QUI TAM RELATORS AS ARTICLE IV OFFICIALS*

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Since the earliest days of the republic, Congress has empowered private plaintiffs—called qui tam relators—to bring claims in court on behalf of the United States. Today, qui tam litigation accounts for billions of dollars in judgments and settlements each year. But despite qui tam's modern significance and historical pedigree, its constitutionality has recently been questioned. To wit, several sitting Supreme Court Justices have suggested that qui tam violates the President's Article II authority because it empowers private relators—who are neither appointed nor supervised by the President—to enforce federal law. Following similar logic, a lower federal court recently ruled a prominent qui tam statute unconstitutional. That decision (or one like it) seems destined for Supreme Court review.

The Supreme Court's anticipated reconsideration of qui tam has spurred a rich scholarly debate. Some scholars contend that qui tam is consistent with a historical understanding of Article II, while others contend that qui tam violates that constitutional provision. But by focusing so centrally on Article II, both sides of the debate overlook a key provision that offers a natural constitutional basis for a large subset of modern qui tam practice: the Article IV Property Clause.

As this Article explains, the Article IV Property Clause gives Congress the authority to empower qui tam relators to bring claims on behalf of the United States—so long as those claims relate to federal property, as the only two qui tam statutes in modern use do. Just as Congress can rely on the Article IV Property Clause to empower territorial officials to exercise federal authority without running afoul of other parts of the Constitution, Congress can rely on the same Property Clause to empower other Article IV officials (i.e., qui tam relators) to assist with other forms of federal property. But outside of the context of federal property, qui tam actions are properly understood as enforcing statutory authority enacted pursuant to one of Congress's Article I powers. And because enforcing Article I statutes in court, on behalf of the United States, constitutes an exercise of Article II authority, qui tam actions unrelated to federal property (such as those relating to money alone) are unconstitutional to the extent they

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do not abide by Article II's structural requirements. In sum, qui tam's constitutionality can largely be saved—if only we look in the right place.

INTRODUCTION

Since the earliest days of the republic, Congress has empowered private plaintiffs—called qui tam relators—to bring legal actions in court on behalf of the United States.[1] This furthered a tradition that flowed throughout early America and, more upstream, the laws of England.[2] Today, relators secure more than $2 billion in judgments and settlements each year.[3] But despite qui tam's modern significance and historical pedigree, the constitutionality of qui tam litigation has recently come into question.

Several sitting Supreme Court justices have suggested that qui tam violates the President's Article II authority because it empowers private relators—who are neither appointed nor supervised by the President—to enforce federal law.[4] In addition, a lower federal court following similar logic

1. Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1239 (2018) [hereinafter Beck, *Neglected History*] (discussing the First Congress); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 549–51 (1990) (discussing qui tam and the First Congress).

2. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (referring to "the long tradition of *qui tam* actions in England and the American Colonies").

3. U.S. Dep't of Just., *False Claims Act Settlements and Judgments Exceed $2.9 Billion in Fiscal Year 2024* (Jan. 15, 2025), https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024#:~:text=Settlements%20and%20judgments%20under%20the, number%20in%20a%20single%20year [https://perma.cc/9LRG-7WTP].

4. Wis. Bell, Inc. v. United States *ex rel.* Heath, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., joined by Thomas, J., concurring) ("The Act's *qui tam* provisions raise substantial constitutional questions

recently ruled a prominent qui tam statute unconstitutional in *United States ex rel. Zafirov v. Florida Medical Associates*.[5] The *Zafirov* decision (or one like it) seems destined for Supreme Court review.

The Supreme Court's anticipated consideration of qui tam's constitutionality has spurred a rich scholarly debate. On one hand are scholars who contend that qui tam's historical pedigree demonstrates that it is consistent with an original understanding of the President's Article II authority. For example, Baronia, Lucky, and Professor Zambrano write that "Founding Era lawmakers passed reams of statutes empowering private plaintiffs to sue for wrongs done to society."[6] They thus argue that history "weakens both the Article II" challenge to qui tam "and the 'unitary executive' theory because it shows that Congress was free to empower private plaintiffs to execute the law."[7]

On the other side of the debate are those who stress Justice Thomas's observation, offered in the qui tam context, that "[s]tanding alone, . . . historical patterns cannot justify contemporary violations of" the Constitution—"even when the practice in question covers our entire national existence and indeed predates it."[8] For example, Professor Lawson and attorneys general for Presidents Ronald Reagan and George W. Bush write that, because "[t]he Constitution's text and structure require all federal law enforcement to be subject to the control and direction of the President," and because qui tam provisions "purport to allow federal law enforcement outside of full presidential control," it follows that those provisions "are unconstitutional."[9] They further contend that "history does not overcome the textual and structural case against qui tam actions outside presidential control."[10]

under Article II. . . . [I]n an appropriate case, the Court should consider the competing arguments on the Article II issue."); United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1737 (2023) (Kavanaugh, J., joined by Barrett, J., concurring) ("I agree with Justice THOMAS that '[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation.' . . . [T]he Court should consider the competing arguments on the Article II issue in an appropriate case."); *id.* (Thomas, J., dissenting) (referring to "serious constitutional questions" regarding qui tam). In a related context, Justice Alito has written that "it raises '[d]ifficult and fundamental questions' about 'the delegation of Executive power' when Congress authorizes citizen suits." U.S. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 62 (2015) (Alito, J., concurring).

5. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1322 (M.D. Fla. 2024) (holding that the False Claims Act's qui tam provision violates the Appointments Clause).

6. Nitisha Baronia, Jared Lucky & Diego A. Zambrano, *Private Enforcement at the Founding and Article II*, 114 CALIF. L. REV. 131, 132 (2026).

7. *Id.*

8. *Polansky*, 143 S. Ct. at 1741 (Thomas, J., dissenting) (internal quotations omitted) (citations omitted).

9. Brief for Former U.S. Attorneys General Edwin Meese III and Michael B. Mukasey, Law Professors Steven G. Calabresi and Gary S. Lawson, and the Landmark Legal Foundation as Amici Curiae Supporting Appellees at 2, United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, Nos. 24-13581, 24-13583 (11th Cir. Mar. 17, 2025).

10. *Id.* at 18 (citation modified).

The truth is more complicated than the excellent scholarship on either side of the present debate suggests. That is because both sides of the debate overlook a constitutional provision that is crucial to understanding Congress's authority to empower qui tam relators. That provision is the Article IV Property Clause, which empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[11]

This Article enters the debate concerning qui tam's constitutionality by highlighting the Article IV Property Clause and explaining why the Clause offers a sound constitutional basis for a large subset of modern qui tam actions. To put this Article's thesis in succinct terms: The Constitution's Article IV Property Clause gives Congress the authority to empower qui tam relators to bring claims on behalf of the United States—so long as those claims relate to federal property, as the only two qui tam statutes in modern use do.[12] But to the extent that any particular qui tam action does not relate to federal property, then the action cannot be defended as an exercise of Congress's Property Clause authority. Instead, such actions are properly understood to enforce a statutory provision enacted pursuant to one of Congress's non-Article IV powers, such as one of Congress's Article I powers (for example, the power to regulate interstate commerce). And because enforcing those non-Article IV statutes in court, on behalf of the United States, constitutes an exercise of the President's Article II authority, some modern qui tam actions unrelated to federal property (such as those relating to money alone) are unconstitutional because they do not abide by Article II's requirements.

To defend its thesis, this Article will work within the methodological terms shared by both sides of the present debate. Pursuant to those terms, uncontested Supreme Court precedent is largely accepted. But where there is no on-point precedent, or where such precedent is contested, this Article turns to constitutional text, structure, and history to argue from first principles. These are the methodological terms that have been used by scholars on both sides of the debate—who are both originalists and non-originalists. What is more, these are the methodological terms that the Supreme Court itself has used in recent years.[13] By working within this familiar and widely shared methodological framework, this Article seeks to advance the debate in ways that will prove helpful to the Supreme Court's anticipated reconsideration of qui tam's constitutionality. In particular, this Article gives reason for any judicial ruling concerning qui tam's constitutionality to carefully account for Congress's ability

11. U.S. CONST. art. IV, § 3, cl. 2.

12. *See infra* Section I.A and Section III.A (referring to the False Claims Act and the Indian Protection Act).

13. *See* Randy E. Barnett & Lawrence B. Solum, *Making the Party Presentation Principle Safe for Originalism*, 174 U. PA. L. REV. 947, 949 (2026).

to empower qui tam relators pursuant to the Article IV Property Clause. This means that in qui tam cases that do not involve federal property, such as *Zafirov*, jurists should be careful to avoid speaking in overly broad terms that fail to leave room for Congress's special ability to empower qui tam relators pursuant to the Property Clause.

Why is the Property Clause so important to a proper understanding of qui tam's constitutionality? Well, the Property Clause—which is also referred to as the Territories Clause—empowers Congress to act with sovereign-like authority regarding federal property.[14] The Clause is thus *the* natural place to find Congress's sovereign-like authority to empower qui tam relators—who take their name from a Latin phrase meaning he "[w]ho sues on behalf of the King as well as for himself."[15] In short, and in the limited context involving federal property, Congress is empowered to act similarly to how the English sovereign historically acted.[16]

The Property Clause is the historical descendant of the royal prerogative pertaining to the management of public property, which Parliament had largely wrested from the king.[17] In some general sense, then, the power to manage public property is in nature—being that it belonged historically to the king. But building on Parliament's hard-fought lessons, the Framers of the U.S. Constitution decided to grant this historically "executive" power to Congress, rather than the President. The property power can therefore be understood as one of the Constitution's few "*exceptions* and *qualifications*" to the "general doctrine . . . that the Executive Power of the Nation is vested in the President."[18] This means that supporters of the unitary executive theory of

14. *See* Gary S. Lawson, *The Territories Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (Josh Blackman & John G. Malcolm eds., 3d ed. 2025) [hereinafter Lawson, *The Territories Clause*] (explaining that Congress can "behave as could any state government within its own jurisdiction," and that a "natural[]" reading of the Clause's "text, . . . gives Congress the same power over, 'other property,' such as inkwells and wagons").

15. J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 431 n.3 (2000) [hereinafter *English Eradication*] (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 1251 (6th ed. 1990)).

16. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 359 (1826) ("With respect to the vast territories belonging to the United States . . . congress have assumed to exercise over them supreme powers of sovereignty."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 668 (1833) ("The power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, but is absolute and unlimited . . . ."). *But see* Michael D. Ramsey, *The Originalist Case Against the* Insular Cases, 77 FLA. L. REV. 517, 572–76 (2025) (discussing ambiguities in Story's and Kent's descriptions).

17. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 334 (2020); *see infra* Section II.B.

18. ALEXANDER HAMILTON, PACIFICUS NO. 1 (June 29, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1973–1974: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8, 13 (Morton J. Frisch ed. 2007) (citation modified).

Article II can readily accept that, although *all* of "the executive power" vested by Article II is vested in the President, other powers historically considered executive (such as the power to manage public property) were vested in Congress through provisions located outside of Article II.

The sovereign-like nature of Congress's Property Clause power is familiar in the territorial context. From the earliest days of the republic, Congress has exercised plenary authority over the federal territories by empowering territorial bodies to exercise *federal* forms of executive, legislative, and judicial power as Congress deemed fit.[19] While Congress's exercise of all three powers might seem in tension with the Constitution's broader commitment to separating powers, a closer inspection of the Constitution's structure reveals there to be no tension at all.

The Article IV Property Clause grants Congress unique power that is distinct from the powers vested by Articles I, II, and III. This means that, when Congress empowers Article IV bodies—such as territorial governors, legislatures, and courts—Congress is not meaningfully hindered by the ordinary separation-of-powers principles that flow from Articles I, II, and III. For better or for worse, the Article IV context is distinct.[20]

The distinction between Article IV and Articles I, II, and III is already familiar in the territorial context. This distinction was on display in 2020, when the Supreme Court ruled that territorial officials exercising federal power in Puerto Rico did not need to be appointed in accordance with Article II's Appointments Clause.[21] "Since the founding," Justice Thomas explained in his separate opinion in that case, there was a "recognized . . . distinction between Article IV power and the powers of the National Government in Articles I, II, and III."[22]

Given the distinction between Article IV and Articles I, II, and III, territorial governors can exercise a form of federal power (i.e., Article IV power) that is executive in nature, despite being selected by popular election—a mode of selection that would not comport with the Article II Appointments Clause.[23]

19. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020) (collecting historical sources).

20. To distinguish Article IV from Articles I, II, and III is not to suggest that the Constitution does not apply in federal territories. That suggestion is a premise of "the much-criticized 'Insular Cases,'" *id.* at 1665, which "have no foundation in the Constitution" and "deserve no place in our law." United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring); *see also* Ramsey, *supra* note 16, at 531 (describing criticisms of the Insular Cases). As explained in Section III, Congress cannot invoke its Article IV power to violate *any* part of the Constitution—including in the territories. *See infra* Part III.

21. *Aurelius*, 140 S. Ct. at 1660–61.

22. *Id.* at 1666 (Thomas, J., concurring in the judgment).

23. *See id.* at 1660 (referring to "Puerto Rico's popularly ratified constitution"); Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L.J. 739, 795 (2022) (referring to "territorial legislatures and governors").

Similarly, Congress can empower territorial judges to exercise a form of federal power (i.e., Article IV power) that is judicial in nature, even though territorial judges do not enjoy the same salary and tenure protections enjoyed by Article III judges.[24] And Congress can empower territorial legislatures to exercise a form of federal power (i.e., Article IV power) that is legislative in nature, without running afoul of the Constitution's nondelegation principle.[25] That is because those territorial officials do not exercise Article I, Article II, or Article III power. They instead exercise Article IV power on Congress's behalf.

Although the distinction between Article IV and Articles I, II, and III is already familiar in the territorial context, it is less familiar in the context of other federal property. This Article thus adds to the scholarly literature by explaining how the distinction between Article IV and Articles I, II, and III applies not just to Congress's regulation of federal territories, but also to Congress's regulation of "other Property," to use the words of the Property Clause.[26] In short, because Congress's authority regarding federal "Territor[ies] [and] other Property" flows from the *same* Article IV Property Clause,[27] the distinction between Article IV and Articles I, II, and III should apply similarly to both the "Territories" and "other Property" contexts.[28]

The Property Clause does not, of course, give Congress unlimited authority to empower qui tam relators. Instead, Articles II, III, and IV of the Constitution all limit Congress's ability to rely on the Property Clause to empower qui tam relators. The limitations imposed by each article will be examined in detail. But in short: Congress may rely on the Article IV Property Clause to empower qui tam relators to litigate *only* in relation to federal property—whether that be real property (i.e., land) or other forms of property, which can run the gamut from paperclips to battleships. But to empower qui tam relators to bring actions that do not relate to federal property (such as actions relating to money alone), Congress must seek to rely on a non-Article IV

24. *Aurelius*, 140 S. Ct. at 1659 (citing American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) for the proposition that "territorial courts may exercise the judicial power of the Territories without the life tenure and salary protections mandated by Article III for federal judges"); *see also* Biber, *supra* note 23, at 796 ("[T]he Supreme Court has long upheld the use of non-Article III courts where judges are appointed by territorial governors without Senate confirmation or lifetime tenure.").

25. *Aurelius*, 140 S. Ct. at 1659 (citing Cincinnati Soap Co. v. United States, 301 U.S. 308, 323 (1937) for the proposition that "territorial legislators may exercise the legislative power of the Territories without violating the nondelegation doctrine"); *see also* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 125 (2004) ("The consensus view from the framing generation to the present has been in favor of territorial legislatures."). The nondelegation doctrine places limits on Congress's ability to delegate its legislative powers. *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 469 (2021).

26. U.S. CONST. art. IV, § 3, cl. 2.

27. *Id.*

28. *Infra* Section II.C.

power, such as an Article I power, which in turn requires qui tam statutes to conform to Article II's appointment and supervision requirements. And in no case may Congress conscript Article III courts to hear qui tam actions that do not abide by Article III's jurisdictional requirements—although those Article III requirements should seldom prove problematic.

Part I of this Article will introduce qui tam litigation and ongoing debates concerning its constitutionality; this will include introducing debates concerning whether qui tam actions are consistent with Articles II and III of the Constitution. Part II will then examine the constitutional clause that is missing from present debates concerning qui tam's constitutionality by arguing that the Article IV Property Clause offers the natural source for Congress's authority to empower qui tam relators. Finally, Part III will outline constitutional limitations on Congress's authority to empower qui tam relators. Specifically, Part III will first discuss underexplored limitations imposed by Article IV itself and will then weigh in on the present debates relating to Articles II and III by explaining what the limitations imposed by Articles II and III mean for both Article IV and non-Article IV qui tam actions.

I. BACKGROUND AND CONSTITUTIONAL CHALLENGES

Section I.A will introduce the historical and modern use of qui tam actions. Sections I.B, I.C, and I.D will then introduce three constitutional objections relating to qui tam. Those objections relate to Article III standing, the Article II Appointments Clause, and the Article II Vesting and Take Care Clauses. Sections I.B, I.C., and I.D. offer those objections in order to introduce the landscape of contemporary debates concerning qui tam's constitutionality. Afterwards, Part II will examine a constitutional provision that is missing from those debates (i.e., the Article IV Property Clause), while Part III will weigh in on the merits of those debates by explaining what the limitations imposed by Articles II and III mean for both Article IV and non-Article IV qui tam actions.

A. *Qui Tam: An Introduction*

Qui tam actions allow a private litigant—called a qui tam relator—to bring an action on behalf of the government. An early form of qui tam can be traced to AD 695, when "Wihtred, King of Kent, issued a law prohibiting labor on the Sabbath,"[29] and allowed "the man who informs" of the violation to receive "half the fine."[30] But it was not until the fourteenth century that "[t]he English experiment with qui tam enforcement began in earnest."[31]

29. *English Eradication*, *supra* note 15, at 567.

30. *Id.*

31. *Id.*; *see also* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) ("*Qui tam* actions appear to have originated around the end of the thirteenth century . . . .").

In fourteenth-century England, "[l]egislation important to the national sovereign was not always a high priority to local officials."[32] "Faced with limited public enforcement resources and the difficulty of implementing national policies over numerous, geographically separated, local jurisdictions, Parliament . . . [turned] increasingly to qui tam enforcement as the most practical means to police compliance with regulatory requirements."[33] And "[o]ver the next 150 years, what began as a trickle of qui tam statutes gradually became a flood."[34] Examples of statutes with qui tam provisions included "a 1381 statute regulating the price of wine," and "a 1423 statute providing for forfeiture of defectively tanned leather."[35]

By the time Blackstone's Commentaries were published in the 1760s, it could be said that English "[s]tatutes frequently permitted a person to sue for a penalty even if the person had not been injured by the conduct giving rise to the forfeiture."[36] Blackstone referred to those actions as "*popular* actions, because they are given to the people in general."[37] But not all popular actions were qui tam actions. Some popular actions were informer statutes, which allow private citizens to alert (i.e., "inform") the government to misconduct and either personally sue to recover a forfeiture or "share in a recovery secured by a government official."[38] Qui tam statutes are a subset of popular actions. As Blackstone explains, when one part of the forfeiture is "given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor," the resulting suit is "called a qui tam action, because it is brought by a person '*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*,'"[39] Latin for he "[w]ho sues on behalf of the King as well as for himself."[40]

The "English tradition of popular enforcement" soon "crossed the Atlantic."[41] The colonies enacted "several informer statutes expressly authorizing qui tam suits,"[42] and "[i]n the decade preceding the Constitutional

32. *English Eradication*, *supra* note 15, at 567.

33. *Id.* The role of qui tam relator or informer was often filled by community outsiders, as it was held in low repute. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 28–29 (2013).

34. *English Eradication*, *supra* note 15, at 570.

35. *Id.* at 571.

36. *Id.* at 550 n.35, 551.

37. *Id.* at 551 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *161).

38. Lee, *supra* note 1, at 550.

39. *English Eradication*, *supra* note 15, at 551 (quoting 3 BLACKSTONE'S COMMENTARIES *161).

