QUI TAM LEGISLATION AND ARTICLE II: STATE CONSTITUTIONAL PRECURSORS TO THE "TAKE CARE" CLAUSE

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ABSTRACT

Anglo-American legislation since the fourteenth century has often authorized "popular" or "qui tam" enforcement, in which an uninjured "common informer" litigates to collect a forfeiture for violation of a statute. Popular enforcement has become considerably less common than in earlier centuries, but remains important because of the qui tam *provisions of the federal False Claims Act (FCA). In* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens*, the Supreme Court rejected an Article III standing challenge to* qui tam *litigation, concluding that the long history of popular enforcement means* qui tam *suits present cognizable "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." However, the* Vermont Agency *Court specifically reserved the question whether federal* qui tam *legislation might intrude on the President's Article II powers by authorizing individuals to litigate claims that should be pursued by the executive branch or to do so without proper appointment. Several Justices have expressed interest in addressing the Article II question in an appropriate case.*

If the Supreme Court does take up an Article II challenge to the FCA, one important question will be the original public meaning of Article II's Take Care Clause. How would Americans in the framing era understand the Constitution's directive that the President "shall take Care that the

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Laws be faithfully executed"? Given that Article II vests "the executive Power" in the President, would they read the Take Care Clause as conferring on the President exclusive authority to protect public rights through litigation, a power incompatible with the long English tradition of popular enforcement? If so, how does one explain the frequent inclusion of qui tam *provisions in early Acts of Congress?*

This article highlights historical evidence that speaks directly to the question of whether Americans in the ratification period would understand the Take Care Clause to preclude federal qui tam *legislation. The Take Care Clause was not created afresh at the Constitutional Convention, but instead borrowed from pre-existing state constitutions. The Pennsylvania Constitution of 1776 and the New York and Vermont Constitutions of 1777 each vested executive power in specified government officials. Each state constitution included a Take Care Clause requiring executive officials to ensure faithful execution of the laws. In the decade preceding the Constitutional Convention, the legislatures in all three jurisdictions made extensive use of popular enforcement. This decade of experience under pre-existing constitutions in three states, including the state that hosted the Constitutional Convention, provides compelling evidence that Americans in the framing generation would not understand the inclusion of a Take Care Clause in Article II as incompatible with enactment of federal* qui tam *legislation.*

From the perspective of Americans in the framing era, allowing a common informer to collect a forfeiture under a penal statute was not a delegation of executive power. The framing generation viewed qui tam *litigation as a species of private litigation, analogous in certain respects to a lawsuit by an aggrieved party. Treatise author Sir William Hawkins explained that an informer suing for a forfeiture under a penal statute did not need to allege individualized injury "because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body." Sir William Blackstone explained that, by filing suit, the informer "made the popular action his own private action" and acquired a property interest in the forfeiture that was consummated by litigating the case to judgment. This understanding of* qui tam *suits as private litigation, rather than government litigation, is confirmed by a public letter*

published in 1788 by Pennsylvania's part-time Attorney General William Bradford, responding to criticism directed at his representation of qui tam *informers in his private practice. Bradford, who later became the second Attorney General of the United States, perceived no tension between litigating cases for the state in his governmental role and simultaneously representing* qui tam *informers in his capacity as a private attorney. Several Justices of the Pennsylvania Supreme Court supported Bradford's position, affirming that a* qui tam *action "is clearly the suit of the informer, and not of the State, until judgment." Bradford's position, supported by judicial and executive officials in Pennsylvania, confirms that* qui tam *legislation was understood as authorizing private litigation, rather than delegating executive authority to pursue claims for the government.*

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INTRODUCTION

Beginning in the fourteenth century, Parliament extensively authorized *qui tam* actions and related forms of popular enforcement.[1] English penal statutes required a person who violated statutory requirements to forfeit money or property, and often provided that *anyone* could sue to collect the forfeiture.[2] The person who sued did not need to be aggrieved or injured in any particularized way.[3] Statutes authorizing such "popular actions" typically required the individual who filed suit—called a "common informer"—to split the proceeds with the government, but the informer could sometimes keep the entire recovery.[4] This English tradition of popular enforcement crossed the Atlantic and was widely embraced in the American colonies and early states.[5] Congress continued the Anglo-American practice of popular enforcement following the ratification of the Constitution, enacting many early statutes that allowed uninjured informers to collect forfeitures arising from violations of federal law.[6]

Popular enforcement has become uncommon in the United States and has disappeared altogether in England.[7] In the late nineteenth and early twentieth centuries, legislators became disillusioned with bounty-based legislation that created cynicism about the motives behind law enforcement and undermined the legitimacy of

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[1] Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 567–601 (2000) [hereinafter Beck, *English Eradication*].

[2] Randy Beck, TransUnion, Vermont Agency *and Statutory Damages Under Article III*, 77 FLA. L. REV. 161, 181–84 (2025) [hereinafter Beck, *Statutory Damages*].

[3] Randy Beck, Qui Tam *Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1255–56 (2018) [hereinafter Beck, *Government Officials*].

[4] Beck, *English Eradication*, *supra* note 1, at 551; 3 WILLIAM BLACKSTONE, COMMENTARIES *161.

[5] Beck, *Government Officials*, *supra* note 3, at 1269–91.

[6] *Id.* at 1291–305; Beck, *Statutory Damages*, *supra* note 2, at 17–27.

[7] Beck, *English Eradication*, *supra* note 1, at 553–55 (United States); *id.* at 601–08 (England).

regulatory regimes.[8] Growth in the size and resources of the government allowed legislators to shift enforcement responsibility to salaried government employees, replacing the often-controversial model of profit-motivated enforcement characteristic of popular actions.[9] Nevertheless, responding to a series of well-publicized procurement scandals, Congress chose in 1986 to incentivize greater popular enforcement through the most important remaining federal *qui tam* statute, the False Claims Act (FCA), designed to target fraud by government contractors.[10] Legislators saw expanded enforcement by *qui tam* informers—typically called "relators" in the FCA context—as a means to supplement federal enforcement resources and to overcome the perceived unwillingness of Department of Justice officials to vigorously enforce the statute.[11] The hope was that the generous bounties available under the FCA would incentivize industry whistleblowers to file *qui tam* suits based on misconduct by their government contractor employers, bringing to light fraudulent schemes that might otherwise remain undetected.[12] More recently, popular enforcement experienced an unexpected revival at the state level in the Texas law prohibiting abortion once a fetus has a detectible heartbeat.[13] The Texas legislation permitted enforcement only through privately-collected forfeitures, an effort to foreclose pre-enforcement constitutional challenges to the legislation.[14]

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[8] NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 24–48 (2013).

[9] Beck, *English Eradication*, *supra* note 1, at 601–03; PARRILLO, *supra* note 8, at 1 (describing the gradual adoption of fixed salaries for government employees in lieu of fees for services performed or outcomes achieved, making "the absence of the profit motive a defining feature of government").

[10] Beck, *English Eradication*, *supra* note 1, at 561–62.

[11] *Id.* at 562–65.

[12] *Id.* at 562–63.

[13] Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 556–57 (2022) [hereinafter Beck, *Controversial Legislation*].

[14] Erik Ramirez, Note, *In the Government's Shoes: Assessing the Legitimacy of State* Qui Tam *Provisions*, 124 COLUM. L. REV. 1121, 1126 (2024) ("The Texas legislature adopted S.B. 8 to insulate the measure from then-constitutional limits on abortion restrictions."). The Texas Court of Appeals has characterized S.B. 8 as "mostly a footnote" in light of

In response to Congress' 1986 revival of popular enforcement of the FCA, some Department of Justice officials and other observers questioned the constitutionality of federal *qui tam* statutes.[15] One concern was whether *qui tam* informers satisfy the requirements for standing to sue under Article III. A *qui tam* statute authorizes private litigation to challenge conduct that caused no particularized injury to the informer, a form of litigation difficult to square with the Court's recent case law on standing.[16] The Supreme Court laid the Article III standing issue to rest in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[17] The Court concluded that the long history of popular enforcement and the enactment of informer statutes by the First Congress demonstrated that, at the time the Constitution was ratified, "*qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[18]

A number of commentators have cited Article II, in addition to Article III standing concerns, as a basis for challenging the constitutionality of federal *qui tam* legislation.[19] Article II vests "[t]he executive Power" in "a President of the United States of America" and instructs the President to "take Care that the Laws

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the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2288 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)). *See* Weldon v. Lilith Fund for Reproductive Equity, 2024 WL 976809, *1 (Tex. Ct. App. Mar. 7, 2024). The state can now enforce a criminal statute prohibiting most abortions, so "[a]bortionists have quit doing business in Texas." *Id.* at *2. Nevertheless, cases raising issues about the enforceability of S.B. 8 under the Texas Constitution continue to work their way through the courts. *See, e.g.*, Tex. Rt. to Life v. Van Stean, 702 S.W.3d 348, 357–58 (Tex. 2024) (remanding case to lower courts to address plaintiffs' standing). Since Article II of the U.S. Constitution concerns the structure and powers of the federal government, a state *qui tam* statute does not raise the Article II issues addressed in this article.

[15] *See* Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. O.L.C. 207, 249–50 (1989); Ara Lovitt, Note, *Fight for Your Right to Litigate:* Qui Tam, *Article II, and the President*, 49 STAN. L. REV. 853 (1997); *see also* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999), *rev'd*, 252 F.3d 749 (5th Cir. 2001) (en banc).

[16] *See* Beck, *Government Officials*, *supra* note 3, at 1249–59.

[17] 529 U.S. 765, 771–78 (2000).

[18] *Id*. at 777–78 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

[19] *See, e.g.*, Lovitt, *supra* note 15, at 867.

be faithfully executed."[20] Several Supreme Court cases have relied on these provisions to conclude that government litigation enforcing the laws or vindicating public rights falls within the "executive power" constitutionally vested in the President.[21]

Starting from the premise that someone litigating public rights is "executing" the laws, the Article II argument against *qui tam* legislation takes two related forms. First, from a separation of powers perspective, defendants have argued that authorizing an uninjured informer to enforce a law protecting interests of the public impermissibly undermines presidential authority by delegating executive power to a private citizen.[22] Second, considered through an appointment power lens, critics of *qui tam* legislation have argued that the power to litigate public rights can be vested only in an "officer of the United States" appointed in conformity with the Appointments Clause.[23] While the *Vermont Agency* Court found that *qui tam* relators satisfy Article III standing requirements, the majority expressed "no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."[24] Three Supreme Court Justices have recently argued that the Court should look for an opportunity to resolve the Article II issue.[25]

If the Supreme Court does take up an Article II challenge to the FCA, one important question will be the original public meaning of

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[20] U.S. CONST. art. II, §§ 1, 3.

[21] *See infra* notes 38–53 and accompanying text.

[22] *See* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 523–29 (5th Cir. 1999), *rev'd*, 252 F.3d 749 (5th Cir. 2001) (en banc).

[23] *See id.* at 531 (citing U.S. CONST. art. II, § 2, cl. 2).

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

[25] United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741–42 (2023) (Thomas, J., dissenting); *id.* at 1737 (Kavanaugh, J., concurring, joined by Barrett, J.); *see also* Wis. Bell, Inc. v. United States *ex rel.* Heath, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., concurring, joined by Thomas, J.) ("The [FCA's] *qui tam* provisions raise substantial constitutional questions under Article II. . . . In an appropriate case, the Court should consider the competing arguments on the Article II issue.").

Article II's Take Care Clause.[26] How would reasonably well-informed Americans in 1789 understand the Constitution's instruction that the President must "take Care that the Laws be faithfully executed"?[27] Would they read the clause as conferring on the President an exclusive power to protect public rights through litigation, a power incompatible with the long English tradition of popular enforcement? If so, how does one explain the frequent resort to *qui tam* legislation by early members of Congress, many of whom participated in the Constitutional Convention?[28]

This article highlights historical evidence that speaks directly to the question of whether Americans in the ratification period would understand the federal Take Care Clause to conflict with *qui tam* legislation. The Take Care Clause was not created afresh at the Constitutional Convention, but instead borrowed from pre-existing state constitutions.[29] The Pennsylvania Constitution of 1776 and the New York and Vermont Constitutions of 1777 each vested executive power in specified government officials.[30] Each state constitution included a Take Care Clause requiring executive officials to ensure the faithful execution of the laws.[31] In the decade preceding the Constitutional Convention, the legislatures in all three jurisdictions made extensive use of popular enforcement,

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[26] *See* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 144 S. Ct. 1474, 1488–89 (2024) (discussing appropriate sources to determine the "original public meaning" of the term "Appropriations" in Article I); Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (discussing evidence that the "original public meaning" of the phrase "trial by an impartial jury" in the Sixth Amendment required a unanimous jury).

[27] U.S. CONST. art. II, § 3.

[28] *Cf.* Burrow-Giles Lithographic Co. v. Sarcony, 111 U.S. 53, 57 (1884) ("The construction placed upon the constitution by [statute], by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.").

[29] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2116 (2019).

[30] *See infra* notes 82, 173 & 245 and accompanying text.

[31] *See infra* notes 94, 181, 247 & 290 and accompanying text.

notwithstanding the Take Care Clause in each state constitution.[32] This decade of experience under pre-existing constitutions in three states, including the state that hosted the Constitutional Convention, provides compelling evidence that framing-era Americans would not have understood inclusion of a Take Care Clause in Article II as incompatible with enactment of federal *qui tam* legislation.

