COMMENTS

The Standing of Qui Tam Relators Under the False Claims Act

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INTRODUCTION

The False Claims Act¹ ("FCA") is the federal government's chief defense against fraud. Passed during the Civil War to help deter fraud by defense contractors,² the FCA grants a cause of action to the United States to sue for civil damages and penalties against any entity knowingly presenting a fraudulent claim to the government.³ The qui tam⁴ provision of the Act authorizes private individuals to adopt the government's cause of action and sue on behalf of the United States.⁵ These qui tam plaintiffs, or "relators," receive a "bounty" of up to thirty percent of the damage award or settlement, plus expenses, attorney fees, and costs of suit.⁶

After the qui tam plaintiff files a complaint, the government retains some control over the suit. The complaint remains under seal for sixty days after it is filed, in order to give the Attorney General time to decide whether to intervene.⁷ After the expiration of the sixty days, the Attorney General can elect to conduct the

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¹ 31 USC § 3729 et seq (1986).

² *US v Bornstein*, 423 US 303, 309 (1976).

³ 31 USC § 3729(a).

⁴ "Qui tam" is short for "qui tam pro domino rege quam pro se imposito sequitur," meaning "who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Society v US Plywood-Champion Papers, Inc.*, 324 F Supp 302, 305 (S D Tex 1971).

⁵ 31 USC § 3730(b)(1).

⁶ 31 USC § 3730(d).

⁷ 31 USC § 3730(b)(2).

action,⁸ in which case the government has primary responsibility for prosecuting the action and is not bound by any action of the qui tam plaintiff.⁹ Alternatively, the government can allow the qui tam plaintiff to conduct the action,¹⁰ while retaining the right to intervene at a later date upon a showing of good cause.¹¹

Although qui tam has been around for centuries,¹² a recent surge in qui tam litigation under the FCA¹³ has prompted defendants to challenge its constitutionality. The attack has come on three fronts: the Article II Appointments Clause,¹⁴ separation of powers,¹⁵ and Article III standing. Lower courts have found the provision constitutional on all three grounds, but have offered little analysis on how a qui tam plaintiff can fulfill Article III standing requirements.

This Comment focuses on the question of whether a qui tam relator can satisfy the Article III standing tests of injury in fact, causation, and redressability. The Comment first outlines the basic doctrine of standing and reviews the treatment given to this issue

⁸ 31 USC § 3730(b)(4)(A).

⁹ 31 USC § 3730(c)(1).

¹⁰ 31 USC § 3730(b)(4)(B).

¹¹ 31 USC § 3730(c)(3).

¹² Both modern commentators and courts have recognized the historical roots of qui tam. The first qui tam statutes apparently were passed in fourteenth century England, see Note, *The Qui Tam Doctrine*, 7 Tex Intl L F 415, 418 (1972), and remain a part of British law. William Holdsworth, 4 *A History of English Law* 240 (Little, Brown, 2d ed 1938). Qui tam has also played a role in American history. The First Congress passed at least one qui tam statute, and, in the words of the Supreme Court, qui tam has been around "ever since the foundation of our government." *Marvin v Trout*, 199 US 212, 225 (1905).

¹³ See Steve France, *The Private War on Pentagon Fraud*, 76 ABA J 46, 46 (March, 1990) (As of October 26, 1989, 198 qui tam suits had been filed under revised law, which is "a deadly David to the Goliath of defense industry fraud and waste.").

¹⁴ Defendants have challenged qui tam under the Appointments Clause, arguing that plaintiffs may not conduct litigation on behalf of the United States because they are not "officers" appointed pursuant to Article II. The lower courts, however, have held that a qui tam relator lacks the "tenure, duration, continuing emolument, or continuous duties" necessary to be an "officer" under Article II, so that his conduct cannot violate the Appointments Clause. See *United States ex rel Newsham v Lockheed*, 722 F Supp 607, 613 (N D Cal 1989); and *United States ex rel Stillwell v Hughes Helicopters, Inc.*, 714 F Supp 1084, 1094 (C D Cal 1989), both quoting *Auffmordt v Hedden*, 137 US 310 (1890) (private merchant appraiser in customs dispute not an Article II "officer").

¹⁵ Defendants have challenged qui tam on separation of powers grounds, arguing that qui tam divests the executive branch of its exclusive control over false claims litigation. Because the extent of the FCA's divestiture is limited, however, the courts have rejected this challenge. See *Newsham*, 722 F Supp at 612; and *Stillwell*, 714 F Supp at 1093.

For a thorough discussion of the separation of powers issues implicated by qui tam, see Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L J 341 (1989). See also the discussion in note 137, suggesting a couple of separation of powers issues raised by qui tam.

by the lower courts. Second, the Comment examines the history of standing doctrine to assess the proper role of original intent arguments in this context. This historical evaluation suggests that the lower courts have improperly afforded qui tam a strong presumption of constitutionality. Finally, this Comment shows how modern standing doctrine should be applied to qui tam. After concluding that a qui tam relator cannot fulfill the Article III injury requirement on his own, the Comment recommends the adoption of an assignment theory to allow standing in qui tam suits. Under this theory, qui tam plaintiffs have standing as assignees of the government's injury. Properly limited, the assignment theory gives effect to congressional intent while preserving the integrity of standing doctrine.

I. STANDING DOCTRINE AND APPLICATION TO QUI TAM BY THE LOWER COURTS

Article III of the Constitution defines the role of federal courts in our government of separated powers. Under § 2 of Article III, the "judicial power" extends to "cases" or "controversies." At least since 1922, the courts have recognized a constitutional command that unless the plaintiff has "standing" to sue, there is no case or controversy. The basic premise of standing is that a plaintiff may not invoke the powers of the federal courts unless he can first meet three Article III requirements: (1) that he personally suffers some actual or threatened injury;¹⁶ (2) that the injury "fairly can be traced" to the defendant's putatively illegal conduct;¹⁷ and (3) that the injury is "likely to be redressed by a favorable decision."¹⁸ The Supreme Court has admitted that these requirements are "concepts concededly not susceptible of precise definition."¹⁹ It has specified, however, that the plaintiff's injury must be "distinct and palpable,"²⁰ not "[a]bstract," "conjectural," or "hypothetical."²¹

When there is no statute granting an express right of action, courts employ two other "prudential" limitations on standing to sue: (1) the plaintiff may not "invoke the general public interest" in support of his claim; and (2) the plaintiff must assert his own

¹⁶ *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464, 472 (1982), quoting *Gladstone Realtors v Village of Bellwood*, 441 US 91, 99 (1979).

¹⁷ *Simon v Eastern Kentucky Welfare Rights Organization*, 426 US 26, 41 (1976).

¹⁸ *Id.* at 38.

¹⁹ *Allen v Wright*, 468 US 737, 751 (1984).

²⁰ *Warth v Seldin*, 422 US 490, 501 (1975).

²¹ *City of Los Angeles v Lyons*, 461 US 95, 101-02 (1983).

legal rights and interests, not the legal rights or interests of third parties.²² However, even a statute cannot abrogate the Article III minima.²³ That is, a naked statutory grant of standing, absent a "distinct and palpable injury," violates Article III.²⁴

Thus, in order to satisfy Article III, a qui tam plaintiff must allege a distinct injury fairly traceable to the false claim at issue and likely to be redressed by a decision in his favor. Several lower courts have ruled that qui tam plaintiffs meet this standard. None of them, however, has satisfactorily demonstrated why.

Among appellate courts, only the Fifth Circuit has entertained a challenge to qui tam on standing grounds. In *United States ex rel Weinberger v Equifax*,²⁵ the Fifth Circuit upheld the plaintiff's standing to assert his FCA qui tam suit, but dismissed his declaratory judgment action for lack of standing. In dismissing the declaratory judgment action, the court reasoned that the plaintiff's interest was only "one shared with other citizens that the government follow its laws. . . . The personal interest he allege[d was] too tenuous and undifferentiated from the interests of others to afford him standing."²⁶ In allowing the qui tam action, however, the court mysteriously ignored the injury in fact requirement. The court simply held that the FCA "clearly accords" standing to qui tam plaintiffs,²⁷ without explaining why the plaintiff had the right to pursue an "injury" (the harm, shared by all citizens, caused by fraud against the government) that seems no less "tenuous and undifferentiated" than his asserted injury under the declaratory action.