40. *Id.* at 551 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1251 (6th ed. 1990)).

41. Randy Beck, Qui Tam *Legislation and Article II: State Constitutional Precursors to the "Take Care" Clause*, 49 HARV. J.L. & PUB. POL'Y 33, 34, 37 (2026) [hereinafter *Constitutional Precursors*]; Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000).

42. *Stevens*, 529 U.S. at 776 (citing the Act for the Restraining and Punishing of Privateers and Pirates, 1st Assembly, 4th Sess. (N.Y. 1692), reprinted in 1 COLONIAL LAWS OF NEW YORK 279, 281 (1894)); *see also* PARRILLO, *supra* note 33, at 26.

Convention," state legislatures "made extensive use of popular enforcement."[43] Later on, "the First Congress enacted a handful of qui tam statutes, and a few more followed in subsequent years."[44] "Like their English counterparts, some of" these statutes "provided both a bounty and an express cause of action; others provided a bounty only."[45] On one count, "early Congresses enacted from five to fourteen popular actions statutes," with the difference in figures arising from the difficulty in categorizing nine statutes that "provided a bounty to informers, but do not make clear whether the bounty was for a successful popular action (in which case the statute authorized a popular action) or was instead for informing authorities of a violation ultimately prosecuted by the government."[46]

Two federal qui tam statutes remain on the books today.[47] First is the Indian Protection Act ("IPA"),[48] which creates qui tam actions "for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe; (2) driving livestock to feed on Indian land; (3) settling on or surveying Indian land; (4) setting up a distillery in Indian country; and (5) trading in Indian country without a license."[49] The second and "most prominent qui tam provision" is the False Claims Act[50] ("FCA").[51] Because the FCA is by far the most common qui tam provision in use today,[52] it will be discussed in more detail.

The FCA was "[p]assed during the Civil War to help deter fraud by defense contractors."[53] At that time, "there were reports of inoperable rifles, spoiled food, and the resale of the same horses to the government over and over again."[54] "To combat this deception, the FCA was to be enforced not only by the Department of Justice ("DOJ") but also by a qui tam provision that would act as a sort of 'whistleblower' mechanism."[55] In 1986, the FCA's qui tam

43. *Constitutional Precursors*, *supra* note 41, at 34.

44. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 726 (2004).

45. *Stevens*, 529 U.S. at 776–77; Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1125 (11th Cir. 2021) (Newsom, J., concurring) (citations omitted) ("The Second, Third, and Fourth Congresses enacted similar statutes in the years that followed.").

46. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 584 n.361 (2005) [hereinafter Prakash, *Chief Prosecutor*].

47. Sarah Leitner, *The Private Rights Model of Qui Tam*, 76 FLA. L. REV. 865, 870 (2024). Until recently, "a provision of the Patent Act" also "contained a *qui tam* provision," but that provision has since been eliminated. *Id.* at 901.

48. *See* Act of June 30, 1834, ch. 161 § 27, 4 Stat. 729, 733–34 (codified at 25 U.S.C. § 201).

49. Leitner, *supra* note 47, at 905 (citing 25 U.S.C. §§ 177, 179, 180, 251 (repealed 2018), 264).

50. 31 U.S.C. §§ 3729–33.

51. Leitner, *supra* note 47, at 898.

52. *See* Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. 1, 44 n.313 (2024).

53. Lee, *supra* note 1, at 543.

54. Leitner, *supra* note 47, at 871.

55. *Id.*

provisions received a major overhaul.[56] "To stimulate private enforcement suits, Congress amended the" FCA in that year "to provide for treble damages and . . . a bounty to the relator of up to thirty percent of any recovery."[57] The 1986 amendments, which remain in effect today, resulted in a "massive upsurge in qui tam actions."[58]

Today, the FCA imposes civil liability for various actions, including "knowingly present[ing] . . . a false or fraudulent claim for payment or approval";[59] "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim";[60] and conspiring to perform those actions.[61] As will prove crucial to this Article's partial defense of the FCA—which focuses on federal property, rather than money—the FCA defines "claim" to mean "any request or demand . . . for *money or property*" that relates to the United States government in one of several statutorily defined ways.[62]

The FCA requires the Attorney General to "diligently . . . investigate a violation" of the FCA and, "[i]f the Attorney General finds that a person has violated or is violating" the FCA, "the Attorney General may bring a civil action . . . against the person."[63] The FCA's qui tam provision permits a private "person" to "bring a civil action for a violation of" the FCA on behalf of "the person and . . . the United States Government."[64] The qui tam provision further provides that "[t]he action shall be brought in the name of the Government," and "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[65]

The FCA gives the Attorney General a right of first refusal. A would-be qui tam relator must serve the United States with a sealed copy of their "complaint and written disclosure of substantially all material evidence and information."[66] The complaint, which "shall be filed *in camera*, shall remain under seal for at least [sixty] days."[67] During those sixty days, "[t]he Government may elect to intervene and proceed with the action."[68] The United

56. *See* William Barr, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 209 (1989).

57. *Id.*

58. *Id.*

59. 31 U.S.C. § 3729(a)(1)(A).

60. *Id.* § 3729(a)(1)(B).

61. *Id.* § 3729(a)(1)(C). The FCA also imposes liability in other contexts. *E.g.*, *id.* § 3729(a)(1)(D)–(F).

62. *Id.* § 3729(b)(2) (emphasis added).

63. *Id.* § 3730(a).

64. *Id.* § 3730(b)(1).

65. *Id.*

66. *Id.* § 3730(b)(2).

67. *Id.*

68. *Id.*

States may also, upon a showing of "good cause," "move the court for extensions of the time during which the complaint remains under seal."[69] During the sealed period, "the Government shall" either "proceed with the action, in which case the action shall be conducted by the Government," or "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action."[70]

"If the Government proceeds with the action," the government has "the primary responsibility for prosecuting" it and "shall not be bound by . . . the person bringing the action."[71] But "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action," although "the court, . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause."[72]

B. *Article III Standing*

The FCA's qui tam provision has been subject to various constitutional challenges. For example, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[73] the Supreme Court considered whether an FCA qui tam relator could satisfy the Constitution's Article III standing requirements.[74]

The underlying dispute in *Stevens* concerned a qui tam relator who alleged that a former employer "submitted false claims to the Environmental Protection Agency (EPA) in connection with various federal grant programs."[75] Writing for the Court, Justice Scalia thought it "beyond doubt that the complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud."[76] But because the FCA "gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery," it meant that "some explanation of standing other than agency for the Government must be identified."[77]

In search of an explanation for relator standing, Justice Scalia first rejected the argument that the relator's entitlement to a monetary bounty was sufficient. That was because "the same might be said of someone who has placed a wager

69. *Id.* § 3730(b)(3).

70. *Id.* § 3730(b)(4).

71. *Id.* § 3730(c)(1).

72. *Id.* § 3730(c)(3).

73. 529 U.S. 765 (2000).

74. *Id.* at 771 (explaining that, to establish Article III standing, a plaintiff must (1) demonstrate "injury in fact," (2) show causation between the injury in fact and the alleged conduct of the defendant, and (3) demonstrate redressability).

75. *Id.* at 770.

76. *Id.* at 771.

77. *Id.* at 772.

upon the outcome," and "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact."[78] By comparison, an "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor."[79] Thus, because "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, it could be said that "the United States' injury in fact suffices to confer standing on" the relator in *Stevens*.[80]

Justice Scalia then "confirmed" the conclusion that relators had standing by referencing "the long tradition of qui tam actions in England and the American Colonies."[81] "That history" was "relevant to the constitutional standing inquiry since . . . Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[82] And because "[q]ui tam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution," the Court thought the "history well nigh conclusive."[83]

One might think *Stevens* settled the issue concerning whether qui tam relators have Article III standing. But recent "developments in the Court's standing jurisprudence cast doubt on the continued vitality of the Court's holding in *Stevens*."[84]

In *TransUnion LLC v. Ramirez*,[85] the Court stated that "the public interest that private entities comply with the law cannot 'be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.'"[86] The *TransUnion* Court also wrote that a "regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law would not only violate Article III but also would infringe on the Executive

78. *Id.* at 772–73.

79. *Id.* at 773.

80. *Id.* at 773–74.

81. *Id.* at 774.

82. *Id.* (citation omitted).

83. *Id.* at 776–77 (quotations and citations omitted).

84. Leitner, *supra* note 47, at 875–76; *see also* United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1305 n.1 (M.D. Fla. 2024) ("Intervening Supreme Court decisions and longstanding precedent arguably undermine *Stevens's* core assumption—that a relator's interest in the lawsuit vests before final judgment."); *but see* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 271, 285 (2008) (extending *Stevens* to an "assignee [who] has promised to remit the proceeds of the litigation to the assignor").

85. 141 S. Ct. 2190 (2021).

86. *Id.* at 2206 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992)); *see also* Leitner, *supra* note 47, at 878–79 (quoting *TransUnion*, 141 S. Ct. at 2206).

Branch's Article II authority."[87] These statements appear to "conflict, on their face, with the assignment theory of relator standing" endorsed in *Stevens*, given that "[q]ui tam provisions allow relators to sue in federal court to redress injuries that are expressly not their own."[88]

The Court's *TransUnion* decision has not been particularly popular among lower court judges.[89] And Eleventh Circuit Judge Kevin Newsom has "propose[d] a different way of thinking about things."[90] Judge Newsom's alternative approach, which has garnered substantial attention,[91] focuses more on Article II than Article III. In particular, he proposes a two-part standing analysis.

First, he posits that "a 'Case' exists within the meaning of Article III, and a plaintiff thus has what we have come to call 'standing,' whenever he has a legally cognizable cause of action, regardless of whether he can show a separate, stand-alone factual injury."[92] This first step leads to the conclusion that "Congress has broad authority to create judicially enforceable rights by statute and thereby authorize private citizens to sue."[93] But Judge Newsom's second step ensures that "Congress's authority isn't unlimited."[94] To wit, his second step maintains that "Article II's vesting of the 'executive Power' in the President and his subordinates prevents Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[95] In a sense, Judge Newsom's approach translates an Article II limitation (i.e., who can bring a federal prosecution) into an Article III limitation (i.e., who can an Article III court recognize as properly exercising Article II power).

87. *TransUnion*, 141 S. Ct. at 2207; *see also* Leitner, *supra* note 47, at 879 (quoting *TransUnion*, 141 S. Ct. at 2207).

88. Leitner, *supra* note 47, at 879.

89. Jonathan H. Adler, *Does the Law of Standing "Need a Rewrite" After* TransUnion*?*, VOLOKH CONSPIRACY (Mar. 10, 2024, 15:57 CT) [hereinafter Adler, *Does the Law of Standing Need a Rewrite*], https://reason.com/volokh/2024/03/10/does-the-law-of-standing-need-a-rewrite-after-transunion/ [https://perma.cc/SPK6-PZH4].

90. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring).

91. *See, e.g.*, Adler, *Does the Law of Standing Need a Rewrite*, *supra* note 89 ("Judge Matey is far from the only federal appellate judge to express concerns about standing in recent years. *TransUnion*, in particular[,] does not appear to be too popular among many judges. Most prominently, Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit has called out the problems with existing standing jurisprudence and its application."); Advisory Opinions: *Bionic Judges*, SCOTUSBLOG, at 32:28–36:00 (Dec. 5, 2023), https://www.scotusblog.com/podcasts/advisory-opinions/bionic-judges/ (on file with the North Carolina Law Review).

92. *City of Hallandale Beach*, 996 F.3d at 1115 (Newsom, J., concurring).

93. *Id.* at 1132.

94. *Id.*

95. *Id.* at 1115.

Judge Newsom speaks to qui tam actions at both steps of his proposed approach. He finds the history of qui tam actions helpful when defending his first step. At that step, Judge Newsom highlights both qui tam actions and the executive branch's ability to bring criminal actions as two historical examples of cases brought by individuals who did not have to establish individual injuries to invoke Article III jurisdiction.[96] But Judge Newsom has more trouble defending qui tam actions when discussing his second step. At that second step, he suggests that the generalized claims brought by qui tam relators resemble the sorts of generalized claims that must be brought (or at least be supervised) by Article II officials accountable to the President.[97] In the end, Judge Newsom seems willing to let qui tam litigation exist as something of an historical anomaly—an "idiosyncratic and unchallenged" exception—to the general rule that "courts haven't allowed private plaintiffs to sue for remedies that accrue to the public as a whole."[98]

* * *

The point for present purposes is that qui tam litigation is susceptible to challenges on the grounds that relators lack constitutional standing. If the Court's statements concerning unharmed plaintiffs in *TransUnion* are to be taken seriously, then qui tam relators—who need not be personally injured—seem unable to satisfy Article III's jurisdictional requirements. And if Judge Newsom's alternative approach becomes the law of the land, then qui tam relators—who bring claims on behalf of the government—would also seem to have difficulty establishing their ability to be heard in an Article III court. Section III.C will offer a response to these constitutional challenges in a context that accounts for the Article IV Property Clause. But first, Sections I.C and I.D will outline additional constitutional challenges to qui tam.

C. *Article II Appointments Clause*

Qui tam litigation has also been challenged on Article II grounds that do not relate to standing. Such challenges were left open by the *Stevens* Court, which "express[ed] no view on the question whether qui tam suits violate Article II."[99] One component of Article II that has served as grounds for challenges to qui tam is the Article II Appointments Clause.

96. *Id.* at 1126 ("[I]t's clear from the history of *qui tam* actions and criminal prosecutions that 'special injury' has never been a generalized requirement for *all* lawsuits.").

97. *Id.* at 1135–36 n.14 (noting that "the existence of *qui tam* actions offers some counterevidence against a strict demarcation of private and public actions, based in Article II," and suggesting as "[o]ne possible explanation" that qui tam "actions didn't raise Article II problems because the executive branch retained full control over them").

98. *Id.* at 1135.

99. Leitner, *supra* note 47, at 875 (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000)).

Consider *United States ex rel. Zafirov v. Florida Medical Associates, LLC*,[100] where District Court Judge Kathryn Kimball Mizelle concluded that FCA relators were not appointed in conformance with the Appointments Clause.[101] In *Zafirov*, the relator "sued her employer . . . for violations of the FCA by misrepresenting patients' medical conditions to Medicare."[102] As is typical, the relator "never asserted that the defendants' allegedly illegal conduct harmed her."[103] "Instead, like a United States Attorney," the relator "proceed[ed] on behalf of the 'real party of interest in this case,' the 'United States of America.'"[104] The defendants objected on the grounds that the relator was an officer of the United States who was not appointed in conformance with the Appointments Clause.[105] Judge Mizelle agreed, and thus dismissed the action as unconstitutional.[106] The case is now on appeal before the United States Court of Appeals for the Eleventh Circuit.[107]

The Article II Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[108]

The Appointments Clause governs the appointment of all officers of the United States. Principal officers must be appointed by the President and confirmed by the Senate.[109] Inferior officers may be appointed, as Congress "think[s] proper," by "the President alone," the "Courts of Law," or "the Heads of Departments."[110]

There are at least two important questions in an Appointments Clause analysis. The first concerns whether an individual is an officer of the United States. Existing Supreme Court precedent maintains that an officer of the United States is an individual who: (1) occupies a continuing position established by law, and (2) exercises "significant authority pursuant to the laws

100. 751 F. Supp. 3d 1293 (M.D. Fla. 2024).
101. *Id.* at 1323–24.
102. *Id.* at 1303.
103. *Id.*
104. *Id.*
105. *Id.* at 1304.
106. *Id.* at 1322–23.
107. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, Nos. 24-13581, 24-13583 (11th Cir. Oct. 30, 2024).
108. U.S. CONST. art. II, § 2, cl. 2.
109. *Zafirov*, 751 F. Supp. 3d at 1306.
110. U.S. CONST. art. II, § 2, cl. 2; *Zafirov*, 751 F. Supp. 3d at 1306.

of the United States."[111] Originalist scholarship, cited approvingly by Justice Thomas,[112] suggests that the term officers of the United States more broadly encompasses "all federal officials with responsibility for an ongoing statutory duty."[113]

If a particular individual is not an officer of the United States, then the individual can be appointed in ways that are not mentioned in the Appointments Clause. But if an individual is an officer of the United States, a second important question can emerge. That second question asks whether the officer is a principal or an inferior officer; the two must be appointed in different ways. But it is often the case that courts do not need to reach this second question. That is because if an officer has been appointed by means that would not be constitutional for either a principal or an inferior officer, then a court need not drill down into deciding whether the officer is a principal or an inferior officer; either way, the appointment is unconstitutional. This is the path that Judge Mizelle took in *Zafirov*.[114]

Judge Mizelle concluded that the relator in *Zafirov* exercised "[t]he power to initiate an enforcement action in the name of the United States to vindicate a public right," which "constitute[d] 'significant authority pursuant to the laws of the United States.'"[115] And although a particular qui tam relator might only hold the qui tam "office" for a limited period of time, "the office of relator persists by operation of the FCA regardless of the occupant and regardless of any intermittent vacancy, resignation, debilitation, or the like," making the office a continuing position.[116] The upshot was that the relator occupied a continuing position established by law, and exercised significant authority pursuant to the laws of the United States. It followed that the relator was an officer of the United States who had to be appointed via one of the methods outlined in the Appointments Clause. And because the relator appointed herself—and self-appointment is not a permissible method of appointment for either principal or inferior officers—Judge Mizelle ruled the appointment unconstitutional.[117]

Judge Mizelle is not alone in her Appointments Clause analysis. On appeal at the Eleventh Circuit, her conclusion has been defended by an avalanche of

111. *Zafirov*, 751 F. Supp. 3d at 1307, 1313 (citations omitted).

112. Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237, 253 (2018) (Thomas, J., concurring) ("To the Founders, this term encompassed all federal civil officials 'with responsibility for an ongoing statutory duty.'") (quoting NLRB v. SW Gen., Inc., 580 U.S. 288, 314 (2017) (Thomas, J., concurring) (citing Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 564 (2018))).

113. Mascott, *supra* note 112, at 564.

114. *Zafirov*, 751 F. Supp. 3d at 1307 n.2.

115. *Id.* at 1307 (citations omitted).

116. *Id.* at 1314.

117. *Id.* at 1322.

amici.[118] And in an unrelated case, Fifth Circuit Judge Duncan has written that "the FCA's qui tam device violates the Appointments Clause," because an FCA relator occupies a continuing position pursuant to which the relator exercises significant authority pursuant to the laws of the United States.[119]

The Appointments Clause analysis offered by Judges Mizelle and Duncan also seems to have support at the Supreme Court. To wit, Justices Thomas, Kavanaugh, and Barrett have each joined or authored at least one recent opinion expressing interest in considering Article II challenges to qui tam actions.[120] Justice Thomas, in particular, has explicitly noted the Appointments Clause.

As Justice Thomas explained in *United States ex rel. Polansky v. Executive Health Resources Inc.*,[121] "the Court has held that 'conducting civil litigation . . . for vindicating public rights' of the United States is an 'executive functio[n]' that 'may be discharged only by persons who are '[o]fficers of the United States'' under the Appointments Clause."[122] Thus, because a "private relator under the FCA . . . is not 'appointed as an officer of the United States' under Article II," it "appears to follow that Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation."[123]

Appointments Clause challenges to qui tam actions are not a new phenomenon either. Over two decades ago, Fifth Circuit Judge Jerry Smith concluded that qui tam actions under the FCA violate the Appointments Clause.[124] And before that, in 1989, then-Assistant Attorney General (and future Attorney General twice over) William Barr authored an Office of Legal Counsel ("OLC") opinion that came to a similar conclusion. As Barr put it, "qui tam suits brought by private parties to enforce the claims of the United States plainly violate the Appointments Clause."[125]

118. *See*, *e.g.*, Brief for Ctr. for Const. Resp. as Amicus Curiae Supporting Appellees at 2, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("[*Q*]*ui tam* actions violate the Appointments Clause of Article II . . . ."); Brief for Chamber of Com. of the U.S. as Amicus Curiae Supporting Defendants-Appellees at 5, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("The district court correctly held that the FCA's *qui tam* provisions conflict with the Appointments Clause 'by permitting unaccountable, unsworn private actors' to hold an executive office."); Brief for Pac. Legal Found. as Amicus Curiae Supporting Defendants-Appellees at 20, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("[*Q*]*ui tam* statutes prevent the Appointments Clause's accountability mechanism from functioning.").

