

The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes

I.	Introduction	401
II.	Citizen Suits	406
III.	Separation of Powers and Theories of Constitutional Interpretation	408
IV.	Public and Private Law Enforcement: A Little History	417
	A. Public and Private Prosecution.....	419
	B. Private Enforcement of Federal Law	425
V.	The Appointments Clause	433
VI.	The Vesting and Take Care Clauses.....	436
	A. The Formalist Argument	441
	B. The Unitarian Argument	444
	C. The Functionalist Argument.....	449
VII.	Conclusion.....	457

I INTRODUCTION

The Supreme Court's decisions under the pollution control statutes administered by the Environmental Protection Agency (EPA) reach startlingly anti-environmental results, but they are explained more by the Court's overwhelming hostility toward the private enforcement of statutes, rather than an anti-environmental bias.¹ Adding insult to

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¹ Jeffrey G. Miller, *The Supreme Court's Water Pollution Jurisprudence: Is the Court All Wet?*, 24 VA. ENVTL. L.J. 125 (2005) [hereinafter Miller, *Is the Court all Wet?*] (examining Clean Water Act (CWA) citizen suits to identify a trend of possible hostility by the Court against private enforcement rather than an anti-environmental bias). See also,

injury, in one of the rare victories for private environmental plaintiffs in those decisions, Justice Kennedy queried whether citizen suits intrude on the President's Article II executive power and violate the separation of power principles.² While other Justices have raised the same concern,³ Justice Kennedy's invitation is particularly significant because he is a swing vote in environmental and other social justice cases.⁴

Justice Kennedy's invitation to challenge the constitutionality of citizen suits followed scholarly challenges that environmental citizen suits intrude on the executive power of Article II⁵ and contemporary

Jeffrey G. Miller, *The Supreme Court's Pollution Control Jurisprudence: Is the Court an Enemy of the Environment?* (April 2, 2010) (unpublished manuscript) (on file with author) [hereinafter *Pollution Control Jurisprudence*]. Brooke Dorner assisted on this manuscript. This research determined whether hostility by the Court against private enforcement existed for all environmental statutes. Of the Court's fifty-six decisions under the pollution control statutes administered by EPA, nineteen were in private enforcement actions, in which the Court reached pro-environmental results in only three decisions, or 16%. In the remaining thirty-seven decisions in non-private enforcement cases, however, the Court reached pro-environmental results in nineteen, or 51%. *Id.*

² Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

³ Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992). Justice Scalia, in the midst of analyzing why the respondents lacked Article III standing, linked standing with Article II. "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 557; *see also* Friends of the Earth, 528 U.S. at 209 (Scalia and Thomas, J.J. dissenting, noting with approval Justice Kennedy's Article II query in that decision); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Fed. Election Comm'n v. Akins, 524 U.S. 11, 36–37 (1998) (Scalia, J., dissenting, O'Connor & Thomas, J.J., joining in dissent, on Article II grounds because the majority opinion allowed plaintiffs to sue the government when they had no individual injuries). Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (noting that while the Court upheld plaintiff's Article III standing to bring a *qui tam* action, it did not consider whether *qui tam* suits violated Article II).

⁴ Chantz Martin, *The Clean Water Act Suffers a Crushing Blow: The U.S. Supreme Court Clears the Way for the Mining Industry to Pollute U.S. Waters*, 49 WASHBURN L.J. 933, 947 n.123 (2010) (observing that Justice Kennedy is the swing vote on environmental issues); *see also* Mark Latham, *The 2008–2009 Term and the Clean Water Act: Justice Kennedy Where Art Thou?*, 44 NEW ENG. L. REV. 293 (2010); Miller, *supra* note 1, at 138; Kenneth M. Murchison, *Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine*, 39 U. BALT. L. REV. 1 (2009).