Subsequent to *Weinberger*, two district courts reached the same conclusion, with similarly sparse analysis. In *Public Interest Bounty Hunters v Board of Governors*,²⁸ the plaintiff, a public interest group, brought a qui tam suit under the FCA to compel the defendant federal bank regulators to investigate banking practices at various banking institutions. Although the court dismissed the action for failure to state a claim, it addressed the Article III issue

²² *Warth*, 422 US at 501.

²³ *Gladstone*, 441 US at 100.

²⁴ See *McClure v Carter*, 513 F Supp 265, 271 (D Idaho) (three judge court), aff'd without opinion, *McClure v Reagan*, 454 US 1025 (1981) (despite congressionally created cause of action, senator did not have standing to challenge appointment of federal judge because he could allege no distinct injury).

²⁵ 557 F2d 456 (5th Cir 1977).

²⁶ *Id* at 460 n 3 (citing *Warth*, 422 US at 499).

²⁷ *Id* at 460.

²⁸ 548 F Supp 157 (N D Ga 1982).

in ruling on the defendant's motion for an award of attorneys' fees. For purposes of assessing attorneys' fees, the court held that the United States was not the true plaintiff in the action. The public interest group was the true plaintiff, and it had standing to sue under Article III.²⁹ The court explained that the purpose of the FCA was to provide a private citizen—who otherwise had no judicially cognizable “interest” in rights protected by federal statutes—an interest sufficient to constitute standing to sue to enforce these statutes. The court acknowledged the Article III injury requirement, but simply asserted that, by virtue of the statutory bounty, the qui tam plaintiff “becomes a ‘person aggrieved’ by defendants’ purported behavior who has suffered ‘injury’ of the constitutional magnitude.”³⁰ The opinion failed, however, to explain how the possibility of the bounty transforms the plaintiff into a person injured by the false claim.

In *United States ex rel Newsham v Lockheed Missiles & Space Co., Inc.*,³¹ a district court in California followed the lead of *Weinberger* and *Bounty Hunters* in relying solely on the FCA's language to find Article III standing. In *Newsham*, the plaintiff, a private citizen, sued Lockheed for defrauding the government on a defense contract. The *Newsham* court nodded in the direction of Article III's “irreducible minimum,” but then asserted, without analysis, that Congress was able to reduce it:

[W]here Congress has authorized judicial review of an issue, the standing inquiry begins with a determination of whether the statute in question authorizes review at the behest of the plaintiff. As long as an issue is justiciable, e.g. not a political question, Congress has the power to determine who is a proper party to a lawsuit.³²

In each of these cases, statutory language seems to control, with no analysis of how a qui tam plaintiff suffers any distinct injury or why Congress might be able to abrogate the Article III requirement.

Only one district court case has provided any analysis on this issue. In *United States ex rel Stillwell v Hughes Helicopters, Inc.*,³³ the plaintiff, a private citizen and employee of Hughes Heli-

²⁹ Id at 161.

³⁰ Id (citations omitted).

³¹ 722 F Supp 607 (N D Cal 1989).

³² Id at 614 (citing *Sierra Club v Morton*, 405 US 727, 732 n 3 (1972)).

³³ 714 F Supp 1084 (C D Cal 1989).

copters, brought a qui tam suit alleging that Hughes overcharged the government on a defense contract. The *Stillwell* court acknowledged the injury in fact requirement, but concluded, that there was no constitutional prohibition to the relator's suing, under the statutory grant of standing, on the government's injury. In other words, the "False Claims Act essentially creates, by legislative fiat, a *de facto* assignment of a portion of the government's interest in the action."³⁴

Recognizing that it had departed from "traditional standing theories," the court posited three ways that a qui tam plaintiff alleges a constitutionally sufficient stake in the outcome. First, the court stated that the possibility of the "bounty" created by the FCA was a sufficient "personal stake" to invoke the judicial power.³⁵ In addition to the bounty, the court offered two other potential "factors" that established injury in fact: the potential harm to the relator's employment relationship with the defendant (his employer), and the potential liability of the relator in a false claims action if he had participated in the fraud and failed to pursue the claim.³⁶

II. HISTORY: ORIGINAL INTENT AND STANDING

In conjunction with their attempts to apply Article III standing doctrine, the lower courts have raised historical arguments in favor of qui tam. These courts have stressed two factors: the purportedly "heavy reliance" of the First Congress on qui tam actions³⁷ and adjudication of such actions in the early days of the Supreme Court.³⁸ Unfortunately, qui tam's historical bases have unduly influenced the lower courts, which have used qui tam's "historical roots"³⁹ to create a presumption of constitutionality. History has served as a proxy for analytical coherence; long-standing tradition has been thought to render unnecessary any close doctrinal scrutiny.⁴⁰

³⁴ Id at 1098. The question whether an Act of Congress may constitutionally accomplish such an assignment is treated in the text at notes 115-37.

³⁵ Id at 1099.

³⁶ Id.

³⁷ *Newsham*, 722 F Supp at 615. See also *Stillwell*, 714 F Supp at 1086.

³⁸ *Newsham*, 722 F Supp at 609.

³⁹ Id.

⁴⁰ *Newsham* mentions *Valley Forge*'s personal injury requirement, but deems *Valley Forge* "easily distinguished" simply because "it was a taxpayers case." 722 F Supp at 614. After dismissing the injury in fact requirement, the court relies on vague notions of "personal stake," taking comfort in qui tam's history. Id at 613-15.

This section examines the historical arguments made for qui tam and suggests that they deserve little weight. Today's standing doctrine so diverges from early doctrine that historical arguments provide no evidence of qui tam's compliance with modern requirements such as injury in fact. Under early doctrine, any form of action was thought to create a case or controversy so long as it was known to the common law in the era of the Framers. Qui tam, because of its historical familiarity, posed no difficulties to courts operating under this theory. But modern standing doctrine replaces attention to the forms of action with new requirements—particularly the requirement that the plaintiff allege injury in fact—and it is far from obvious that qui tam plaintiffs meet these requirements. Standing is a modern game, and courts that uphold qui tam on historical grounds are playing by archaic rules.

A. Qui Tam and the First Congress

The First Congress's purported reliance on qui tam is of little help in resolving the standing issue. In *Bowsher v Synar*,⁴¹ the Supreme Court reiterated its view that the "actions" of the First Congress provide "contemporaneous and weighty evidence" of the Constitution's meaning.⁴² But *Bowsher* does not stand for any sort of "adverse possession" of constitutionality. The Court expressly rejected that notion in an earlier case:

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.⁴³

Acts of the First Congress are by no means immune from constitutional scrutiny; in fact, the Court has found several of them unconstitutional.⁴⁴

What *Bowsher* does stand for is that *deliberations* of the First Congress on constitutional issues illuminate constitutional debate

⁴¹ 478 US 714 (1986) (holding unconstitutional Congress's assumption of executive power by giving the Comptroller General, an officer removable by Congress, the ability to make budget cuts and order the President to implement those cuts).

⁴² Id at 723.

⁴³ *Walz v Tax Commission*, 397 US 664, 678 (1970).

⁴⁴ See *Hayburn's Case*, 2 US 408 (1792) (declining to enforce the First Congress's grant of non-judicial duties to courts); *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) (declaring unconstitutional § 13 of the First Judiciary Act); and *New York Times v Sullivan*, 376 US 254, 276 (1964) (broad consensus that Sedition Act, passed by the First Congress, was "inconsistent with the First Amendment").

today. The "actions" of the First Congress that provide "contemporaneous and weighty evidence" of the Constitution's meaning are deliberative actions, not mere legislative enactments. Indeed, *Bowsher* was based on "debate" in the First Congress of 1789.⁴⁵

Hence, if the courts are to consider the history of *qui tam* actions they must do so "not because a Congressional conclusion on a constitutional issue is conclusive," but "because of [their] agreement with the reasons upon which it was avowedly based."⁴⁶ Absent some record of the First Congress's deliberation on the Article III ramifications of *qui tam*, those statutes provide a historical reference, but do not constitute "contemporaneous and weighty evidence." Even if the *qui tam* actions were part of the "[d]eeply embedded traditional ways of conducting government" at the time of the First Congress, these traditions do not "supplant the Constitution"; they only "give meaning" and "may be treated as a gloss" on the words of a text.⁴⁷

The value of the "gloss" provided by *qui tam*'s history may therefore depend on the depth of its tradition. *Newsham* cites "at least ten" of the statutes passed by the First Congress as providing for *qui tam* actions.⁴⁸ However, the First Congress's "heavy reliance"⁴⁹ on *qui tam* is overstated. As *Stillwell* admits, "most of these statutes resembled simple informer laws."⁵⁰ Indeed, many of the statutes merely allowed an informer to share in a recovery secured by a government official, or allowed an injured party to sue.⁵¹ Others seemed to allow recovery for "public" injuries,⁵² but only one seemed to expressly permit the informer to pursue the claim as

⁴⁵ *Bowsher*, 478 US at 723-24.