The argument proceeds in three stages. Part I considers the Article II challenge to federal *qui tam* legislation, highlighting case law characterizing litigation of public rights as a component of "executive power" and cases suggesting that being authorized to initiate and conduct such litigation makes the litigant an "officer of the United States" subject to the Appointments Clause.[33] Part II reviews historical evidence from Pennsylvania, New York, and Vermont showing frequent enactment of legislation authorizing actions by common informers, notwithstanding state constitutional provisions comparable to those found in Article II.[34]

Part III considers why Americans in the framing-era might have considered legislation allowing collection of forfeitures by private informers compatible with a constitutional provision making government officials responsible to ensure faithful execution of the laws.[35] Execution of the laws in the framing period generally referred to a subset of the activities pursued by government officials. A *qui tam* suit, on the other hand, was viewed as a species of private litigation, analogous in some respects to a lawsuit by an aggrieved private party (who also can be described as "enforcing" the law). While a *qui tam* action might have legal consequences affecting the government—such as a right to share in a successful recovery, or a bar on asserting a duplicative claim—the informer was not thought of as carrying out a governmental function. From the perspective of framing-era Americans, allowing a common

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[32] *See infra* Parts II.A.2, II.B.2, II.C.2 & II.C.4.

[33] *See infra* Part I.

[34] *See infra* Part II.

[35] *See infra* Part III.

informer to enforce a statutory forfeiture benefiting the public would not be viewed as a delegation of executive power, any more than allowing an aggrieved party to enforce a statutory forfeiture for unlawful conduct. A public letter published in 1788 by Pennsylvania's part-time Attorney General William Bradford confirms this distinction between government and private litigation.[36] Bradford, with support from several Justices of the Pennsylvania Supreme Court, perceived no tension or incompatibility between litigating cases for the state in his governmental role and simultaneously representing *qui tam* informers in his capacity as a private attorney.[37]

I. ARTICLE II OBJECTIONS TO FEDERAL *QUI TAM* LEGISLATION

The Supreme Court has long cited Article II's Take Care Clause as support for a presidential power to supervise those who execute the laws. The Court has also classified government enforcement litigation as an exercise of executive power. These precedents have fueled arguments that *qui tam* informers violate Article II by executing the laws without presidential appointment or supervision.

A. Presidential Supervision of Government Enforcement Litigation

In *Myers v. United States*, the Court determined that a postmaster appointed with Senate advice and consent was properly removed from office by the President without Senate approval, even though his four-year statutory term of office had not concluded.[38] The Court looked to the text of the Take Care Clause, among other evidence, to find a presidential power to remove executive officers:

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[36] *See* William Bradford, Correspondence of Attorney General William Bradford and the President in Council, PA. PACKET & DAILY ADVERTISER, at 3 (Jan. 16, 1788).

[37] *See infra* notes 323–39 and accompanying text.

[38] 272 U.S. 52, 107–08, 176 (1926).

> As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.[39]

The President's constitutional responsibility to ensure "the effective enforcement of the law" implicitly required "as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal."[40] In the century since former President Taft wrote the Court's opinion in *Myers*, the Court has developed a nuanced case law permitting Congress to sometimes impose limited qualifications on the President's removal power, but has continued to rely on the Take Care Clause for a constitutional principle that subjects executive officials to some level of presidential supervision.[41]

The Court made comparable use of the Take Care Clause when it applied the Appointments Clause in *Buckley v. Valeo*. In the initial legislation creating the Federal Election Commission (FEC), none of the FEC's six voting members had been appointed in a manner satisfying the technical requirements of the Appointments Clause:

> Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well. The remaining four voting members of the Commission are appointed by the President

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[39] *Id.* at 117.

[40] *Id.* at 132.

[41] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020).

> *pro tempore* of the Senate and by the Speaker of the House. While the second part of the Clause authorizes Congress to vest the appointment of the officers described in that part in "the Courts of Law, or in the Heads of Departments," neither the Speaker of the House nor the President *pro tempore* of the Senate comes within this language.[42]

The statutory arrangements for appointments to the FEC led the Court to inquire "which, if any, of [the FEC's statutory] powers may be exercised by the present voting Commissioners, none of whom was appointed as required by [the Appointments] Clause."[43]

The Court concluded that the FEC could constitutionally be given powers that Congress could give to its own committees, such as "investigative and informative" responsibilities.[44] However, the Court reached a different conclusion regarding the enforcement powers given to the Commission:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."[45]

Quoting an earlier opinion, the Court noted that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged

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[42] Buckley v. Valeo, 424 U.S. 1, 126–27 (1976) (per curiam) (quoting U.S. CONST. art. II, § 3, cl. 2).

[43] *Id.* at 137.

[44] *Id.*

[45] *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

with the duty of such enforcement."[46] Therefore, provisions of the statute "vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violated Article II.[47] "Such functions may be discharged only by persons who are 'Officers of the United States' within the language of" the Appointments Clause.[48]

The Court again addressed Article II issues in *Morrison v. Olson*, concerning the now-expired provisions of the Ethics in Government Act allowing the appointment of an independent counsel to investigate and prosecute criminal conduct by high-level executive branch officials.[49] With respect to the Appointments Clause, the Court determined that the independent counsel was an "inferior officer," because she could be removed by the Attorney General for "good cause" and possessed only limited jurisdiction and duties.[50] The Court found the Act's provision for judicial selection of the independent counsel consistent with the Appointments Clause, which allows Congress to vest appointment of inferior officers in the "courts of Law."[51] Turning to broader Article II concerns, the Court found "no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the executive branch."[52] The Court concluded, however, that the Act did not unduly interfere with the role of the executive branch, in part because it gave "the Attorney General several means of supervising or controlling" the independent counsel's exercise of prosecutorial powers, including the "good cause" removal provision, which

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[46] *Id.* at 139 (quoting Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 202 (1928)).

[47] *Id.* at 140.

[48] *Id.*

[49] 487 U.S. 654, 659–60 (1988); *see also* Richard Samp, *Good-bye,* Morrison v. Olson, LAW & LIBERTY (Sep. 7, 2021), https://lawliberty.org/good-bye-morrison-v-olson/ [https://perma.cc/BT7G-EHE5].

[50] *Morrison*, 487 U.S. at 671–72.

[51] *Id.* at 673–77.

[52] *Id.* at 691.

afforded a "substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel."[53]

B. Article II Objections to Qui Tam *Litigation Under the FCA*

Following the 1986 amendments designed to increase *qui tam* litigation under the FCA, defendants began challenging the constitutionality of the statute.[54] A disagreement arose within the Department of Justice (DOJ) about how to respond to the litigation. The Solicitor General's office advocated for defending the facial constitutionality of the statute on historical grounds.[55] The Office of Legal Counsel (OLC) wrote and later published a memorandum arguing, along with the Civil Division and the Office of Legal Policy, that *qui tam* legislation threatens presidential power and DOJ should join those contesting the constitutionality of the FCA's *qui tam* provisions.[56]

OLC's memorandum raised the Article III standing argument that was ultimately rejected by the *Vermont Agency* Court.[57] In addition, OLC presented Article II arguments based on the Appointments Clause and constitutional separation of powers principles. With respect to the Appointments Clause, OLC highlighted *Buckley*'s language indicating that "conducting civil litigation in the courts of the United States for vindicating public rights" is a function that "may be discharged only by persons who

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[53] *Id.* at 696.

[54] *See, e.g.*, United States v. Gen. Contractors, Inc., 1990 WL 455191 (E.D. Wash. Dec. 4 1990); United States *ex rel.* Truong v. Northrop, 728 F. Supp. 615 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989).

[55] *See* Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. O.L.C. 207, 212–14 (1989).

[56] *Id.* at 208.

[57] *Compare id.* at 224–28, *with* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000).

are 'Officers of the United States.'"[58] *Buckley* had defined an "Officer of the United States" subject to the Appointments Clause as "any appointee exercising significant authority pursuant to the laws of the United States."[59] OLC contended that *qui tam* relators under the FCA "exercis[e] significant governmental power."[60] A relator can litigate a fraud claim against a defendant on behalf of the United States, even if the Attorney General concludes that the defendant had not committed fraud or that proceeding with an FCA claim would be inappropriate.[61] FCA relators exercise this power even though they are not appointed in the manner required by the Appointments Clause and, indeed, "hold no commission under the United States."[62]

OLC's separation-of-powers argument drew a contrast with *Morrison v. Olson*. In holding that appointment of an independent counsel did not violate the separation of powers, the *Morrison* Court relied upon features of the Ethics in Government Act allowing the Attorney General to exert sufficient control over the independent counsel to ensure faithful execution of the laws.[63] OLC argued that the FCA *qui tam* provisions did not give the Attorney General comparable means of control over a relator.[64] Of particular significance, in OLC's view, was the relator's ability to initiate and litigate an action on behalf of the United States without the Attorney General's approval.[65] OLC emphasized that the FCA *qui tam* provision "removes from the executive branch the prosecutorial discretion that is at the heart of the President's power to execute the laws" and gives the relator a voice in important

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[58] Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. O.L.C. at 221 (quoting Buckley v. Valeo, 424 U.S. 1, 140 (1976)).

[59] *Buckley*, 424 U.S. at 125–26.

[60] Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. O.L.C. at 222.

[61] *See id.*

[62] *Id.* at 221.

[63] Morrison v. Olson, 487 U.S. 654, 696 (1988).

[64] Constitutionality of the *Qui Tam* Provisions of the False Claims Act, 13 Op. O.L.C. at 229–31.

[65] *Id.* at 229–30.

litigation decisions even in cases where the Justice Department intervenes.[66]

The Article II arguments against the FCA *qui tam* provisions have enjoyed only limited success in the courts. A Fifth Circuit panel did find the FCA unconstitutional on Article II grounds in a 2-1 decision, but the ruling was reversed by the en banc court.[67] Several other circuit courts have rejected Article II challenges to the statute.[68] Nevertheless, the issue has not been definitively resolved by the Supreme Court and rests on propositions finding arguable support in Supreme Court dicta.

The lingering uncertainty over Article II and federal *qui tam* legislation came to the surface recently in *United States ex rel. Polansky v. Executive Health Resources, Inc.*[69] *Polansky* was a statutory interpretation case in which the Court determined that the government could move to intervene in an FCA case that it had initially elected not to pursue and, once it had intervened, could seek to dismiss the action over the relator's objection.[70] In a solo dissent, Justice Thomas disagreed with the majority's reading of the statute, finding that the FCA did not give the government a unilateral right to dismiss an action if it intervened after the case was under way.[71] However, he also believed this perceived statutory limitation on dismissal by the government raised the question of whether the FCA satisfies Article II.[72] He therefore would have remanded the case for the Third Circuit to consider in the first instance the "substantial arguments . . . that private relators

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[66] *Id.* at 228–29.

[67] *See* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999), *rev'd*, 252 F.3d 749 (5th Cir. 2001) (en banc).

[68] *See, e.g.*, United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 804–07 (10th Cir. 2002); United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1040–42 (6th Cir. 1994); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 749–59 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1155 (2d Cir. 1993).

[69] 143 S. Ct. 1720 (2023).

[70] *Id.* at 1727.

[71] *Id.* at 1737 (Thomas, J., dissenting).

[72] *Id.* at 1740–41.

may not represent the interests of the United States in litigation."[73] Justice Kavanaugh wrote a short concurring opinion, joined by Justice Barrett.[74] Justice Kavanaugh agreed with Justice Thomas that there were substantial arguments concerning the constitutionality of *qui tam* legislation and expressed the view that "the Court should consider the competing arguments on the Article II issue in an appropriate case."[75] The expression of interest in the Article II question by three Supreme Court Justices has spurred additional Article II challenges in FCA litigation. Following the Court's opinion in *Polansky*, a federal district court in Florida ruled that the FCA's *qui tam* provisions violate the Appointments Clause.[76] A Fifth Circuit judge has argued in a concurring opinion that the FCA violates both the Appointments Clause and the Take Care Clause, and another Fifth Circuit Judge joined the call to revisit circuit precedent on the Article II issue.[77] However, a number of federal district courts have rejected Article II challenges.[78]

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[73] *Id.* at 1740–42.

[74] *Id.* at 1737 (Kavanaugh, J., concurring, joined by Barrett, J.).

[75] *Id.* Justices Kavanaugh and Thomas reaffirmed their interest in addressing the Article II question in a more recent concurring opinion. *See* Wis. Bell, Inc. v. United States *ex rel.* Heath, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., concurring, joined by Thomas, J.).

[76] *See* United States *ex rel.* Zafirov v. Fla. Med. Assocs., 751 F. Supp. 3d 1293, 1322 (M.D. Fla. 2024); *see also* United States *ex rel.* Gose v. Native Am. Servs. Corp., 2025 WL 1531137, at *1 (M.D. Fla. May 29, 2025). *Zafirov* has been appealed, but the Eleventh Circuit has not yet issued an opinion.

[77] *See* United States *ex rel.* Montcrief v. Peripheral Vascular Assocs., 133 F.4th 395, 410–12 (5th Cir. 2025) (Duncan, J., concurring); *see also* United States *ex rel.* Gentry v. Encompass Health Rehab. Hosp. of Pearland, L.L.C., 157 F.4th 758, 766–67 (5th Cir. 2025) (Ho, J., concurring).