⁵ William H. Lewis, Jr., *Environmentalists' Authority to Sue Industry for Civil Penalties is Unconstitutional under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10101 (1986). Accord Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55 (1989); Charles S. Abell, *Ignoring the Trees for the Forests:*

reiteration of the unitary theory of executive power,⁶ providing additional theoretical underpinning for those challenges.⁷ Scholars accepted the invitation and ably defended citizen suits.⁸ However, a few scholars, apparently less sure of the defenses, scrambled to find other avenues for private enforcement.⁹

Defendants in citizen suit cases have occasionally raised the issue unsuccessfully in lower courts.¹⁰ The unanswered question is why

How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle, 81 VA. L. REV. 1957 (1995).

⁶ The unitary executive theory, in a more modest articulation, can be traced back to THE FEDERALIST NO. 70 (Alexander Hamilton), which emphasized that unity of the executive branch made it both effective and responsible to the people. By unity he meant that there was only one President, not two or more, and not an executive council. It also meant that the President had control over his subordinates. *Id.*

⁷ See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003) [hereinafter Prakash, *Executive Power*].

⁸ See Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001); Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383 (2001); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 213 (1992).

⁹ See generally Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005) (advocating that statutes authorize their implementing agencies to tailor the nature and extent of private enforcement, thus avoiding arguments that private enforcement interferes with enforcement discretion); Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75 (2009) (advocating use of corporate law to prevent companies from violating environmental statutes on the theory that illegal actions are ultra vires); David Krinsky, *How to Sue without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301 (2007) (advocating use of Article I courts for private enforcement against the government).

¹⁰ See N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., 200 F. Supp. 2d 551 (E.D.N.C. 2001); Atlantic States Legal Found., Inc. v. Buffalo Envelope, 823 F. Supp. 1065 (W.D.N.Y. 1993); Del. Valley Toxics Coal. v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993); Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404 (N.D. Ind. 1990); Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801 (N.D. Ill. 1988); Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987); Student Pub. Interest Research Grp. of N.J., Inc. v. Monsanto Corp., 600 F. Supp. 1474 (D. N.J. 1985).

they have not done so more often. A closer look at the issue¹¹ is warranted by the overwhelming hostility of the Court toward citizen suits;¹² the continued development of the unitary theory of the executive branch;¹³ the Court's embrace of that theory in its latest separation of powers decision;¹⁴ new insights and research into the origins and nature of prosecutorial discretion;¹⁵ and changes in the composition of the Court making it potentially more sympathetic to Article II challenges.¹⁶

Critics challenge that citizen suits violate three aspects of Article II: the Vesting Clause, the Appointments Clause, and the Faithful

¹¹ For a recent example of this re-examination, see Robert L. Glicksman, *The Constitution, the Environment, and the Prospect of Enhanced Executive Power*, 40 ENVTL. L. REP. 11,002 (2010).

¹² Miller, *Pollution Control Jurisprudence and Is the Court all Wet?*, *supra* note 1.

¹³ See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313 (2010); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) [hereinafter Prakash, *The Chief Prosecutor*]; Prakash, *supra* note 7; Calabresi & Prakash, *supra* note 7; Calabresi & Rhodes, *supra* note 7.

¹⁴ *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). Chief Justice Roberts' opinion for the majority is a classical unitarian analysis in tone, conflating the Vesting Clause and the Faithful Execution Clause and emphasizing the central importance of the President's power to remove subordinates, the President's public accountability for actions of the entire executive branch, and the consequent suspicion of independent agencies. The decision held that Congress could not limit the ability of the Security and Exchange Commission (SEC) to removal of members of the Public Company Accounting Oversight Board to "for cause" removal, when the President's ability to remove commissioners from the SEC was already limited to "for cause" removal. *Id.*

¹⁵ See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1 (2009); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L.J. 561 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989); Prakash, *The Chief Prosecutor*, *supra* note 13.

¹⁶ Chief Justice Roberts replaced Chief Justice Rehnquist. Rehnquist had become a functionalist on separation of powers issues. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988). Based on his majority opinion in *Free Enterprise Fund*, Roberts may be both a formalist and a unitarian. Justice Alito replaced Justice O'Conner. Alito is generally more conservative than O'Conner, who had become increasingly favorable to environmental interests. Miller, *Is the Court All Wet?*, *supra* note 1, at 138. Finally, Justice Kagan replaced Justice Souter. This change will make much less of a difference than the others, but the other changes are generally unfavorable to citizen suit interests.