⁴⁶ *Myers v United States*, 272 US 52, 136 (1926).

⁴⁷ *Youngstown Sheet & Tube Co. v Sawyer (The Steel Seizure Case)*, 343 US 579, 610-11 (1952) (Frankfurter concurring).

⁴⁸ 722 F Supp at 609.

⁴⁹ *Id* at 615.

⁵⁰ 714 F Supp at 1086.

⁵¹ See Act of July 31, 1789, § 38, 1 Stat 29, 48; Act of September 1, 1789, §21, 1 Stat 55, 60; Act of August 4, 1790, § 69, 1 Stat 145, 177 (all three statutes being customs and maritime laws providing for a share of recovery to informers); Act of September 2, 1789, § 8, 1 Stat 65, 67 (penalties levied against Treasury Department officials for violation of prohibitions attached to their office must be shared with the informer); Act of March 1, 1790, § 6, 1 Stat 101, 103; Act of July 5, 1790, § 1, 1 Stat 129 (allowing government-appointed census-takers to bring suit and retain half of fines recovered); and Act of May 31, 1790, §§ 2, 6, 1 Stat 124, 125-26 (allowing authors and publishers to recover from copyright violators).

⁵² See Act of July 31, 1789, § 29, 1 Stat 29, 45 (permitting recovery against customs officials for failing to display table of fees and duties); Act of August 4, 1790, § 55, 1 Stat 145, 173 (same); and Act of July 20, 1790, § 1, 1 Stat 131 (permitting recovery against ship masters for failing to contract with crew).

plaintiff.⁵³ Moreover, all of the First Congress's alleged "qui tam" provisions have since been repealed. One of the few qui tam provisions in force today (four remain besides the FCA) has been described as an "anachronistic" vestige of the past.⁵⁴ Of the remaining qui tam statutes, only the FCA purports to allow private parties to vindicate a proprietary interest belonging to the government.⁵⁵

Qui tam is thus far from a "deeply embedded traditional way[] of conducting government." The extent of its early use is unclear, and Congress has seldom resorted to qui tam since the early 1800s.⁵⁶ Thus, even the "gloss" provided by qui tam's history appears muted.

B. History and the Doctrine of Standing

Even if qui tam's tradition were more deeply embedded, the history of Article III's case or controversy requirement suggests that "original intent" is meaningless in the specific context of standing. Standing, including the injury in fact requirement, is a twentieth century judicial construct—an attempt to give meaning to "case" or "controversy" after its original meaning had lost its effectiveness.

Despite the modern Supreme Court's insistence that the doctrine is historically based,⁵⁷ standing is a "relatively recent" doctrinal creation.⁵⁸ The Court first introduced the doctrine in 1922 in *Fairchild v Hughes*,⁵⁹ and did not use the term "standing" as an Article III concept until 1939.⁶⁰ Historically, Article III jus-

⁵³ Act of March 3, 1791, § 44, 1 Stat 199, 209 (allowing an action for "penalty or forfeiture . . . by action of debt, in the name of the person or persons intitled [sic] thereto, or by information, in the name of the United States of America").

⁵⁴ Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1084 (Foundation, 3d ed 1988) (referring to 31 USC §§ 231-34).

⁵⁵ See 18 USC § 962 (1988) (forfeiture of vessels privately armed against friendly nations); 25 USC § 201 (1982) (recovery of penalties for violation of Indian protection laws); 35 USC § 292(b) (1982) (penalties for patent infringement); and 46 USC § 723 (1982 & 1986 Supp) (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations).

⁵⁶ See Note, *The History and Development of Qui Tam*, 1972 Wash U L Q 81, 95-101.

⁵⁷ See *Flast v Cohen*, 392 US at 101; *Glidden Co. v Zdanok*, 370 US 530, 563 (1962); and *Joint Anti-Fascist Refugee Committee v McGrath*, 341 US 123, 150 (1951) (Frankfurter concurring).

⁵⁸ See William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 224 (1988).

⁵⁹ 258 US 126 (1922).

⁶⁰ Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan L Rev 1371, 1378 and n 36 (1988) (citing *Coleman v Miller*, 307 US 433, 464 (1939)).

ticiability depended only on the availability of the proper writ or form of action. As the Court explained in *Osborn v Bank of the United States*, justiciability existed only where a legal question “assume[d] such a *form* that the judicial power [was] capable of acting on it.”⁶¹ Thus, modern standing limitations on justiciability (injury in fact, causation, and redressability) were unnecessary at the time the Framers drafted Article III; the rigidity of the forms of action provided the “filter” afforded by today’s doctrine. Until this modern doctrine took shape, the form and not the substance of a proceeding determined its Article III justiciability.⁶²

The modern Supreme Court has often insisted that standing requirements coincide with the forms “historically viewed as capable of judicial resolution.”⁶³ Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v McGrath*,⁶⁴ was apparently the first to assert that the Article III requirement that the plaintiff be “affected adversely” in a “personal” way, not “in some indefinite way in common with people generally,”⁶⁵ was for the most part coextensive with the forms that were the “business of the colonial courts and the courts of Westminster when the Constitution was framed.” Frankfurter posited that such cases, which arose in ways that “to the expert feel of lawyers constitute[d] ‘case or controversy,’ ”⁶⁶ were precisely the ones that would survive the scrutiny of the modern Article III doctrine. Subsequent decisions followed Frankfurter’s lead:

[O]ne touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort “recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems.”⁶⁷

(Frankfurter concurring)).

⁶¹ 22 US 738, 819 (1824) (emphasis added).

⁶² *Tutun v United States*, 270 US 568, 577 (1926) (“Whenever the law provides a remedy enforceable in the courts according to the *regular course of legal procedure*, and that remedy is pursued, there arises a case within the meaning of the Constitution.”) (emphasis added). See also *Muskrat v United States*, 219 US 346, 356-59 (1911); and *Keller v Potomac Electric Power Co.*, 261 US 428, 444 (1923).

⁶³ *Flast v Cohen*, 392 US at 101.

⁶⁴ 341 US 123, 149-59 (1951).

⁶⁵ *Id.* at 151.

⁶⁶ *Id.* at 150.

⁶⁷ *Glidden*, 370 US at 563 (quoting *United Steelworkers v United States*, 361 US 39, 60 (1959) (Frankfurter concurring)).

However, the Court mischaracterized history. Several modern commentators have agreed that in the late eighteenth century, "the 'courts in Westminster' afforded to a stranger a means of attack . . . without requiring a showing of injury to his personal interest."⁶⁸

The use of the proper form of action rendered unnecessary the modern day Article III inquiry into injury, causation, and redressability. Indeed, several of the writs allowed actions that were "astonishingly similar to the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart."⁶⁹ It is clear that pre-Revolutionary courts could hear certain types of actions where the "plaintiff had no personal interest or injury in fact."⁷⁰ In fact, prior to the development of modern standing doctrine, the Supreme Court entertained "public actions" that would clearly be precluded under today's Article III requirements.⁷¹ Under a writ of mandamus, the Court allowed a plaintiff to sue even though he "had no interest other than such as belonged to others" and sought only to enforce "a duty to the public generally."⁷²

Given the permissiveness of "public actions" first allowed under Article III and the novelty of modern standing doctrine, it is not surprising that the Court has heard qui tam actions without pausing to ascertain the parties' standing.⁷³ Nor is the Court inaccurate in referring to qui tam suits as examples of those that were traditionally justiciable.⁷⁴ At the same time, however, qui tam's

⁶⁸ Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L J 816, 819-20 (1969) (citing Edward Coke, 2 *Institutes of the Laws of England* 602 (1797)). See also Louis Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv L Rev 255, 258-61 (1961).