119. United States *ex rel.* Montcrief v. Peripheral Vascular Assocs., P.A., 133 F.4th 395, 411 (5th Cir. 2025) (Duncan, J., concurring).

120. *See supra* note 4.

121. 143 S. Ct. 1720 (2023).

122. *Id.* at 1741 (Thomas, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 128–40 (1976) (per curiam)).

123. *Id.*

124. Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 758 (5th Cir. 2001) (Smith, J., dissenting).

125. Barr, *supra* note 56, at 210–11.

To be sure, not everyone agrees that qui tam violates the Appointments Clause. Some Eleventh Circuit amici in *Zafirov* argue that qui tam relators need not be appointed in conformance with the Appointments Clause. Professor Beck, for example, maintains that "[q]ui tam litigation was understood [at the Founding] as private enforcement authorized by statute, not an exercise of governmental power requiring constitutional appointment."[126] Professors Pfander and Zambrano, and Lucky, similarly maintain that relators should not be treated "as 'officers' subject to the Appointments Clause, when . . . the very point of qui tam legislation" at the Founding "was often to extend enforcement beyond the federal bureaucracy."[127]

* * *

Qui tam actions have been challenged on the grounds that relators are officers of the United States who have not been constitutionally appointed. Section III.B will respond to that argument by noting how the Appointments Clause is largely a non-issue in the Article IV context, where qui tam relators can qualify as Article IV officials who need not be appointed in the same ways as some non-Article IV officials. But first, Section I.D will introduce a third constitutional challenge to qui tam.

D. *Article II Vesting and Take Care Clauses*

Qui tam has also been said to violate the Article II Vesting and Take Care Clauses. The Vesting Clause states that "[t]he executive Power shall be vested in a President of the United States of America."[128] The Take Care Clause states that the President "shall take Care that the Laws be faithfully executed."[129]

Challenges to qui tam based on Vesting and Take Care Clauses maintain that bringing a federal lawsuit on behalf of the United States constitutes an exercise of Article II executive power. Such challengers are aided by *Seila Law LLC v. Consumer Financial Protection Bureau*,[130] where the Supreme Court characterized "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" as "a quintessentially executive power."[131] Building on similar understandings of executive power, challengers have argued that, by empowering a private relator to exercise executive power outside of the President's chain of command, qui tam actions

126. Brief for Randy Beck as Amicus Curiae Supporting Plaintiff-Appellant and Intervenor-Appellant at 4, United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293 (11th Cir. 2025) (Nos. 24-13581, 24-13583) [hereinafter Randy Beck Amicus Br.].

127. Brief for Legal Hist. Scholars James Pfander, Diego Zambrano & Jared Lucky as Amici Curiae in Support of Neither Party at 8, *Zafirov*, 751 F. Supp. 3d 1293 (No. 24-13581) [hereinafter Pfander, Zambrano & Lucky Amicus Br.].

128. U.S. CONST. art. II, § 1, cl. 1.

129. *Id.* § 3.

130. 591 U.S. 197 (2020).

131. *Id.* at 219.

undermine the vesting of "the executive power" in the President, and hamstring the President's ability to ensure that the laws be "faithfully executed."

To get a flavor of the various shapes that Article II Vesting and Take-Care arguments against qui tam can take, consider four arguments put forward in the 1989 OLC opinion authored by then-Assistant Attorney General Barr.[132] First, Barr contends that a qui tam relator can undermine the Executive Branch's initial decision to bring a lawsuit.[133] This is because, at least in the FCA context, "the qui tam mechanism" places "the decision whether and when to commence an action" into the hands of a relator who does not work for the Department of Justice ("DOJ").[134] If the initial filing is made when the DOJ is not prepared to bring a case, a relator's decision to file can "alert[] targets of criminal investigations" being conducted by DOJ, "sometimes resulting in disclosure of key information in [DOJ's] possession, including [DOJ's] litigating positions."[135] What is more, a qui tam lawsuit can "complicat[e]" DOJ "attempts to prepare a comprehensive plea arrangement and civil settlement."[136]

Second, Barr contends that qui tam relators can interfere with executive branch decisions regarding the use of resources.[137] For example, when DOJ determines not to intervene in a case, DOJ must "nevertheless . . . spend resources monitoring cases that it had for good reason decided not to bring."[138] That is "[b]ecause it is never possible to tell what prejudice [DOJ] might suffer from a relator's conduct."[139] One might also add that the FCA's requirement that the Attorney General "diligently . . . investigate a violation" pursuant to a tight, sixty-day timeline can result in a need for DOJ to shift investigative resources away from projects DOJ would prefer to prioritize.[140]

Third, Barr contends that although the DOJ can later seek to intervene in a case that the DOJ initially decided to not pursue, DOJ "cannot intervene unless" it "persuades the court that 'good cause' exists."[141] And "[e]ven then, the private relator still has 'the right to conduct the action,' and the court may not 'limit[] [his] status and rights.'"[142]

132. Barr, *supra* note 56.

133. *Id.* at 216–17.

134. *Id.* at 217.

135. *Id.*

136. *Id.*

137. *See id. But see* John Harrison, *The Article II Executive Power and the Rule of Law (Part I)*, VOLOKH CONSPIRACY (July 22, 2019, at 11:34 CT), https://reason.com/volokh/2019/07/22/the-article-ii-executive-power-and-the-rule-of-law-part-i/ [https://perma.cc/45KZ-DZAL] (stating that "Article II executive power consists exclusively of the capacity to perform the roles constituted by" legal rules, and that "[e]xecutive power brings with it no authority to use government resources").

138. Barr, *supra* note 56, at 218.

139. *Id.* at 218–19.

140. *Id.* at 230; 31 U.S.C. § 3730(a).

141. Barr, *supra* note 56, at 230 (citing 31 U.S.C. § 3730(c)(3)).

142. *Id.*

Fourth, Barr contends that "even where the Attorney General does enter the case during the first sixty days, he does not have the right to take over the litigation."[143] Instead, "[t]he relator remains a full party entitled to participate in the case."[144] And "[t]hrough his own conduct of the case, the relator effectively can overrule litigation decisions made by the Attorney General, and he is specifically empowered to challenge any effort by the government to settle or dismiss the suit."[145] What is more, "[w]hen a dispute arises between the Attorney General and the relator, the ultimate decision is left to the discretion of the court."[146]

In addition to Barr's 1989 OLC memo, examples of challenges to qui tam grounded in the Article II Vesting and Take Care Clauses can be observed in more modern sources. The defendant in *Zafirov*, for example, challenged the FCA's qui tam provision on both grounds.[147] But because Judge Mizelle resolved the case on Appointments Clause grounds, she declined to reach those Vesting and Take Care Clause arguments.[148] Nonetheless, on appeal at the Eleventh Circuit, various amici have argued that qui tam actions run afoul of the Article II Vesting and/or Take Care Clauses.[149]

Jurists have also signaled an interest in these arguments. Judge Duncan recently wrote that "the FCA's qui tam device violates the Take Care Clause" because it "allow[s] private [relators] to initiate and prosecute suits to enforce federal law."[150] Justice Kavanaugh's statement (joined by Justice Barrett)

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1303 (M.D. Fla. 2024).

148. *Id.* at 1304.

149. *E.g.*, Brief for Former U.S. Att'ys Gen. Edwin Meese III & Michael B. Mukasey, L. Professors Steven G. Calabresi & Gary S. Lawson & the Landmark Legal Found. as Amici Curiae Supporting Appellees at 14, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("[O]nce one recognizes that enforcement of the False Claims Act is enforcement of federal law, the Article II Vesting Clause locates control of that enforcement in the President. In multiple respects, the provisions in the False Claims Act violate this principle."); Brief for Ctr. for Const. Resp. as Amicus Curiae Supporting Appellees at 2, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("Not only do *qui tam* actions violate the Appointments Clause of Article II, as the district court correctly held, but they violate the Vesting Clause and the Take Care Clause as well."); Brief for Chamber of Com. of the U.S. as Amicus Curiae Supporting Defendants-Appellees at 5, *Zafirov*, 751 F. Supp. 3d 1293 (Nos. 24-13581, 24-13583) ("By empowering self-appointed private persons to initiate and conduct litigation on behalf of the United States, the *qui tam* provisions likewise violate Article II's Vesting Clause. And they inhibit the President's prosecutorial discretion and control over *qui tam* actions, in violation of the Take Care Clause."); Brief for Pac. Legal Found. as Amicus Curiae Supporting Defendants-Appellees, *supra* note 118, at 18 ("[B]y allowing individuals outside of the Executive Branch to enforce the law, 'the solitary nature of the Executive Branch' is violated, and the people no longer have 'a single object for the[ir] jealousy and watchfulness.'") (alteration in original) (citations omitted).

150. United States *ex rel.* Montcrief v. Peripheral Vascular Assocs., 133 F.4th 395, 412 (5th Cir. 2025) (Duncan, J., concurring).

referencing "substantial arguments that the qui tam device is inconsistent with Article II" would seem to include arguments grounded in the Article II Take Care and Vesting Clauses.[151] And when Justice Thomas noted that "[t]he potential inconsistency of qui tam suits with Article II has been noticed for decades," he cited an academic publication discussing both the Appointments Clause and the Take Care Clause.[152] Justice Thomas also cited Fifth Circuit Judge Jerry Smith's 2001 opinion,[153] which concluded that FCA "qui tam actions in which the government has declined to intervene violate[] the Take Care Clause."[154]

This is not to say that everyone agrees that qui tam violates the Article II Vesting and Take Care Clauses. To the contrary, a substantial number of Eleventh Circuit amici in *Zafirov* defend qui tam from such challenges.[155] Baronia, Lucky, and Professor Zambrano contend that "Founding Era lawmakers passed reams of statutes empowering private plaintiffs to sue for wrongs done to society."[156] They thus argue that history "weakens both the Article II" challenge to qui tam "and the 'unitary executive' theory because it shows that Congress was free to empower private plaintiffs to execute the law."[157] And Beck has similarly argued that qui tam is consistent with an original understanding of the Take Care Clause.[158] Beck highlights state qui tam practice in early America, and contends that, because such practice was consistent with "take care" clauses in state constitutions, federal qui tam should similarly be considered consistent with the Article II Take Care Clause.[159]

* * *

The Article II Vesting and Take Care Clauses offer additional grounds for challenging the constitutionality of qui tam—although numerous scholars contend that qui tam is consistent with those clauses. Scholars on both sides of the debate describe their Article II arguments as offering dispositive evidence of qui tam's constitutionality. But both sides of the debate overlook the Article IV Property Clause—which offers the most natural source for

151. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1737 (2023) (Kavanaugh, J., concurring, joined by Barrett, J.) (quoting *Polansky*, 143 S. Ct. at 1741 (Thomas, J., dissenting)).

152. *Id.* at 1741 (Thomas, J., dissenting) (citing James T. Blanch, Note, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 736–67 (1993)).

153. *Id.* at 1741.

154. Riley v. St. Luke's Episcopal Hosp., 252 F.3d, 749, 758 (5th Cir. 2001) (Smith, J., dissenting).

155. *See, e.g.*, Randy Beck Amicus Br., *supra* note 126, at 6 ("[E]arly Americans saw no conflict between qui tam enforcement and constitutional provisions vesting executive power"); Pfander, Zambrano & Lucky Amicus Br., *supra* note 127, at 8 ("Founding-Era Americans clearly saw no conflict between the Vesting and Take Care Clauses and *qui tam* practice.").

156. Baronia, Lucky & Zambrano, *supra* note 6, at 132.

157. *Id.*

158. *Constitutional Precursors*, *supra* note 41, at 41–42.

159. *Id.* at 51–88.

Congress's qui tam authority. Part II will therefore respond to the present debate concerning qui tam's constitutionality by explaining how many qui tam actions can be understood as exercising Congress's Article IV authority, rather than the President's Article II authority.

II. CONSTITUTIONAL AUTHORITY

In *United States ex rel. Polansky v. Executive Health Resources, Inc.*,[160] Justice Thomas expressed interest in considering "a question that *Stevens* left unaddressed: What is the source of Congress' power to effect partial assignments of the United States' damages claims?"[161] He offered two possible answers: Article I (the Necessary and Proper Clause, in particular) and Article IV.[162] He quickly poured cold water on the first option—stating, "if qui tam suits violate Article II, then it appears unlikely that any assignment effectuated by the FCA's qui tam provisions could be considered 'necessary and proper for carrying into Execution' any constitutional power."[163] But his brief statement suggested that Article IV offers a more promising source for Congress's qui tam authority. "The Article IV Property Clause," he wrote, "is most familiar . . . in its application to landed property, . . . but it has been recognized as applying to personal property as well."[164]

Part II will explain why the Article IV Property Clause indeed offers a constitutional basis for empowering qui tam relators. Section II.A will first introduce the Article IV Property Clause. Sections II.B and II.C will then introduce the concept of Article IV officers, with Section II.B focusing on federal territories and Section II.C focusing on what the Property Clause refers to as "other Property."

A. *Article IV Property Clause*

The Property Clause, which is also referred to as the Territories Clause, states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[165] Like the Enclave Clause, which empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever" in Washington, D.C.,[166]

160. 143 S. Ct. 1720 (2023).

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

162. *Id.*

163. *Id.* (citing Gonzales v. Raich, 545 U.S. 1, 61 (2005) (Thomas, J., dissenting)).

164. *Id.* (quoting David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 256–57 (1995)).

165. U.S. CONST. art. IV, § 3, cl. 2.

166. The Enclave Clause grants Congress separate authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of

the Property Clause gives Congress unique power. The two Clauses grant Congress the sort of general governmental authority that the Constitution otherwise withholds from the federal government and reserves to the States.

As Professor Lawson describes, "[t]he Territories Clause . . . appears to be a plenary grant of power to Congress to govern territory as a general government," without having to "[trace] each act of legislation . . . to an enumeration of power beyond the Territories Clause itself."[167] Congress can rely on the Property Clause to "pass a general criminal code, regulate the private law of torts and contracts, provide for rules of marriage and descent, and behave [within territories] as [could] any state government within its own jurisdiction."[168] This view of the Property Clause is supported by historical sources and has prevailed in the case law, where the Supreme Court has repeatedly declared "that Congress has 'general and plenary' power over federal territory."[169]

Congress's Property Clause power can be traced to the royal prerogative historically exercised by the King of England. One might think the Framers would have assigned the royal prerogative to the President. But as Professor McConnell explains, the Constitution's Framers "explicitly dealt with every prerogative power identified in Blackstone" by "assign[ing] many of those prerogatives to Congress, even though they had been attached to the executive under the British constitution."[170] This included Congress's power "to dispose of federal lands," which can be traced to "the Crown's authority over lands that came into its possession through discovery or conquest," and, even earlier, the "prerogative of unfettered jurisdiction" that "[p]re-modern kings" exercised over "crown lands."[171]

Historically, the King exercised prerogative authority over royal "forests," which "were lands reserved for the king's own pleasure and profit," "exempt from the ordinary law of the land, and subject to a special code of royal regulations."[172] These much-despised "forest laws" could be "administered in special courts by specially appointed officials."[173] But over the course of English history, the King's prerogative power over crown lands was reduced to make

the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17.

167. Lawson, *The Territories Clause*, *supra* note 14.

168. *Id.*

169. *Id.* (citing Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890)); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION 264 (2005) ("Structurally, [the Property Clause] endowed Congress with the same plenary power that a state legislature had over state soil.").

170. MCCONNELL, *supra* note 17, at 95.

171. *Id.* at 97, 228–29.

172. *Id.* at 228.

173. *Id.* at 228–29 (citation omitted).

room for an increasingly prominent Parliament. This was, in part, a parliamentary response to kings who had engaged in "extensive sales" of land in order "to make ends meet."[174] "To foreclose any further sacrifice of the national patrimony to satisfy short-term royal needs, Parliament gradually limited the power of the Crown to alienate the lands, eventually eliminating the prerogative to dispose of the lands altogether."[175]

By the time Blackstone was writing in the 1760s, it could be said that "[t]he hated 'forest laws,' with their special courts, had . . . passed into desuetude 'a century past.'"[176] Indeed, "Blackstone listed the demise of the forest laws as among the most important curtailments of royal prerogative."[177] Nonetheless, some aspects of the King's power over crown lands remained. "[P]recedent as recent as 1774—the eve of the American Revolution," established that "the king had authority to govern conquered and 'vacant' territories as a matter of prerogative, without involvement of Parliament."[178] And "[a]t least in theory, the king could be a despot in such lands."[179]

No doubt conscious of how the King's prerogative power over various lands had given way to Parliamentary control, the Framers of the U.S. Constitution took care to give the Article IV Property Clause power to Congress, rather than the President. The Constitutional Convention "deftly repudiated executive prerogative over the American equivalent of crown lands, namely public lands owned by the federal government, and also over the American equivalent of conquered or vacant lands."[180] The Framers thus took from the President the independent source of funding that the President would have had if he, rather than Congress, had been granted the authority to dispose of the "rich and fertile country" that would become "national stock."[181]

In the early years of the new nation, "Congress would follow the British model of summoning territorial assemblies," and leaving the territories "subject until statehood to the plenary authority of the national legislature."[182] Chief Justice Marshall offers some insight into this early history. "[C]ongress," Marshall observed in 1810, "possess[es] and exercis[es] the absolute and

174. *Id.* at 228.

175. *Id.* at 228–29.

176. *Id.* at 229 (citation omitted).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 230. There does not seem to have been much more debate concerning the Property Clause during the Constitutional Convention. Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 26 (2001) ("[T]he existing records from the Constitutional Convention provide little guidance on the framers' interpretation of" the Property Clause).

181. THE FEDERALIST NO. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961).

182. MCCONNELL, *supra* note 17, at 230.

undisputed power of governing and legislating for the territory of Orleans."[183] This meant Congress could give a territory "a legislative, an executive, and a judiciary, with such powers as it has been [*Congress's*] *will* to assign."[184] Like the King's forest laws, which were not part of "the ordinary law of the land,"[185] the Property Clause empowered Congress to exercise "absolute and undisputed power"[186] in the territories without running afoul of the Constitution's ordinary constraints.

In addition to empowering Congress to regulate federal "Territory," the Property Clause also empowers Congress to regulate "other Property belonging to the United States."[187] The best reading of that text extends Congress's Article IV authority over both real property (i.e., land) and personal property (for example, warships and parchment). As Lawson explains, the "text" of the Property Clause "places territories in the same phrase as, and gives Congress the same power over, 'other [p]roperty,' such as inkwells and wagons."[188]

In addition to the text, there is historical support for reading the Property Clause as empowering Congress to regulate both real and personal property. Begin with the author of the Property Clause, Gouverneur Morris. Professor Engdahl contends that, as an "assistant superintendent of finance for the American Confederation, and protégé of financier Robert Morris, Gouverneur Morris certainly understood that the phrase 'other property' comprehends *personal* property no less than real."[189] Consider also the views expressed by Secretary of the Treasury Albert Gallatin in 1803.[190] Writing then to President Thomas Jefferson, Gallatin indicated that the Property Clause's reference to "other Property" included "personal property."[191]

A few decades later, in 1830, Justice Story noted that Congress's Property Clause power "may be applied to the due regulation of all other *personal* and *real* property rightfully belonging to the United States."[192] That was how the power

183. Sere v. Pitot, 10 U.S. (6 Cranch) 332, 337 (1810) (Marshall, C.J.).

184. *Id.* (emphasis added).

185. MCCONNELL, *supra* note 17, at 228.

186. *Sere*, 10 U.S. at 337.

187. U.S. CONST. art. IV, § 3, cl. 2.

188. Lawson, *The Territories Clause*, *supra* note 14.

189. Engdahl, *supra* note 164, at 250.

190. Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), https://founders.archives.gov/documents/Jefferson/01-39-02-0281#:~:text=If%20the%20acquisition%20of%20territory,common%20to%20the%20United%20States [https://perma.cc/KG7T-U72K].