Execution Clause. The Vesting Clause states: “The executive Power shall be vested in a President.”¹⁷ Citizen suit critics assert that law enforcement prosecution is an executive function vested solely in the President and citizen enforcement infringes on executive power. The Appointments Clause authorizes the President, “with the Advice and Consent of the Senate,” to appoint “Officers of the United States” and authorizes Congress to vest the power to appoint “inferior Officers” in the President, the Courts, or the Heads of Departments.¹⁸ Critics assert that because citizen enforcers exercise an executive prosecutorial function, they must be appointed by the President. Finally, the Faithful Execution Clause states that the President “shall take Care that the Laws be faithfully executed.”¹⁹ Critics assert that citizen enforcement makes it impossible for the executive to faithfully execute the laws, because he has no control over a significant class of law enforcers. The three clauses are related, in that 1) the Vesting Clause and the Faithful Execution Clause both turn on the meaning of “executive” and “execute” and 2) the Court decided many challenges to statutory limitations on the President’s power to appoint and remove executive officials based on a statute’s effects on the President’s ability to faithfully execute the laws.²⁰

Part II of this article describes citizen suits and their role in the enforcement of environmental law. Part III outlines the background of separation of powers and the dominant theories of analyzing separation of powers issues. Part IV explores the roles of public and private enforcement before and after the framing of the Constitution and the effects of those roles on interpreting the three relevant constitutional clauses. Part V examines Appointments Clause challenges to citizen suits. Part VI examines Vesting Clause and Take Care Clause challenges to citizen suits. This article concludes that citizen suits are constitutional under the Vesting Clause and the Take Care Clause and do not violate the Appointments Clause.

¹⁷ U.S. CONST. art. II, § 1, cl. 1.

¹⁸ U.S. CONST. art. II, § 2, cl. 2.

¹⁹ U.S. CONST. art. II, § 3.

²⁰ See *Printz v. United States*, 521 U.S. 898, 922 (1997); *Myers v. United States*, 272 U.S. 52, 133 (1926); *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890).

II CITIZEN SUITS

Citizen suits are statutory causes of action brought by private plaintiffs against defendants violating the host statutes. They are typified by Section 304 of the Clean Air Act (CAA),²¹ the first of the citizen suit provisions in the pollution control statutes. Section 304 authorizes suit against EPA for failing to perform a mandatory duty under the statute, and against members of the regulated public for violating air pollution control requirements under the Act. The first is a statutory mandamus provision. The second is a classic private enforcement provision. The two are separable and raise different separation of powers questions.²² This article focuses on the second.

Section 304 of the CAA²³ requires the plaintiff to give sixty days' notice to EPA, the relevant state, and the potential violator before filing suit against most violations and advance notice before filing suit against violations excepted from the sixty-day period.²⁴ If EPA or the state takes and diligently prosecutes an enforcement action in federal court prior to the filing of a citizen suit, the citizen suit is barred, although the citizen may intervene in the federal action.²⁵ After the citizen suit is filed, EPA may intervene as a matter of right and no consent decree may be filed in a suit to which it is not a party, without an opportunity for it to review the decree and comment on it to the court.²⁶ To enter a consent decree in this context, courts must find that the decree is: 1) the result of good faith bargaining rather than collusion, 2) fair, just, and equitable, and 3) consistent with the statute being enforced.²⁷ A court should defer to EPA's comments²⁸ on whether the proposed decree complies with the statute at issue and is in the public interest. If the citizen plaintiff prevails, the court may assess civil penalties and order compliance.²⁹ Penalties are paid into

²¹ 42 U.S.C. §§ 7401–7671q, § 7604 (2012).

²² See Glicksman, *supra* note 11, at 11,004–05; Johnson, *supra* note 8, at 387–93.