⁶⁹ Winter, 40 Stan L Rev at 1396 (cited in note 60).

⁷⁰ *Id.*

⁷¹ See *Hawke v Smith*, 253 US 221 (1920) (plaintiff files petition for injunction seeking to enjoin Ohio Secretary of State from spending public funds to submit referendum to state electors on the question of ratification of the Eighteenth Amendment); *Leser v Garnett*, 258 US 130 (1922) (suit by Maryland voters to have names of women stricken from the state voter registration list, pursuant to their argument that the Nineteenth Amendment was invalidly adopted); *Millard v Roberts*, 202 US 429 (1906) (citizen challenge to constitutionality of revenue law not originating in House of Representatives); and *Wilson v Shaw*, 204 US 24 (1907) (citizen suit to halt payments related to development of Panama Canal).

⁷² *Union Pacific v Hall*, 91 US 343, 354 (1876). The striking contrast with *Frothingham*, where the court required the plaintiff to show he suffers "some direct injury . . . and not merely that he suffers in some indefinite way with people generally," 262 US at 488, underscores the abruptness of the doctrinal change inaugurated by the early standing cases.

⁷³ See *Adams, qui tam v Woods*, 6 US (2 Cranch) 336 (1805); and *Jones, qui tam v Ross*, 2 US (2 Dall) 143 (1792).

⁷⁴ See *Flast v Cohen*, 392 US at 120 (Harlan dissenting); and *Priebe & Sons, Inc. v*

historical justiciability cannot trump modern standing requirements. Because standing is a relatively recent judicial construct, even clear original intent does not tell us whether qui tam actions are constitutional today.⁷⁵

Indeed, the Court has recently questioned the role of history as a "touchstone" of justiciability. In *Valley Forge Christian College v Americans United for Separation of Church and State*, the Court came close to admitting its historical error:

The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for *forms of relief historically associated with courts of law* in terms that have a familiar ring to those trained in the legal process.⁷⁶

But *Valley Forge* fell short of repudiating standing's historical foundations. Instead, it attempted to rewrite history. After setting forth the injury in fact, causation, and redressability requirements, Justice Rehnquist defined the relevant history as that which comports with the modern doctrine: only to the extent that history is consistent with modern standing law "does Art. III limit the federal judicial power 'to those disputes . . . which are traditionally thought to be capable of resolution through the judicial process.'"⁷⁷

After *Valley Forge*, then, history (beyond Justice Rehnquist's characterization of it) is irrelevant to the dictates of standing. Qui

United States, 332 US 407, 418 (1947) (Frankfurter dissenting). Qui tam actions were traditionally justiciable "before the king's justices at Westminster" under the writ of quo warranto. William M. Blackstone, 3 *Commentaries* *262-64 (1765). The availability of quo warranto might explain the paucity of express authorization for qui tam actions in the First Congress. With quo warranto as the vehicle for individual suits, a statutory grant of "standing" would have been superfluous.

⁷⁵ Several commentators have suggested that original intent has a very important role in this context: to compel the rescission of standing doctrine. See Winter, 40 *Stan L Rev* at 1374 (cited in note 60); and Jaffe, 75 *Harv L Rev* at 303 (cited in note 68). The admittedly imprecise state of the present doctrine may in fact recommend its reconsideration. Rather than exploring the propriety and course of comprehensive doctrinal changes, however, this Comment focuses on the proper application of the current, albeit imperfect, doctrine.

⁷⁶ 454 US at 471 (emphasis added). In several ways, Justice Rehnquist's opinion in *Valley Forge* seemed to track and reject the language used by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v McGrath*. Frankfurter referred to "the expert feel of lawyers" and the forms that were the "business of the Colonial Courts," 341 US at 150; Rehnquist pointedly rejected both of these "touchstones," abandoning the "familiar ring" to lawyers and the "forms of relief historically associated with courts of law" as guides to Article III. See also *Flast v Cohen*, 392 US at 95-96, where the Court recognized the "uncertain historical antecedents of the case-and-controversy doctrine."

⁷⁷ *Valley Forge*, 454 US at 472 (quoting *Flast*, 392 US at 97).

tam's long-standing tradition therefore provides no evidence that it fulfills the tests of injury in fact, causation, and redressability.

III. PROPER APPLICATION OF ARTICLE III STANDING DOCTRINE

With the air cleared of presumptions of historical entitlement, a fresh examination of the qui tam plaintiffs' standing is warranted. This Comment analyzes three theories offered by the lower courts to uphold the standing of qui tam relators: (1) qui tam plaintiffs suffer individual injuries of Article III magnitude; (2) the FCA's qui tam provision renders distinct and personal injury in fact unnecessary; and (3) a qui tam plaintiff satisfies Article III by adopting the government's injury under an assignment theory. This Comment rejects the first two theories, but advocates acceptance of the third.

A. Qui Tam Plaintiffs and Injury, Causation, and Redressability

One theory advanced by the lower courts for upholding the standing of qui tam relators is that the relators suffer their own Article III injuries. The lower courts have found several possible sources of interest, none of which withstands doctrinal scrutiny. Although successful qui tam plaintiffs win bounties, may lose their jobs, or (like all taxpayers) may be deprived of the efficient use of their taxes, their interests fail to rise to the level of Article III injury in fact.⁷⁸

1. The chance of receiving the statutory bounty.

Stillwell asserts that the qui tam plaintiff's prospect of receiving the FCA's "bounty" constitutes a sufficient "stake" in the outcome of the suit to satisfy Article III.⁷⁹ There are several problems with the court's conclusion. First, it is difficult to see the possibility of receiving a bounty as an "injury" cognizable under Article III. Quite the contrary; we should all be so lucky. The defendant's

⁷⁸ An atypical plaintiff might be able to allege an Article III injury in fact, but the typical qui tam plaintiff must rely on the more ephemeral "injuries" discussed in this section. For example, a subcontractor or business partner of Lockheed that is supplying the company with spare parts for fighter jets might, when Lockheed double bills the government and consequently loses its contract, suffer an Article III injury. If the subcontractor successfully convinces the court that his injury is "fairly traceable" to the fraud, he has standing regardless of the conclusions of this Comment. The remainder of this Comment assumes the plaintiff is not within the special subset of relators who might be able to allege injury in fact.

⁷⁹ 714 F Supp at 1099.

action creates the possibility of a windfall, conferring an *ex ante benefit* on the *qui tam* plaintiff (equal to the expected bounty, discounted by the probability of losing, minus any costs associated with losing, such as attorneys' fees). A rational plaintiff will bring suit only when he perceives the value of the discounted bounty to exceed the costs associated with loss. If such a bounty could confer standing, Congress could easily evade the Article III minima by rewarding successful plaintiffs who had in no way been injured.⁸⁰

2. Potential harm to the "whistleblower" in the employment context.

The *Stillwell* court went on to hold that even if the bounty cannot confer standing, two potential harms to a *qui tam* plaintiff who is employed by the defendant constitute injury in fact.⁸¹ The employee who blows the whistle on his employer by bringing a false claim suit risks getting fired and "blackballed" in his employment market. Conversely, the employee who fails to pursue the claim may risk liability if he is a participant in the fraud. Besides these injuries' patent limitation to particular fact patterns, they fail to satisfy Article III for two reasons. First, the injuries fail to satisfy the causation prong of the Article III test. As with the bounty, the defendant's false claim to the government cannot be said to have caused these potential "injuries." Any injury to the whistleblower as employee is caused by his employer's retaliatory measures, and Congress has provided a separate remedy for these illegal actions.⁸² That the employee's act is a but-for cause of the employer's retaliation cannot provide the constitutionally required link to the *substantive* prohibition of the FCA. The only substantive link is the employer's initial false claim to the government, something too far removed from the injury to provide Article III causation. Second, these injuries do not amount to the "actual" or "threatened" injuries that constitute injury in fact. Rather, they

⁸⁰ A plaintiff might also argue that injury lurks in the potential litigation costs (i.e., attorneys' fees) he would incur if he lost the suit. But these costs also fail to satisfy Article III because they are not "fairly traceable" to the substantive prohibition of the FCA. The "injury" is "traceable" not to the action of the defendant, but to the plaintiff; if *ex post* the plaintiff's litigation strategies fail to yield the windfall, his loss is "traceable" only to his own errors (whether in poor litigation strategy or in choosing to pursue a meritless claim in the first place). In this sense, plaintiff's "injury" is merely "a byproduct of the suit," lacking the required causation to the FCA's substantive prohibition. *Diamond v Charles*, 476 US 54, 70-71 (1986).