[78] *See, e.g.*, United States *ex rel.* Heath v. Wis. Bell, Inc., 2025 WL 3033792, at *12–13 (E.D. Wis. Oct. 29, 2025) (rejecting Article II challenges); United States *ex rel*. McCullough v. Anthem Ins. Cos., Inc., 2025 WL 2782576, at *15–16 (S.D. Ind. Sep. 30, 2025) (same); United States *ex rel.* Stenson v. Radiology Ltd., 2025 WL 1785266, at *2 (D. Ariz. June 27, 2025) (rejecting Article II arguments based on Ninth Circuit precedent); United States *ex rel.* Permenter v. Eclinicalworks, LLC, 2025 WL 1762264, at *11 (M.D. Ga. June 25, 2025) (rejecting Article II arguments because "every Circuit court that has considered the issue has upheld the constitutionality of the FCA's qui tam

II. POPULAR ENFORCEMENT AND STATE TAKE CARE CLAUSES

Article II arguments against federal *qui tam* legislation rest on inferences from the clause vesting executive power in the President and the instruction that the President should "take Care that the Laws be faithfully executed." The arguments draw support from precedent, invoking language from opinions like *Myers*, *Buckley*, and *Morrison*. But can Article II arguments against *qui tam* legislation be justified under an originalist theory of constitutional interpretation? Is the constitutional challenge to *qui tam* legislation supported by the original public meaning of Article II's text? Would eighteenth century Americans have understood the Take Care Clause to be incompatible with the long Anglo-American history of popular enforcement? Historical evidence from states with Take Care Clauses in their state constitutions strongly supports a negative answer. In the years leading up to the U.S. Constitutional Convention, the legislatures of Pennsylvania, New York, and Vermont made extensive use of popular enforcement, notwithstanding state constitutional provisions instructing executive officials to ensure faithful execution of the laws.[79]

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provisions"); United States *ex rel*. Publix Litig. P'ship v. Publix Super Mkts, Inc., 2025 WL 1381993, at *3 (M.D. Fla. May 13, 2025) (rejecting Article II arguments because "the overwhelming weight of the law is to the contrary at this time"); United States *ex rel.* Adler v. Sporn Co., 2025 WL 1371272, at *17 (D. Vt. May 12, 2025) (finding *Zafirov* unpersuasive); Kenley Emergency Med. v. Schumacher Grp. of La. Inc., 2025 WL 1359065, at *5 (N.D. Cal. May 9, 2025) (claiming to be bound by Ninth Circuit precedent); United States *ex rel.* Gonite v. UnitedHealthcare of Ga., Inc., 2025 WL 1184109, at *3–4 (M.D. Ga. Apr. 23, 2025) (rejecting Article II challenges); United States *ex rel.* Penelow v. Janssen Prods., LP, 2025 WL 937504, at *12 (D.N.J. Mar. 28, 2025) (same); United States *ex rel.* Adams v. Chattanooga Hamilton Cnty. Hosp. Auth., 2024 WL 4784372, at *2–3 (E.D. Tenn. Nov. 7, 2024) (rejecting Article II arguments based on Sixth Circuit precedent).

[79] *Qui tam* enforcement was common throughout the American colonies and states before and after the Declaration of Independence. *See* Beck, *Government Officials*, *supra* note 3, at 1269–91. This article focuses on Pennsylvania, New York, and Vermont because those states included a Take Care Clause in their state constitutions prior to the U.S. Constitutional Convention. However, one could easily show similarly extensive use of popular enforcement in other American states in the framing era. *See, e.g.*, Randy Beck, *Standing to Litigate Public Rights in Georgia Courts*, 75 MERCER L. REV. 297, 303–13

A. Pennsylvania

Pennsylvania adopted a 1776 constitution that vested executive power in specified officials and instructed them to ensure faithful execution of the laws. Notwithstanding the inclusion of a Take Care Clause in the state constitution, the Pennsylvania legislature included *qui tam* provisions in a wide range of statutes. The Pennsylvania Council of Censors, tasked with investigating and reporting violations of the state constitution, raised no issue regarding the legislature's extensive reliance on popular enforcement.

1. The Pennsylvania Constitution of 1776

Pennsylvania adopted a state constitution in 1776, consisting of a Declaration of Rights and a Frame of Government.[80] The 1776 Constitution vested the "supreme legislative power" in a unicameral General Assembly called the "[H]ouse of [R]epresentatives,"[81] and provided that "[t]he supreme executive power shall be vested in a [P]resident and [C]ouncil."[82] The Executive Council consisted of twelve members elected for staggered three-year terms to represent the city of Philadelphia and Pennsylvania's then-eleven counties.[83] One member of the Council was chosen annually to serve as President by a joint ballot of the General Assembly and the Council, and another Council member was selected to serve as Vice President.[84]

(2023) (discussing Georgia *qui tam* statutes from the colonial period through the beginning of the nineteenth century). Early Congresses also adopted numerous federal statutes providing for popular enforcement. Beck, *Government Officials*, *supra* note 3, at 1291–305; Beck, *Statutory Damages*, *supra* note 2, at 185–99; Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776–77 (2000).

[80] PA. CONST. of 1776.

[81] *Id.* § 2.

[82] *Id.* § 3.

[83] *Id.* § 19.

[84] *Id.*

A range of executive powers were conferred on Pennsylvania's President and Council, including many that foreshadowed those that would later be conferred on the U.S. President under the United States Constitution. The Pennsylvania President and Council could appoint and commission judges and "all other officers, civil and military," except those chosen by the General Assembly or elected by the people.[85] They could fill vacancies in offices until a new office holder could be selected in the legally prescribed manner.[86] The President and Council could lay before the General Assembly "such business as may appear to them necessary."[87] They could pardon most offenses and remit fines.[88] They could draw from the Treasury sums appropriated by the General Assembly.[89] The President of the Council was "commander in chief of the forces of the State," though he could not command troops in person except with the Council's approval.[90]

All judicial, executive, and military officers were required to swear or affirm allegiance to the newly independent Commonwealth, promising not to do anything "prejudicial or injurious to the constitution or government" of Pennsylvania.[91] They were also required to take an oath to "faithfully execute the office" conferred and to "do equal right and justice to all men, to the best of my judgment and abilities, according to law."[92] These required oaths anticipated in substance the oath required of the

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[85] *Id.* § 20. They also had power to commission local sheriffs and coroners selected by election. *Id.* § 31.

[86] *Id.* § 20.

[87] *Id.*

[88] *Id.* The pardon power did not extend to impeachments, and in cases of murder or treason, the President and Council were limited to granting temporary reprieves that would terminate at the end of the next legislative session.

[89] *Id.*

[90] *Id.* Other powers of the President and Council differed from those of the U.S. President. For instance, the Pennsylvania President and Council could try impeachments, advised by the Justices of the Pennsylvania Supreme Court. *Compare* U.S. CONST. art. I, § 3 (vesting the Senate with the sole power to try impeachments), *with* PA. CONST. of 1776, § 20.

[91] PA. CONST. of 1776, § 40.

[92] *Id.*

President under the U.S. Constitution, who must promise "that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[93] The 1776 Pennsylvania Constitution likewise foreshadowed the federal Take Care Clause. The Pennsylvania President and Council were instructed to "take care that the laws be faithfully executed."[94] Requiring officials to swear to "faithfully execute" an office had a long tradition in Anglo-American government.[95] The fact that the Take Care Clause shared language with these time-honored oath requirements provides context, illuminating how the "faithfully executed" language of the Take Care Clause would have been understood.[96]

2. Pennsylvania Legislation Providing for Popular Enforcement

Notwithstanding the Pennsylvania Constitution's provisions vesting executive power in the President and Council and requiring them to ensure faithful execution of the laws, the fourth statute enacted by the new Pennsylvania General Assembly included a forfeiture subject to popular enforcement by a common informer. The legislation laid out procedures for the election of justices of the peace in Philadelphia and in counties throughout the state.[97] In the four northern and western Pennsylvania counties—those furthest from Philadelphia—the statute required overseers of the poor in each township to "appoint a place for holding the said election in

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[93] U.S. CONST. art. II, § 1.

[94] PA. CONST. of 1776, ch. II, § 20. Similar language had previously appeared in "a frame of government for colonial Pennsylvania." Kent, Leib & Shugerman, *supra* note 29, at 2116.

[95] Kent, Leib & Shugerman, *supra* note 29, at 2117–18.

[96] *Id.* at 2118–19 (noting that the "faithful execution" language of official oaths imposed obligations that "look a lot like *fiduciary* duties in the private law as they are understood today").

[97] *See* Act of Feb. 5, 1777 [hereinafter Act for Electing Justices of the Peace], *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 41 (James T. Mitchell & Henry Flanders eds., 1903).

their respective townships and give public notice thereof by advertising the same at six or more public places at least ten days before the time appointed."[98] The legislature imposed these obligations on local overseers "under the penalty of ten pounds for every refusal or neglect, to be paid to the person that will sue for them."[99] The provision authorizing such suits echoes Blackstone's discussion of statutory forfeitures "given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same."[100]

The General Assembly considered the options and made a deliberate decision to rely on common informers to enforce the statutory provisions regarding the advertisement of justice of the peace elections in remote counties. A different section of the statute imposed a more extensive set of duties on commissioners and assessors in the seven Pennsylvania counties closer to Philadelphia, requiring those officials to meet and divide their counties into electoral districts, and then to advertise voting locations.[101] Commissioners and assessors in these more populous counties were subject to a larger twenty pound forfeiture if they neglected to appear and perform their statutory duties.[102] The legislature did not provide for popular enforcement of these forfeitures, but instead specified that the twenty pounds would be paid to the county treasurer and would be collected by the other commissioners and assessors who complied with the statute.[103] Thus, in a single statute, we find one forfeiture enforceable by a common informer and a distinct forfeiture enforceable only by public officials.

The General Assembly's decision to have public officials enforce forfeitures incurred near population centers, while relying on

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[98] *Id.* § 5 (§6 P.L.), at 43–44. This provision applied to overseers of the poor in Cumberland, Bedford, Northumberland, and Westmoreland counties.

[99] *Id.* at 44.

[100] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *161.

[101] *See* Act for Electing Justices of the Peace, *supra* note 97, § 2 (§3 P.L.), at 41–42.

[102] *Id.* § 3 (§4 P.L.), at 42.

[103] *Id.*

common informers in more remote areas, highlights a theme in the history of popular enforcement. Popular actions were often used historically to enforce regulation of decentralized conduct likely to occur outside the view of public officials.[104] The statute also illustrates the tendency to authorize popular enforcement in early American election law, perhaps as a way to bolster public confidence that laws governing electoral contests would not be ignored.[105] The Pennsylvania legislature again relied on common informers in the election law context a few months later in a statute regulating General Assembly elections. The legislation imposed variable forfeitures on election judges and inspectors, and smaller variable forfeitures for overseers of the poor or constables who neglected, refused, or willfully misbehaved in performing election-related duties.[106] The fines and penalties imposed by the statute were divided "one-half thereof to the person or persons who will sue or prosecute for the same and the other half to the public treasury of this state."[107] In 1785, following the conclusion of the Revolutionary War, Pennsylvania enacted a wide-ranging overhaul of the State's election laws, including an enforcement provision specifying that forfeitures imposed under the act, unless otherwise directed, could be recovered by "any person who shall sue for the same . . . to the use of the informer or prosecutor."[108]

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[104] *See* Beck, *Government Officials*, *supra* note 3, at 1262–65, 1269–85.

[105] *Id.* at 1286–88. Popular actions created an avenue for statutory enforcement even if executive officials proved unwilling to enforce the law. *Id.* at 1265.

[106] *See* Act of June 14, 1777, § 9 (§ 21 P.L.), *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 123.

[107] *Id.* A statute the following year, however, provided for county commissioners to enforce a distinct forfeiture applied to election judges. *See* Act of Mar. 23, 1778, §4 (§ 5 P.L.), *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 224 (providing for up to twenty pound forfeitures for election judges failing to provide timely notice to election victors "for the use of the commonwealth, to be recovered by the commissioners of the county where such offense shall happen").

[108] *See* Act of Sep. 13, 1785, § 25 (§ 33 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 48–49 (James T. Mitchell & Henry Flanders eds., 1906).

The Pennsylvania General Assembly also relied on popular enforcement in early legislation arising from the military conflict with Great Britain. One statute authorized a popular action against anyone who contracted to take an assignment of pension benefits awarded to soldiers and sailors injured in the war.[109] The goal was presumably to protect wounded veterans against predatory behavior and ensure that they would not be tempted to alienate a needed source of support.[110] A person who illegally contracted to purchase a veteran's pension rights was required to forfeit the contract amount "to any person who will sue or prosecute for the same."[111] The statute authorized the pensioner to testify, even if serving as the prosecutor.[112] The legislature thus recognized that the statute could be used by an aggrieved pensioner to recover compensation, but nevertheless authorized anyone to sue if the aggrieved party did not.[113]

Another war-related statute provided that persons refusing to swear loyalty to the Pennsylvania state government could not serve in various professions, with violators subject to a large forfeiture (up to £500) split between the state and "him, her or them who shall commence and carry on such prosecution with effect."[114] A person neglecting to take the loyalty oath could also be sued by a common informer to require the surrender of any weapons and ammunition they possessed.[115] A separate section of the statute sought to prevent transmission of intelligence to the enemy, authorizing *qui*

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[109] *See* Act of Sep. 18, 1777, *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 140.

