits and dismiss them. So, allowing the government unfettered authority to take over and dispose of FCRA *qui tam* suits could be undesirable.

There are two potential solutions to this problem. One would simply be to deny the government any authority to intervene in the proposed *qui tam* suits. Such government authority was not a feature of *qui tam* suits historically. The original FCA "contained no provision for the Government to take over the action,"[347] and neither did the *qui tam* statutes passed by the First Congress.[348] As argued earlier, the long history of *qui tam* actions is their best shield against constitutional attack. The absence of any governmental authority to intervene in and control most *qui tam* actions throughout the nation's history suggests that such authority is not constitutionally required but is merely a policy choice made by Congress with regard to the FCA.[349]

The other solution would be to authorize the government to intervene in and take over *qui tam* actions under the FCRA, but to impose on the Attorney General a duty to pursue such actions, provided they are not frivolous. Congress has the authority to impose such a duty on the Attorney General. Although Congress usually chooses to vest the executive with great discretion over enforcement decisions, it may control that discretion by statute.[350] By

346. *E.g.*, United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 806 (10th Cir. 2002); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753–54 (5th Cir. 2001); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 753–55 (9th Cir. 1993).

347. S. REP. NO. 99-345, at 10 (1986).

348. *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125.

349. *See* Polansky v. Exec. Health Res. Inc., 17 F.4th 376, 387 n.12 (3d Cir. 2021) (stating that *qui tam*'s "deep historical roots suggest that, even if the 'good cause' standard reduces the Government's degree of control over a relator's suit, such a lack of direct control was not considered an unconstitutional flaw at the founding"), *aff'd*, 143 S. Ct. 1720 (2023).

350. Heckler v. Chaney, 470 U.S. 821, 832–33 (1985); Dunlop v. Bachowski, 421 U.S. 560, 567 n.7 (1975).

requiring the Attorney General to pursue any FCRA action in which the government intervenes unless it is frivolous, Congress would reduce the government's incentive to interfere with legitimate *qui tam* actions.

Perhaps the best overall solution would be to allow relators full control over FCRA *qui tam* actions, but to include a fallback provision authorizing the government to intervene in such actions in the event that courts determine that such an intervention power is necessary to make the scheme constitutional. The statute could include guidance for the Attorney General to follow in the event the intervention power is triggered.

vi. Class Actions

Statutory damages are an important feature of the FCRA, but even the allowance for such damages provides little incentive for an individual lawsuit about a violation of it. The maximum recovery for statutory damages is $1,000, and a lawsuit for that amount would usually not make economic sense. The true significance of the statutory damages provision lies in its ability to be invoked in a class action in which hundreds, thousands, or even millions of plaintiffs seek such damages, exposing the defendant to a judgment for millions or even billions of dollars.[351]

Accordingly, Congress might wish to make clear in the statute authorizing *qui tam* actions that such actions could proceed as class actions. Even in the absence of such specific authorization, class actions would be appropriate simply by virtue of Rule 23 of the Federal Rules of Civil Procedure. Rule 23 applies even where the underlying law does not explicitly authorize class actions and even in some cases where the underlying law explicitly *forbids* class actions.[352] But making such authorization explicit in the statute would defeat any argument that class actions are not permitted in a *qui tam* suit.

Of course, as noted earlier,[353] class actions might in some cases lead to undesirable policy results. In *Spokeo*, for example, the defendant, in its petition for certiorari, emphasized that class action certification would expose it to potential liability in the billions of dollars, even though the plaintiff, it argued, had not suffered any concrete harm.[354] Such enormous exposure, the defendant argued, would create great pressure on it to settle, regardless of the merits of the case.[355] The Supreme Court may have been moved by the prospect

351. "[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem . . . ." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1977)).

352. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399–400, 434–36 (2010) (holding that a class action could proceed in federal court with regard to a cause of action provided by a state law that prohibited class actions).

353. *See supra* Section I.C.

354. *See* Joan Steinman, Spokeo*, Where Shalt Thou Stand?*, 68 VAND. L. REV. EN BANC 243, 251 (2015).

355. *Id.*

of such huge potential liability for mere technical statutory violations. Similar concerns have motivated state legislatures to bar class actions with regard to certain statutory duties.[356] Such concerns might lead Congress to impose some limit on class actions under statutes such as the FCRA.

CONCLUSION

Congress and the nation are not helpless in the face of the Supreme Court's use of standing to thwart enforcement of federal law. The *qui tam* action is a versatile, available solution to the standing problem created by *Spokeo* and *TransUnion*. Because the United States always has standing to enforce federal law, whether or not it has suffered the kind of injury that would give standing to a private party, it could always authorize itself to seek statutory penalties for violations of statutes such as the FCRA. And because the *qui tam* mechanism allows the United States to authorize a private party to bring suit on its behalf and retain a specified percentage of the proceeds, Congress could use this mechanism to restore the ability of private parties to recover statutory damages in cases in which *TransUnion* now blocks such recovery. Congress need not wait for the Supreme Court to moderate its latest standing stringency. It could, under current law, fix the new standing problem legislatively.

356. *See Shady Grove*, 559 U.S. at 443–45 (Ginsburg, J., dissenting).