⁸¹ 714 F Supp at 1099.

⁸² 31 USC § 3730(h) (1982 & 1987 Supp).

are speculative harm, which is insufficient to invoke the judicial power.⁸³

3. A generalized injury, as a taxpayer, for commission of fraud on the United States.

Setting aside issues of the statutory bounty and the employee's interest, there is one sense in which the qui tam plaintiff is clearly "injured" by the submission of a false claim to the United States government. When a defense contractor defrauds the government, the plaintiff's tax dollars are wasted. Such waste inevitably results in higher taxes and a diminished national defense. However, these "injuries" do not suffice under Article III. Although an Article III injury may not be "susceptible of precise definition,"⁸⁴ it must at a minimum be "distinct and palpable."⁸⁵

The Court's standing cases reveal that the relator's generalized injury, shared in common with all citizens, is insufficiently "distinct" to satisfy Article III. In *Valley Forge*, the Court reviewed its prior decisions on standing in the context of generalized injuries. The first of those decisions was *Frothingham*. In *Frothingham*, a taxpayer challenged the constitutionality of the Maternity Act of 1921, which provided federal funding for maternal and infant health programs.⁸⁶ The Court denied the plaintiff standing, concluding that her only "injury" was that officials of the executive department were executing an act of Congress that she asserted to be unconstitutional. This injury did not satisfy Article III because it was not sufficiently "distinct"; here, the plaintiff merely "suffer[ed] in some indefinite way in common with people generally."⁸⁷

The second case cited in *Valley Forge*, *Schlesinger v Reservists Committee to Stop the War*,⁸⁸ also denied standing in a taxpayer challenge. The plaintiffs in that case contested the constitutionality, under the Incompatibility Clause, of the commissions in the Armed Forces Reserve held by certain members of Congress. As in *Frothingham*, the Court held that the alleged injury did not satisfy Article III because it was an "abstract injury in nonobservance of the Constitution asserted by . . . citizens."⁸⁹

⁸³ *Schlesinger v Reservists Committee to Stop the War*, 418 US 208, 220-22 (1974).

⁸⁴ *Allen*, 468 US at 751.

⁸⁵ *Warth*, 422 US at 501.

⁸⁶ 262 US at 479.

⁸⁷ *Id* at 488.

⁸⁸ 418 US 208 (1974).

⁸⁹ *Id* at 223 n 13.

Valley Forge itself emphasizes this same Article III limitation in a context more closely analogous to qui tam suits under the FCA. In *Valley Forge*, the plaintiff, an organization dedicated to the separation of church and state, challenged the federal government's conveyance of "surplus property" to a church-affiliated college. The injury alleged by the plaintiffs was, like the injury to qui tam relators under the FCA, the "'depriv[ation] of the fair . . . use of [their] tax dollar.'"⁹⁰ The Court held that this injury was insufficiently "personal" to confer Article III standing.⁹¹ *Valley Forge*, then, is conclusive authority for denying standing to qui tam relators based on the injury they suffer in common with the taxpaying public. The precise contours of an Article III injury may not be definable, but the Court has at least made it clear that the injury must be more distinct than that suffered by all taxpayers through the inefficient use of their funds.

B. Congress's Role in Article III Justiciability

The second theory offered by the lower courts for upholding the standing of qui tam relators is that the FCA permits the relator to sue on the undifferentiated injury to the public. This theory must be rejected. The Supreme Court has emphasized (albeit in dicta) that the showing of a distinct injury, discussed above, is part of the irreducible minimum of Article III.⁹² Under "prudential" standing principles explored in this subsection, a statutory right of action can enable a plaintiff to assert generalized grievances, but only after he establishes his own distinct injury. In *Valley Forge*, the Court expressly stated that Congress may not lower the threshold requirements of standing under Article III.⁹³ Thus, the FCA cannot, without violating Article III, confer standing on qui tam relators by creating an implicit right to be free from fraud against the U.S. government.

Despite the Court's recent statements expressly limiting Congress's ability to confer standing, the lower courts in *Newsham*,

⁹⁰ 454 US at 476.

⁹¹ *Id.* at 485. *Valley Forge* also notes that *Flast v. Cohen* created an exception to the general rule that taxpayers qua taxpayers do not have standing. Under *Flast*, a taxpayer has standing if he "allege[s] the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8." 392 US at 102-03. In *Valley Forge*, as in qui tam suits under the FCA, the *Flast* exception was inapplicable: the suit did not challenge an enactment of Congress under Article I, § 8.

⁹² See *Gladstone*, 441 US at 100; *Reservists Committee*, 418 US at 221; and *Allen*, 468 US at 751.

⁹³ 454 US at 487-88 n 24.

Bounty Hunters, and *Weinberger* readily upheld the relators' standing based entirely on the qui tam provision of the FCA. *Newsham*, for example, concluded that "Congress has the power to determine who is a proper party to a lawsuit" so long as the issue is otherwise "justiciable."⁹⁴ The lower courts' disregard for Article III's "irreducible minimum" is puzzling, but their conclusion is perhaps attributable to the Supreme Court's equivocation on this issue in the past.⁹⁵

In order to assess the proper role of Congress in conferring standing, this section examines two of the Court's most important pronouncements on the topic: *Warth v Seldin* and *Linda R.S. v Richard D.* Understood correctly, these opinions define the role of Congress in a way consistent with the Article III minimum. Taken out of context, the breadth of their language can be used to justify congressional evisceration of standing doctrine. This section analyzes the two decisions and attempts to reconcile Congress's power to create standing with the Article III core.

1. *Warth v Seldin* and prudential standing.

"Prudential" standing is often misunderstood as granting blanket permission for Congress to decide who is a proper party to a lawsuit.⁹⁶ In reality, prudential standing concerns additional barriers to standing, created by the Supreme Court, that lie outside the Article III core. Congress may waive these prudential limitations in its legislation, but it may not invade the core itself.⁹⁷ *Warth* identifies two limits on standing as within the prudential rather than Article III arena:

First, . . . when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal

⁹⁴ 722 F Supp at 614. See also, *Bounty Hunters*, 548 F Supp at 161; and *Weinberger*, 557 F2d at 460.

⁹⁵ In *Sierra Club v Morton*, 405 US 727, 732 n 3 (1972), for example, the Court suggested, in dictum, that "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine." (citation omitted). This dictum is likely part of the prior "ambiguity" expressly clarified in *Valley Forge*, see 454 US at 472, although it should be noted that *Valley Forge* fails to mention *Sierra Club* in this context.

⁹⁶ See *Newsham*, 722 F Supp at 614.

⁹⁷ *Warth*, 422 US at 501.

rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.⁹⁸

Hence, when Congress grants a right of action, a plaintiff may "have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of [his] claim."⁹⁹ Arguably, then, the *qui tam* provision of the FCA, by providing a right of action, confers standing on *qui tam* plaintiffs to assert the generalized injury to the public caused by the submission of a false claim to the government.

But this notion appears directly opposed to the Court's insistence that Congress may not abrogate the Article III minima, which require "distinct and palpable,"¹⁰⁰ "concrete,"¹⁰¹ and "personal"¹⁰² injury. The Court recently has clarified that no "Congressional enactment[] can lower the threshold requirement for standing under Article III."¹⁰³ As discussed above, *Valley Forge* and its predecessors indicate that the undifferentiated injury to the public caused by an FCA violation is insufficiently concrete and distinct to satisfy Article III.