²³ Clean Air Act § 304, 42 U.S.C. § 7604 (2010).

²⁴ *Id.* § 304(b).

²⁵ *Id.* § 304(b)(1)(B).

²⁶ *Id.* § 304(c)(3).

²⁷ See *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Alaska 1977).

²⁸ Although it is the United States, not EPA, that brings or intervenes in a civil enforcement action, and it is the Department of Justice (DOJ) that represents the United States before the courts, in almost all cases DOJ will act at the request of EPA.

²⁹ Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (2010).

the federal treasury,³⁰ although part of the penalties may be applied toward an environmental improvement.³¹ The court may award attorney's fees to prevailing parties,³² although awards to successful plaintiffs are common and awards to successful defendants are rare.³³ There are slight variations among the provisions in the different statutes,³⁴ but they all follow the pattern established by Section 304 of the CAA. Citizen suits have proven to be important in the enforcement of the pollution control statutes,³⁵ with citizens filing more than half of the number of civil actions as the federal government.³⁶

In light of the Court's pervasive hostility toward citizen suits, it is only a question of time until the Court grants certiorari on the issue of whether citizen suits unconstitutionally intrude on executive power under Article II. That constitutional confrontation also seems inevitable in light of the Court's curtailment of citizen suits under Article III, imposing steadily more restrictive standing requirements,³⁷ and Justice Scalia's conflation of Articles II and III underpinning his standing doctrine.³⁸ Standing did not become a serious constitutional matter in citizen suits until the 1980s, when Justice Scalia seized Article III's "cases and controversies" restriction on the courts' jurisdiction as a basis to deny standing for private plaintiffs who failed to suffer individual injuries from those violations. Earlier

³⁰ *Id.* § 304(g)(1); *see also* Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2010).

³¹ *Id.* § 304(g)(2).

³² *Id.* § 304(d).

³³ JEFFREY G. MILLER ET AL., INTRODUCTION TO ENVIRONMENTAL LAW 716 (2008).

³⁴ E.g., Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6975, 6972(a)(1)(B) (2012) (providing that citizens may file suit to abate imminent and substantial endangerment to health or the environment caused by solid or hazardous waste, regardless of whether it arises from a violation of the statute).

³⁵ See Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1189 (1998); James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER. L. REV. 1, at 1, 5 (2003); Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Enforcement Actions Brought Under EPA-Administered Statutes, 1995–2000*, 29 COLUM. J. ENVTL. L. 359, 385–86 (2004); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1620 (1995).

³⁶ Smith, *supra* note 35, at 385–87.

³⁷ See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109–10 (1998).

³⁸ See *supra* note 3; *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

standing jurisprudence focused on whether the parties had sufficient stakes in a dispute to assure they fairly presented it to the courts, framing standing concerns more as prudential rather than as constitutional concerns.³⁹ This article does not examine the issue of Article III standing, because it is amply analyzed by the existing literature.⁴⁰ Instead, the article focuses on the Article II issues, because they have been subject to far less analysis by the Court or scholars.

III SEPARATION OF POWERS AND THEORIES OF CONSTITUTIONAL INTERPRETATION

As basic as separation of powers is to our understanding of the Constitution, that document does not use the term or anything like it. Instead, the doctrine emerges from the structure of the Constitution and the writings of the framers of the Constitution, particularly *THE FEDERALIST NO. 47* (James Madison). The original Constitution contains seven articles; the three articles allocating powers among the three branches of government occupy eighty percent of its space. The first article, by far the longest, vests the “legislative Powers” granted therein (the enumerated powers) in Congress. The second article, a little shorter, vests “executive Power” in the President. The third, shorter still, vests “judicial Power” in the Supreme Court and such inferior courts as Congress establishes. In these three articles, the Constitution also created a system of checks and balances between the branches, giving each branch discrete powers over the others.