[110] The statute contained an exception if the consideration for the assignment was maintaining the veteran for life or as long as the pension continued. *Id.* § 3, at 144–45.

[111] *Id.* at 145.

[112] *Id.*

[113] *Id.*

[114] Act of Apr. 1, 1778, § 2 (§ 3 P.L.), *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 239–40.

[115] *Id.* § 4 (§ 5 P.L.), at 242 (providing that the defendant "shall forfeit the said arms and ammunition to the state, and also double the value thereof to such person or persons who shall discover the same to any justice of the peace . . . and shall legally prosecute him to conviction").

tam litigation against any individual who traveled, without written authorization, to Philadelphia (while under British control) or other areas of the state behind enemy lines.[116]

A number of Pennsylvania statutes enacted between 1777–1788 deployed common informers to regulate and facilitate commercial activities, consistent with a regular use of such legislation in English law.[117] A wartime statute established forfeitures for importing merchandise from Great Britain, "one-half thereof to the use of the informer, and the other half to the use of this commonwealth."[118] Another statute allowed a popular action when someone sought to sell merchandise by public auction, advertised such an auction, or worked as a traveling peddler or hawker.[119] Those involved in the production of flour or bread for export could be sued by an informer if they neglected to register their brands in a timely fashion with a local clerk.[120] The master of a ship that

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[116] *Id.* §§ 4–5 (§ 6 P.L.), at 242–43.

[117] Beck, *English Eradication*, *supra* note 1, at 591.

[118] Act of Sep. 10, 1778, § 5 (§ 6 P.L.), *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 290–91. A distinct provision of the statute created a forfeiture if goods were landed in the state or found on a ship that was not reported in the manifest provided to the port's naval officer. That forfeiture was to be enforced through seizure by the naval officer, but the statute nevertheless provided that the proceeds would go "one half to the informer, and the other half to the use of this state." *Id.* § 7 (§ 8 P.L.), at 292.

[119] Act of Nov. 26, 1779, §§ 2, 9–10 (§§ 4, 15–16 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 17, 21–22 (James T. Mitchell & Henry Flanders eds., 1904). The public auctioneer for the city of Philadelphia was authorized to sue for offenses occurring within his jurisdiction, "but not exclusive of any other person who will sue or prosecute for the same." *Id.* § 4 (§ 9 P.L.), at 19. Later legislation enlisted common informers to enforce a rule preventing an appointed public auctioneer from purchasing auctioned merchandise. Act of Dec. 9, 1783, § 2 (§ 3 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 226–27 (James T. Mitchell & Henry Flanders eds., 1906). After the war, the legislature relaxed the ban on hawkers and peddlers, but authorized *qui tam* actions against anyone who pursued that profession without obtaining a license under the statute. Act of Mar. 30, 1784, §§ 1–2 (§§ 2–3 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 295–96.

[120] Act of Dec. 28, 1781, § 2 (§ 3 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 379–80. A subsequent law appeared to allow common informers to work alongside public officials to enforce rules against

continued to occupy a public wharf twenty-four hours after being asked to vacate could be sued for £100, "half to him that will sue for the same."[121] An individual who built a toll bridge in Lancaster County could be sued for charging higher rates than the legislation authorized, with half of the proceeds going to "the party complaining or who may sue for the same."[122] And the lighthouse keeper for Cape Henlopen (near Philadelphia) could be sued for up to £250 for neglect of duty, "one half thereof to him who shall sue or prosecute for the same."[123]

As we observed in the election law statutes discussed above, it was relatively common in eighteenth century Anglo-American legislation to permit popular actions against government officials who failed to perform legal duties.[124] Legislators found popular enforcement particularly appropriate to monitor conflicts of interest affecting regulatory officials.[125] The Pennsylvania legislature provided that a public inspector of flour had to pay a forfeiture to a common informer if he sought to sell or trade in the commodity he was responsible to regulate.[126] Similarly, those

misbranding flour for export. Act of Sep. 15, 1784, § 2 (§ 3 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 380. Someone misbranding inferior quality flour as "superfine" would forfeit £100 to the Commonwealth, to be collected by the Attorney General. *Id.* In addition, the casks of flour violating the statute could be seized and forfeited, "one-half for the use of the commonwealth, and the other half to the inspector or other person who shall prosecute such offender to conviction." *Id.*

[121] Act of Apr. 1, 1784 [hereinafter Supplement Respecting Wardens of Philadelphia], § 6 (§ 9 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 343.

[122] Act of Sep. 22, 1787, § 3 (§ 4 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 108, at 526.

[123] Act of Oct. 4, 1788, § 33 (§ 33 P.L.), *reprinted in* 13 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 116 (James T. Mitchell & Henry Flanders eds., 1908).

[124] Beck, *Government Officials*, *supra* note 3, at 1239.

[125] *Id.* at 1265, 1285–86, 1305.

[126] Act of Apr. 5, 1781, § 14 (§ 16 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 294.

appointed as corders of wood faced a popular action if they sought to purchase firewood for the purpose of resale.[127]

The Pennsylvania legislature repeatedly enlisted informers to help implement regulations designed to prevent over-fishing of important waterways. Informers could recover fines from those using brush nets in the Schuylkill River,[128] using multiple nets in the Schuylkill River, net fishing at prohibited times and locations,[129] or using multiple nets, fishing dams, or other prohibited techniques in the Delaware and Lehigh Rivers.[130] Legislators likewise incorporated common informers into the machinery of currency regulation. A seller who refused to take bills of credit issued by the state, or who offered a lower price for payment in gold or silver, would forfeit the value of the items offered for sale, "one moiety thereof to the person or persons giving information of the same and prosecuting the offender to conviction."[131] Informers could likewise collect forfeitures from individuals counterfeiting or altering the face value of bills of credit.[132]

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[127] Supplement Respecting Wardens of Philadelphia, *supra* note 121, § 4 (§ 8 P.L.), at 341–42.

[128] Act of Mar. 24, 1781, § 3 (§ 4 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 271.

[129] Act of Mar. 28, 1785, §§ 1, 5–6, 8 (§§ 4, 8–9, 12 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 522–26; *see also* Act of Mar. 9, 1786, § 3 (§ 5 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 108, at 195 (doubling fines and penalties and providing "one-half to the informer or prosecutor.").

[130] Act of Mar. 30, 1784, §§ 1, 6 (§§ 2, 8 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 300–01, 303.

[131] Act of Apr. 7, 1781, § 8 (§ 10 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 306. *See also* Act of Dec. 23, 1780, § 3 (§ 4 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 250 (providing for the forfeiture of double the value of goods for refusing authorized bills of credit or offering reduced prices for gold or silver, half payable to informer).

[132] Act of Mar. 16, 1785, § 43 (§ 58 P.L.), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 484–85 (providing half of forfeiture "to the use of the person or persons who shall make discovery of such offence and prosecute such offender to conviction"); *see also* Act of Nov. 26, 1779, § 1 (§ 5 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note

Pennsylvania legislation in the years leading up to the U.S. Constitutional Convention included an eclectic assortment of other forfeitures enforceable through *qui tam* or popular actions. Common informers were deployed to suppress vices like Sabbath-breaking, profane swearing, cursing, cock fighting, gambling, and dueling.[133] Popular actions were used to help protect Philadelphians against unsafe stockpiling or transportation of gunpowder,[134] to enforce several provisions of the Pennsylvania law for the gradual abolition of slavery,[135] and to prevent the construction of party walls that might encroach on city streets before surveyors had established accurate property boundaries.[136]

Two other statutes bear special mention as we consider the relationship between the Pennsylvania Constitution's Take Care Clause and the enactment of *qui tam* legislation. We are examining whether the vesting of "supreme executive power" in Pennsylvania's President and Council, along with the responsibility to "take care that the laws be faithfully executed," were viewed as incompatible with a popular action pursued by a member of the public acting as a common informer. One statute provided for the Executive Council to appoint an Escheator General, who would conduct inquests concerning estates that might have escheated to the state when an intestate owner died

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119, at 14–15 (requiring a forfeiture split between the "discoverer" and the state; the defendant was also required to compensate those aggrieved); *id.* § 3 (§ 7 P.L.), at 16 (providing for an additional payment from the state treasury "if any person or persons shall take and prosecute any of the hereinbefore mentioned felons to conviction").

[133] Act of Mar. 30, 1779, § 11 (§ 15 P.L.), *reprinted in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 97, at 337; Act of Sep. 25, 1786, § 13 (§ 19 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 108, at 321–22.

[134] Act of Mar. 28, 1787, § 10 (§ 11 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 108, at 421.

[135] Act of Mar. 29, 1788, §§ 2, 4–5 (§§ 3, 5–6 P.L.), *reprinted in* 13 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 123, at 52–56.

[136] Act of Apr. 15, 1782, § 2 (§ 4 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 487.

without heirs.[137] If an inquest found an escheat, the Escheator General was responsible to file the testimony with the Pennsylvania Supreme Court, triggering a limitations period during which people could litigate claims to or against the escheated property.[138] However, to ensure that "all estates . . . which shall escheat to the commonwealth . . . may be discovered," the legislation also provided a bounty for a common informer to litigate the Commonwealth's rights in an estate subject to escheat:

> [T]he person who shall first inform the [P]resident or [V]ice-[P]resident in [C]ouncil by writing signed by such person in the presence of two subscribing witnesses of any escheat happening within this commonwealth from and after the publication of this act and who shall procure necessary evidence to substantiate the title of the commonwealth to the same and shall prosecute the right of the commonwealth thereto with effect, such person shall be entitled to one-third part of the price which such goods and chattels or one-fifth part of the price which such lands respectively shall have produced after all costs of prosecution and charges of sale be deducted therefrom.[139]

Significantly, while the statute required the informer to file notice with the Council, it provided for the informer to pursue the Commonwealth's claim. Nothing in the statute indicated that the Escheator General or any other executive official was expected to intervene and litigate on the Commonwealth's behalf. The legislature authorized the informer to "prosecute the right of the commonwealth" to the escheated estate, with the bounty dependent on the informer doing so "with effect." The legislation

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[137] Act of Sep. 29, 1787, § 2 (§ 3 P.L.), *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 108, at 556–58.

[138] *Id.* §§ 4–5 (§§ 5–7 P.L.), at 559–61.

[139] *Id.* §§ 6–7 (§ 9 P.L.), at 562.

reflected no apparent concern that the informer's activities might undermine the constitutional role of the executive branch.

The other legislation of particular interest is a 1780 statute designed to ensure that money due to the state made its way into the treasury. One section prohibited any justice, officer, clerk or other person from concealing or discharging a fine or forfeiture imposed by a court.[140] A person violating this prohibition would forfeit treble the value of the amount discharged or concealed, "the one moiety thereof to the use of the state, and the other moiety to such person or persons as will sue for the same."[141] Another section of the statute applied to "the secretary of the supreme executive council, or his deputies," requiring them to keep accurate records of fees and license money paid to "the governor" for the support of government and to deposit the money into the treasury within ten days.[142] If the secretary or his deputies violated the record-keeping or funds-transfer rules, they would forfeit "any sum that the [supreme] court in their discretion may think just and proper, the one moiety thereof to the use of the state and the other moiety to him or them that will sue for the same."[143] Relevant to our discussion, even though this statute regulated officials who were employees of the Executive Council, Pennsylvania law authorized popular enforcement, rather than enforcement by the President and Council.

3. The Pennsylvania Council of Censors

Pennsylvania's 1776 Constitution included a novel provision requiring the election—every seven years—of a Council of Censors,

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[140] Act of Mar. 18, 1780, § 5 (§ 6 P.L.), *reprinted in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, *supra* note 119, at 136–37.

[141] *Id.*

[142] *Id.* § 9 (§ 10 P.L.), at 138.

[143] *Id.*

with the goal of preserving "the freedom of the commonwealth."[144] The Censors were charged with conducting a thorough review of government compliance with constitutional requirements:

> [The Council of Censors' duty] shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution.[145]

The Censors' comprehensive constitutional audit, with its particular focus on separation of powers issues, provided a natural opportunity to surface any constitutional concerns that might arise from the legislature's frequent resort to *qui tam* legislation.

The Council of Censors issued separate reports on the constitutional fidelity of the legislative branch and the executive branch.[146] The report on the Pennsylvania legislature identified a wide range of clear or arguable constitutional violations. For instance, the General Assembly too often acted by resolution, avoiding the more demanding process for passing a law, and frequently enacted legislation in the same session in which it was introduced, ignoring the constitutional provision calling for delay until the next legislative session when possible to allow for public comment.[147] The Censors also complained of legislative violations of the Bill of Rights. The Censors believed constitutional rights of

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[144] PA. CONST. of 1776, § 47; Angus Harwood Brown, *The Pennsylvania Council of Censors and the Debate on the Guardian of the Constitution in the Early United States*, 64 AM. J. LEGAL HIST. 1, 1 (2024) (describing the novelty of the Council of Censors).

[145] PA. CONST. of 1776, § 47.

[146] *See* JOURNAL OF THE SECOND SESSION OF THE COUNCIL OF CENSORS 134 (1784) [hereinafter COUNCIL OF CENSORS JOURNAL, SECOND SESSION], *available at* https://discover-llmc-com.us1.proxy.openathens.net/?a=p&p=set&set=35390 (addressing the legislative branch); *id.* at 165 (addressing the executive branch).