The apparent conflict between prudential standing and the irreducible core of Article III, however, is illusory. The Article III core can be reconciled with prudential standing principles by distinguishing "standing to initiate a suit" from standing to assert the public's rights "once the proceeding is properly initiated."¹⁰⁴ Standing to sue "as a representative of the public interest" can exist only in the latter sense, once the party seeking review has shown that he himself has suffered an injury.¹⁰⁵ In other words, "[t]he test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."¹⁰⁶

Thus, *Warth* correctly states that a plaintiff has "standing" to assert the rights of the general public or of third parties when a congressional statute grants a right of action. But this "standing"

⁹⁸ *Id.* at 499 (citations omitted).

⁹⁹ *Id.* at 501.

¹⁰⁰ *Id.*

¹⁰¹ *Reservists Committee*, 418 US at 221.

¹⁰² *Wright*, 468 US at 751.

¹⁰³ *Allen*, 454 US at 487-88 n 24. Even more clear is this mandate: "In no event . . . may Congress abrogate the Art. III minima." *Gladstone*, 441 US at 100.

¹⁰⁴ *Sierra Club*, 405 US at 737 and n 12 (citation omitted).

¹⁰⁵ *Id.* at 737-38.

¹⁰⁶ *Id.* at 740 n 15.

is only the permission to assert rights once the plaintiff properly initiates the proceeding by asserting his own distinct and personal injury. A naked congressional "grant" of "standing" cannot permit a plaintiff to adopt the injury to the general public as his own Article III injury. "Standing to initiate a review proceeding" must have a distinct injury as its predicate, regardless of the terms of a statute.¹⁰⁷

In sum, the FCA cannot, of its own force, confer standing on qui tam relators. "Prudential" standing principles permit a plaintiff to assert the rights of the public once he establishes his own distinct injury, not to substitute the injury to the general public for his own Article III injury. Thus, a qui tam plaintiff has standing to raise the injury to the general public only after he establishes standing to initiate a suit, which requires a distinct, personal injury, causally related to the legal prohibition and likely to be redressed if he prevails.

2. *Linda R.S.* and the creation of legal rights.

The second opinion that adds to the confusion about Congress's role in creating standing is *Linda R.S. v Richard D.*¹⁰⁸ In *Linda R.S.*, the Supreme Court noted that Congress has the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."¹⁰⁹ A plausible reading of this case might indicate that Congress could grant standing to qui tam relators by creating a legal right to be free from the submission of fraudulent claims to the government.

One objection to the application of this principle to qui tam is that the FCA does not explicitly create any individual right, the invasion of which constitutes injury in fact. Rather, the FCA purports to authorize individuals to sue on the *government's* legal right to be free from fraud. The legal rights created by the FCA are exclusively the government's: the FCA makes it unlawful to

¹⁰⁷ Warth, 422 US at 501.

¹⁰⁸ 410 US 614 (1973).

¹⁰⁹ Id at 617 n 3, citing *Trafficante v Metropolitan Life Insurance Co.*, 409 US 205, 212 (1972) (White concurring). In *Trafficante*, the Court highlighted the correct use of Congress's power to confer standing by creating legal rights. *Trafficante* held that § 810(a) of the Civil Rights Act creates an individual right, which did not exist without the statute, to be free from "injur[y] by a discriminatory housing practice." 409 US at 212. Defendant's invasion of this right constituted the "individual injury or injury in fact" required by Article III. Id at 209. See also *Havens Realty Corp. v Coleman*, 455 US 363, 373-75 (1982) (similar "right" created by § 804(a) of same statute).

present a false claim "to an officer or employee of the U.S. Government," or to use a false record to get a claim "paid or approved by the Government,"¹¹⁰ and any person violating the Act is made "liable to the United States Government" for civil penalties plus treble "the amount of damages which the Government sustains."¹¹¹ Without any individual "right," there is no invasion and therefore no injury to establish standing.

On the other hand, one might assert that the FCA creates an implicit individual right. After all, the Court in other contexts has found an individual right implicit in a congressional grant of standing.¹¹² By providing a cause of action for qui tam plaintiffs, Congress arguably meant to create a right in all citizens to be free from fraud against the United States treasury. When a false claim is submitted to the government, this individual "right" is invaded.

But this theory runs into a more fundamental objection: even Congress cannot abrogate the Article III core requirement of distinctness. As Justice (then Judge) Scalia suggested, there is "[u]ltimately . . . a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called 'core' requirement of standing."¹¹³ Likewise, the Court has held that the Article III core requires a showing of "individual injury" even when the asserted right is one created by Congress.¹¹⁴

Thus, although the precise limits of Congress's power to create legal rights that confer standing have not been demarcated, there must be at least one limitation on Congress's power if any meaningful Article III minimum is to remain: Congress may not create an "individual" right to be free from undifferentiated injury to the general public. Adjudication based on the invasion of an "individual" right to be free from injuries to society would eviscerate the requirement that Article III injuries be "distinct."

The FCA therefore cannot confer standing on qui tam plaintiffs by creating an implicit right to be free from fraud against the United States government. The harm caused by the submission of a false claim to the government is no less generalized and undifferentiated than the deprivation of efficient revenue use that the

¹¹⁰ 31 USC § 3729(a).

¹¹¹ *Id.*

¹¹² See *Trafficante*, 409 US 205.

¹¹³ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U L Rev* 881, 886 (1983).

¹¹⁴ *Trafficante*, 409 US at 212.

Court expressly rejected as an Article III injury in *Valley Forge*. Even if the FCA explicitly purported to create such a right, its invasion could not constitute a cognizable injury under Article III.

C. Assignment of the Government's Injury

This Comment has suggested that the qui tam relator cannot assert standing by alleging his own injury in fact or by claiming that the FCA creates an individualized injury for him. A third way for the relator to obtain standing is to argue that the FCA has "assigned" him the government's injury, and that the assignment satisfies Article III. This theory has some merit, and one district court has already embraced it.¹¹⁵ The FCA qui tam provision effectively assigns the government's right of action to the qui tam relator, contingent on the relator's filing the suit. This relator has standing, as the government's assignee, based on the government's underlying injury. Properly limited, the assignment theory effectuates the clear will of Congress without frustrating the underlying policies of Article III or weakening the standing doctrine.

1. Assignment and the FCA.

Federal courts traditionally have allowed suits by assignees of non-personal rights of action without questioning whether the assignee has asserted a personal injury.¹¹⁶ Moreover, fraud claims have specifically been found assignable,¹¹⁷ which suggests that the U.S. government could properly assign its claim under the FCA. Although the Supreme Court has not addressed this issue specifically, an assignee presumably fulfills Article III standing requirements by adopting the assignor's injury. As discussed in the next subsection, an assignee has standing not because he alleges per-

¹¹⁵ *Stillwell*, 714 F Supp at 1098 ("The False Claims Act essentially creates, by legislative fiat, a *de facto* assignment of a portion of the government's interest in the action.").

¹¹⁶ *FDIC v Main Hurdman*, 655 F Supp 259, 266-68 (E D Cal 1987) (bank's claim for fraud assignable to FDIC; FDIC suffered no injury); *Klamath-Lake Pharmaceutical Association v Klamath Medical Service Bureau*, 701 F2d 1276, 1282-83 (9th Cir 1983) (treble damages for antitrust violation assignable); *In Re National Mortgage Equity Corp.*, 636 F Supp 1138, 1152-56 (C D Cal 1986) (treble damages under RICO assignable); *Board of Trade of San Francisco v Swiss Credit Bank*, 728 F2d 1241, 1242-43 (9th Cir 1984) (except for personal causes of action, assignability generally accepted); and *Meta-Film Associates, Inc. v MCA, Inc.*, 586 F Supp 1346, 1350 (C D Cal 1984) (approving of standing to sue for copyright infringement and unfair competition based on assignment of rights in copyrighted material).

¹¹⁷ *Main Hurdman*, 655 F Supp at 266-68.

sonal injury in fact, but because he stands in the shoes of the assignor.

The FCA may indeed be said to create a de facto assignment of a portion of the government's interest in the action.¹¹⁸ By permitting an individual to "bring a civil action . . . for the United States Government" in which "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action,"¹¹⁹ the FCA effectively assigns part of the government's interest to the qui tam plaintiff. Under the FCA, the qui tam plaintiff is entitled to at least fifteen percent of the government's recovery,¹²⁰ even when the government chooses to intervene and take control of the action. Hence, Congress has assigned the government's right of action to any individual who chooses to pursue the claim in the courts.