*THE FEDERALIST NO. 47*⁴¹ explains that the framers of the Constitution embedded separation of powers to prevent any one branch from aggrandizing its powers, thereby avoiding tyranny over the people by any branch or by the government generally. The framers of the Constitution “viewed the principle of separation of powers as a vital check against tyranny.”⁴² Of course, King George of England and the executive power he personified was the most obvious version of the tyranny the young country wished to avoid. Indeed, the

³⁹ Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 316–32 (2001).

⁴⁰ Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169 (1997).

⁴¹ THE FEDERALIST NO. 47 (James Madison).

⁴² Buckley v. Valeo, 424 U.S. 1, 121 (1976).

Declaration of Independence listed eighteen specific complaints against “He,” the King,⁴³ although colonial complaints were often occasioned by acts of Parliament rather than of the King. For instance, Parliament enacted the tax on tea, which lit the spark of revolt, at least in Boston. But the Declaration conflated complaints against parliamentary enactments and royal actions as actions “He [the King] has combined with others” to take.⁴⁴ The Declaration suggests that if the framers of the Constitution looked for guidance to events leading to the Revolution, they did not intend the executive to be the dominant branch of government. Indeed, it is second place to the legislative branch in the Constitution both in sequence and in length. At the same time, delegates to the Constitutional Convention sought to create a viable executive, in reaction to the absence of an executive branch under the then operative Articles of Confederation, leading to ineffective government, especially in foreign relations.⁴⁵

It is not completely clear how prosecution of federal offenses fits into this constitutional framework, for the Constitution does not mention prosecution.⁴⁶ However, we are accustomed to the notion that prosecutorial functions are executive in nature and performed by the executive branch. The statements in Justice Scalia’s dissent in *Morrison*, that “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function,” and that when prosecution is conducted by government “always and everywhere” it has “been conducted never by the legislature, never by the courts, and always by the executive,” are consistent with this notion.⁴⁷ Characterizing prosecution as a core executive function led Justice Scalia to conclude that a statute infringing on executive prosecution power is unconstitutional. The Constitution does not vest in the President “*some of* the executive power, but *all of* the executive power.”⁴⁸

In *Morrison*, however, a seven to one majority upheld the constitutionality of a statute creating an independent counsel, not appointed by the President and subject only to limited executive

⁴³ THE DECLARATION OF INDEPENDENCE para. 3–20 (U.S. 1776).

⁴⁴ *Id.* at para. 15.

⁴⁵ THE FEDERALIST NOS. 3, 4, *supra* note 6 (John Jay), NOS. 15, 16 (Alexander Hamilton); *see also infra* note 82.

⁴⁶ See discussion *infra* Part VI.A.

⁴⁷ *Morrison v. Olson*, 487 U.S. 654, 706 (1988).

⁴⁸ *Id.* at 705.

supervision and control, to investigate and prosecute the criminal offenses of a limited number of high-executive officials. The more measured conclusion by the majority in *Morrison* that “[t]here is 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,”⁴⁹ makes more sense than Justice Scalia’s pronouncements, because neither the Constitution nor its historical explanatory documents mention or consider prosecution. Moreover, there is significant evidence suggesting the framers of the Constitution did not consider prosecution to be a quintessentially executive function.⁵⁰ The majority ultimately concluded that the special prosecutor statute was constitutional because it did not “impermissibly burden[] the President’s power” or “unduly interfere[] with the role of the Executive Branch,” a balancing decision.⁵¹

The difference between the approaches of Justice Scalia and the majority in *Morrison* illustrates the dichotomy between the dominant theories of separation of powers interpretation: formalism (Justice Scalia’s rigid dissent) and functionalism (the majority’s flexible approach). It does so in a decision of considerable relevance to our inquiry, involving all three of the constitutional clauses examined here, in the context of a prosecutor who was generally free of executive supervision. In the separation of powers decisions cited in the article, the majority opinion invariably uses a formalistic analysis when it overrules an action by one of the three branches of government as violating separation of powers principles and invariably uses a functionalistic analysis when it upholds such an action. Virtually all of the decisions have dissents, which invariably use the opposite analysis to the formalism or functionalism used by the majority opinions. Single justices may take both formalist and functional approaches in different decisions. Indeed, in the separation of powers decisions of the 1980s, Justice White was the only Justice to take consistently functionalist positions, Justice Scalia was the only Justice to take consistently formalist positions, and the other Justices

⁴⁹ *Id.* at 691. Indeed, the Court has long considered prosecution to be an executive function; see *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976).