191. *Id.* (writing that, because "the words 'other property' follow and must be embraced by the same construction which will apply to the new territory," adopting the argument that the Property Clause limited Congress's power "to the territory belonging to the United States at the time when the constitution was adopted" would require adopting the absurd conclusion "that the United States could not after the constitution, either acquire or dispose of any personal property."); *see also* Lawson, *The Territories Clause*, *supra* note 14 (citing Gallatin and referring to after-acquired "inkwells and wagons").

192. STORY, *supra* note 16, § 1319, at 196 (emphasis added).

"has been constantly understood, and acted upon."[193] And in 1840, the Supreme Court noted that "[t]he term territory," as used in the Property Clause, "is merely descriptive of *one* kind of property . . . [a]nd Congress has the same power over it as over any *other* property belonging to the United States."[194] The Court further wrote that "this power is vested in Congress without limitation."[195]

Although "the historical setting of the Property Clause, the documentary evidence that survives, and early interpretations of the Clause all confirm that the founders envisioned" that the Property Clause power would be "broadly" construed,[196] some commenters have read the Clause more narrowly. In particular, some commenters have rejected the broad "police power" reading of the Clause, which maintains that the Clause "confer[s] not only the powers of ownership but also general sovereign authority to regulate private conduct that occurs on federal" property "or that affects federal" property.[197]

A rather infamous example of a narrow reading of the Property Clause is offered in *Dred Scott v. Sanford*.[198] In that case, Chief Justice Taney "concluded that the term 'territory' in the Property Clause referred only to the territory that Virginia and other states had ceded to the United States under the Articles of Confederation."[199] That meant Congress's Property Clause power over the "territories" would not include new territories that were *later acquired* by the United States—such as the federal territories deemed free from slavery pursuant to the Missouri Compromise.[200] Taney offered a similarly distorted reading of "other property" by concluding the term extended to "personal property—that is, the ships, arms, and munitions of war, which," at the time of ratification, "*then* belonged in common to the State sovereignties."[201]

Taney's overly narrow reading of the Property Clause is unconvincing. As Professor Ramsey explains, "it would be absurd to think Congress had power over only the then-existing property of the United States and not later-acquired property."[202] And "it would be extraordinarily odd and ungrammatical to

193. *Id.* In a 1791 debate concerning the constitutionality of the national bank, Alexander Hamilton also "took as given that Congress had broad authority in the Property Clause." Appel, *supra* note 180, at 33 n.146 (citation omitted).

194. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).

195. *Id.*

196. Appel, *supra* note 180, at 16.

197. *See* Thomas W. Merrill, *Property Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 278, 278 (Edwin Meese III, Matthew Spalding & David Forte eds., 2005).

198. 60 U.S. 393 (1857).

199. Appel, *supra* note 180, at 42.

200. *Id.*; Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548. Taney had to dodge existing precedent recognizing the Property Clause power as extending to territory that did not exist at ratification. Appel, *supra* note 180, at 42–43.

201. *Dred Scott*, 60 U.S. at 437.

202. Ramsey, *supra* note 16, at 541; *see also* AMAR, *supra* note 169, at 269 n.*.

read the same phrase to have a temporal limit with respect to territory but not property."[203]

Beyond Taney, others have offered more reasonable, but nonetheless narrow, interpretations of the Property Clause. For example, some have argued that Congress has different Property Clause authority relating to federal property located within states. As Professor Merrill contends, "[t]he Property Clause authorized Congress to exercise a general police power within the territories before they were formed into states," but "Congress could exercise full police powers over federal land located in a state only in accordance with the Enclave Clause."[204] Under that theory, Congress could enact "at least some preemptive federal legislation" for property located within states, "but only if designed to protect the proprietary interests of the United States."[205] In short, Merrill contends that "the Framers intended" for the Property Clause to afford Congress a "police power" over "federal land located in territories," but only a more limited power to "protect[] . . . non-enclave federal land located in states."[206]

Merrill's argument finds some support in Justice Story. Story wrote that, although "[t]he power of [C]ongress over the public territory is clearly exclusive and universal," Congress's power "to regulate the other national property (unless it has acquired, by cession of the states, exclusive jurisdiction) is not necessarily exclusive in all cases."[207] Thus, according to Story, "[i]f the national government own[s] a fort, arsenal, hospital, or lighthouse establishment, not so ceded, the general jurisdiction of the state is not excluded in regard to the site."[208] Instead, the general jurisdiction of the state "remains in full force" and is only "subject to the rightful exercise of the powers of the national government."[209]

Under this "protective theory" of Article IV, Congress can rely on the Property Clause to enact legislation to "protect" federal property from things like "trespass and nuisances," but could not exercise "general sovereign authority" over such property like Congress can over federal territories.[210] But in *Kleppe v. New Mexico*,[211] the Supreme Court "reject[ed]" a similarly narrow reading of the Property Clause and concluded—in the context of non-territorial property located *within* the State of New Mexico—that the Clause empowers

203. Ramsey, *supra* note 16, at 541.
204. Merrill, *supra* note 197, at 279–80.
205. *Id.* at 280.
206. *Id.*
207. STORY, *supra* note 16, § 1322, at 198.
208. *Id.*
209. *Id.*
210. Merrill, *supra* note 197, at 278–79.
211. 426 U.S. 529 (1976).

Congress to "exercise[] the powers *both* of a proprietor *and* of a legislature over the public domain."[212]

An even narrower conception of the Property Clause (which was more clearly rejected in *Kleppe*) is "the proprietary theory."[213] The proprietary theory "maintains that the Property Clause simply allows Congress to act as an ordinary owner of land."[214] Under this theory, Congress could rely on the Property Clause to "set policy regarding whether" federal property "will be sold or retained and, if they are retained, who may" use the property "and for what purposes."[215] But the proprietary theory would reserve "political sovereignty over federal" property to the States.[216]

The "protective" and "proprietary" theories of the Property Clause are in tension with *Kleppe*, where the Court "embrace[d] the full-blown police power theory."[217] But even putting *Kleppe* to the side, the text of the Property Clause does not lend support to the idea that Congress has different authority concerning "Territory" and "other Property," let alone different authority concerning "other Property" located within or outside of a state. To the contrary, the Clause's text indicates that Congress has the same power over federal territories and "other Property," regardless of where the property is located.[218]

For purposes of this Article, it is not necessary to determine whether the Property Clause gives Congress the same police power over "Territory" and "other Property." That is because all three readings of the Article IV Property Clause offered above—the broad police power theory, and the narrower protective and proprietary theories—leave plenty of room for Congress to empower qui tam relators.

Under the police power theory, Congress's qui tam authority is clear-cut. Just as Congress can exercise its police power over federal "Territory" to empower territorial prosecutors, Congress can exercise the same authority to empower qui tam relators to help Congress remedy fraud and other misconduct respecting "other Property belonging to the United States."[219] Under the more narrow protective theory, Congress can rely on the Property Clause to empower relators to help Congress "protect" federal property from things like trespass,

212. *Id.* at 533–34, 537, 540, 545 (emphasis added).

213. Merrill, *supra* note 197, at 278.

214. *Id.*

215. *See id.*

216. *Id.*

217. *Id.* at 280–81.

218. *See* Lawson, *The Territories Clause*, *supra* note 14 (referring to the "natural[]" reading of "the text, which places territories in the same phrase as, and gives Congress the same power over, 'other property,' such as inkwells and wagons").

219. U.S. CONST. art. IV, § 3, cl. 2. *See infra* Section II.C (discussing Article IV officers in the context of federal territory and other property).

nuisance, fraud, or other misconduct. And under the proprietary theory, Congress could empower relators to assist Congress in bringing a lawsuit to defend the government's property rights in court—just as a private property owner can assign litigation rights to others.[220]

* * *

Historically, the English monarch exercised substantial authority over public lands. But that power gave way to an increasingly prominent Parliament. Building upon the English experience, the Framers of the U.S. Constitution granted the vestiges of the royal prerogative in Congress rather than the President.

On its broadest reading, the Property Clause gives Congress a police power over "Territory" and "other Property belonging to the United States." On narrower readings, the Property Clause gives Congress police power over territories, but more limited authority to protect or act as an ordinary property owner concerning non-territorial property. Both the broad and the two narrower readings permit Congress to empower qui tam relators.

B. *Article IV Officials: Territories*

Since the nation's beginning, Congress has relied on its sovereign-like Article IV authority to empower territorial legislatures, governors, and courts.[221] If those territorial officials had exercised Article I legislative power, Article II executive power, or Article III judicial power, there would have been constitutional problems. A popularly elected territorial governor exercising Article II power would no doubt qualify as an Officer of the United States who must be appointed pursuant to the Appointments Clause—which does not list election as a permissible means of appointment. A territorial legislature exercising Article I authority without much guidance from Congress would likely run afoul of the nondelegation doctrine. And a territorial judge exercising Article III authority would need to enjoy Article III compensation and tenure protections.

How could it be, then, that Congress has long empowered territorial officers with *federal* forms of legislative, executive, and judicial power without running afoul of the structural limitations imposed by Articles I, II, and III? The best explanation is that territorial officials do not exercise power vested by Articles I, II, or III. Instead, territorial officials are Article IV

220. *See* Leitner, *supra* note 47, at 893–94 (referring to the right of the United States to "seek relief" for private wrongs, "just like you or I could," and explaining how "claims vindicating traditional proprietary interests, such as those arising in contract, tort, property, and fraud, are assignable").

221. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1667 n.2 (2020) (Thomas, J., concurring in the judgment) (citing historical statutes delegating Article IV authority).

officials exercising a particular form of federal power (i.e., Article IV) on Congress's behalf.[222]

The interaction between Article IV and Articles I, II, and III was recently on display in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*.[223] In *Aurelius*, Congress invoked its Property Clause authority to create the Financial Oversight and Management Board, which could "file for bankruptcy on behalf of Puerto Rico or its instrumentalities," "supervise and modify Puerto Rico's laws (and budget) to 'achieve fiscal responsibility and access to the capital markets,'" and "gather evidence and conduct investigations in support of these efforts."[224] The statute creating the Board empowered the President of the United States to appoint seven of the Board's members without Senate confirmation, so long as the President selected six "from lists prepared by congressional leaders."[225] Creditors challenged the constitutionality of those appointments on the grounds that the Board's members were officers of the United States who were not selected in accordance with the Appointments Clause.[226]

The Supreme Court ruled that the Board members were territorial officials (not officers of the United States) whose appointment did not run afoul of the Appointments Clause.[227] In so ruling, the Court made clear that "the Appointments Clause has no Article IV exception."[228] That meant that a territorial official who *also* exercised sufficient national authority could not escape the Appointments Clause's requirements.[229] But officials exercising power that was "primarily" territorial in nature (according to the majority), or "entirely" territorial in nature (according to Justice Thomas's concurrence), could be appointed in ways that were not outlined in the Appointments Clause.[230]

To support the distinction between officers of the United States and Article IV officials, the Court first analyzed the Appointments Clause's text, which "suggests a distinction between federal officers—officers exercising

222. Thus, various scholars (including myself) have recognized that the nondelegation doctrine applies differently in the territorial context. *See, e.g.*, LAWSON & SEIDMAN, *supra* note 25, at 128; Eli Nachmany, Article, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17, 21 (2022); Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1272–73 (2021).

223. 140 S. Ct. 1649 (2020). I served on the litigation team representing creditors before the Supreme Court in *Aurelius*. The views expressed in this Article should not be attributed to my former employer or clients.

224. *Id.* at 1655 (citations omitted).

225. *Id.* at 1655.

226. *Id.* at 1656.

227. *Id.* at 1664–65.

228. *Id.* at 1657.

229. *Id.* at 1658–59.

230. *Id.* at 1670 (Thomas, J., concurring in the judgment).

power of the National Government—and nonfederal officers—officers exercising power of some other government."[231] The Court then offered an argument grounded in constitutional structure.[232] "The Constitution," the Court wrote, "envisions a federalist structure, with the National Government exercising limited federal power and other, local governments—usually state governments—exercising more expansive power."[233] But the Constitution also "recognizes that for certain localities, there will be no state government capable of exercising local power."[234] Those exceptional circumstances were addressed by the Property Clause and the Enclave Clause, which "give Congress the power to legislate for those localities in ways 'that would exceed its powers, or at least would be very unusual' in other contexts."[235]

After focusing on constitutional text and structure, the Court turned to history. The Court explained how Congress had long relied on the Enclave and Property Clauses to "legislate[] for entities that are not States," either by "ma[king] local law directly" or by "creat[ing] structures of local government, staffed by local officials, who themselves have made and enforced local law."[236] When doing so, Congress "create[d]" and "filled" local offices "in ways other than those specified in the Appointments Clause."[237] For example, "[w]hen the First Congress legislated for the Northwest Territories, . . . it created a House of Representatives for the Territory with members selected by election."[238] The First Congress "also created an upper house of the territorial legislature, whose members were appointed by the [p]resident (without Senate confirmation) from lists provided by the elected, lower house," and "created magistrates appointed by the [g]overnor."[239] Similar congressional practice "continued unabated for more than two centuries."[240]

The upshot of the Court's analysis was that there was a distinction between officers of the United States (who must be appointed pursuant to one of the Appointments Clause's exclusive means) and territorial officials (who exercised Article IV power and thus could be appointed through other means). The Court was arguably unanimous in recognizing that distinction,[241] although the justices

231. *Id.* at 1658 (majority opinion).
232. *Id.* at 1658–59.
233. *Id.* at 1658.
234. *Id.*
235. *Id.* (quoting Palmore v. United States, 411 U.S. 389, 398 (1973)).
236. *Id.*
237. *Id.* at 1659.
238. *Id.*
239. *Id.*
240. *Id.*
241. Justice Sotomayor authored an opinion concurring in the judgment. *Id.* at 1671–83 (Sotomayor, J., concurring in the judgment). She suggested that Puerto Rico achieved a special status of self-government, which limited Congress's ability to create officers in the territory. *See id.* at 1679–

disagreed as to the constitutional significance of a third category of officers: officers who exercised *both* national and local or territorial power.

The Court's majority concluded that, so long as a territorial official exercised power that was "primarily" local in nature, the official did not have to be appointed through one of the means outlined in the Appointments Clause.[242] But Justice Thomas did not see a need for the "the Court [to] set[] up a dichotomy between officers with '*primarily* local versus *primarily* federal' duties."[243] Because he thought "[t]he Board's members have responsibility for ongoing statutory duties that are *entirely* within the scope of Article IV,"[244] he did not think there was a need to "decide whether an officer exercising both national and Article IV powers qualifies as an 'Officer of the United States,'"[245] let alone adopt an "amorphous" test for identifying officials exercising "primarily" territorial power.[246]

Although Justice Thomas did not join his colleagues in drawing a distinction between territorial officials exercising "primarily" local or national power, he did agree with the relevant history. "[T]he First Congress," he explained, "recognized the distinction between territorial and national powers and understood that officers performing duties pursuant to only Article IV territorial powers are not officers 'of the United States.'"[247] More generally, he noted that, "[s]ince the founding, this Court has recognized a distinction between Article IV power and the powers of the National Government in Articles I, II, and III," and "[t]he founding generation understood the phrase '[o]fficers of the United States' to refer to officers exercising the powers of the National Government, not officers solely exercising Article IV territorial power."[248]

Even though Justice Thomas found significant value in congressional practice, he (like the majority)[249] did not rely on historical practice alone. He instead drew support from constitutional text and structure. As to text, he noted how the Appointments Clause refers to "other [o]fficers of the United States" alongside officials who exercise national (rather than territorial) power—namely, "Ambassadors, [and] other public Ministers and Consuls."[250] As to structure, he noted how the "ultimate source" of territorial authority was the

80. Outside of Puerto Rico's unique context, her position seems to maintain a distinction between territorial and non-territorial officers. *See id.* at 1680.

242. *Id.* at 1662 (majority opinion).

243. *Id.* at 1670 (Thomas, J., concurring in the judgment) (emphasis added).

244. *Id.*

245. *Id.*

246. *Id.* at 1670–71.

247. *Id.* at 1669 (citation omitted).

248. *Id.* at 1666.

249. *Id.* at 1656 (majority opinion) (structural argument); *id.* at 1657–58 (textual argument).

250. *Id.* at 1668 (Thomas, J., concurring in the judgment) (quoting U.S. CONST. art. II, § 2, cl. 2).

Article IV Property Clause,[251] and explained that "[t]he powers vested in territorial governments are distinct from the powers of the National Government."[252] This meant that "[t]erritorial legislatures exercise the legislative power of the Territory, not Article I legislative power,"[253] "[t]erritorial officials exercise the executive power of the Territory, not Article II executive power,"[254] and "territorial courts exercise the judicial power of the Territory, not the 'judicial power of the United States' under Article III."[255]

* * *

The *Aurelius* Court recognized a distinction between territorial officials exercising Article IV power, and officers of the United States exercising power vested by Articles I, II, or III. The distinction flows from the Constitution's text, structure, and history. And territorial officials are best understood as Article IV officials empowered to help regulate federal "Territory."[256] Section II.C will now introduce a second category of Article IV officials—ones exercising Article IV power relating to "other Property belonging to the United States."[257] This Article contends that qui tam relators can qualify as this second type of Article IV official.

C. *Article IV Officials: Other Property*

Similar to how the Supreme Court recognized a distinction between exercises of Article IV power and exercises of Articles I, II, and III power in the territorial context,[258] courts should recognize the same distinction when it comes to what the Property Clause refers to as "other Property."[259] Doing so would be consistent with constitutional text, structure, and history.

As to the text, the Property Clause makes no textual distinction between Congress's Article IV authority relating to "Territory" or "other Property."[260] As Professor Ramsey explains, "Congress's power over territory and its power over property were granted in parallel."[261] Thus, as a textual matter, if the Property Clause empowers Congress to create Article IV officials that help Congress manage federal "Territory" (as *Aurelius* rightly recognizes), then the

251. *Id.* at 1667 n.1 (quoting Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1875 (2016)).
252. *Id.* at 1667.
253. *Id.* (citing Cincinnati Soap Co. v. United States, 301 U.S. 308, 322–23 (1937)).
254. *Id.* at 1667–68 (citing Snow v. United States, 85 U.S. (18 Wall.) 317, 321–22 (1873)).
255. *Id.* (citing American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1872)).
256. *See* U.S. CONST. art. IV, § 3, cl. 2.
257. *Id.*
258. *See supra* Section II.B.
259. U.S. CONST. art. IV, § 3, cl. 2.
260. *Id.*
261. Ramsey, *supra* note 16, at 541.

Property Clause should similarly empower Congress to create Article IV officials that help Congress manage "other Property."

The only colorable textual argument to the contrary turns on the Property Clause's requirement that exercises of Article IV power be "needful."[262] But it is difficult to see why it would be "needful" for Congress to empower some Article IV officials (for example, territorial prosecutors) to bring enforcement actions concerning territorial property, but not "needful" for Congress to empower other Article IV officials (for example, qui tam relators) to bring enforcement actions concerning "other" *federal* property.

Sure, admitted states might have state property law and state prosecutors. And perhaps for that reason, one might contend that it is not always "needful" for Congress to similarly regulate (a) federal property subject to state property law and (b) federal property that is not subject to state property law. But there are no doubt occasions when state officials do not wish to regulate (or protect) *federal* property in the same ways that *Congress* would like. And the "plenary" authority granted to Congress by the Property Clause leaves Congress wide discretion to determine that a "needful" means of regulating (or protecting) federal property is to empower qui tam relators to act on *Congress's* behalf, rather than rely on state officials to do as Congress wishes.