Put differently, the FCA's qui tam provision is an enforceable unilateral contract, the terms and conditions of which are accepted by the relator upon filing the qui tam suit. Because assignment is a matter of contract, the unusual terms of the FCA's assignment cannot affect its legal sufficiency. Although an assignor does not usually retain the right to intervene after the assignment is made effective,¹²¹ the parties may agree to limit the operation of an assignment.¹²² Thus, the fact that the assignor (the federal government) reserves a right to intervene cannot affect the sufficiency of the assignment.

A potential objection to enforcing the FCA's assignment is that the Act assigns only a fraction of the government's right of action. The qui tam relator is entitled at most to a thirty percent share of the government's recovery. Under traditional assignment law, partial assignments were generally unenforceable unless authorized by statute.¹²³ Thus, in states lacking such a statute, the FCA's qui tam provision arguably fails to qualify as a legal assignment.

¹¹⁸ *Stillwell*, 714 F Supp at 1098.

¹¹⁹ 31 USC § 3730(b)(1),(5).

¹²⁰ 31 USC § 3730(d)(1). When the information providing the basis for the suit does not come from the relator, his share may not exceed ten percent of the award to the government. *Id.*

¹²¹ See, for example, *Jacobson v Tahoe Regional Planning Agency*, 566 F2d 1353 (9th Cir 1977) (dismissing, for lack of standing, the suit of an assignor whose interest in affected property was assigned to another entity).

¹²² See *Sillman v Chrisman*, 584 SW2d 441, 447 (Mo Ct App 1979).

¹²³ See *Assignments*, 6A Corpus Juris Secundum § 11 at 602 (West, 1975 & 1989 Supp).

This objection, however, fails to recognize two unique aspects of the assignment at issue here. The first is that the Act preserves a single cause of action. Under the FCA, the Justice Department is entitled to intervene, and the federal government is entitled to share in the recovery, but the suit filed by the relator precludes a separate action by the government or anyone else. In this sense, the FCA's assignment is not partial. Rather, the government's right to intervene and share in the recovery are properly characterized as its "fee" for the full assignment of the right of action.

Thus, the FCA's assignment should be fully enforceable. Rules barring partial assignments cannot apply to the FCA's assignment—those rules are concerned with preventing multiple suits on a single right of action.¹²⁴ Indeed, in most states the general rule forbidding partial assignments is inapplicable where the rights of all interested parties are before the court and can be settled there.¹²⁵

The second and more important aspect of the FCA's assignment is that it is part of an Act of Congress. Even if some state laws forbid this kind of assignment, the FCA is federal law, and therefore trumps state law under the Supremacy Clause. Congress clearly meant to confer standing on qui tam plaintiffs; it is indisputably the intent and effect of the FCA to assign the government's cause of action, contingent on the qui tam relator's filing the suit.

2. Assignment and Article III standing.

An examination of the doctrine and policy of Article III is required in order to determine whether a qui tam relator has standing. The federal courts have allowed assignees to sue without explaining how they satisfy Article III standing requirements. This section offers a doctrinal justification for permitting assignees and other legal representatives to sue in federal court.

Constitutional standing principles are grounded in two major policy considerations. First, standing limitations ensure genuine adverseness of litigation.¹²⁶ Without the requirement of a distinct injury, "concerned bystanders" could bring suits and federal courts would be made forums for airing abstract grievances, transformed

¹²⁴ See *In re Fine Paper Litigation State of Washington*, 632 F2d 1081, 1091 (3d Cir 1980).

¹²⁵ *Id.* See also *Hardware Dealers Mutual Fire Insurance Co. v Farmers Insurance Exchange*, 480 P2d 226 (Wash App 1971).

¹²⁶ *Baker v Carr*, 369 US 186, 204 (1962).

into the "roving commissions" that the case or controversy requirement was designed to prevent.¹²⁷ Second, standing preserves a specific element of separation of powers: it defines "the role assigned to the judiciary in a tripartite allocation of power to assure that the courts will not intrude into areas committed to the other branches of government."¹²⁸

Granting standing to *qui tam* plaintiffs on an implicit assignment theory would violate neither of the policies protected by Article III. The *qui tam* plaintiff, as "assignee" of part of the government's right of action, is far from a "concerned bystander" attempting to air an "abstract grievance." At least in the FCA context, the distinct injury to the government assures that the court will not be hearing an "abstract grievance." Moreover, the portion of the government's recovery to which the *qui tam* plaintiff is entitled (between fifteen and thirty percent of the amount of the judgment) assures concrete adverseness of litigation as well or better than many of the "injuries" found sufficient by the Court.¹²⁹

In fact, the attenuated nature of the "injuries" that qualify under Article III suggests that the "gatekeeper" function of standing has more to do with preserving the role of the judiciary than with ensuring adverseness. As then-Judge Scalia noted, "if the purpose of standing is 'to assure that concrete adverseness which sharpens the presentation of issues,' the doctrine is remarkably ill-designed for its end."¹³⁰ Ever since *Frothingham*, the Court has acknowledged that standing is important primarily because it preserves the role of the courts in our system of separated powers. The *Frothingham* Court, refusing to hear a challenge to an Act of Congress based on an indefinite, general interest, explained the reason for its decision:

¹²⁷ See *Furman v Georgia*, 408 US 238, 467 (1972).

¹²⁸ *Flast v Cohen*, 392 US 83, 95 (1968).

¹²⁹ For an example of a dubious "injury," see *United States v SCRAP*, 412 US 669 (1973) (George Washington Law School students had standing to challenge the Interstate Commerce Commission's failure to prepare an environmental impact statement before permitting a railroad freight surcharge because the surcharge would assertedly cause a rise in the cost of recycled goods, which in turn would lead to a decline in the use of such goods, thus increasing the amount of litter in parks and forests and thereby harming the students who used the parks and forests).

¹³⁰ Scalia, 17 *Suffolk U L Rev* at 891 (cited in note 113) (quoting *Baker*, 369 US at 204). See also *Valley Forge*, 454 US at 486 n 21 (quoting *Doremus v Board of Education*, 342 US 429, 435 (1952) ("essence of standing 'is not a question of motivation [for zealous pursuit of a claim] but of possession of the requisite . . . interest that is, or is threatened to be, injured'")).

To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.¹³¹

Recently, the Supreme Court suggested that the preservation of separation of powers is the “single basic idea” upon which Article III standing rests. And it is this concept that allows “the gradual clarification of the law [of standing] through judicial application.”¹³²

If the separation of powers notion introduced in *Frothingham* is in fact the driving force behind standing, then FCA qui tam relators clearly possess standing as assignees. The separation of powers focus suggests that standing is about ensuring a suitable *case*, not about securing the ideal *plaintiff*. In fact, the textual source of standing evinces the same focus: federal courts must hear only “cases” or “controversies.” If standing focuses on the “case” and not the party, then assignees have standing—the assignor’s underlying injury assures an Article III case, regardless of who files the suit.

Although the Supreme Court has not upheld the standing of assignees specifically, derivative standing is not a concept foreign to the Court. In *Warth v Seldin*, for example, the Court reaffirmed the doctrine of “associational” or “representational” standing.¹³³ After reaffirming that standing requires a showing of injury in fact, the *Warth* Court sanctioned the standing of organizations (that allege no injury to themselves) as representatives of their members. The Court justified representational standing in a way relevant to assignee standing:

The possibility of such representational standing, however, does not eliminate or attenuate the constitutional require-

¹³¹ 262 US at 488-89. The Court has not been entirely consistent in its adherence to this view. In *Flast*, 392 US at 100-01, the Court denied that there was any separation of powers basis for standing: “The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, from the substantive issues the individual seeks to have adjudicated.” To the *Flast* Court, the “gist” of standing was simply “assur[ing] that concrete adverseness which sharpens the presentation of issues.” *Id.* at 99 (quoting *Baker v Carr*, 369 US 186, 204 (1962)). However, as discussed in the text immediately following this note, the Court has recently returned to this separation of powers rationale, emphatically embracing it in *Allen v Wright*, 468 US 737 (1984).