⁵⁰ See *infra* Part III.

⁵¹ *Morrison*, 487 U.S. at 692–93.

generally migrated from formalist positions in the earlier decisions to functionalist positions in the later decisions.⁵²

Formalism, also known as originalism, focuses on the text of the Constitution and understanding of the document by its framers and often relies on historical evidence.⁵³ It sees separation of powers as three relatively rigid silos, with little intermixing of functions, except as specifically provided by the Constitution, usually in the form of checks and balances. It is suspicious of independent agencies and novel governmental structures. It would engage in a two-stage analysis, asking whether a function was executive in nature and, if so, whether Congress bestowed it anywhere but on the executive branch. If answers to both questions are positive, the statute is unconstitutional.

The recently rearticulated unitary executive theory is a formalistic theory featuring a robust and expansive reading of executive power, and focusing particularly on the President's authority to appoint and remove executive officials at will as a necessary means of controlling and exercising executive power. It envisions all executive power flowing to and from the President, enabling him to control all executive decisions and functions exclusively, completely, and comprehensively. His undiluted authority makes him wholly responsible and publicly accountable for all executive functions, rooting the unitary executive theory in the President's democratic accountability to the public. Query what that really means, when the public cannot recall a President, when a President is in his second term and cannot stand for re-election, and when an objectionable executive action is accompanied by hundreds of other executive actions, some acceptable, some not, and most neutral?

The unitary executive theory is built on the word "unity," which the Constitution does not use. That is not an indictment of the concept, since the Constitution does not use "separation of powers,"

⁵² E.g., *Mistretta v. U.S.*, 488 U.S. 361 (1989); *Morrison*, 487 U.S. 654; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

⁵³ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 239 (2009). Originalists have developed so many variants that it is hard to precisely define originalism. Indeed, Justice Scalia, "the most outspoken and revered of originalist judges," uses variants "he has otherwise criticized in order to reach results that appear to be consistent with his personal preferences." *Id.* at 293, 297.

either. *THE FEDERALIST* uses “unity” to distinguish between an executive branch with one head rather than with two or more heads or even an executive council, concluding that an executive branch with only one head is far preferable.⁵⁴ Unitarians advance unity to a more lofty level by arguing the Constitution vests the single executive with absolute and complete control over anything and everything done by all executive employees, for any less control would deprive him of the ability to accomplish his constitutional duty to faithfully execute the laws.⁵⁵ The theory is most expansively articulated by Steven G. Calabresi and Christopher S. Yoo, in *The Unitary Executive*.⁵⁶ Their central focus is on the disarming thesis that the President’s power to appoint executive officials, regardless of whether the Constitution requires their appointments to be approved by the Senate, carries with it the power to dismiss them without cause and without approval of the Senate.⁵⁷ Calabresi and Yoo characterize the removal power as “a fault line between the tectonic plates represented by the presidency and the Congress,”⁵⁸ or between advocates of the unitary executive

⁵⁴ THE FEDERALIST NO. 70, *supra* note 6 (Alexander Hamilton). “Advantages of a Single Executive,” for instance, uses “unity” at least five times in explaining that an executive with one head can act with more energy, speed, vigor, and accountability than two or more executives or an executive council. *Id.*

⁵⁵ See U.S. v. Nixon, 418 U.S. 683, 692–93 (1974), in which the unitary theory is starkly argued by President Nixon in response to the Special Prosecutor’s enforcement of a subpoena *duces tecum* for the President’s tape recordings and documents in connection with the Watergate investigation. The President claimed, unsuccessfully, that the dispute was an intra-family squabble between superior and inferior officers within the executive branch, presenting no justiciable dispute for the courts to resolve. *Id.* For an opinion with a distinctly unitarian flavor to it, see Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

⁵⁶ CALABRESI & YOO, *supra* note 13. Accord Prakash, *The Chief Prosecutor*, *supra* note 6.