What is more, scholars have already recognized that, as a matter of text, the Property Clause makes no distinction between Congress's ability to empower Article IV officials respecting the territories and "other Property." Professors Lawson and Seidman have inquired into whether the fact that the Property Clause "does not distinguish between 'Territory' and 'other Property'" requires concluding that "[i]f Congress can delegate to private persons legislative power over territories," then Congress "can also delegate to private persons legislative power over all federal property[.]"[263] To be sure, Lawson and Seidman contended that "[t]he lesser evil" is to require that Article IV officials regulating *both* the territories and "other Property" be appointed through the means outlined in the Appointments Clause.[264] But the Court in *Aurelius* already began the march down the alternative path—i.e., the path in which Article IV officials need not be selected through those means. And rightfully so—as the textual, structural, and historical arguments offered in *Aurelius* demonstrate.[265]

Extending the distinction between Article IV and Articles I, II, and III from the territorial context to the "other Property" context would also be consistent with constitutional structure. As already noted, the Framers granted

262. U.S. CONST. art. IV, § 3, cl. 2.
263. LAWSON & SEIDMAN, *supra* note 25, at 137.
264. *See id.* at 138.
265. *See supra* Section II.B.

what remained of the royal prerogative relating to public lands to Congress, not the President.[266] Had the Framers given the President the authority to "dispose of" federal property, it would have given the President access to funds (for example, property sale revenue) that were independent from congressional oversight. And that would have risked ignoring the hard-fought lessons offered by Parliament, which had slowly chipped away at the prerogative power exercised by kings whose "extensive sales" of property had "sacrific[ed] . . . the national patrimony to satisfy short-term royal needs."[267]

Although the historical lessons concerning Parliament relate to real property, rather than personal property, control over the latter could have offered Presidents a similarly problematic source of independent funding. Imagine a President who might wish to sell some warships or Smithsonian art to pay for projects Congress does not wish to fund. By not giving the President that power, the Property Clause acts as a structural check on presidential authority. And from the perspective of constitutional ratifiers, that structural check might have made more palatable the constitutional decision to vest *all* Article II executive power (but not Article IV power) in a "President who would not be king."[268]For example, it might have made more palatable the decision to empower the President to control all exercises of Article II prosecutorial power since qui tam relators need not exercise any of that Article II power, but could instead bring claims relating to "other Property" pursuant to Article IV power that is granted to Congress rather than the President.

Finally, as to history, there is arguably some evidence that past Congresses have relied (whether they knew it or not) on Article IV to empower officials to help dispose of "other Property." In 1790, the First Congress relied on "reputable merchants" to appraise the value of unclaimed personal property (for example, unclaimed barrels of molasses) to be sold at auction.[269] Although the 1790 statute suggests that the unknown owner of the property retained a right to recoup the funds that the property earned at auction,[270] the United States' ability to sell the unclaimed property indicates that the federal government exercised some property interest over the personal property.[271] In property law

266. *See supra* Section II.A.

267. MCCONNELL, *supra* note 17, at 228–29.

268. *Id.* at 7.

269. Act of Aug. 4, 1790, ch. 35, § 33, 1 Stat. 145, 165–66, *repealed by*, Act of Mar. 2, 1799, ch. 22, § 112, *cited in* Mascott, *supra* note 112, at 535.

270. "[U]pon due proof of his, her or their property," the individual would "be entitled to receive" the money (less duties) earned from the sale of the property at auction. *Id.* at 165.

271. *See id.* (Unclaimed "goods to be sold at public auction, and retaining the duties and charges thereon, shall pay the overplus, if any there be, into the treasury of the United States.").

terms, the government could be thought of as having acquired that interest through something akin to custodial escheatment.[272]

What was the constitutional status of these "reputable merchants"? Judge Mascott explains that the First Congress did *not* treat them as Article II officers.[273] The merchants were instead something else. And one might make sense of the situation by conceptualizing the merchants as Article IV officials tasked with helping Congress sell federal property at auction—i.e., helping Congress "dispose of . . . other Property belonging to the United States."[274] Under that theory, Congress could similarly empower other sets of Article IV officials (for example, qui tam relators) to help Congress receive fair value for property (like the "reputable merchants" did) by identifying fraud and other misconduct relating to such property.

To be sure, one could make sense of the historical record in other ways. For example, it could be that the "reputable merchants" were not officers of the United States because they did not exercise federal power *at all* (Article IV or otherwise).[275] Or perhaps one might conceptualize the merchants as not being officers of the United States because they only exercised federal power for too brief a time, rather than on an ongoing basis.[276] Another way to read the history is to understand the 1790 act (and others like it) as evidence that early Congresses understood themselves (incorrectly, in this Article's view) as empowering relators and informers pursuant to Article I powers, not Article IV powers.

Probably the best historical read of the "reputable merchant" example is that it demonstrates a Congress that understood itself as empowering merchants

272. "Although escheat originally meant that the state became absolute owner of the property, the term escheat is also used to include custody of unclaimed property." Susan T. Kelly, Note, *Unclaimed Billions: Federal Encroachment on States' Rights in Abandoned Property*, 33 B.C. L. REV. 1037, 1037 (1992); Note, *Escheat of Corporate Dividends*, 65 HARV. L. REV. 1408, 1413 (1952) (explaining that the federal government exercises powers very similar to escheat), *cited in id.* at 1038 n.7. Although beyond the scope of this Article, recognizing the Property Clause as the vesting aspects of what was once a royal prerogative might require recognizing that the federal Congress has escheatment and *bona vacantia* (i.e., escheatment as to personal property) powers that might otherwise be thought of as belonging to the States. *C.f.* Kelly, *supra* note 272, at 1041 ("[T]he English common law rights of escheat and *bona vacantia* . . . were left with the states.").

273. *See* Mascott, *supra* note 112, at 535.

274. U.S. CONST. art. IV, § 3, cl. 2.

275. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1980 (2021) (distinguishing "officers" from "'lesser functionaries' such as employees or contractors," the latter of which do not "exercis[e] significant authority pursuant to the laws of the United States" (alteration in original) (citations omitted)).

276. *See* Mascott, *supra* note 112, at 534 (discussing contractors and stating that, in the Founding era, "one additional requirement for federal officer status appears to be responsibility for *ongoing* duties"); *see also* United States v. Germaine, 99 U.S. 508, 511–12 (1878); E. Garrett West, Essay, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J.F. 42, 53 (2017) (discussing *Germaine*).

pursuant to Congress's Article I, Section 8 power to collect duties.[277] The idea being that auctioning unclaimed goods was a necessary and proper means of collecting duties owed on such goods.[278] But even if early Congresses did understand themselves as relying on Article I to empower qui tam relators, that history "[s]tanding alone, . . . cannot justify contemporary violations of constitutional guarantees."[279] And that is so, as Justice Thomas explained in the qui tam context, "even when the practice in question covers our entire national existence and indeed predates it."[280] Thus, if Article I really does not permit Congress to empower qui tam enforcement of Article I statutes (as Section III.B will argue), then it might simply be the case that, although early Congresses understood themselves as relying on Article I authority to empower qui tam relators, those early Congresses were simply mistaken about what Article I empowered them to do.

But here is the important part: jurists like Justice Thomas, who seem prepared to rule that early Congresses were mistaken about their ability to empower qui tam relators, need not jump to the conclusion that federal statutes empowering qui tam relators (both in the eighteenth century and today) are unconstitutional altogether. To the contrary, principles of constitutional avoidance may counsel in favor of giving those statutes a saving construction when fairly possible.

Thus, in light of the strong textual and structural arguments in favor of recognizing Article IV as a source of authority for empowering officials to regulate "other Property"—as well as the overwhelming historical evidence recognizing Article IV as a source of similar authority in the territories—courts can salvage a good bit of early and modern qui tam practice by locating the legitimate source of authority for that practice in the Article IV Property Clause. An alternative approach would require courts to rule qui tam statutes unconstitutional—despite textual, structural, and related historical arguments in favor of their constitutionality—simply because the enacting Congresses thought (incorrectly) that they were constitutionally exercising Article I power,

277. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States").

278. *See* Act of Aug. 4, 1790, ch. 35, § 33, 1 Stat. 145, 165, *repealed by*, Act of Mar. 2, 1799, ch. 22, § 112 (Unclaimed "goods to be sold at public auction, and retaining the duties and charges thereon, shall pay the overplus, if any there be, into the treasury of the United States"). A similar story could be told of a 1791 Act concerning the collection of duties on spirits, which allowed an individual that "discover[ed]" or "seiz[ed]" certain goods to recover one half of the "penalt[ies] and forfeiture[s]" related to those goods, and to "recover[]" that money "with costs of suit, by action of debt, in the name of the person or persons intitled thereto, or by information, in the name of the United States of America." Act of March 3, 1791, ch. 15, § 44, 1 Stat 199, 209.

279. United States *ex rel*. Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (citation modified) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)).

280. *Id.* (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 678 (1970)).

when those Congresses should have understood themselves as constitutionally exercising Article IV power to achieve similar results.

* * *

Since the days of the Constitution's framing, Congress has empowered two types of officials: territorial officials and qui tam relators. The Supreme Court has rightly identified Article IV as the source of Congress's authority to empower the first set of officials. Section II.C argued that Article IV can serve as the source of Congress's authority to empower the second set of officials as well. But Congress's Article IV authority to empower officials is not unlimited. Thus, Part III will conclude by outlining limitations on Congress's qui tam authority.

III. CONSTITUTIONAL LIMITATIONS

Congress's Article IV authority to empower qui tam relators is not unlimited.[281] As the Supreme Court correctly observed, "separation-of-powers principles apply when Congress acts under its Article IV power to legislate 'respecting . . . other Property.'"[282] But to say that constitutional principles apply to exercises of Article IV power is to offer an unhelpful truism. Yes, Congress cannot violate *any* part of the Constitution when it acts pursuant to *any* power—including its Article IV power. But the tricky part is determining *how* different parts of the Constitution limit exercises of Article IV power.[283]

In two recent cases, the Court made some headway in determining how different parts of the Constitution limit exercises of Article IV power. In

281. *See* Lawson, *The Territories Clause*, *supra* note 14 (contending, for example, that Congress can only pass territorial legislation that complies with the formalities of Article 1, Section 7 for lawmaking).

282. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct., 1649, 1657 (2020) (quoting Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 270–71 (1991)).

283. The Supreme Court's infamous "Insular Cases" reveal the human stakes involved in correctly unpacking the relationship between Article IV and the rest of the Constitution. In those cases, the Court "developed the so-called 'doctrine of territorial incorporation,'" which claims to "distinguish[] territories that are likely candidates for future statehood from those that are not." Lawson, *The Territories Clause*, *supra* note 14 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922)). "For the former, all provisions of the Constitution apply of their own force to territorial inhabitants." *Id.* "For the latter," only "those provisions that are 'fundamental' . . . apply of their own force to territorial inhabitants," while "'non-fundamental' constitutional rights apply only if and how Congress chooses to extend them." *Id.* The Insular Cases's doctrine of territorial incorporation "has been universally criticized by scholars." *Id.* And rightly so, as "[n]othing in the Constitution speaks of 'incorporated' and 'unincorporated' Territories," nor does anything in the Constitution "extend[] to the latter only certain supposedly 'fundamental' constitutional guarantees," let alone "authorize[] judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion." United States v. Vaello Madero, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring); *see also* Ramsey, *supra* note 16, at 520. Thus, to be clear, nothing in this Article's thesis concerning the interaction between Article IV and other parts of the Constitution turns on the assumptions exhibited in the Insular Cases.

Aurelius, the Court explained that although "the Appointments Clause has no Article IV exception," the Clause did not mandate that the Article IV board at issue in that case be appointed via the limited means outlined in the Appointments Clause given that the Clause did not restrict the appointment of officials who exercised power that was at least "primarily" territorial in nature.[284] And in the second case, *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*[285]("*MWAA*"), "the Court held that separation-of-powers principles forbid *Members* of Congress to become members of a board that controls federally owned airports."[286] In other words, whether the board at issue in *MWAA* was established pursuant to the Article I Commerce Clause or the Article IV Property Clause (something the Court did not answer), congressional authority must be exercised by *Congress*—specifically, the two-chambered legislature defined in Article I, Section 1—rather than by *individual* legislators.[287]

Cases like *Aurelius* and *MWAA* suggest that the Constitution imposes real limitations on exercises of Article IV power.[288] The remainder of Part III will outline three such limitations. The first category of limitations, discussed in Section III.A, includes the limitations imposed by Article IV. Those

284. *Aurelius*, 140 S. Ct. at 1657, 1661–63, 1664–65.

285. 501 U.S. 252 (1991).

286. *Aurelius*, 140 S. Ct. at 1664 (emphasis added) (citing *Metro. Washington Airports Auth.*, 501 U.S. at 275–76).

287. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (referring to "the prohibition against legislative self-delegation" as "a central and increasingly well-settled element of the separation of powers"); Chad Squitieri, *Treating the Administrative as Law: Responding to the "Judicial Aggrandizement" Critique*, 110 CORN. L. REV. ONLINE 1, 27–28 (2025) [hereinafter Squitieri, *Judicial Aggrandizement*], https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2024/12/Squitieri-Final.pdf [https://perma.cc/6S5M-Q269] (critiquing the practice in which "a modern legislator . . . unjustly exercises too much power by seeking to influence policy through personal lobbying" of executive agencies "rather than collective lawmaking" (emphasis omitted)).

In *MWAA*, the Court found that the "facts belie the *ipse dixit* that the Board members will act 'in their individual capacities,'" and thus "conclu[ded] that the Board members act in their official congressional capacities." *MWAA*, 501 U.S. at 267. This suggests that the central holding in *MWAA* was based on the exercise of power by individual members of Congress—which is how the *Aurelius* Court described *MWAA*. *See Aurelius*, 140 S. Ct. at 1663–64. It should be noted, however, that a separate part of *MWAA* mentions that "Congress as a body also exercises substantial power over the appointment and removal of the particular Members of Congress who serve on the Board." *MWAA*, 501 U.S. at 268. Because the Court in *MWAA* did not conclude that the board in question was only established pursuant to Article IV (rather than the Article I Commerce Clause), *see id.* at 271–72, the *MWAA* Court did not clearly rule that the Congress as a collective body is unable to oversee an Article IV board. But to the extent that *MWAA* could be read as suggesting as much, that suggestion would be in tension with *Aurelius*—which might explain why the Court in *Aurelius* read *MWAA* as speaking to what individual "Members of Congress" could do, rather than what Congress can do. *Aurelius*, 140 S. Ct. at 1664.

288. *See also* AMAR, *supra* note 169, at 265 ("[I]n exercising its general authority over federal territory . . . Congress had to comply with separation of powers.").

limitations, like Article IV itself, have been underexplored in present scholarship considering the constitutionality of qui tam. The second and third categories of limitations, which are discussed in Sections III.B and III.C, include the limitations imposed by Articles II and III. Debates concerning qui tam's conformity with Articles II and III were introduced in Part I; Sections III.B and III.C will weigh in on those debates by explaining what the limitations imposed by Articles II and III mean for both Article IV and non-Article IV qui tam actions.

A. *Article IV Limitations*

As a textual matter, in order for a statute[289] empowering qui tam relators to qualify as a valid exercise of Congress's Property Clause power, the statute must qualify as at least one of three things:

> Option 1: the "dispos[ition] of" "Territory or other Property belonging to the United States,"[290]
>
> Option 2: a "needful Rule[]" or "Regulation[] respecting the Territory or other Property belonging to the United States,"[291] or
>
> Option 3: a "Law[] which shall be [a] necessary and proper" means "for carrying into Execution" either Option 1 or Option 2.[292]

Options 1 and 2 constitute legislation that Congress could enact without invoking the Necessary and Proper Clause.[293] Those two options are available because Congress "does not need to invoke the" Necessary and Proper Clause "as an authorization" to "legislate[] for the territories" or other federal property, since the Property Clause gives Congress a "self-contained grant[] of general legislative power."[294] Option 3 is available because Congress *can* elect to invoke the Necessary and Proper Clause when carrying into execution "*all* . . . Powers vested by this Constitution."[295]

289. As a textual matter, it is not clear that Congress needs to exercise its Property Clause authority by enacting a statute—as compared to some other "needful Rule[] [or] Regulation[]" of the non-statutory sort. *See* U.S. CONST. art. IV, § 3, cl. 2. But because the FCA and IPA are statutes, the Article will limit its analysis to statutory exercises of Article IV authority.

290. U.S. CONST. art. IV, § 3, cl. 2.

291. *Id.*

292. *Id.* art. I, § 8, cl. 18.

293. This Article's references to the Necessary and Proper Clause should be understood in terms broad enough to encompass the theory that the Clause elucidates a concept that would have been part of the Constitution even absent the Clause. *E.g.*, GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 107 (2010) [hereinafter LAWSON ET AL., ORIGINS] ("[T]he Federalists asserted that the Necessary and Proper Clause had no substantive effect, but was merely a recital of the incidental powers doctrine.").

294. LAWSON & SEIDMAN, *supra* note 25, at 128.

295. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

Depending on which of the above three options Congress utilizes to enact a qui tam statute, the text of Article IV (or a mixture of Article IV and the Necessary and Proper Clause) imposes slightly different limitations on Congress's qui tam authority. Five textual limitations are worth mentioning. Those limitations relate to (1) types of congressional actions, (2) necessity requirements, (3) the definition of Article IV "property," (4) the requirement that qui tam actions be "respecting" Article IV property, and (5) the requirement that relators deal "primarily" or "exclusively" with Article IV property.

Congressional Action. The first limitation imposed by Article IV relates to the type of congressional action at issue. A qui tam statute must constitute a "dispos[ition]" of property (Option 1), a "needful Rule[]" or "Regulation[]" (Options 2 and 3), or a necessary and proper "Law[]" (Option 3).

As to Option 1, Supreme Court precedent makes clear that a statute effectuating a full or partial transfer of government property qualifies as "dispos[ing]" of said property within the meaning of Article IV. In particular, the Court's 1840 decision in *United States v. Gratiot*[296] reasoned that, to "dispose" of property, Congress need not sell property outright; Congress could instead "dispose" of property by leasing it (and thus retaining long-term interests in the land).[297]

One might seek to extend *Gratiot's* understanding of "dispose" to cover qui tam statutes that assign an interest in damages from the United States to a relator. The theory might proceed along two steps: (1) that "property" within the meaning of the Article IV Property Clause constitutes a bundle of interests relating to a particular object (such as the right to use the object, sell the object, destroy the object, or bring a lawsuit about the object), and (2) Congress could partially "dispose" of the "property" by only assigning a small sliver of property interest (namely, a right to sue for damages), while retaining the lion's share of property interests (i.e., retaining the right to use, sell, and destroy). But this Article does not defend such an expansive reading of the disposal power. Slicing property interests so thinly would be in tension with ratification-era definitions

296. 39 U.S. (14 Pet.) 526 (1840).

297. *See id.* at 538 (Congress's power to "dispose" permitted a leasing of property and "[t]he disposal must be left to the discretion of Congress.").

of "dispose"[298] and "property,"[299] which, when considered together, suggest a power to manage or regulate particular objects (for example, land and chattel) rather than assign singular property interests (i.e., singular sticks in the "bundle" of sticks) relating to particular objects. Indeed, the concept of property as a "bundle" of sticks or rights—familiar to modern law students—is attributable to twentieth-century theorists and thus would not have been top of mind to ordinary readers at the time of the Constitution's ratification.[300]

Congress would be on much safer footing if it instead empowered qui tam relators through Options 2 or 3. As to Option 2, one scholar has written that "congressional acts obviously constitute rules or regulations" within the meaning of Article IV.[301] Another has stated that "rules and regulations are forms of legislation."[302] Those statements are rather conclusory, but it is difficult to offer a counterargument worthy of a meaningful response. To put it simply, a federal statute can qualify as a "rule" or "regulation" within the meaning of the Article IV Property Clause. And the situation presented by Option 3 is even less deserving of substantial analysis. A federal statute is, quite obviously, a "Law[]" within the meaning of the Necessary and Proper Clause.[303]

* * *

Because the two qui tam statutes in modern use (i.e., the FCA and IPA) are federal statutes, they satisfy the congressional action requirements imposed by Options 2 and 3—which is to say, the FCA and IPA qualify as "rules" and "regulations" (Option 2) and/or "laws" (Option 3). The FCA and IPA might

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298. Ratification-era definitions suggest that "dispose" was understood to include, in relevant context, a power to regulate or manage an item. *See, e.g.*, *Dispose, n.s. (1773)*, SAMUEL JOHNSON'S DICTIONARY, https://johnsonsdictionaryonline.com/views/search.php?term=dispose [https://perma.cc/F5WP-DPFY] ("Power; management; disposal: with *at* or *to*"); *Dispose*, WEBSTER'S DICTIONARY 1828, https://webstersdictionary1828.com/Dictionary/dispose [https://perma.cc/UKE9-QQ79] ("To set; to place or distribute; to arrange; used with reference to order. The ships were disposed in the form of a crescent. . . . To regulate; to adjust; to set in right order.").