[147] *Id.* at 137–39.

property had been violated, particularly in the process of gathering supplies for the military,[148] and that the legislature had authorized numerous violations of the right to a jury trial.[149]

Several of the Censors' criticisms focused on instances in which the General Assembly had undermined separation of powers principles by taking actions that should have been left to other branches of government. For example, the General Assembly had addressed issues of title to land that could have been resolved in the courts.[150] They had also dissolved marriages, "an intrusion upon the judicial branch."[151] The Censors likewise found legislative intrusion on executive powers, for instance, by recommending pardons or ordering the release of a prisoner.[152]

Of particular relevance for our purposes is the Censors' discussion of the constitutional provision giving the President and Executive Council power to appoint "all other officers civil and military (except such as are chosen by the General Assembly, or by the people) agreeable to this frame of government, and the laws that may be made hereafter."[153] A majority of the Censors understood this to mean that the "appointment of officers is an executive prerogative, and belongs to the Council in all cases, if it be not in express terms vested in the Assembly or in the people."[154] The Censors therefore disapproved of several statutes in which the General Assembly had retained control over the appointment of particular officers.[155]

The Censors also identified a statute that they believed to violate the Take Care Clause, giving the Executive Council the

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[148] *Id.* at 135.

[149] *Id.* at 141.

[150] *Id.* at 136.

[151] *Id.*

[152] *Id.* at 140–41.

[153] PA. CONST. of 1776, § 20; COUNCIL OF CENSORS JOURNAL, SECOND SESSION, *supra* note 146, at 139–40.

[154] COUNCIL OF CENSORS JOURNAL, SECOND SESSION, *supra* note 146, at 140. A significant minority of the Council of Censors believed the General Assembly could, by law, vest the appointment of officers outside the Executive Council. *Id.* at 144.

[155] *Id.* at 140.

responsibility to ensure faithful execution of the laws.[156] The legislation had appointed commissioners to take measures for the defense of the Delaware Bay and River:

> The proper powers of Council were, by this act, transferred to commissioners named by the House. These commissioners were authorised to fit out what ships they saw fit; to continue them at their discretion, unless otherwise directed by the House. Duties on imports were appropriated to this service, and subjected to the draughts of the commissioners on the officer who collected them; and lastly, the commissioners were authorised to borrow money on their funds, not exceeding 25,000*l*. and directed to repay the same.[157]

The Censors did note, however, that the legislation appropriately reserved to the Executive Council the nomination of the commander and officers involved in the naval armament.[158]

The Council of Censors' report on the executive branch also identified a large number of actions by the Executive Council deemed to violate the 1776 Constitution, sometimes on grounds comparable to those highlighted in the legislative report.[159] The Censors pointed to the executive's role in seizing property of citizens to provide supplies for the military.[160] They highlighted instances in which individuals had been taken prisoner and banished from the state without a jury trial.[161] The Censors objected to a number of instances in which the Executive Council had created new offices, appointed people to them, and set their salaries without legal or constitutional authorization.[162] The Executive

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[156] *Id.* at 141.
[157] *Id.*
[158] *Id.*
[159] *See id.* at 165–66.
[160] *Id.* at 165.
[161] *Id.*
[162] *Id.*

Council also spent money without legislative appropriation or redirected funds appropriated for other purposes.[163] They had made decisions about officer appointments by secret ballot, reducing the accountability of individual members of the Council.[164] They declared martial law,[165] changed the terms of a legally prescribed oath,[166] and committed other acts the Censors deemed illegal or unconstitutional.[167]

The Censors' report on the Executive Branch quoted the Pennsylvania Constitution's Take Care Clause, identifying two episodes in which they thought the Executive Council had "yielded the executive power to the legislature."[168] One instance involved a forfeited estate to which the Commonwealth had an unsettled claim.[169] The Executive Council conferred with a legislative committee about the claim, even though the laws gave the Council "full powers as to this species of property, and they were fully authorized to bring suits in necessary cases."[170] The Censors similarly objected to the Council conferring with the legislature about the accounts of a deceased official, even though the Council had authority to decide whether to confirm the accounts and the legislature "had nothing to do with them."[171]

The Censors' reports on both the legislative branch and the executive branch show that they were fully aware of the state Take Care Clause and sensitive to its violation. The Censors jealously guarded against legislative encroachments on executive power, including the power to appoint officers. It therefore seems particularly telling that neither report issued by the Censors raised an issue with respect to the General Assembly's frequent enactment

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[163] *Id.* at 166.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *See id.*
[168] *Id.* at 165.
[169] *See id.*
[170] *Id.*
[171] *Id.*

of *qui tam* legislation authorizing uninjured common informers to pursue claims for the benefit of the public. The implication is that the Censors did not perceive *qui tam* informers to be officers within the scope of the state Appointments Clause and did not view *qui tam* litigation as an exercise of executive power, even when the litigation pursued claims that might have been brought by executive branch officials. The contrary implication—that the Censors simply overlooked a conflict between the Take Care Clause and the enactment of *qui tam* legislation—seems implausible in light of the General Assembly's extensive resort to popular enforcement and the wide-ranging and detail-oriented constitutional review reflected in the Censors' reports.

B. New York

New York legislation following the Declaration of Independence exhibits the same pattern observed in Pennsylvania. The New York Constitution included a Take Care Clause requiring executive officials to ensure the faithful execution of the laws. That provision of the state constitution did not inhibit the state legislature from making extensive use of *qui tam* enforcement.

1. The New York Constitution of 1777

New York adopted a constitution in 1777, implementing a very different governmental structure than the Pennsylvania Constitution of the prior year. The New York Constitution vested "the supreme legislative power" in a bicameral legislature, consisting of an Assembly elected by male residents and a Senate elected by those owning a freehold worth more than £100.[172] The Constitution vested "the supreme executive power and authority of this state" in "a governor" elected for a three-year term by the same freeholders eligible to vote for Senate.[173] In the Federalist

[172] N.Y. CONST. of 1777, §§ 2, 7, 10.
[173] *Id.* § 17.

Papers, Alexander Hamilton responded to criticism that the U.S. President would be too much like the King of Great Britain, arguing instead that the President's constitutional powers were actually closer in many respects to those of the New York Governor under the 1777 New York Constitution.[174] The Governor was "general and commander-in-chief of all the militia, and admiral of the navy."[175] He could issue pardons and reprieves except in cases of murder or treason, in which case his power was limited to suspending execution and referring the matter to the legislature.[176] The Governor could also recommend matters for the legislature's consideration.[177]

With the Chancellor and the Justices of the Supreme Court, New York's Governor sat on a Council of Revision that could recommend changes or veto pending legislation, subject to override by two thirds of both legislative chambers.[178] The Governor was also a voting member of a Council of Appointment, along with four members of the Senate, and could appoint all officers with the Council of Appointment's advice and consent.[179] As under the United States Constitution, civil and military officers received their commissions from the Governor.[180] And particularly significant for our purposes, the New York Constitution instructed the Governor "to take care that the laws are faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature."[181]

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[174] *See* FEDERALIST PAPERS NO. 69 (Alexander Hamilton).
[175] N.Y. CONST. of 1777, § 18.
[176] *Id.*
[177] *Id.* § 19.
[178] *Id.* § 3.
[179] *Id.* § 23.
[180] *Id.* § 24.
[181] *Id.* § 19.

2. New York Legislation Providing for Popular Enforcement

The year following the adoption of the 1777 New York Constitution, the legislature enacted a statute setting forth comprehensive procedures for the elections for Governor, Lieutenant Governor, Assembly, and Senate.[182] As was true in Pennsylvania, New York incorporated common informers into its election monitoring machinery. Legislation authorized popular enforcement if an election inspector, sheriff, or clerk engaged in "corrupt misbehavior in any matter or thing in or relating to" an election covered by the statute:

> And it shall be lawful for any person without the consent of the attorney-general to file and prosecute an information for such misbehavior in the supreme court of judicature of this State in the nature of a *qui tam* suit; and if the prosecutor shall prevail he shall have judgment and execution for his costs of suit against the person convicted.[183]

A later provision of the legislation imposed a forfeiture of £500 on anyone who used "bribery menace or other corrupt means" to influence a person's vote.[184] Half of this latter forfeiture was allocated "to the use of the person suing and prosecuting for the same" and the other half to the state treasury.[185]

The provision allowing *qui tam* prosecution of election officials without the consent of the Attorney General seems highly significant for our inquiry. The legislature adopted this statute less than a year after the New York Constitution vested the "supreme executive power" in the Governor and obliged him to "take care

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[182] Act of Mar. 27, 1778, ch. 16, 1778 N.Y. Laws 28.
[183] *Id.* at 34.
[184] *Id.* at 36.
[185] *Id.*

that the laws are faithfully executed."[186] If these constitutional provisions were understood to give the Governor an exclusive power to control all litigation advancing the interests of the public, then a statute authorizing a *qui tam* action based on the public's interest in election integrity should have raised concerns. If private control of public litigation was understood to violate the state's Take Care Clause, then the express statutory permission to pursue a *qui tam* action without the Attorney General's consent should have made the constitutional issue impossible to miss. As a member of the Council of Revision, New York Governor George Clinton was well positioned to seek revision or veto of the statute if he believed it intruded on his constitutional authority.[187] And yet we have no evidence that the Governor or anyone else raised a constitutional objection to the election statute's *qui tam* provisions.

The passage of time did not cause constitutional qualms to emerge. When the New York legislature overhauled its election statute in 1787, it expanded the role of common informers in enforcing election rules. A longer list of election officials was now subject to a forfeiture, not just for "corrupt misbehaviour," but also for willful neglect of duties, with half of the forfeiture allocated "to the use of any person who shall prosecute for the same."[188] The new statute continued to impose a forfeiture for bribing or improperly influencing voters, half allocated "to the use of the person suing and prosecuting for the same."[189] And a new forfeiture was added requiring a voter who refused to take a loyalty oath when requested to pay £5 "to any person who will sue for the same."[190]

A week after incorporating popular enforcement into the state's 1778 election law, the New York legislature adopted a highly ambitious system of wage and price controls for goods and services throughout the state.[191] At the recommendation of the Continental

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[186] *See supra* notes 173 & 181 and accompanying text.

[187] *See supra* note 178 and accompanying text.

[188] Act of Feb. 13, 1787, ch. 15, 1787 N.Y. Laws 371, 382.

[189] *Id.* at 383.

[190] *Id.* at 376.

[191] Act of Apr. 3, 1778, ch. 34, 1778 N.Y. Laws 71.

Congress, seven northern states negotiated wage and price caps for a wide variety of goods and services, in many cases forbidding more than a seventy-five percent increase over prices charged in 1774.[192] The New York legislature implemented the multi-state agreement by statutorily forbidding buyers and sellers from offering or asking for higher prices than those negotiated by the cooperating states.[193] Common informers were given the central role in enforcing the law. A person knowingly violating the statute would forfeit treble the value of the offending articles in a suit "by any person who shall sue and prosecute the same to his own use."[194]

The massive scale of this regulatory undertaking—seeking to cap the price to be paid in the vast majority of commercial transactions within the state—suggests why the legislature might have seen popular enforcement as a practical necessity. In the midst of prosecuting a war against Great Britain, there was no way New York could realistically afford to hire enough bureaucrats to monitor commercial transactions throughout the state and bring enforcement litigation against significant numbers of violators.[195] The regulatory scheme was soon reconsidered. The implementing legislation was suspended less than three months after enactment,[196] and repealed the following year.[197] But the fact that the New York legislature saw popular actions as the best means of enforcing such an ambitious regulatory agenda underscores how

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[192] *See id.* pmbl.

[193] *Id.* at 74.

[194] *Id.*

[195] *See* Beck, *Government Officials*, *supra* note 3, at 1314 (noting the challenge of enforcing federal law in remote areas when the government could not afford a large workforce); *see also id.* at 1262–63 (describing how common informers were used to enforce ambitious wage and price controls under English statute).

[196] Act of June 29, 1778, ch. 42, 1778 N.Y. Laws 83.

[197] Act of Oct. 28, 1778, ch. 2, 1778 N.Y. Laws 90. Congress recommended repealing the price control regulations on the ground that such measures were ineffective and counterproductive. *See* James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 S.D. L. REV. 673, 695 (2008). The New York legislature later adopted another price control statute, also enforceable by common informers, to become effective only if Massachusetts, Pennsylvania, and Connecticut enacted comparable legislation. *See* Act of Feb. 26, 1780, ch. 43, 1780 N.Y. Laws 214.

engrained popular enforcement had become as an element of Anglo-American law in the era when the U.S. Constitution was framed.

Over the ensuing decade, the New York legislature frequently embraced popular enforcement of commercial regulations. Statutes authorized popular actions against tavernkeepers and innholders who exceeded specified prices for food, fodder, lodging, and liquor,[198] who sold liquor at retail without a license,[199] or who failed to keep two spare beds for travelers and stabling and provisions for four horses.[200] Common informers could collect forfeitures from those who exported grain or flour from the state without a license,[201] or constructed substandard flour casks,[202] from anyone working as a hawker or peddler,[203] from anyone who purchased arms, clothing, or munitions from a soldier,[204] from those violating statutory procedures designed to facilitate collection of duties on imports,[205] from any person operating an unauthorized ferry across the East River between Queen's County and Westchester County, from any licensed ferry operator for charging higher fees than

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[198] Act of Mar. 2, 1779, ch. 17, 1779 N.Y. Laws 109, 111.