⁵⁷ CALABRESI & YOO, *supra* note 13, at 6. The Constitution requires Senate approval for some appointments, but is silent on removal. Appointment with the approval of the Senate and removal without the approval of the Senate is asymmetrical, but makes sense both in terms of management and constitutional politics. If the President makes a nomination for office and the Senate disapproves of the nomination, there are likely other nominees acceptable to both the President and the Senate. However, once the President has lost confidence in an official confirmed by the Senate, if the Senate must but does not approve removal, the President must proceed with an official who he does not trust, a dysfunctional situation. The origin of Senate approval of appointments was the “great compromise” between large and small states, resulting in a Senate favoring small states and a House of Representatives favoring large states. Senate approval of appointments enabled small states to assure large states did not get all of the plum appointments, a purpose not subverted by the President’s removal of disloyal or poorly performing officials without senate approval. *Myers v. United States*, 272 U.S. 52, 111 (1926).

⁵⁸ CALABRESI & YOO, *supra* note 13, at 6.

principle and those taking a more modest view of executive power. The bulk of the book examines each presidency to demonstrate that all Presidents have claimed and most have exercised unrestricted removal power, in an attempt to undercut any argument that the executive has acquiesced in congressional incursions on that executive authority.

That the President may remove cabinet and subcabinet appointees without congressional approval is a fairly common sense notion; to do his job the President must be able to surround himself with subordinates who adhere to his policies and directives and in whom he trusts. An unbounded and unrestricted presidential removal power, however, is not as commonsense when applied to an independent counsel appointed to investigate and prosecute executive officials close to the President; the counsel probably cannot fulfill his functions if the President can remove him at will. But under Calabresi and Yoo's articulation of the unitary executive theory, the President has unrestricted constitutional power to remove at will cabinet and subcabinet officials, independent prosecutors,⁵⁹ officials of independent administrative agencies,⁶⁰ and civil servants,⁶¹ and any attempt by Congress to restrict his removal power is unconstitutional.⁶² Justifying presidential removal of members of the civil service, Calabresi and Yoo remind us the original purpose of the civil service was to insulate government employees from the spoils system, and they reassure us that purpose will be served as long as superior scores on merit-based examinations are required for new civil servants hired to replace those the President has fired for political reasons or for no reason at all.⁶³

The unitary executive theory most directly addresses citizen suits through the appointment and removal power; unitarians would argue that because citizen enforcers are executive officials, the President must be able to appoint and remove them and Congress cannot insulate them from presidential control. Part V of this article concludes citizen enforcers are not officials and are not appointed, and, therefore, are not subject to the Appointments Clause. It also

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 425–26.

⁶¹ *Id.* at 6, 423–25.

⁶² *Id.* at 5–6, 422–23.

⁶³ *Id.* at 7.

concludes that persons do not have to be government officials to do the government's business. If appointment and removal are the main concerns of the unitary executive theory, that theory is not inimical to citizen suits.

The unitary executive theory, however, conflates the appointment power with the vesting and faithful execution powers. According to Calabresi and Yoo, the Vesting Clause and Faithful Execution Clause give the President all executive power, including "the power to remove and direct all lower-level executive officials," making him not only commander in chief of the armed forces but also "law enforcement officer in chief of the federal government."⁶⁴ This ensures "energetic enforcement of the law," promotes accountability, and "eliminates conflicts in law enforcement and regulatory policy."⁶⁵ The bedrock principle of the unitary executive is that "whatever executive power might exist must be exercised subject to presidential supervision and control."⁶⁶ Without such control, the President cannot assure that the laws are faithfully executed.⁶⁷ If citizen suits are an exercise of law enforcement authority, they must be subject to presidential supervision and control, and any congressional attempt to insulate them from such supervision and control violates separation of powers principles. Calabresi and Yoo examine each of the Presidencies, finding evidence that Presidents actually controlled those who litigated for the United States in some specific litigation. Others have concluded that law enforcement is the very essence of executive power and authority.⁶⁸ This articulation of executive power conflates law enforcement and executive authority in a way that is unlikely to have been envisioned by the framers of the Constitution, as demonstrated in Part IV.