299. Ratification-era definitions suggest that "property" was understood, in relevant context, as particular items or lands. *See, e.g.*, *Property, n.s. (1755)*, SAMUEL JOHNSON'S DICTIONARY, https://johnsonsdictionaryonline.com/views/search.php?term=property [https://perma.cc/D569-JWBZ] ("The thing possessed"); *Property*, WEBSTER'S DICTIONARY 1828, https://webstersdictionary1828.com/Dictionary/property [https://perma.cc/6EJ9-JUMN] ("The thing owned; that to which a person has the legal title, whether in his possession or not. It is one of the greatest blessings of civil society that the *property* of citizens is well secured.").

300. *See* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 62–63 (2014).

301. Appel, *supra* note 180, at 81.

302. Biber, *supra* note 23, at 781.

303. *See* U.S. CONST. art. I, § 7, cl. 3 (extending the Article I, Section 7 lawmaking process to "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)"); Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 946–47 (1983) (discussing James Madison's statement in the Constitutional Convention regarding a desire to have the Article I, Section 7 lawmaking requirements apply broadly).

also satisfy the congressional action requirement imposed by Option 1, although that would require an aggressive reading of Congress's power to partially "dispose" of "property," which this Article does not defend.

Necessity. Article IV also imposes certain necessity limitations. Specifically, any "Rule[]" or "Regulation[]" must be "needful" (Options 2 and 3). And any "Law[]" must be "necessary and proper" (Option 3). Interestingly, a parsing of the relevant constitutional text reveals that "disposition[s]" made under Option 1 need not be "needful" or "necessary and proper." Instead, as the Supreme Court has concluded, "[t]he disposal must be left to the discretion of Congress."[304]

What sort of necessity limitation must Congress satisfy to empower qui tam officials through Options 2 or 3? For starters, an original understanding of the Constitution would not seem to support any meaningful difference between "needful" (Options 2 and 3) and "Necessary and Proper" (Option 3). That is because "[t]he phrase 'necessary and proper' was used in eighteenth-century British legislation more or less interchangeably" with similar terms such as "needful."[305]

But to note the similarity between "needful" and "Necessary and Proper" is not to make too much headway concerning how those terms limit Congress's authority to empower qui tam relators. That is because the meaning of the Necessary and Proper Clause has been the subject of significant and long-standing debate.[306] Rather than dive too deeply into that debate—which would have constitutional repercussions that extend well beyond the qui tam context—this Article will analyze Congress's qui tam authority pursuant to the seminal understanding of the Necessary and Proper Clause adopted by Chief Justice Marshall in *McCulloch v. Maryland*.[307] When viewed through that lens, Congress can empower qui tam relators without running afoul of the necessity requirements imposed by Options 2 and 3.

At issue in *McCulloch* was whether Congress could create a national bank.[308] Chief Justice Marshall explained that the Necessary and Proper Clause empowered Congress to incorporate a bank as an implied *means* of carrying

304. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840).

305. LAWSON ET AL., ORIGINS, *supra* note 293, at 14–15. British practice is "at least potentially part of the back story of the Necessary and Proper Clause," although "enormous differences between American constitutional drafting and British statutory drafting . . . make it very unlikely that the latter strongly influenced the former." *Id.* at 15.

306. *See* Gary Lawson & Niel S. Siegel, *Necessary and Proper Clause: Common Interpretation*, NAT'L CONST. CTR. [hereinafter *Common Interpretation*], https://constitutioncenter.org/the-constitution/articles/article-i/clauses/754 [https://perma.cc/JR3T-L3ZD] (referring to "three competing understandings").

307. *See* 17 U.S. (4 Wheat.) 316, 418–21 (1819).

308. *See id.* at 401. Ilan Wurman, *The Necessary and Proper Clause and the Law of Administration*, 93 GEO. WASH. L. REV. 1196, 1204–05 (2025).

enumerated *ends* into execution. He reasoned that "[a]lthough" the Constitution's "enumerated powers" did not mention "the word 'bank' or 'incorporation,'" Article I, Section 8 did vest Congress with various "great powers," such as the powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[309] He then reasoned that the Constitution "does not profess to enumerate the means by which" Congress's great powers "may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers."[310] Thus, he concluded, in one of the case's more memorable lines: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[311]

Similar to how Congress could empower "private banks"[312] to carry out Congress's great fiscal powers under the *McCulloch* understanding of the Necessary and Proper Clause, Congress could empower private relators to carry out Congress's Property Clause power under similar readings of "needful" (Options 2 and 3) or "Necessary and Proper" (Option 3).[313] Empowering Article IV officials is not a great power or constitutional end. Instead, and as long-standing practice in the territories makes clear, empowering Article IV officials is a long-accepted means through which Congress can carry out the end of regulating federal property.[314]

Even if one ascribed to the narrow "protection" or "proprietary" theories of the Property Clause when it comes to non-territorial property,[315] empowering qui tam relators would constitute "needful" (Options 2 and 3) or "necessary and proper" (Option 3) means of protecting federal property and acting as an ordinary owner of such property. That is because assigning the right to defend property rights in court is both a well-known means of protecting property and is something that even ordinary property owners can do.[316]

As was suggested in Section II.C, it is possible that it will more often be (a) "needful" to empower some Article IV officials (for example, territorial prosecutors) to bring enforcement actions in the territorial context (where

309. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

310. *Id.* at 408–09.

311. *Id.* at 421.

312. *See* Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORN. L. REV. 843, 851, 897–901 (2024) (describing the First and Second National Banks).

313. Indeed, "legislation establishing the First Bank of the United States . . . included *qui tam* provisions to enforce limitations on lending to the government." Randy Beck Amicus Br., *supra* note 126, at 26–27 (emphasis added).

314. *See supra* Section II.B.

315. *See supra* Section II.A.

316. *See* Leitner, *supra* note 47, at 893–94.

Congress cannot rely on state prosecutors or state property law) than it will be (b) "needful" to empower other Article IV officials (for example, qui tam relators) to bring enforcement actions concerning non-territorial federal property (where Congress need not create property law from scratch). But there are likely to be many occasions when state officials or state laws do not regulate (or protect) *federal* property to *Congress's* satisfaction. And although both the Necessary and Proper Clause and Article IV's "needful" requirement impose objective requirements that leave room for judicial review,[317] the "plenary" nature of Congress's Article IV power leaves Congress wide discretion to determine that a "needful" means of regulating (or protecting) federal property is to empower qui tam officials to act, on *Congress's* behalf, in ways that state officials might not.[318]

Finally, some scholars and jurists contend that the Necessary and Proper Clause's requirement that laws be "proper" imposes an independent requirement that statutes not violate any part of the Constitution.[319] Statutes enacted pursuant to Option 3 would have to satisfy that "proper" requirement.[320] But such a requirement would not present an issue for qui tam actions that otherwise fall within the confines of Article IV, since such actions do not violate Articles II or III (or any other part of the Constitution, for that matter).[321] This sort of "proper" requirement would, however, present an independent constitutional problem for FCA and IPA qui tam actions that do not relate to federal property.

As will be explained in Section III.B, FCA and IPA actions unrelated to federal property must be defended (if at all) as a "Necessary and Proper" means of carrying one of Congress's non-Article IV powers (for example, Article I powers) into effect. In the FCA context, the most natural source of power for qui tam claims unrelated to federal property is Congress's Article I power "[t]o

317. *See* LAWSON ET AL., ORIGINS, *supra* note 293, at 14; *cf.* Squitieri, *Judicial Aggrandizement*, *supra* note 287, at 24 n.119 (collecting authorities discussing judicial review of Congress's Necessary and Proper determinations).

318. A congressional desire to harmonize divergent state property law would be consistent with British *qui tam* statutes, which were often used to "monitor[] decentralized government activity to ensure compliance with directives from a central government." Beck, *Neglected History*, *supra* note 1, at 1269.

319. *See, e.g.*, LAWSON ET AL., ORIGINS, *supra* note 293, at 93; *Common Interpretation*, *supra* note 306; John F. Manning, *The Supreme Court 2013 Term: Foreword: The Meanings of Constitutional Power*, 128 HARV. L. REV. 1, 6 (2014) ("[B]oth the Rehnquist and Roberts Courts have held that a law is not 'proper' if it cannot satisfy the Court's own conception of freestanding . . . principles of federalism and separation of powers.").

320. Even if "proper" imposes an independent requirement that a statute not violate Articles II and III, statutes enacted pursuant to Option 2 would still have to comply with Article II and III because those parts of the Constitution (like all parts of the Constitution) apply in their own right. *See infra* Sections II.B, II.C.

321. *See infra* Sections III.B, III.C.

regulate Commerce with foreign Nations, and among the several States."[322] In the IPA context, the most natural source of power for qui tam claims unrelated to federal property is Congress's Article I power "[t]o regulate commerce with . . . Indian Tribes."[323] Because enforcing an Article I statute in court on behalf of the United States requires an exercise of Article II authority, qui tam provisions requiring unconstitutional exercises of Article II power cannot be said to be the products of "Necessary and Proper" laws.[324]

* * *

Article IV imposes a necessity requirement on Congress's efforts to empower qui tam relators pursuant to Options 2 or 3. Because empowering Article IV officials is an appropriate means of carrying Congress's Property Clause power into effect—at least pursuant to the *McCulloch* framework—FCA and IPA qui tam actions relating to federal property satisfy this necessity requirement. But qui tam actions that do not relate to federal property—including some FCA and IPA qui tam actions—do not satisfy this necessity requirement. That is because the latter class of actions must be defended as "Necessary and Proper" means of carrying one of Congress's Article I powers into execution. And because such actions require unconstitutional exercises of Article II authority (as will be explained in Section III.B), the actions cannot be said to be a product of "Necessary and Proper" laws.

Federal Property. A third limitation imposed by Article IV concerns the meaning of "Territory or other Property belonging to the United States." Under Option 1, any "disposition" must be "of" such property. Under Option 2, any rule or regulation must be "respecting" such property. And under Option 3, any law must be a necessary and proper means of disposing of, or making needful rules or regulations respecting, such property.

As demonstrated in Section II.B, the term "other Property" has long been understood as encompassing both real property (i.e., land) and personal property (i.e., inkwells and wagons). Thus, Congress can empower qui tam relators to bring claims respecting both forms of federal property. This can include "trustland," which is federal land for which "the federal government holds legal title, but the beneficial interest remains with" a Native American tribe.[325] But what about two other forms of potential property—namely, money

322. U.S. CONST. art. I, § 8, cl. 3.

323. *Id.*

324. *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1742 (2023) (Thomas, J., dissenting) ("[I]f *qui tam* suits violate Article II, then it appears unlikely that any assignment effectuated by the FCA's *qui tam* provisions could be considered 'necessary and proper for carrying into Execution' any constitutional power.").

325. *Native American Ownership and Governance of Natural Resources*, OFF. OF NAT. RES. REVENUE, https://revenuedata.onrr.gov/how-revenue-works/native-american-ownership-governance/ [https://perma.cc/49J2-MMUZ]. Although "most Native American lands are trust land," the other

and an assigned right to pursue monetary damages? This Article contends that those two things do *not* qualify as Article IV "property."

Start with money. Determining whether "other Property" includes money is relevant because the FCA permits qui tam relators to bring a "claim" concerning "money or property."[326] But Article IV's reference to "other Property" is "most naturally . . . a reference to 'other Property similar in character to the Territory belonging to the United States.'"[327] That means that the phrase "other Property" includes "[t]angible items, such as land or paper clips," but not money alone.[328]

The conclusion that "other Property" relates to other tangible items like land or paper clips, but not money alone, can be defended in terms of constitutional text, structure, and history. As to text, "[i]f one judges words by the company that they keep, the inclusion in this clause of the phrase 'or other Property' would most naturally be taken as a reference to 'other Property similar in character to the Territory belonging to the United States that is the primary subject of this clause.'"[329] That means that "[t]angible items . . . are sensible subjects for a clause that deals with authority to 'dispose of' and to make 'Rules and Regulations respecting' such property, while money is a much poorer fit."[330] What is more, "[a]n ordinary reader in 1788 would expect to find" congressional authority concerning money "somewhere in Article I, along with the taxing, appropriations, and fiscal management provisions, instead of in the grab bag of miscellaneous provisions that constitute Article IV."[331]

As to structure, interpreting "other Property" to include money would have the effect of recognizing in Congress a freestanding (and largely unlimited) spending power. In particular, it would lead to the conclusion that Congress could "dispose" (meaning, spend) "property" (meaning, money) without any requirement that such spending be necessary, proper, needful, or connected to one of Congress's other enumerated powers. Thus, "smuggling a freestanding spending power into the Constitution" via the Property Clause

major type of Native American land is "Fee land," or land "purchased by tribes, in which the tribe acquires legal title under specific statutory authority." *Id.*

326. 31 U.S.C. § 3729(b)(2)(A). The allegations in *Zafirov* relate only to money. *E.g.*, First Amended Complaint Alleging Violations of the Federal False Claims Act & Demand for a Jury Trial at 1–2, 30–32, United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293 (M.D. Fla. 2024) (No. 8:19-cv-01236-KKM-SPF).

327. Chad Squitieri, *The Appropriate Appropriations Inquiry*, 74 FLA. L. REV. F. 1, 14 n.64 (2023) [hereinafter Squitieri, *Appropriate Appropriations*] (quoting LAWSON & SEIDMAN, *supra* note 25, at 28).

328. LAWSON & SEIDMAN, *supra* note 25, at 28.

329. *Id.*

330. *Id.*

331. *Id.*

"would 'largely unravel[] the entire scheme of enumerated power that is so carefully laid out elsewhere in the Constitution.'"[332]

Finally, as to history, locating a freestanding, unlimited "spending power in the Property Clause would make superfluous the debates at the Constitutional Convention concerning whether the Taxing Clause should vest a freestanding power to spend."[333] The Taxing Clause debates addressed whether the Taxing Clause's reference to "pay[ing] the Debts and provid[ing] for the common Defence and general Welfare of the United States"[334] constitutes an independent spending power, or is instead "best understood as listing the exclusive *purposes* for which Congress can 'lay and collect taxes duties, imposts and excises.'"[335] Those historical debates would have been largely beside the point if the Property Clause included a freestanding power to spend money in unnecessary and improper ways.

To be sure, at least one scholar has offered an alternative view. Professor Engdahl contends that the term "other Property" does extend to money—which would mean that the Property Clause *does* constitute a freestanding spending power.[336] To support this position, Engdahl notes that, as an "assistant superintendent of finance for the American Confederation, and protege of financier Robert Morris," Gouverneur Morris "certainly understood that the phrase 'other property' comprehends *personal* property no less than real, and understood that personal property includes money, as well as financial assets of all kinds."[337]

Engdahl might be correct about what Gouverneur Morris thought. But Morris's idiosyncratic understanding of the Property Clause as a Spending Clause—which apparently went unnoticed by the rest of the Framers who dedicated so much time debating the Taxing Clause—does not constitute dispositive evidence of how ordinary readers understood the Property Clause when it was ratified. Thus, although Morris's views of the Clause are important in general, his unique views on financial matters must not be overly relied on.

Indeed, in a related context, Morris signaled that his idiosyncratic understanding of the Property Clause was not shared by others. In 1803, Morris wrote:

> I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice

332. Squitieri, *Appropriate Appropriations*, *supra* note 327, at 14 n.64 (quoting LAWSON & SIEDMAN, *supra* note 25, at 24 (referring to the Taxing Clause)).

333. *Id.* For a discussion of the debates, see *id.* at 10–13.

334. U.S. CONST. art. I, § 8, cl. 1.

335. Squitieri, *Appropriate Appropriations*, *supra* note 327, at 10 (quoting U.S. CONST. art. I, § 8, cl. 1).

336. *See* Engdahl, *supra* note 164, at 216, 250.

337. *Id.* at 250.

> in our councils. In wording the [Property Clause], I went as far as circumstances would permit to establish the exclusion. *Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made*.[338]

This statement reveals that, in a related context involving the Property Clause, "Morris did not believe that his views represented those of the convention as a whole."[339] And Morris's candor in that related context gives reason to discount arguments that he quietly inserted a freestanding spending power into the Constitution by using a general term (i.e., "property") to cover money and other financial instruments that might not have been top-of-mind to ordinary readers who did not share Morris's unique financing background.

Like money, an assigned right to seek monetary damages should not qualify as Article IV property. This is of particular relevance because the Court in *Stevens* found Article III jurisdiction on the theory that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator.[340] And in *Polansky*, Justice Thomas wondered whether the Property Clause might give Congress "the power to assign claims for damages as 'other Property.'"[341] But for the textual, structural, and historical reasons outlined below, an assigned right to sue for damages should not qualify as Article IV "property."

To repeat the textual point: Article IV's reference to "other Property" is "most naturally . . . a reference to 'other Property similar in character to the Territory belonging to the United States,' which means "[t]angible items, such as land or paper clips,"[342] not an assigned right to sue for money. This is consistent with ratification-era dictionaries suggesting that "property" referred to particular *items* (for example, land and wagons) rather than individual property interests (for example, the right to sue) that run in relation to those items.[343]

As to structure, treating an assigned right to sue for money as Article IV property would allow Congress to assign the right to sue about *anything*. This would allow Congress to bootstrap its way into bypassing any meaningful limitation imposed by the Property Clause's reference to "property." More specifically, it would allow Congress to place the power to enforce *any* law into

338. Letter from Gouverneur Morris, Assistant Superintendent of Fin., Am. Confederation, to Henry W. Livingston (Dec. 4, 1803) (emphasis added), https://press-pubs.uchicago.edu/founders/documents/a4_3_1s12.html [https://perma.cc/M5TZ-DNM8]; *see also* Appel, *supra* note 180, at 33 n.146 (describing Morris's comment).

339. Appel, *supra* note 180, at 33 n.146.

340. Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 773–74 (2000).

341. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1742 (2023) (Thomas, J., dissenting).

342. LAWSON & SIEDMAN, *supra* note 25, at 28.

343. *See supra* note 298.

the hands of private actors—even when enforcing the underlying law would, absent a monetary bounty, undoubtedly require an exercise of Article II authority.

For example, Congress could enact a law stating that the United States has an interest in the "faithful enforcement of federal drug laws." At the moment such a law is enacted, the United States could not seriously be said to have a *property* interest in the faithful enforcement of federal drug laws. The fact that Congress might then seek to assign the "faithful enforcement of federal drug laws" to a bounty-seeking relator should not transform an exercise of Article II power into Article IV property. To put the limiting principle more simply: Article IV empowers Congress to regulate *existing* property; it does not empower Congress to *create* "property" at the very moment Congress seeks to regulate it. For something to qualify as regulatable Article IV property, the purported property must exist *before* the right to sue about it is assigned. An alternative approach would upset the Constitution's structure by allowing Congress to dramatically extend its plenary Property Clause power by *statutorily* redefining Article IV's *constitutional* reference to federal property.[344]

This limiting principle is consistent with Blackstone's contention that an informer only obtains a "consummated" property interest upon successful "judgment" in the case.[345] Blackstone analogized this to securing a property interest in the state of nature.[346] Popular actions, Blackstone explained, "are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them."[347] This made popular actions "open . . . to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them."[348]

344. A similar situation concerned state efforts to define their own compliance with the Taking Clause. In *Tyler v. Hennepin County*, 143 S. Ct. 1369 (2023), a state sold a "home for $40,000 to satisfy a $15,000 tax bill," keeping the remaining $25,000. *Id.* at 1373. The County argued that homeowners had no property interest in home equity exceeding the tax debt. *See id.* at 1374. The Supreme Court reasoned that "state law cannot be the only source" of defining property, "[o]therwise, a State could 'sidestep the Takings Clause . . . .'" *Id.* at 1375 (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)). For similar reasons, the meaning of Article IV "property" should not be defined by Congress alone—otherwise Congress could sidestep the limitations imposed by Article IV's reference to "property" by purporting to recognize a property interest in recovering a monetary bounty for lawsuits relating to virtually anything. To the extent that *Tyler* turned on concluding that surplus equity constitutes property (rather than concluding more generally that the state failed to pay just compensation when it offered $15,000 for a $40,000 home), the holding does not upset this Article's conclusion that money does not qualify as Article IV property. Although home equity can be measured in monetary terms, it is integrally tied to a fundamental type of property—i.e., the home.