[199] Act of Feb. 21, 1780, ch. 40, 1780 N.Y. Laws 207, 207; *see also* Act of Mar. 14, 1781, ch. 27, 1781 N.Y. Laws 344, 344 (stating that half of a forfeiture for unlicensed sale of strong liquors goes to "the prosecutor" and the other half to overseers of the poor).

[200] Act of Mar. 5, 1783, ch. 22, 1783 N.Y. Laws 537, 537.

[201] Act of Oct. 20, 1779, ch. 21, 1779 N.Y. Laws 165, 166; Act of Mar. 14, 1778, ch. 10, 1778 N.Y. Laws 18, 19.

[202] Act of Feb. 26, 1780, ch. 41, 1780 N.Y. Laws 208, 209.

[203] Act of Mar. 26, 1781, ch. 39, 1781 N.Y. Laws 358, 358–59; Act of Apr. 4, 1785, ch. 54, 1785 N.Y. Laws 100.

[204] Act of Mar. 21, 1783, ch. 43, 1783 N.Y. Laws 562.

[205] Act of Mar. 22, 1784, ch. 10, 1784 N.Y. Laws 599, 604 (stating that half of any forfeiture collected under the statute goes to state treasurer and "the remaining half to the person or persons who shall sue for the same"); Act of Nov. 18, 1784, ch. 7, 1784 N.Y. Laws 11, 16 (granting half of any forfeiture "to him or them that shall inform and sue for the same"); *see also* Act of Apr. 11, 1787, ch. 81, 1787 N.Y. Laws 509, 517–18 (permitting forfeited ships and merchandise to be prosecuted by "the collector, or officer or other person who shall seize the same;" providing one moiety of the forfeiture "to the use of the person or persons who shall inform and prosecute for the same" and another moiety to the people of the state).

statutorily authorized,[206] or from a lender charging usurious interest rates—but only if the aggrieved borrower did not sue in a timely fashion.[207]

Common informers were repeatedly enlisted to bolster regulatory regimes that were operated by government appointees. For instance, merchants could face popular actions if they tried to evade or circumvent inspection regimes directed at regulating the production of "sole leather" for shoes and boots,[208] the export of "pot ash" and "pearl ash,"[209] and the export of flour or bread.[210] Common informers were granted broad powers in connection with commercial regulations related to the war. In a statute designed to supply the army and deny supplies to the enemy, a common informer could sue for a monetary forfeiture from anyone who purchased cattle or beef with the intent to resell it.[211] In addition, the statute declared it "lawful for any person, or persons to take, seize, and convert" to his own use cattle or beef acquired for resale.[212] A later statute declared any goods from British territories or imported on British ships "contraband" that was "liable to seizure and condemnation."[213] The legislation declared it "lawful for any person or persons whatsoever" "to seize and take all goods wares and merchandize" that the person "supposed to be contraband."[214]

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[206] Act of Mar. 31, 1785, ch. 46, 1785 N.Y. Laws 91, 92–93.

[207] Act of Feb. 8, 1787, ch. 13, 1787 N.Y. Laws 365–66.

[208] Act of Apr. 28, 1784, ch. 46, 1784 N.Y. Laws 680, 681–82 (stating that half of a forfeiture must go "to the use of such person or persons who prosecuted for the same").

[209] Act of Apr. 23, 1784, ch. 40, 1784 N.Y. Laws 665, 667 (stating that half of all fines or forfeitures are to be allocated to "the officer or other person who will sue for the same").

[210] Act of Mar. 16, 1785, ch. 35, 1785 N.Y. Laws 66, 68 (stating that one half of a forfeiture should be paid to the state treasurer "and the other half thereof to such person as shall inform and sue for the same").

[211] Act of June 24, 1780, ch. 69, 1780 N.Y. Laws 266, 272.

[212] *Id.*

[213] Act of July 22, 1782, ch. 7, 1782 N.Y. Laws 509, 509.

[214] *Id.*

Several New York statutes relied on popular enforcement for conservation measures designed to protect natural resources or wildlife. One law allowed "any person or persons" to recover forfeitures designed to prevent setting fires, taking timber, or letting livestock roam on certain beaches and islands.[215] Another deployed common informers to enforce restrictions on hunting seasons for deer and heath hens.[216] A later enactment authorized popular enforcement of limits on when nets could be used for fishing in Suffolk County rivers and creeks.[217]

Other New York statutes employed popular actions to enforce what might be characterized as public health and safety measures. A common informer could collect a forfeiture from any doctor who inoculated a person for small pox,[218] from a man who did not respond to a "hue and cry" for help in apprehending a robber,[219] from someone violating the rules for the safe transportation and storage of gunpowder,[220] or from individuals celebrating the new year by discharging firearms or setting off fireworks near a building.[221]

As we saw in Pennsylvania, New York followed the English practice of using popular actions to monitor legal compliance by public officials. An early New York statute permitted a common informer to sue a justice of the peace who failed to assist efforts to acquire a farmer's excess grain for the army.[222] That same session, the legislature authorized *qui tam* actions against any person entrusted with monies of the United States who put the funds to

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[215] Act of Apr. 24, 1784, ch. 42, 1784 N.Y. Laws 668.

[216] Act of Mar. 11, 1785, ch. 31, 1785 N.Y. Laws 62. This statute also included a ban on setting fires in certain wooded areas.

[217] Act of Apr. 17, 1786, ch. 39, 1786 N.Y. Laws 252, 252–53 (stating that a forfeiture is to be recovered by "any person or persons who will sue for the same;" half goes to the "prosecutor" and half to the county treasurer).

[218] Act of Apr. 4, 1778, ch. 36, 1778 N.Y. Laws 78, 78.

[219] Act of Oct. 15, 1779, ch. 19, 1779 N.Y. Laws 162, 163.

[220] Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627, 627.

[221] Act of Apr. 22, 1785, ch. 81, 1785 N.Y. Laws 152, 152.

[222] Act of Oct. 31, 1778, ch. 5, 1778 N.Y. Laws 92, 94 (stating that a forfeiture is to be recovered "by any person, who will sue for the same").

unauthorized use.[223] A justice of the peace or a commissioner appointed to lay out roads could be sued in a popular action for failing to perform duties relating to road construction and maintenance.[224] If a constable who levied on a person's property to satisfy a judgment neglected to pay the money to the magistrate within twenty days, the constable was liable for a forfeiture to "the party grieved, or any other who will sue for the same."[225] Common informers could collect forfeitures from tax collectors who neglected to collect a tax on dog owners (to compensate losses by owners of sheep),[226] from an officer who accepted a reward for excusing someone from jury duty,[227] from a sheriff who violated rules governing service and return of process,[228] or from an overseer of wells and pumps in New York City who neglected his duty.[229]

Additional statutes enacted between adoption of the 1777 New York Constitution and the U.S. Constitutional Convention authorized popular actions in a wide and eclectic array of situations. The legislature employed popular enforcement to implement a ban on selling a person brought into the state as a slave.[230] A person who ignored a subpoena to testify at a court martial could face a popular action.[231] So could someone who conducted, sold tickets for, or won a lottery.[232] Common informers were enlisted to keep people from pulling up stakes used to mark

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[223] Act of Mar. 5, 1779, ch. 22, 1779 N.Y. Laws 117, 117–18.

[224] Act of Oct. 1, 1779, ch. 6, 1779 N.Y. Laws 151, 151–52.

[225] Act of Feb. 26, 1780, ch. 44, 1780 N.Y. Laws 214, 218.

[226] Act of Feb. 20, 1786, ch. 11, 1786 N.Y. Laws 189, 189.

[227] Act of Apr. 19, 1786, ch. 41, 1786 N.Y. Laws 273, 277.

[228] Act of Feb. 19, 1787, ch. 32, 1787 N.Y. Laws 407, 408. In addition to the forfeiture "to the party who shall sue for the same," the sheriff was liable for treble damages to a person thereby aggrieved.

[229] Act of Mar. 19, 1787, ch. 59, 1787 N.Y. Laws 475, 476.

[230] Act of Apr. 12, 1785, ch. 68, 1785 N.Y. Laws 120, 121. The legislation required a person sold in violation of the statute to be freed.

[231] Act of Feb. 19, 1780, ch. 39, 1780 N.Y. Laws 206, 206.

[232] Act of Feb. 14, 1783, ch. 12, 1783 N.Y. Laws 523, 524 (stating that half of a forfeiture must go to the state and the other half must go to the person or persons "who shall have voluntarily given information of such offence, and prosecuted the same to effect").

out roads in New York City,[233] or from breaking fences and gates enclosing certain public roads;[234] and they also helped enforce traffic rules, including a law giving carriages traveling toward Albany a right of way over those leaving the city.[235] This practice of authorizing *qui tam* and other popular actions to enforce the interests of the New York public continued unabated throughout the period of interest for understanding the federal Take Care Clause. In the final months leading up to the U.S. Constitutional Convention, the New York legislature authorized popular actions to suppress certain forms of vandalism[236] and to penalize the use of copper coins of less than standard weight or the use of coins made with base metals.[237] The legislative record makes clear that New York legislators viewed *qui tam* litigation as a routine method of enforcing the laws, a view unaffected by inclusion of a Take Care Clause in the New York Constitution.

C. Vermont

Vermont rounds out our survey of jurisdictions that included a Take Care Clause in their state constitution prior to the U.S. Constitutional Convention. The pattern observed in Pennsylvania and New York continued in Vermont, where the legislature made extensive use of popular enforcement. Regular enactment of *qui tam* legislation continued following the report of the Vermont Council of Censors in 1785 and the adoption of a revised Constitution in 1786.

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[233] Act of May 4, 1784, ch. 56, 1784 N.Y. Laws 704, 705.
[234] Act of Feb. 26, 1785, ch. 24, 1785 N.Y. Laws 53, 53.
[235] Act of Mar. 13, 1780, ch. 60, 1780 N.Y. Laws 253, 253.
[236] Act of Mar. 24, 1787, ch. 66, 1787 N.Y. Laws 489–90.
[237] Act of Apr. 20, 1787, ch. 97, 1787 N.Y. Laws 569, 570.

1. The Vermont Constitution of 1777

The status of the territory of Vermont was contested at the time of the American Revolution. Many settlers occupied land under grants from the Governor of New Hampshire, but New York claimed jurisdiction over the same lands and refused to recognize the validity of the New Hampshire grants.[238] Vermont residents declared themselves an independent state in 1777, adopting a constitution and organizing a government.[239] A revised constitution followed in 1786.[240] Congress eventually admitted Vermont to the union as the 14th State in 1791, shortly after the ratification of the United States Constitution.[241]

Vermont's 1777 Constitution borrowed heavily from the Pennsylvania Constitution adopted the previous year.[242] The 1777 Vermont Constitution vested "supreme legislative power" in a "House of Representatives" or "General Assembly" elected annually.[243] The power to allocate statutory forfeitures was expressly recognized as a legislative power in Section 30 of the Frame of Government, which provided that "[a]ll fines, licence money, fees and forfeitures, shall be paid, according to the direction hereafter to be made by the General Assembly."[244] The "supreme executive power" was constitutionally vested in "a Governor and Council."[245] This "Supreme Executive Council" consisted of a Governor, Lieutenant Governor and twelve other members, elected

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[238] VT. CONST. of 1777, pmbl.

[239] *See id.*; *see also id.* ch. I, § 4.

[240] VT. CONST. of 1786.

[241] *See* David B. Froomkin & A. Michael Froomkin, *Saving Democracy from the Senate*, 2024 UTAH L. REV. 397, 461.

[242] *See supra* notes 80–96 and accompanying text.

[243] VT. CONST. of 1777, ch. II, § 2.

[244] *Id.* ch. II, § 30. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *159 ("The party offending [a penal statute] is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires.").

[245] VT. CONST. of 1777, ch. II, § 3.

annually at the same time as the legislature.[246] The Constitution instructed the Governor and Council to "take care that the laws be faithfully executed" and to "expedite the execution of such measures as may be resolved upon by the General Assembly."[247] The Governor and Council did not have a veto, but were entitled to inspect and propose amendments to pending legislation.[248] They had the power "to appoint and commission[] all officers," except those selected by the General Assembly.[249] They could grant pardons and remit fines except in cases involving impeachment, treason, or murder; for someone convicted of treason or murder, the Governor and Council could only grant a reprieve until the end of the next legislative session.[250] The Governor was commander in chief of the state's armed forces, but could only command in person with the Council's consent.[251]

2. Vermont Legislation Providing for Popular Enforcement

As we saw in Pennsylvania and New York, the Vermont legislature regularly turned to popular enforcement, notwithstanding the state constitutional Take Care Clause. In a particularly busy legislative session in February 1779, the General Assembly enacted over a dozen distinct *qui tam* statutes in a single month. One statute, for example, regulated "briefs" soliciting charitable contributions, imposing a forfeiture of £5 for reading a brief in a Vermont town or plantation, unless it had been approved by the Governor and Council or related to a local resident in need.[252] The legislature allocated one third of the forfeiture "to him that shall inform and prosecute to effect, and the other two thirds to the

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[246] *Id.* ch. II, § 17.
[247] *Id.* ch. II, § 18.
[248] *See id.* ch. II, § 14.
[249] *Id.* ch. II, § 18.
[250] *Id.*
[251] *Id.*
[252] Act of Feb. 17, 1779, 1779 Vt. Acts & Resolves 70.

town treasurer where such offence is committed."[253] In the same month, the Vermont legislature authorized common informers to collect forfeitures from persons who hindered a county surveyor in performing his duties,[254] who charged higher than authorized rates for ferry service,[255] who used currency issued based on private credit,[256] who killed a deer outside of hunting season,[257] who concealed or harbored someone banned from the state,[258] who obstructed the migration of fish up and down Vermont rivers,[259] who made a counterfeit of any town's brand,[260] who operated an inn or tavern or sold retail quantities of alcohol without a license,[261]

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[253] *Id.*

[254] Act of Feb. 17, 1779, 1779 Vt. Acts & Resolves 80, 81 (giving "the one moiety of which penalty to be paid to the treasurer of the county wherein the offence is committed, and the other moiety to the person who shall prosecute the same to effect").