¹³² *Allen v Wright*, 468 US at 752.

¹³³ 422 US at 511.

ment of case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.¹³⁴

Because standing is built on the "single and basic idea" of ensuring a proper case or controversy, representatives may have standing even without alleging an Article III injury of their own. Legal representatives need not assert their own distinct injury so long as the underlying controversy contains a distinct injury to the represented party.¹³⁵

The same rationale justifies assignee standing. An assignee has standing because he stands in the shoes of the assignor, whose asserted distinct injury assures that the court will not involve itself in matters properly resolved by other branches of government. The underlying injury to the assignor assures an Article III case or controversy. The Seventh Circuit recently recognized this principle: "if an injured person assigns his right of action to someone else, the assignee has standing to enforce the right even though he is not the one who was injured by the defendant's wrongdoing."¹³⁶

Within the specific context of false claims litigation, there is similarly no risk of the courts intruding into areas committed to other branches of government. The government's (assignor's) distinct injury secures a proper judicial controversy. It is thus of no Article III moment¹³⁷ that the legal representative or assignee in the *qui tam* suit suffers no individual injury.

¹³⁴ *Id.* (citation omitted).

¹³⁵ See Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, 13 *Federal Practice and Procedure* § 3531.9 at 627 (West, 1984) ("In a variety of circumstances, both traditional and modern, a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples."). See also FRCP 17(a), which allows parties to sue "without joining the party for whose benefit the action is brought."

¹³⁶ *National Association of Realtors v National Real Estate Association, Inc.*, 894 F2d 937, 941 (7th Cir 1990).

¹³⁷ Even if the *qui tam* relator is a proper Article III plaintiff, however, some separation of powers concerns remain. Both *Newsham* and *Stillwell* confronted this issue and, relying heavily on the Court's recent decision in *Morrison v Olson*, 487 US 654, 108 S Ct 2597 (1988), held that the FCA's *qui tam* provision comports with separation of powers principles. *Newsham*, 722 F Supp at 611-13; and *Stillwell*, 714 F Supp at 1086-93. In *Morrison*, the Court expressly rejected the notion that even purely executive functions—"law enforcement" functions that typically have been undertaken by officials within the Executive Branch—must be left to the exclusive control of the executive branch. 108 S Ct at 2619. Provided that a statute: (1) is not an attempt by Congress to increase its own powers; (2) works no judicial usurpation of executive functions; and (3) preserves "sufficient" executive

3. Limitations on Congress's power to assign.

Even if the assignment theory survives in the context of the FCA, an issue that must be faced is whether the theory will eventually swallow the doctrine of standing. Taken to its logical extreme, the power to assign may indeed swallow Article III standing. An assignor can assign any non-personal right of action.¹³⁸ Congress can therefore assign a right of action whenever the assignor, the federal government, has a right to sue.

Consider the implications of this theory when carried to its limit. Part of Congress's constitutional role is deciding on the appropriate enforcement machinery to implement its laws.¹³⁹ What if Congress adds a qui tam provision to the federal criminal statutes? The government certainly has standing in criminal cases, and the associational standing analysis above suggests that the assignor's standing should be sufficient to assure an Article III case.

If this is allowed, however, Congress holds all of the keys to standing—no Article III core is left. All Congress has to do to create standing for individuals is to create a right of action for the government and then “assign” it by tacking on a qui tam provision.

The reason for this problem is that the “associational standing” analogy used above is an imperfect one. When an association sues on behalf of its members, a proper Article III case is guaranteed by the underlying standing of the association's members be-

control over its functions, the act will not violate separation of powers principles. *Id.* at 2620-22.

As *Stillwell* and *Newsham* recognize, *Morrison* provides a quick answer to the separation of powers issue. The FCA presents no risk of usurpation of executive powers by the legislative or judicial branches. The qui tam plaintiff, like the independent prosecutor, is a private individual whose performance of executive functions cannot constitute congressional aggrandizement. Moreover, the executive control deemed “sufficient” in *Morrison* is in many ways weaker than that afforded to the Attorney General by the FCA. See *Stillwell*, 714 F Supp at 1092. Nevertheless, two separation of powers problems may still exist. Since this Comment focuses on the standing question, it will suffice to merely identify these potential concerns. First, the FCA removes from the Justice Department the power to control the initiation of litigation. This power to initiate may be “so central” to the functioning of the executive branch that exclusive control is required. See *Morrison*, 108 S Ct at 2615. Second, and more importantly, *Stillwell* and *Newsham* overstate the importance of congressional aggrandizement to a finding of separation of powers violations. Congress could not, for example, make qui tam the enforcement mechanism for all federal law, even though no increase in congressional power would result.

¹³⁸ *Board of Trade of San Francisco v Swiss Credit Bank*, 728 F2d 1241, 1243 (9th Cir 1984).

¹³⁹ See *Tigner v Texas*, 310 US 141, 148 (1940) (“Whether proscribed conduct is to be deterred by qui tam action or triple damages or injunction, or by criminal prosecution . . . is a matter within the legislature's range of choice.”).

cause they are subject to the “distinct and palpable” injury requirement. This same guarantee does not hold where the underlying plaintiff is the government, as in *qui tam* suits, because the government need not allege a distinctive injury.

The distinctive injury requirement is the “essential element” of modern standing doctrine that assures a suitable Article III case.¹⁴⁰ This requirement, as part of the Article III core, suggests that there is something fundamentally wrong with plaintiffs using Article III courts to vindicate majoritarian interests.¹⁴¹ Such interests are properly defended in the representative branches of government.

The doctrine of standing makes an exception to this principle where the government itself acts as plaintiff. Governments exist to promote the “interest of all”—“to prevent the wrongdoing of one resulting in injury to the general welfare.”¹⁴² The Court has long held that this duty alone can be sufficient to give the government “standing in court.”¹⁴³ The government enjoys, in other words, a special constitutional status as plaintiff—it sues, for example, to enforce the criminal laws, and it need not show a particularized injury as a predicate to sue.

If the Article III core is to remain, however, the government’s “special status” standing must not be assignable. Allowing individuals, as *qui tam* relators, to sue to enforce the criminal laws would run afoul of the Article III core. In order to preserve the Article III core, assignment must be allowed only where the government’s suit would satisfy the distinctive injury requirement of Article III. Article III therefore permits *qui tam* only where the government’s suit vindicates a “distinct and palpable” injury. When the government’s right of action falls in the “special status” category outlined above, its assignees cannot have standing.

CONCLUSION

It is not readily apparent that FCA *qui tam* relators satisfy Article III standing requirements. Contrary to the views of the lower courts, history cannot provide a definitive answer. Original intent arguments are inapplicable to a standing doctrine of relatively recent origin. Nor can *qui tam* plaintiffs assert a constitutional injury in fact of their own. The lower courts’ theories for

¹⁴⁰ Scalia, 17 *Suffolk U L Rev* at 898 (cited in note 113).

¹⁴¹ *Id.*

¹⁴² *In re Debs*, 158 US 564, 584 (1895).

¹⁴³ *Id.*

injury in fact suffer from fundamental causation problems. Moreover, the FCA cannot confer standing merely by creating a private cause of action. Although language in some of the Supreme Court's older standing opinions may suggest otherwise, Article III requires a distinct, personal injury as a predicate for all suits, regardless of the existence of a congressionally created cause of action.

On the other hand, Article III poses no obstacle to allowing FCA qui tam plaintiffs to sue as the federal government's assignees. The Supreme Court has endorsed derivative standing in its associational standing cases, and the rationale of those cases supports the standing of assignees. An Article III case or controversy is ensured by the underlying standing of the assignor, regardless of whether the assignor or his legal representative files the complaint. No matter *who* brings the suit, only the courts can decide whether in a given case the government was wrongfully defrauded.

This same argument cannot justify qui tam in all contexts. If Congress attempts to use qui tam in cases where the government suffers no distinct injury, the derivative standing rationale is invalid. The Article III requirement of distinctive injury is not satisfied where the government sues to vindicate majoritarian interests. The standing of qui tam relators is thus limited to cases where the government would have standing if it were a private plaintiff.