345. 2 WILLIAM BLACKSTONE, COMMENTARIES [hereinafter 2 BLACKSTONE] *437.

346. *See Constitutional Precursors*, *supra* note 41, at 90.

347. 2 BLACKSTONE, *supra* note 345, at *438.

348. *Id.*

Although the analogy to the state of nature should not be stretched too thinly, it supports the idea that a right to sue for qui tam damages would not qualify as Article IV property at the moment of assignment. Similar to how a property interest in wild animals might not perfect until successful capture,[349] a property interest in a qui tam bounty is not perfected (for either the relator or the United States[350]) at the moment a relator purports to pursue an action on behalf of the United States.[351] Indeed, a perfected property interest does not exist until a court enters final judgment—which might be years (if ever) after the relator first began to purportedly exercise Article IV power. As a matter of structure, Congress must not be permitted to hollow out the President's Article II enforcement authority by invoking the Property Clause to empower qui tam relators to enforce federal law when the purported property in question might not ever perfect in *anyone*—let alone constitute existing "Property belonging to the United States."[352]

Finally, as to history, recognizing a qui tam relator's right to collect monetary damages as "property" would seem to require recognizing a property interest in federal office (i.e., seem to require recognizing a property interest in serving as a qui tam relator). That would present a historical problem because, "[i]n Revolutionary America, the idea of offices as property was roundly rejected."[353] One reason why "Americans rejected property interests in federal

349. *See, e.g.*, Pierson v. Post, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805) ("[M]ere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him." (emphasis omitted)).

350. Because the relator brings a claim on behalf of the United States, the United States' right to the damages would not perfect until judgment. The government's non-immediate interest is similar to Blackstone's description of the King's non-immediate interest in "estrays," or "valuable animals . . . found wandering in any manor or lordship, and no man knoweth the owner of them." 1 WILLIAM BLACKSTONE, COMMENTARIES *288. Although "the law" gave estrays "to the king as the general owner and lord paramount of the soil," the King did *not* have an immediately vested interest in estrays. *Id.* Instead, "in order to vest an absolute property in the king, or his grantees, [estrays] must be proclaimed in the church and two market towns next adjoining to the place where they are found." *Id.* Only "then, if no man claims [the estrays], after proclamation and a year and a day passed, [the estrays] belong to the king or his substitute." *Id.*

351. This moment would seem to be "no later than the point in time at which the Government declines to intervene in the seal period and the relator may proceed with the action as the only plaintiff in court." United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1742 (2023) (Thomas, J., dissenting).

352. U.S. CONST. art. IV, § 3, cl. 2.

353. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 20 (2021). Jed Shugerman contends "the concept of offices as property continued into the First Congress and early republican America." Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 216 n.6 (2024). For support, he cites *Marbury v. Madison*, where "Chief Justice Marshall referred to Marbury's irrevocable and vested rights to his office." *Id.* at 283 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803)). But such language can be understood as merely "vestiges of the property conception of office" that "remain to this day." Manners & Menand, *supra*, at 19. Today it is common to state that "[w]e 'take' and 'hold' and 'forfeit'

office"[354] might have been the work of Montesquieu, who was "hugely influential at the Founding," and who suggested, "property in offices was incompatible with republicanism."[355] Regardless of the reason, "[b]y 1787, America's theorists had developed a clear rule of republican officeholding,"[356] and had thus departed from the European model of offices-as-property. It would run against early Americans' rejection of the offices-as-property model to conclude that Congress can give relators a "property" right in representing the United States in court for an indefinite term of years (i.e., the unknown length of a lawsuit).

To be sure, the textual, structural, and historical arguments offered above do *not* leave Congress unable to assign a right to sue as a means of managing (or protecting) things that *do* qualify as Article IV property—such as a federal warship or wagon. Nor does it mean that Congress is unable to entice an assignee to pursue a claim by granting the assignee a monetary bounty upon litigation success.[357] That is because, in such situations, it would *not* be the right to the money *itself* that qualifies as Article IV property. The monetary bounty would simply be a byproduct of Congress's decision to enact a qui tam statute respecting something that independently qualifies as federal property (for example, a federal warship or wagon).

* * *

Qui tam actions relying on Congress's Article IV power must relate to Article IV "property." That term encompasses both real and personal property. But it should not be read to encompass money or an assigned right to sue for money. Congress can, however, empower relators to collect monetary bounties as a byproduct of bringing actions relating to Article IV "property."

Respecting. A fourth limitation, which like the necessity requirement only relates to Options 2 and 3, concerns the meaning of "respecting." A natural reading of this requirement recognizes a need to establish some sort of "nexus"[358] between federal property and the relevant "rule or regulation"

office." *Id.* But in speaking that way, one does not seriously maintain that an officeholder has a literal property interest in an office. Shugerman also contends that early congressional debates "reflected that the office-as-property system continued to have supporters." Shugerman, *supra*, at 283. But he concedes that "[t]he First Congress did not revive sale of office," but instead required "sureties," and thus "converted the purchase system into a more republican system" in which "officers had to provide financial 'sureties' as bonds of faithful execution." *Id.* at 282–83.

354. Wurman, *supra* note 308, at 1223.

355. *Id.* at 1221 (citing MONTESQUIEU, THE SPIRIT OF THE LAWS 70 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989) (1748)).

356. Manners & Menand, *supra* note 353, at 20; *see also* Shugerman, *supra* note 353, at 282 (First Congress "converted the purchase system into a more republican system: officers had to provide financial 'sureties' as bonds of faithful execution.").

357. *C.f.* PARRILLO, *supra* note 33, at 1 (stating that, in early America, "[d]istrict attorneys" could "w[i]n a fee for each criminal they convicted").

358. Appel, *supra* note 180, at 83.

(Options 2 and 3) or "law[]" (Option 3). In the qui tam context, this means establishing a nexus between the qui tam statute and the underlying property at issue in any qui tam action.

The FCA's definition of "claim," which establishes a legal nexus between the relator's lawsuit and the underlying "property,"[359] readily satisfies this "respecting" (i.e., nexus) requirement. In short, the FCA helps Congress both manage and protect federal property from fraud and other forms of misconduct. The same can be said of IPA qui tam actions that help Congress manage and protect "trust land," i.e., federal land for which "the federal government holds legal title."[360]

Other FCA and IPA qui tam actions, however, cannot be said to be "respecting" federal property. For example, some IPA qui tam actions relate to "fee land," or land "purchased by tribes, in which the tribe acquires legal title under specific statutory authority."[361] Such actions are properly understood as "respecting" *tribal* property, which is distinct from territory owned by the United States.[362] Similarly, some FCA actions relate to money alone—which, as explained above, should not qualify as Article IV property.

To be clear, the requirement that a qui tam statute only be "respecting" federal property leaves room for run-of-the-mill FCA actions, which relate to forms of overpayment (i.e., money) concerning property. But for these actions to be successful, they would need to be reoriented so as to properly "respect" qualifying federal property. For example, an FCA relator might allege that the government has been fraudulently overcharged for federal equipment (for example, warships or office chairs). Relatedly, an FCA relator might allege that the government has been fraudulently overcharged for services performed in relation to federal property (for example, information technology services for government computers).

Fraud or other misconduct can undermine the federal government's ability to fully enjoy its property. Thus, a qui tam statute aimed at reducing such misconduct could reasonably be said to be "respecting" federal property. One could imagine other situations that stretch the nexus too thin (for example,

359. 31 U.S.C. § 3729(b)(2).

360. *Native American Ownership and Governance of Natural Resources*, *supra* note 325. As noted in Section I.A, the IPA "authorizes *qui tam* actions for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe; (2) driving livestock to feed on Indian land; (3) settling on or surveying Indian land; (4) setting up a distillery in Indian country; and (5) trading in Indian country without a license." Leitner, *supra* note 47, at 905 (2024) (citing 25 U.S.C. §§ 177, 179, 180, 251 (repealed 2018), 264).

361. *Native American Ownership and Governance of Natural Resources*, *supra* note 325.

362. "U.S. territories . . . are not sovereigns distinct from the United States," Puerto Rico v. Sanchez Valle, 579 U.S. 59, 71 (2016), whereas "Indian tribes" are "separate sovereigns," *id.* at 70; *see also Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/frequently-asked-questions [https://perma.cc/QT9F-DRRP] ("The relationship between federally recognized tribes and the United States is one between sovereigns.").

allegedly fraudulent cafeteria services offered at a private building used to sell accounting services to a company that performs remote information technology services for government computers), but courts are capable of policing that line.

* * *

Article IV qui tam actions must constitute an exercise of statutory authority that is "respecting" federal property. Some FCA and IPA actions (for example, those relating to "trust land" or federal office chairs) satisfy this requirement because they are qui tam actions "respecting" federal property. Other actions (for example, those relating to "fee land" or money alone) do not, because they are not actions "respecting" things that should qualify as federal "property" within the meaning of the Property Clause.

Primary/Exclusive. Finally, to qualify as Article IV officials, qui tam relators must deal "primarily" (under the *Aurelius* majority framework) or "exclusively" (under Justice Thomas's framework) with Article IV property.[363] Under either framework, relators representing the United States concerning matters relating "primarily" to non-property would not qualify as Article IV officials—even if Congress also empowered them to engage in trivial work respecting federal property.

Relators who bring claims relating primarily to tribal property (i.e., some IPA relators), or money alone (i.e., some FCA relators), do not satisfy this primary/exclusive requirement. But under either statute, relators who bring claims relating primarily to federal property do satisfy this requirement. Thus, courts considering the constitutionality of FCA and IPA actions should not consider the constitutionality of those statutes in *general*. Instead, courts should consider the *particular* form of federal power that a relator purports to exercise in any particular action. When a court determines that a particular relator is purporting to unconstitutionally exercise Article II power, the court should do as the court in *Zafirov* did[364] and dismiss that relator's action. But the existence of such relators should not upset the constitutionality of other relators' actions. Arguments for ruling the qui tam statutes facially unconstitutional (as the *Zafirov* defendants do) therefore go too far.[365]

* * *

For a qui tam action to qualify as an exercise of Congress's Property Clause power, it must satisfy five conditions. FCA and IPA actions respecting federal property satisfy those conditions. But other FCA and IPA actions do not. Courts should therefore consider the constitutionality of qui tam actions on a

363. *See supra* Section II.B.

364. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1322–23 (M.D. Fla. 2024).

365. Brief of Defendants-Appellees at 55–56, United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, Nos. 24-13581 & 24-13583 (11th Cir. Mar. 10, 2025).

case-by-case basis by asking whether a particular relator is purporting to exercise federal power through constitutional or unconstitutional means.

B. *Article II Limitations*

So long as qui tam actions satisfy the five criteria outlined in Section III.A, they do not violate the Constitution's Article II limitations because the actions would be exercises of Article IV power, not Article II power. Like how Congress can empower Article IV officials in the territories without violating Article II,[366] Congress can empower qui tam officials to exercise Article IV power without violating Article II. Jurists and litigants taking the position that much of modern qui tam practice violates Article II should thus be careful not to overstate their claims by failing to account for the special Article IV context. But what about qui tam actions that cannot be defended on Article IV grounds? Section III.B will now explain how those actions violate Article II. In doing so, Section III.B will begin to weigh in on the constitutional debates presented in Part I.

The limits imposed by Article II are subject to substantial debate. But to begin with a point that should be uncontroversial: Enforcing statutes enacted pursuant to an Article I power—in court, on behalf of the United States—requires an exercise of Article II executive power. Some scholars contend that executing federal law is *all* that Article II vests.[367] Others maintain that Article II also vests other power, such as foreign affairs power.[368] But there is widespread agreement that Article II executive power encompasses, at minimum, the power to enforce statutes enacted pursuant to an Article I power.[369]

366. *See supra* Section II.B (discussing *Aurelius*).

367. *See, e.g.*, Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM L. REV. 1169, 1173 (2019) ("[T]he opening sentence of Article II vested exactly what it says: the power to execute the law, both by enforcing its negative prohibitions and by carrying out its affirmative projects."); *id.* at 1180 ("[T]he power to execute the law," which "authorizes the President to bring that law—which before execution exists only on paper—into effect in the real world[,]" includes "coercing obedience from private parties, like ticketing jaywalkers.").

368. *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *How to Think About the Removal Power*, 110 VA. L. REV. ONLINE 159, 168 (2024) ("[D]escrib[ing] executive power as including 'law execution,'" does not "contradict our claim that the term 'executive power' was used in a manner indicating it had substantive content."); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1593 (2005) ("[I]n eighteenth-century terminology foreign affairs were classified as part of the 'executive' functions of the government.").

369. Buckley v. Valeo, 424 U.S. 1, 138 (1976) ("[D]iscretionary power to seek judicial relief[] is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."). Some scholars have argued that *qui tam* enforcement of federal statutes constituted an exercise of private power (rather than governmental power). *E.g.*, *Constitutional Precursors*, *supra* note 41, at 43–47. Such arguments are properly addressed through the Appointments Clause analyses offered below, which consider whether an individual exercises governmental authority.

Once it is recognized that enforcing Article I statutes in court, on behalf of the United States, constitutes an exercise of Article II authority, it becomes clear that some FCA and IPA qui tam actions require exercises of that power. That is because FCA and IPA actions unrelated to federal property must be defended as exercises of one of Congress's Article I authorities—save for a few exceptions that are irrelevant in the FCA and IPA contexts.[370] In the FCA context, the most natural source of power for qui tam claims unrelated to federal property is Congress's Article I power "[t]o regulate commerce with foreign nations, and among the several states."[371] And in the IPA context, the most natural source of power for qui tam claims unrelated to federal property is Congress's Article I power "[t]o regulate commerce with . . . Indian tribes."[372]

But to say that some FCA and IPA qui tam actions require an exercise of Article II authority is not to say that such actions require an *unconstitutional* exercise of Article II authority. That is due to the distinction between (a) "the content of the powers conveyed by the Executive Power Clause," which many scholars and jurists agree includes the power to enforce Article I laws, and (b) "the subsequent question of whether any such powers are defeasible."[373] Although there is disagreement as to the precise contours of the second question, the lines of constitutional argument are relatively clear, and focus on the meaning of the Appointments, Vesting, and Take Care Clauses. What is more, mainstream readings (i.e., those with support at the Supreme Court) of all three clauses indicate that modern qui tam actions are unconstitutional to the extent they purport to insulate relators from presidential control.

Appointments Clause. Begin with the Appointments Clause. Under current doctrine, any "significant" exercise of Article II power, performed by an individual holding a continuing position established by law, must be performed by an Officer of the United States.[374] Alternatively, under Judge Mascott's originalist framework cited approvingly by Justice Thomas,[375] the

370. Outside of Articles I and IV, Congress is granted power in other contexts. *E.g.*, U.S. CONST. art. II, § 1, cl. 4 (presidential electors); U.S. CONST. art. II, § 2, cl. 2 (vesting of appointment power); U.S. CONST. art. III, § 3 (treason); U.S. CONST. art. V (propose amendments); U.S. CONST. amend. XIV, § 5 (enforcing 14th Amendment); U.S. CONST. amend. XV, § 2 (enforcing 15th Amendment (suffrage-race)); U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes . . . ."); U.S. CONST. amend. XIX, § 2 (enforcing 19th Amendment (suffrage-sex)); U.S. CONST. amend. XX, § 4 (President-elect vacancy); U.S. CONST. amend. XXIII (D.C. electors); U.S. CONST. amend. XXIV, § 2 (enforcing 24th Amendment (poll tax)); U.S. CONST. amend. XXV (presidential vacancies); U.S. CONST. amend. XXVI, § 2 (enforcing 26th Amendment (suffrage-age)).

371. U.S. CONST. art. I, § 8, cl. 3.

372. *Id.*

373. Mortenson, *supra* note 367, at 1185 n.57.

374. *See supra* Section I.C (discussing contemporary Appointments Clause doctrine).

375. Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) ("To the Founders, this term encompassed all federal civil officials 'with responsibility for an ongoing

Appointments Clause offers the exclusive means of appointing "all federal officials with responsibility for an ongoing statutory duty."[376] Because relators bring cases on behalf of the United States, they qualify as officers of the United States under both current doctrine and the originalist alternative—at least absent a historical exception, or absent qualifying as an Article IV official.

To unpack that conclusion: "[S]ignificant administrative and enforcement authority" includes "the power to seek daunting monetary penalties against private parties in federal court—a quintessentially executive power."[377] Because qui tam relators exercise that very sort of power, they satisfy the "significant authority" test in addition to Judge Mascott's easier-to-satisfy standard. As to serving in a continuing office: the question is whether relators "serve on an ongoing, rather than a temporary or episodic basis."[378] And relators serve on ongoing bases.

True, relators serve for only one lawsuit at a time (although many relators are repeat litigants).[379] But qui tam litigation can last years and span across presidential administrations.[380] As Justice Scalia explained, there is "nothing unusually limited about" a tenure that can last the life of an investigation or litigation.[381] "To the contrary," such a lengthy tenure is "unlike most high-ranking Executive Branch officials."[382] What is more, relators' "duties, salary, and means of appointment" are all established by statute—offering additional indicia of a continuing office.[383] Relators' duties involve the full range of powers associated with prosecuting lawsuits.[384] Their salaries are their statutory

statutory duty.'" (quoting NLRB v. SW General, Inc., 580 U.S. 288, 314 (2017) (Thomas, J., concurring) (citing Mascott, *supra* note 112, at 564))).

376. Mascott, *supra* note 112, at 564. Judge Mascott only references *qui tam* once in passing, *id.* at 463 n.99, but notes that "one did not necessarily need to be continuously employed or remunerated to qualify as an officer," *id.* at 534. "A number of the individuals receiving fees for services performed or for each day worked were considered officers by the First Congress." *Id.*

377. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2189 (2020).

378. *Lucia*, 138 S. Ct. at 2052 (citation modified).

379. *See* Kathryn E. Garza, Note, Qui Tam *Tension: The Appropriate Standard of Review in Government-Requested FCA Dismissals*, 99 TEX. L. REV. 655, 676 (2021).

380. *See, e.g.*, United States *ex rel.* Montcrief v. Peripheral Vascular Assocs., 133 F.4th 395, 411 (5th Cir. 2025) (Duncan, J., concurring) ("The position is not transient because it can last years. Montcrief, after all, sued over *seven* years ago.").

381. Morrison v. Olson, 487 U.S. 654, 718 (1988) (Scalia, J., dissenting) (discussing the independent counsel).

382. *Id.*

383. *Lucia*, 585 U.S. at 246.

384. 25 U.S.C. § 201 (empowering IPA relators to sue to collect "[a]ll penalties which shall accrue" under the relevant statutes); 31 U.S.C. § 3730(b)–(c) (FCA).

bounties—a common form of payment for officers in early America.[385] And their means of self-appointment are established by statute.[386]

In sum, because qui tam relators in the FCA and IPA contexts self-appoint themselves to exercise significant executive power for potentially years on end,[387] and self-appointment is not one of the modes of appointment permitted in the Appointments Clause,[388] FCA and IPA qui tam actions unrelated to federal property would seem to violate the Article II Appointments Clause—again, at least without a historical exception.