[255] Act of Feb. 20, 1779, 1779 Vt. Acts & Resolves 88, 88–89 (providing "one half to the informer, and the other half to the town treasurer where such offence is committed").

[256] Act of Feb. 1779, 1779 Vt. Acts & Resolves 93, 95–96 (giving "the one half thereof to him or them that shall prosecute the same to effect, and the other half to the town treasurer"); *see also id*. at 93 (providing that "whosoever shall make discovery and give information" of counterfeiting or altering bills of credit "shall have and receive as a reward for his good service in discovering and informing as aforesaid, the sum of ten pounds").

[257] Act of Feb. 20, 1779, 1779 Vt. Acts & Resolves 109 (giving "the one moiety thereof to the person or persons that shall prosecute the same to effect, and the other moiety to the treasury of the town in which the conviction is made").

[258] Act of Feb. 26, 1779, 1779 Vt. Acts & Resolves 125, 127 (allocating "two-thirds thereof to the use of this state, the other third to the use of him or them who shall prosecute the same to effect").

[259] Act of Feb. 23, 1779, 1779 Vt. Acts & Resolves 127, 127–28 (providing "one half to the complainer or informer, who shall prosecute the same to effect, the other half to the county treasurer").

[260] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 140, 141 (stating that "he or they so offending shall forfeit the sum of ten pounds for every such offence, one half to the complainer, and the other half to the county treasury"); *see also id.* (requiring the same split for forfeitures by town branders who violated statutory requirements).

[261] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 147, 150 (disposing of fines "half to him that complains and prosecutes the same to effect, and the other half to the town treasury").

who operated or promoted a lottery,[262] who exported untanned cattle hide,[263] who served as clerk at a proprietors' meeting but neglected or refused to perform statutory duties,[264] who owned an inn or tavern and kept cards, dice, billiards, or other unlawful games,[265] who owned unbranded cows, sheep, or swine,[266] or who was named executor in a will and neglected to probate the will or prepare an inventory of the estate.[267]

Over the next several years, the Vermont General Assembly enacted a number of statutes empowering common informers to enforce duties of government officials or others performing public functions. *Qui tam* informers could collect forfeitures from officials who neglected to make lists of taxable property,[268] from the town of Pownal if it failed to repair a particular road,[269] from clerks and collectors who failed to perform statutory duties connected with a proprietors' meeting,[270] from town clerks and selectmen who

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[262] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 153 (giving "the one half to him that shall prosecute the same to effect and the other half to the county treasury of the county where the offence is committed").

[263] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 165 (providing "one half thereof to the complainer who shall prosecute the same to effect, and the other half to the treasury of the county where the offence is committed").

[264] Act of Feb. 23, 1779, 1779 Vt. Acts & Resolves 122, 123 (providing "one half of such fine shall be paid to the complainant, who shall prosecute to effect, and the remainder to the proprietor's treasurer, for the use of the propriety").

[265] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 136 (giving "the said fine to be disposed of, one half to the informer, the other half to the treasurer of the town where such offence is committed").

[266] Act of Feb. 15, 1779, 1779 Vt. Acts & Resolves 142 (providing "one half whereof shall be to the complainer, and the other half to the town treasury").

[267] Act of Feb. 19, 1779, 1779 Vt. Acts & Resolves 100, 101–02 (giving "the other moiety to him or them who shall inform or sue for the same, and prosecute to full effect").

[268] Act of June 1781, Vt. Acts & Laws 1, 2 (report of legislative session of June 1781 at Bennington) (providing "one half thereof for the Use of this State, the other half for the Use of the Complainer, who shall prosecute the same to effect").

[269] Act of Feb. 26, 1782, 1782 Vt. Acts & Resolves 84 (giving "the one half to the County Treasurer, for the use of the County, and the other half to the person who shall sue for the same").

[270] Act of Oct. 24, 1782, Vt. Acts & Laws 32, 33–34 (report of legislative sessions of June and October 1782) (providing "one half of such fine shall be paid to the complainant, who shall prosecute to effect, and the remainder to the proprietor's

neglected duties related to collecting funds to raise troops,[271] and from clerks of county courts who failed to receive, transport, and count votes for the Council of Censors.[272]

Other statutes in this period authorized popular enforcement of laws regulating private conduct. One notable enactment banned exports of grain, meat, and other items needed as provisions for troops.[273] The statute authorized sheriffs, grand jurors, selectmen and "all Persons whatever within this State" to seize goods that they suspected were to be exported in violation of the law.[274] Upon conviction, the court could require forfeiture of the goods or impose a fine up to £40, "the one Half of the Forfeiture or Fine to the Use of this State, the other Half to the Person prosecuting to effect."[275] Other statutes directed at private conduct permitted common informers to collect forfeitures from creditors committing usury,[276] from someone voluntarily giving or receiving a smallpox infection

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treasurer, for the use of the propriety"). It is not clear whether a clerk or collector selected at a proprietors' meeting should be thought of as a government official, or perhaps something more like a corporate officer. But since they are performing functions for the collective benefit of local residents, I have included them here.

[271] Act of Mar. 4, 1784, Vt. Acts & Laws 3, 4 (report of legislative session of February & March 1784 at Bennington) (providing "one half to him or them who shall prosecute the same to effect, and the other half to the Treasurer of the county where such Town Clerk or Select-Men live").

[272] Act of Oct. 29, 1784, Vt. Acts & Laws 10, 11 (report of legislative session of October 1784 at Rutland) (providing "one moiety to him who shall prosecute the same to effect").

[273] Act of Mar. 8, 1780, Vt. Acts & Laws 3, 4 (report of legislative session of March 1780 at Westminster).

[274] *Id.* at 4.

[275] *Id.*

[276] Act of Oct. 16, 1782, Vt. Acts & Laws 16, 16–17 (report of legislative sessions of June and October 1782) (providing "one moiety thereof to the public Treasurer of this State, the other moiety to the informer that shall sue for and prosecute the same to effect").

without authorization or failing to report such an infection,[277] or from someone obstructing a road.[278]

3. The Vermont Council of Censors

Like the Pennsylvania Constitution, Vermont's Constitution provided for the election of a Council of Censors empowered to investigate and report on "whether the constitution has been preserved inviolate, in every part," whether the legislature or executive "assumed to themselves, or exercised, other or greater powers, than they are entitled to by the constitution," and "whether the laws have been duly executed."[279] Vermont's first Council of Censors issued a 1785 report and proposed changes to the Constitution.[280] In examining the operation of Vermont's government under the 1777 Constitution, the Council of Censors was particularly sensitive to separation of powers concerns. The Censors quoted Blackstone for the proposition that tyrannical governments combine "the right both of making and enforcing the laws" in the "same man" or "body of men."[281] In their view, "legislative and executive authorities" deserved "severe censure" when they "transgressed the limits marked out to them by the Constitution, and intruded upon the province allotted to the other."[282]

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[277] Act of Mar. 2, 1784, Vt. Acts & Laws 2–3 (report of legislative session of February & March 1784 at Bennington) (providing "one half to the person or persons who shall prosecute to effect, and the other half to the treasury of the town where such offence shall be committed").

[278] Act of Oct. 29, 1784, Vt. Acts & Laws 7, 9–10 (report of legislative session of October 1784 at Rutland) (providing "one moiety of which to the person that doth prosecute the same to final judgment").

[279] VT. CONST. of 1777, § 44.

[280] *See The Constitution as Revised by the First Council of Censors and Recommended for the Consideration of the People* (Oct. 1785) [hereinafter *Proposed Constitution of Vermont Censors*]; *Address of the Council of Censors* (Feb. 14, 1786) [hereinafter *Address of Vermont Censors*]; VT. CONST. of 1786.

[281] *Address of Vermont Censors*, *supra* note 280, at 533.

[282] *Id.*

In their address to the citizens of Vermont, the Council of Censors criticized the Executive Council for exceeding its powers in a variety of respects, including by granting divorces to particular individuals, adjusting a debt owed by a particular debtor, and granting a parcel of land to an individual in lieu of a different parcel granted by the legislature.[283] The Censors highlighted instances where the Executive Council delegated to other officials powers legislatively assigned to them or took actions inconsistent with legislative directions.[284] The Censors also directed a range of criticisms at the General Assembly, many of them grounded in separation of powers concerns. The censors were particularly critical of the legislature for depriving courts of jurisdiction over land title disputes and contract actions, and for denying individuals their rights to judicial protection and trial by jury.[285] They believed the General Assembly had usurped judicial powers in several instances when they "vacated judgments, recovered in due course of law" or stayed the execution of judgments.[286] The Censors also noted that the legislature had engaged in "an evident infringement upon the constitutional prerogatives of the executive Council" by granting pardons in cases that did not involve treason, murder, or impeachment.[287]

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[283] *See id.* at 534–36.

[284] *See id.* at 534–35. For instance, where state auditors sought to collect a statutory forfeiture from an official who refused to deliver papers in his possession to the auditors, the Council received the papers and discharged the individual before the litigation could move forward. *Id.* at 535.

[285] *See id.* at 536–37. The censors also noted a statute, apparently never carried into execution, that had provided for legislative resolution of land disputes based on reports from commissioners, something that would have amounted to a usurpation of judicial power. *Id.* at 537.

[286] *Id.* at 540–42.

[287] *Id.* at 541. The censors perceived another departure from constitutional requirements when the legislature authorized the Governor and Council to appoint officers for a new county, rather than having them selected initially by election. *Id.* at 542.

4. Vermont Legislation Under the Constitution of 1786

Vermont adopted a revised constitution at a 1786 constitutional convention in which delegates voted on the Council of Censors' proposed amendments.[288] At the Council of Censors' suggestion, the Vermont Constitution of 1786 expressly reinforced the principle of separation of powers: "[t]he legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."[289] Neither in their proposed constitutional amendments nor in their address to citizens on the operation of Vermont's government did the censors suggest that the General Assembly was violating the Take Care Clause when it enacted legislation providing for enforcement of statutory forfeitures by common informers. The 1786 Constitution continued to instruct the Governor and Council "to take care that the laws be faithfully executed,"[290] but said nothing to suggest that the framers perceived any inconsistency with legislative reliance on popular enforcement.

The 1786 Vermont Constitution no longer included Section 30 expressly recognizing the legislative power to allocate legislative fines or forfeitures.[291] However, the General Assembly soon adopted legislation premised on that power.[292] One such statute set default rules for payment of fines and penalties imposed under penal statutes, with the money going to different government treasuries depending on which court imposed the fine.[293] However, these default rules could be varied by "any express law of this State" that "otherwise ordered" a different allocation of the fine.[294] The legislature expressly provided for situations where a statute

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[288] Paul S. Gillies, *Revising the Vermont Constitution: 1785–1986, and Beyond*, VT. BAR J. & L. DIG., Oct. 1991, at 6–9.

[289] VT. CONST. of 1786, ch. II, § 6.

[290] *Id.* ch. II, § 11.

[291] *See supra* note 244 and accompanying text.

[292] *See* Act of March 9, 1787, 1787 Vt. Acts & Resolves 70.

[293] *Id.* at 70–71.

[294] *Id.* at 71.

authorized popular enforcement, but a case was, in fact, prosecuted by a government official:

> *And be it further enacted by the authority aforesaid*, That where any part of a penalty or forfeiture is or shall be given to any one who shall prosecute to effect, and no private person shall appear to prosecute therefor, and such prosecution shall be commenced for such penalty or forfeiture, on the complaint, information, or presentment of the State's Attorney, Grand Jurors, or other informing officers, the whole of such penalty or forfeiture shall be paid and belong to the treasury to which one part thereof would have belonged in case the same had been sued for by a common informer.[295]

Interestingly, this law concerning the allocation of fines and penalties also contained a forfeiture subject to popular enforcement. A court clerk or justice of the peace who failed to report the imposition and collection of a fine in a timely fashion was himself subject to a forfeiture, "one half to him or them who will prosecute the same to effect, and the other half to the treasury where the fine is payable."[296]

The General Assembly continued to enact *qui tam* statutes under Vermont's new 1786 Constitution in the years leading up to the drafting and ratification of the United States Constitution. Another busy legislative session in February and March 1787 produced well over a dozen distinct statutes providing for popular enforcement, including the re-enactment of several measures first adopted in earlier years. One ambitious regulatory undertaking required state and local officials to acquire uniform weights and measures that would then be used as the basis for certifying weights and measures used by merchants.[297] The legislation included forfeitures

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[295] *Id.*

[296] *Id.*

[297] Act of Mar. 2, 1787, 1787 Vt. Acts & Resolves 161.

applicable to the State Treasurer, county treasurers, town selectmen, and merchants, all of which could be enforced through popular actions.[298] In that same legislative session, the General Assembly authorized common informers to collect forfeitures from those altering or defacing brands on sheep or cattle,[299] from persons issuing or using unauthorized currency,[300] from those owning an inn or tavern that possessed dice, cards, or other instruments for gaming,[301] from ferry operators charging higher than authorized rates for ferry service,[302] from those obstructing the migration of fish up and down the state's rivers,[303] from individuals conducting or promoting lotteries,[304] from millers charging higher than authorized fees for grinding grain,[305] from persons felling trees into a river,[306] from a town's selectmen for failing to maintain a set of stocks, a signpost (for posting notices), and a pound for animals,[307]

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[298] *Id.* at 162 (providing "one half to him who shall prosecute the same to effect"). The law continues that "the one half [ought be given] for the use of the informer" and that "the other moiety [ought be given] to the informer or him that shall prosecute for the same." *Id.* at 163.