What, then, to make of the argument that qui tam is constitutional because it qualifies for a historical exception? Well, as Justice Thomas rightfully notes: "'Standing 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.'"[389] But originalists like Justice Thomas might be convinced by arguments sounding in so-called liquidated originalism, which seeks to "settle practically underdeterminate new law by adopting one permissible interpretation rather than another."[390] Pursuant to such arguments, one might contend that the term "[o]fficers of the United States" is underdeterminate—at least as to the qui tam question. Further, one might contend that, because early Congresses relied on qui tam, the underdeterminate term "[o]fficers of the United States" came to have a liquidated meaning that excluded qui tam relators. But the historical evidence does not support this sort of historical exception to the otherwise straightforward Appointments Clause analyses offered above. That is because there is no significant evidence indicating that Congress's spotty reliance on qui tam "reflected constitutional reasoning," or resulted in a "constitutional settlement," as liquidation requires.[391] Even those scholars—such as Professors

385. 25 U.S.C. § 201 (IPA bounty); 31 U.S.C. § 3730(d) (FCA bounty); Christine Chabot, *The Founders' Purse*, 110 VA. L. REV. 1027, 1088 (2024) ("By far the larger number of federal officials were compensated by fees for services rendered.") (citation omitted).

386. *See* 25 U.S.C. § 201 (IPA); 31 U.S.C. § 3730(b) (FCA).

387. 31 U.S.C. §§ 3729–3733 (FCA); 25 U.S.C. § 201 (IPA).

388. *See* United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, 751 F. Supp. 3d 1293, 1322 (M.D. Fla. 2024).

389. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 678 (1970)).

390. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142 (2016).

391. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019) (contending that constitutional liquidation required "three key elements"); *see also* Randy Beck, Transunion*,* Vermont Agency*, and Statutory Damages Under Article III*, 77 FLA. L. REV. 161, 217 (2025) ("[Qui tam] statutes [enacted by early Congresses] were signed without objection by early Presidents and applied in judicial proceedings without anyone raising a constitutional issue under Article II.").

Beck, Pfander, and Zambrano, and Lucky, who rely on history to defend qui tam—note that the matter was not widely debated.[392]

The lack of debate (and thus lack of liquidation) is understandable given the long history of qui tam in England. Given that history, early congressional practice is best explained as a reflexive adoption of Parliamentary practice—an adoption that did not fully account for the differences between a sovereign Parliament and a Congress whose enumerated powers did not include "the Executive power" vested in a coequal President.[393] As Professors Woolhandler and Nelson explain, "early qui tam statutes do not . . . demonstrate a determinate 'original understanding' of the constitutional separation of powers."[394] "Because American-style separation of powers had never been put into practical operation before the 1780s, members of the First Congress could not possibly have grasped all of the questions that it raised, let alone worked out coherent answers to them."[395] Thus, although "early qui tam statutes" might "[a]t most, . . . provide some legislative precedents that arguably *started* the process of 'liquidating' the Constitution's meaning," the precedents are "far from overwhelming."[396]

* * *

Under existing doctrine and the leading originalist alternative, qui tam officers bringing claims outside of the Article IV context are officers of the United States whose self-appointment violates the Appointments Clause. Early congressional practice relying on relators is best explained as a reflexive adoption of long-standing parliamentary practice—an adoption that did not fully grapple with the distinction between a sovereign parliament and a Congress whose enumerated powers did not include "the executive power" vested in a coequal President.

Vesting and Take Care Clause. Some modern qui tam actions also violate mainstream understandings of the Vesting and Take Care Clauses. Start with the understanding of those clauses offered by the unitary executive theory, to

392. *See, e.g.*, *Constitutional Precursors*, *supra* note 41, at 88 ("[R]esearch has turned up no evidence that anyone raised separation of powers issues concerning popular enforcement or viewed such actions as introducing on the role of state executives."); Pfander, Zambrano & Lucky Amicus Br., *supra* note 127, at 6–8 (highlighting instances in which constitutional objections to qui tam might have been raised, but were not).

393. *See* Prakash, *Chief Prosecutor*, *supra* note 46, at 589 (distinguishing Parliament from Congress in the qui tam context).

394. Woolhandler & Nelson, *supra* note 44, at 727.

395. *Id.*

396. *Id.* at 727–28; *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36 (2001) ("[U]ntil quite late, [England] had a relatively ill-defined sense of separated powers.").

which the Supreme Court has increasingly signaled its adherence.[397] The theory recognizes that, because *all* executive power is constitutionally vested in the President, ordinary legislation cannot re-vest executive power in actors who are not (ultimately) controllable by the President.[398] A quintessential representation of this understanding is offered by Justice Scalia's dissent in *Morrison v. Olson*.[399] There, he explained that a statute violates Article II when "the statute deprive[s] the [p]resident . . . of *exclusive* control over the exercise of" "purely executive power,"[400] and noted that "the removal of a prosecutor" is "the virtual embodiment of the power to 'take care that the laws be faithfully executed.'"[401]

For various reasons, including those outlined in Barr's 1989 OLC memo, the FCA clearly violates a unitary understanding of the Vesting and Take Care Clauses. To briefly run through three of the more obvious problems: First, the FCA essentially requires the executive branch to investigate allegations (on a tight, sixty-day clock) based on a private relator's say-so.[402] Under the unitary executive framework, launching an executive branch investigation constitutes an exercise of executive power vested in the President and takes finite investigative resources away from other activities that the President might think important. What is more, the President might conclude that faithful execution requires more than sixty days (plus however many days a *court* thinks satisfy "good cause") of investigation before an action is made public.[403]

Second, the FCA empowers private relators to prosecute claims independent from presidential oversight.[404] In such situations, the President's agents only get copies of litigation documents and can seek to intervene upon a showing of "good cause."[405] And even if "good cause" is established to a *court's* satisfaction, the President's agents can only participate in the relator's action to the extent that it does not "limit[] the status and rights of the" relator.[406] But under the unitary executive framework, prosecuting an entire lawsuit requires an exercise of Article II power vested in the President. And a relator might make any number of litigation decisions that the President does not think are a faithful execution of the law.

397. *See* Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 138–39, 147–53 (2022) [hereinafter Chabot, *Interring the Unitary Executive*] (describing the Roberts Court).

398. *See* Bamzai & Prakash, *supra* note 368, at 175 ("[T]he Necessary and Proper Clause does not allow Congress to treat allocations of authority as defaults.").

399. *See* 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

400. *Id.* at 705 (emphasis added).

401. *Id.* at 726.

402. 31 U.S.C. § 3730(a)–(b).

403. *Id.* § 3730(b)(2)–(3).

404. *Id.* § 3730(c)(3).

405. *Id.*

406. *Id.*

Third, even when the President's agents decide to prosecute a FCA claim, the FCA permits the relator to meaningfully participate in the litigation.[407] For example, a relator is entitled to a "hearing" before the government can dismiss the case.[408] And even when the government demonstrates that a relator's "unrestricted participation . . . would interfere with or unduly delay the Government's prosecution of the case," a court need not limit the relator's participation.[409] Instead, the relator's ability to so interfere or delay, or otherwise act in a way that "would be repetitious, irrelevant, or for purposes of harassment," is something left to the *court's* "discretion."[410] But the unitary executive theory maintains that *all* federal executive power is vested in the President—not the President *and* a private co-prosecutor or court.

The IPA, by comparison, is arguably salvageable under a unitary executive understanding of the Article II Vesting and Take Care Clauses. Unlike the FCA, which purports to limit presidential control, the IPA is silent as to the President's ability to oversee actions. If it is assumed that such silence leaves room for the President to exercise full control over the relator's claim—by, for example, empowering the President to direct all of the relator's litigation decisions, including the decision to bring or dismiss the claim—then there would be no obvious tension with Article II.[411] And as it turns out, there is historical support for interpreting statutory silence against a background principle of presidential supervision.

"Presidents Washington, Adams, and Jefferson routinely and publicly directed district attorneys and the attorneys general to start and stop prosecutions" even though "no federal statute ever authorized presidential superintendence."[412] The natural implication of that history is that "the Constitution itself must have been read to authorize presidential direction."[413] And sure enough, "Presidents cited the Constitution as authorizing their

407. *Id.* § 3730(c)(1)–(2).

408. *Id.* § 3730(c)(2)(a).

409. *Id.* § 3730(c)(2)(c).

410. *Id.*

411. Similarly, one might read a background assumption of presidential supervision into delegations of federal eminent domain authority to conclude those delegations are constitutional. The Supreme Court ruled that private delegatees satisfying an agency's certification process could exercise delegated eminent domain authority. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2251–53 (2021). Because the eminent domain power in *PennEast* stemmed from a statute enacted pursuant to the Commerce Clause, *id.* at 2265 (Barrett, J., dissenting), the constitutionality of the delegatees' authority turns on the extent that the President, acting through a federal agency, can supervise the delegatees' litigation decisions. That Article II question was not presented in *PennEast*, and thus remains unresolved. Justice Kavanaugh recently raised the issue in a case concerning private actors advising the Federal Communications Commission. FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2518 (2025) (Kavanaugh, J., concurring) ("Congressional delegations of policymaking authority" to entities "independent" of the President "raise significant Article II issues.").

412. Prakash, *Chief Prosecutor*, *supra* note 46, at 527.

413. *Id.*

control."[414] Nonetheless, if the IPA is interpreted to reject a background principle of presidential control, the IPA would violate a unitary understanding of the Article II Vesting and Take Care Clauses by placing entire federal prosecutions under the purview of private relators, rather than the President.

One need not adhere to the unitary executive theory, however, to conclude that modern qui tam actions run afoul of the Article II Vesting and Take Care Clauses. Other understandings of Article II with purchase at the Supreme Court lead to a similar conclusion. The *Morrison* majority, for example, concluded that an independent counsel statute did not "*sufficiently* deprive[] the President of control over the independent counsel."[415] To the extent the IPA's relative silence can be interpreted in harmony with a background principle of presidential control, the IPA could be read to satisfy the *Morrison* standard. But the FCA qui tam actions do not satisfy that standard.

Unlike the independent counsel in *Morrison*, a FCA qui tam relator is not "subject to removal by a higher Executive Branch official."[416] Moreover, the FCA does not require (as the independent counsel statute in *Morrison* required), substantial "compl[iance] with Justice Department policy."[417] Nor does the FCA require that the Attorney General retain "the 'unreviewable discretion' to decline to request the appointment of an independent counsel," or "control[] the breadth of the" litigation by "provid[ing] the statement of facts upon which the" relator's jurisdiction is established.[418] These provisions, among others,[419] demonstrate how the President is "sufficiently deprived" of control over exercises of vested Article II authority, which the President must take care be faithfully executed.

Nonetheless, if one's understanding of the Article II Vesting and Take Care Clauses does not require the President to exercise *any* control over exercises of Article II power, then one might find modern qui tam practice to be consistent with those clauses.[420] For example, the "empty vessel" theory

414. *Id.*

415. Morrison v. Olson, 487 U.S. 654, 693 (1988) (emphasis added).

416. *Id.* at 671.

417. Barr, *supra* note 56, at 229 (citations omitted).

418. *Id.*

419. *See supra* Section I.D.

420. Randy Beck offers a related argument, contending that qui tam is consistent with an original understanding of the Take Care Clause. *Constitutional Precursors*, *supra* note 41, at 33–35. Beck highlights eighteenth-century qui tam practice in states (Pennsylvania, New York, and Vermont) with state constitutional take care clauses. *Id.* at 52–88. But under the unitary executive theory and existing Supreme Court precedent, there are substantial reasons to conclude that Beck's otherwise insightful analysis does not undermine the conclusion that, because qui tam relators exercise Article II power outside of presidential control, they run afoul of the federal Constitution that vests "the 'executive Power'—all of it" in one "'President,' who must 'take Care that the Laws be faithfully executed.'" Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art. II, §§ 1, 3); *see also* Brief for Pac. Legal Found. as Amicus Curiae Supporting Defendants-Appellees, *supra* note 118, at 10–15 (responding to Beck).

maintains that executive power is best understood as an "empty vessel whose authority in any particular case depended *entirely* on the substantive decisions of the entity . . . which possessed the legislative power to direct executive action."[421] Qui tam enforcement of Article I laws seems consistent with an empty vessel theory of Article II. The idea being that, yes, the President has Article II authority to execute federal statutes—but sometimes those statutes might say that enforcement is to be handled by someone operating outside of the President's control.

There are reasons to reject a theory of Article II that would permit Congress to substantially undermine, through *statute*, the *constitutional* decision to vest the President (rather than whoever Congress thinks best) with the power to enforce federal law. For example, if one accepts that "We the People" are the relevant sovereign,[422] then intra-textual comparisons between Article IV and Article I indicate that, although the sovereign People granted Congress sovereign-*like* authority to statutorily vest executive power as Congress pleases in the Article IV context (for example, by heading a territorial government with zero, one, or multiple governors), Congress cannot similarly invoke Article I to undermine the sovereign People's decision to vest Article II executive power in the President alone. At minimum, adopting the empty vessel theory would seem to call out for subjecting qui tam relators to the Appointments Clause. Otherwise, one's understanding of Article II might permit Congress to require that *every* federal statute be enforced *entirely* by self-appointed relators who (because they allegedly hold no federal office) are not removable absent statutory amendments. Even if subjecting people to such exercises of executive power might be something Congress can do through its sovereign-like

For one, all three state constitutions vested the "supreme" executive power in state executives. *Constitutional Precursors*, *supra* note 41, at 52, 68, 78 (citations omitted). Like the U.S. Constitution's vesting of judicial power in both "supreme" and "inferior" courts, U.S. CONST. art. III, § 1, the state constitutions leave room for the possibility that executive power could be exercised by inferior actors, such as qui tam relators. Not so with the U.S. Constitution's vesting of "the executive power" in the President alone. U.S. CONST. art. II, § 1. Second, two states (New York and Vermont) had constitutional provisions that can be read as expressly permitting qui tam. New York's Constitution expressly incorporated English and colonial law, which no doubt included qui tam. N.Y. CONST. of 1777, art. 35. And Vermont's legislature claimed the constitutional authority to allocate statutory forfeitures, which presumably permitted the legislature to allocate those forfeitures to relators (as would be consistent with longstanding qui tam practice). *Constitutional Precursors*, *supra* note 41, at 78–82. Finally, even assuming that the Article II Vesting and Take Care Clauses are underdeterminate and thus susceptible to liquidation, Beck concedes that "research has turned up no evidence that anyone raised separation of powers issues concerning popular enforcement or viewed such actions as intruding on the role of state executives." *Id.* at 88. The lack of evidence demonstrates that, whatever the merits of the relevant state practice, it does not "reflect[] constitutional reasoning" or "constitutional settlement" of the sort necessary for liquidation. Baude, *supra* note 391, at 1.

421. Mortenson, *supra* note 367, at 1269 (emphasis added).

422. *See* AMAR, *supra* note 169, at 7–13; William M.M. Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. 297, 300 (2025).

Article IV power, it does not follow that Congress can do so through its more limited Article I authorities.

Nonetheless, fully responding to the empty vessel theory is a task best left to other work. For the moment, it will suffice to recognize that, if one is willing to adopt the empty vessel theory—which is at odds with current Supreme Court precedent—[423]then qui tam actions might seem less problematic under the Article II Vesting and Take Care Clauses.

* * *

To the extent that modern qui tam practice enables relators to enforce Article I laws in court on behalf of the United States, outside of any meaningful presidential control, such practice runs afoul of mainstream understandings of the Article II Vesting and Take Care Clauses. To the extent that the IPA can be read in harmony with a background principle of presidential control, IPA qui tam actions are consistent with the Article II Vesting and Take Care Clauses (although not the Appointments Clause). But because the FCA purports to so severely limit the President's control of qui tam enforcement of Article I laws, FCA actions unrelated to federal property do not comply with any but the narrowest of understandings of the Article II Vesting and Take Care Clauses.

C. *Article III Limitations*

Article III imposes independent limitations on the use of qui tam actions. Regardless of whether Congress seeks to empower a qui tam relator to exercise Article IV power or Article II power, Congress cannot require Article III courts to hear qui tam claims that do not comply with Article III itself. But with that said, Article III does not impose a significant roadblock because qui tam relators can readily satisfy Article III's requirements.

Start with relators exercising Article II power. As noted in Section III.B, such relators must be subject to proper presidential control and be appointed in accordance with the Appointments Clause. But assuming those Article II requirements are satisfied, Article III does not prevent such relators from representing the interests of the United States in an Article III court—just as Article III does not prevent a DOJ lawyer from representing the interests of the United States in an Article III court. Although a run-of-the-mill private plaintiff must demonstrate a personal injury to establish Article III standing, a DOJ lawyer representing the interests of the United States does not have to make such a showing.[424] Put more clearly: DOJ lawyers representing the interests of the United States do not need to establish that they are *personally*

423. *See* Chabot, *Interring the Unitary Executive*, *supra* note 397, at 138–39, 147–53 (describing the Roberts Court).

424. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

injured in the same way that private plaintiffs do. A constitutional qui tam relator exercising Article II authority should be held to the same Article III standard that DOJ lawyers are held to in analogous contexts.

For qui tam relators exercising Article IV power, Article III should similarly not prevent an uninjured relator from representing the interests of the United States. Like an uninjured DOJ official, an uninjured qui tam relator exercising Article IV power can represent the United States' interests in an Article III court. The United States' "sovereign[]" and "proprietary" interests, which are represented by both qui tam relators and DOJ officials, fall comfortably within the category of "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."[425] Indeed, the United States' interests are perhaps more obvious in the context of federal property.[426]

To the extent that the Supreme Court's standing precedent suggests that a DOJ lawyer cannot represent the United States without suffering a personal injury, it is a sign that something has gone awry in the doctrine.[427] Similarly, if standing doctrine purports to prohibit qui tam relators from bringing claims in federal court—as relators have long done—it is a sign that the doctrine has gone haywire. The *Stevens* Court seemed to recognize as much when it jerry-rigged its novel injury-assignment theory—which permitted the Court to conclude that relators had standing and thus permitted the Court to avoid upsetting qui tam's storied history.[428] The *Stevens* Court's creative holding need not be disturbed. But in the future, it would be cleaner for the Court to more simply conclude that relators have standing because they are Article II or Article IV officers (depending on the context) rather than build atop *Stevens's* assignment theory.[429]

Finally, even if qui tam enforcement of Article IV laws were somehow determined to not fall within Article III jurisdiction, Congress could permit qui tam relators to exercise Article IV power in Article IV courts. Congress already allows territorial officials to bring claims in Article IV courts,[430] and Congress could extend those courts' jurisdiction to hear qui tam claims relating to "other

425. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771, 774 (2000) (citations omitted).

426. *Hallandale Beach*, 996 F.3d at 1125 (referring to "harm to [government] property").

427. *Id.* at 1125 ("[N]o one doubts—or ever doubted—that federal criminal prosecutions are 'Cases' within the meaning of Article III.").

428. *Stevens*, 529 U.S. at 773–74.

429. Likewise, adopting this Article's understanding of qui tam would not require disturbing the Court's extension of *Stevens* in *Sprint*. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 271, 285 (2008). A qui tam relator who "has promised to remit the proceeds of the litigation to" Congress, *see id.*, could still qualify as an Article IV official with the ability to bring a claim in an Article III court.

430. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828); *see also* Biber, *supra* note 23, at 796–97.

Property." Alternatively, Congress could create special Article IV courts to hear qui tam claims relating to "other Property." The Court of Federal Claims, which is a non-Article III tribunal with jurisdiction to hear contractor "dispute[s] concerning . . . rights in tangible or intangible property," offers one template.[431]

CONCLUSION

Qui tam's constitutionality is currently the subject of a rich scholarly debate. But scholars on both sides of the debate have overlooked a constitutional provision that is crucial to understanding Congress's authority to empower qui tam relators. That provision is the Article IV Property Clause, which gives Congress the authority to empower qui tam relators to bring claims on behalf of the United States—so long as those claims relate to federal property, as the only two qui tam statutes in modern use do. In sum, qui tam's constitutionality can largely be saved—if only we look in the right place.

431. 28 U.S.C. § 1491(a)(2).