[299] Act of Mar. 5, 1787, 1787 Vt. Acts & Resolves 25 (providing "one half to him or them who shall prosecute the same to effect, and the other half to the treasury of the county").

[300] Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 38, 40 (providing "one third part to him or them who sue for and prosecute for the same to effect"); *see also id.* at 38 (offering a reward from the public treasury to an informer who shall "make discovery, and give information" leading to conviction of a counterfeiter).

[301] Act of Feb. 28, 1787, 1787 Vt. Acts & Resolves 48 (providing "the one moiety thereof to the informer, with costs of prosecution").

[302] Act of Feb. 27, 1787, 1787 Vt. Acts & Resolves 70 (providing "one half to the informer who shall prosecute the same to effect").

[303] Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 72 (providing "one half to the complainer or informer who shall prosecute the same to effect, the other half to the county treasury").

[304] Act of Feb. 27, 1787, 1787 Vt. Acts & Resolves 93 (providing "one half to him who shall prosecute the same to effect").

[305] Act of Mar. 31, 1787, 1787 Vt. Acts & Resolves 104 (providing "one moiety whereof shall be to the complainer who shall prosecute the same to effect").

[306] Act of Mar. 9, 1787, 1787 Vt. Acts & Resolves 105, 106 (providing "to the use of any person who shall sue for and prosecute the same to effect").

[307] Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 117, 118 (providing "the other half to him or them who will prosecute for the same to effect before any Court").

from persons impounding animals who failed to give notice to the owners (or those seeking to rescue animals from being transported to the pound),[308] from a clerk at a proprietor's meeting who neglected statutory duties,[309] from someone giving or receiving a small pox infection without authorization or failing to report such an infection,[310] from finders of stray animals or lost goods who failed to record and advertise the find,[311] from those keeping an inn or tavern or making retail sales of alcohol without a license,[312] and from lenders and others committing usury.[313]

III. POPULAR ENFORCEMENT AS PRIVATE LITIGATION

In the period leading up to the drafting of the United States Constitution, Pennsylvania, New York, and Vermont all operated under state constitutions vesting executive power in specified officials and instructing them to "take care" that the laws be faithfully executed. All three jurisdictions made routine and extensive use of legislation allowing common informers to sue for statutory forfeitures. The informer was not required to show any individualized injury from the challenged conduct; such litigation instead furthered the public's interest in the enforcement of state law. Our 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. Censors elected to conduct constitutional audits in Pennsylvania and Vermont jealously sought out separation of powers violations,

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[308] *Id.* at 118, 120.

[309] Act of Mar. 9, 1787, 1787 Vt. Acts & Resolves 121, 123 (providing "one half of such fine shall be paid to the complainant who shall prosecute to effect").

[310] Act of Feb. 27, 1787, 1787 Vt. Acts & Resolves 142, 143 (providing "one half to the person or persons who shall prosecute to effect").

[311] Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 144 (providing "one half to the complainer and the other half to the Town Treasurer").

[312] Act of Mar. 10, 1787, 1787 Vt. Acts & Resolves 149, 151 (providing that "fines shall be disposed of, half to him who complains and prosecutes to effect").

[313] Act of Mar. 8, 1787, 1787 Vt. Acts & Resolves 170, 171 (granting "the other moiety to the informer that shall sue for and prosecute the same to effect").

but raised no constitutional concerns about the heavy use of *qui tam* litigation in those states.

The lack of any constitutional objection to *qui tam* legislation in these three states can be attributed to the eighteenth century understanding of popular enforcement and its relation to government enforcement. Sir William Blackstone, in his *Commentaries on the Laws of England*, discussed *qui tam* litigation in connection with enforcement of "penal statutes," which exacted forfeitures for violating statutory requirements.[314] Blackstone outlined a range of legislative options for collection of the forfeitures imposed in penal statutes.[315] While a legislature could provide for enforcement by public officials, they could also award the statutory forfeiture to a "party grieved" by the defendant's unlawful conduct or to "any common informer; or, in other words, to any such person or persons as will sue for the same."[316] When the legislature chose the latter option, the suits were "called *popular* actions, because they are given to the people in general."[317]

Like a suit by an aggrieved party, a suit by a common informer was seen as a form of private litigation, not litigation by or on behalf of the government, and therefore would not implicate any separation of powers principles implicit in the Take Care Clause. Blackstone emphasized the private nature of *qui tam* litigation in a passage of the *Commentaries* explaining that a popular action gives the common informer a property interest in the statutory forfeiture:

> [The informer] obtains an inchoate imperfect degree of property, by commencing his suit; but it is not consummated till judgment, for if any collusion appears, he loses the priority he had gained. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to

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[314] 3 WILLIAM BLACKSTONE, COMMENTARIES *159–60.

[315] Beck, *Statutory Damages*, *supra* note 2, at 182–84.

[316] 3 WILLIAM BLACKSTONE, COMMENTARIES *159–60.

[317] *Id.* at *160 (emphasis in original).

> all the world) cannot after suit commenced remit any thing but his own part of the penalty. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest.[318]

In Blackstone's telling, forfeitures given to "any person that will sue for the same" are placed "as it were in a state of nature, accessible by all the king's subjects."[319] Analogous perhaps to the fox in *Pierson v. Post*, they are "open . . . to the first occupant, who declares his intention to possess them by bringing his action" and then carries out that intention by litigating to judgment.[320]

Enforcement of penal statutes was not considered an exclusive governmental prerogative. The question of who could sue to collect a statutory forfeiture under a penal statute was instead a matter for legislative determination based on policy considerations.[321] While a statute authorizing enforcement actions by legislative or judicial officials might well have raised separation of powers concerns in the framing generation, separation of powers concerns were not implicated when a legislature vested enforcement authority in an aggrieved private party or in "any of the king's subjects in general."[322]

The distinction between government enforcement actions and private enforcement actions played a central role in an interesting public exchange that played out in Pennsylvania newspapers in 1788. Richard Wells published a wide-ranging critique of actions connected with the condemnation and sale of his ship, *The Anna*,

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[318] 2 WILLIAM BLACKSTONE, COMMENTARIES *437.

[319] *Id.* at *438.

[320] *Id.*; *see* Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805). Evidence from England indicates that some people became professional informers, making a living from pursuing a portfolio of *qui tam* actions. *See, e.g.*, Beck, *English Eradication*, *supra* note 1, at 577; Beck, *Controversial Legislation*, *supra* note 13, at 608–13.

[321] *See* Beck, *Statutory Damages*, *supra* note 2, at 182–84, 230.

[322] 3 WILLIAM BLACKSTONE, COMMENTARIES *160.

apparently for smuggling.[323] While the core of Wells' complaint focused on the state's Controller General, he also criticized Pennsylvania's part-time Attorney General, William Bradford, who represented a *qui tam* informer in his private practice, serving as one of the attorneys trying the case.[324] In particular, Wells complained about the attorneys' fees paid to Bradford, which Wells thought were excessive and should have been submitted to the Executive Council for approval in light of Bradford's generous salary as an officer of the state.[325]

Bradford initially wrote privately to the Executive Council to respond to Wells' complaint, and then solicited the Council's permission to publish his letter.[326] He noted that Wells "evidently accuses me of a violation of my public duty, in accepting fees on the prosecution of several informations in the name of Frederick Phile, *qui tam*."[327] Bradford contended that "my official duty does not call upon me to assist in the prosecution of any *qui tam* information."[328]

> These suits may be, and generally are, instituted without authority from the Council, or the knowledge of the Attorney-General. They are conducted at the private risque of the informer, and by such council as he chuses to employ. He alone is answerable for all costs and expences, and liable for all damages to the party injured, in case he should fail. Till the sentence of condemnation passes, he fights the battle alone, unaided by the State, which has never in a single instance borne any part of the expence incurred on an unsuccessful information. Whenever I happen to be retained in these causes, I appear as council for the informer;

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[323] *See* Richard Wells, *To the Public*, PA. PACKET & DAILY ADVERTISER, at 1 (Jan. 4, 1788).

[324] *Id.* at 1–2.

[325] *Id.* at 2.

[326] *See* Bradford, *supra* note 36, at 3.

[327] *Id.*

[328] *Id.*

> I receive my recompence from him, and not from the State . . .[329]

Bradford expressed confidence "that your Excellency and the Council will not conceive that I violate my public duty by attending to the business of my profession."[330]

Bradford appended to his letter a statement "by all the Judges of the Supreme Court, who are at present in town." The three Justices who signed the statement supported Bradford's position that a *qui tam* suit is private litigation unconnected to Bradford's role as Attorney General:

> [I]t is no part of the duty of [the Attorney-General] to assist in the prosecution of any *qui tam* information, or other penal action; nor has it ever been considered as such either before or since the revolution. The suit is clearly the suit of the informer, and not of the State, until judgment; it not being manifest before, that the commonwealth has any interest in it. The Attorney-General is not bound, nor has he any right *ex officio* to interfere in the prosecution; but he is certainly at liberty, like other gentlemen of his profession, to be retained by the informer; and whenever he is so, he is considered as advocating the cause in his professional, not in his public character.[331]

Pennsylvania's Executive Council found Bradford's distinction between government litigation and private *qui tam* litigation persuasive. The letter authorizing Bradford to publish the correspondence noted that "from your letter, as well as the certificate of the judges, the Board are fully satisfied, that you, as

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[329] *Id.* Bradford defended the practice of deducting the expenses of prosecution (including attorney's fees) from the proceeds of a condemnation sale before dividing the recovery with the government as reasonable.

[330] *Id.*

[331] *Id.*

Attorney General, [were] not bound, or had any right, *ex officio*, to interfere in or carry on the prosecution against the ship Anna."[332] The controversy apparently did no lasting damage to Bradford's reputation, as he was subsequently appointed by President Washington to become the second Attorney General of the United States.[333]

Article II challenges to *qui tam* legislation rest on the premise that suits to vindicate the public interest in enforcing the law are appropriate only for government officials. The framing generation, aware of the centuries-old Anglo-American practice of popular enforcement, did not see the world that way. Just as aggrieved private parties may file suits to enforce the law without implicating Article II, common informers could also pursue private litigation to enforce the law. In a sense, the common informer was an aggrieved party as a member of the community whose laws had been breached, since a violation of a penal statute was deemed "a general Grievance to every Body."[334] By filing suit to collect a statutory penalty, a common informer "made the popular action his own private action."[335] It was "the suit of the informer, and not of the State, until judgment."[336] Since a popular action was a private lawsuit, rather than a government lawsuit, it did not implicate the governmental duty to "take Care that the Laws be faithfully executed."

As Justice Scalia's opinion for the *Vermont Agency* Court recognized, "immediately after the framing, the First Congress enacted a considerable number of informer statutes."[337] Frequent inclusion of *qui tam* provisions in federal legislation continued for

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[332] *Id.* (republishing a Jan. 14, 1788 letter from the Secretary of the Council to Attorney General Bradford).

[333] *See* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 45, 116 n.361 (2007).

[334] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN *267.

[335] 2 WILLIAM BLACKSTONE, COMMENTARIES *437.

[336] *See* Bradford, *supra* note 36, at 3.

[337] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776 (2000).

at least a decade following the ratification of the Constitution.[338] Congress in these early federal statutes was not disregarding the provisions of Article II, which vests executive power in the President, or the constitutional mandate to ensure faithful execution of the laws.[339] Instead, like the legislatures of Pennsylvania, New York, and Vermont in the decade preceding the drafting and ratification of the U.S. Constitution, Congress was simply carrying forward the longstanding Anglo-American practice of supplementing executive enforcement of penal statutes with private enforcement actions pursued by common informers.

CONCLUSION

The Supreme Court in recent years has frequently invoked history and tradition as the touchstone for interpreting the U.S. Constitution.[340] Careful attention to framing-era history undermines the Article II arguments against federal *qui tam* legislation.

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[338] Beck, *Statutory Damages*, *supra* note 2, at 185–99.

[339] U.S. CONST. art. II, §§ 1, 3.

[340] *See, e.g.*, Chiafalo v. Washington, 140 S.Ct. 2316, 2325–2329, 592–97 (2020) (holding that the history of the practice under Article II and the Twelfth Amendment shows states can bind the votes of presidential electors); Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of America, Ltd., 144 S. Ct. 1474, 1481–86 (2024) (looking to history of English, colonial, state and early congressional legislation to define "appropriation" in Article I).