Functionalism conceives of separation of powers more flexibly, explicitly or impliedly focusing on how to adapt two-century-old constitutional concepts and phrases to situations and issues never

⁶⁴ *Id.* at 3–4.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 20.

⁶⁷ The Office of Legal Counsel has rejected this interpretation of the Faithful Execution Clause, stating that the clause stands for "the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws." U.S. Dep't of Justice, Memorandum for John Schmidt Associate Attorney General, *Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7, 1995), <http://www.justice.gov/olc/arbitn.fin.htm> (last visited Oct. 3, 2012) (citing INS v. Chadha, 462 U.S. 919 (1983)).

⁶⁸ See Prakash, *Executive Power*, *supra* note 7.

envisioned by the framers of the Constitution, making the document a living and evolving set of principles and concepts, rather than an unchanging dead hand of the past. Functionalism builds on the concept that the Constitution does not require absolute separation, a concept enunciated by *THE FEDERALIST NO. 47*⁶⁹ and by Justice Joseph Story in his *Commentaries on the Constitution of the United States*, first published in 1833.⁷⁰ Functionalism rejects the “archaic view of the separation of powers as requiring three airtight departments of government.”⁷¹

Functionalists acknowledge that if Congress removes from the President power that the Constitution specifically and unambiguously assigned to him or transfers power from the President to Congress, the statute is presumptively unconstitutional. But they also contend that if Congress otherwise invades or interferes with presidential power to achieve legitimate congressional goals, the statute is presumptively constitutional if the attainment of the constitutional goals outweighs the detriment to the President and the statute does not prevent the President from achieving his constitutional responsibilities.⁷²

The Court’s separation of powers decisions span such a broad range of issues⁷³ that it is difficult to synthesize its separation of

⁶⁹ THE FEDERALIST NO. 70, *supra* note 6 (Alexander Hamilton). Harking back to Montesquieu, Madison wrote that although the three great powers cannot be united in one person or body without tyranny, the powers need not be wholly separated to do so. Rather, “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamentals of a free constitution are averted.” *Id.* at 318.

⁷⁰ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* 197 (Carolina Academic Press, 1987).

But when we speak of a separation of the three great departments of government, and maintain, that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly separate and distinct, and have no common link of connexion [sic] or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be executed by the same hands, which possess the whole power of either of the other two departments; and that such exercise of the whole would subvert the principles of a free constitution.

Id. at 197–98.

⁷¹ Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 443 (1977) (quoting the District Court opinion, 408 F. Supp. 321, 342 (D.D.C. 1976)).

⁷² See *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124 (1996), available at http://www.justice.gov/olc/delly.htm#N_1_.

⁷³ See, e.g., *Minstretta v. U.S.*, 488 U.S. 361 (1989) (discussing the validity of sentencing guidelines promulgated by an organization in the judicial branch); *Morrison v.*

powers jurisprudence. The Office of Legal Counsel⁷⁴ has organized the decisions around three useful principles,⁷⁵ roughly reflecting the fundamentalists' analytical framework. First, where the Constitution is “[e]xplicit and unambiguous,”⁷⁶ it must be strictly followed. Second, when legislation directly or indirectly transfers executive or judicial authority to Congress, the statute is unconstitutional.⁷⁷ Third, where legislation inhibits or prevents a branch from performing a constitutionally assigned function, it may be constitutionally valid if a strong congressional need to vindicate other objectives within its authority outweighs the interference with the function.⁷⁸

Olson, 487 U.S. 654 (1988) (discussing the validity of a special prosecutor appointed by a judicial committee to investigate and prosecute crimes against high executive branch officials); *Chadha*, 462 U.S. 919 (discussing the validity of a one house veto over actions taken by the Attorney General under statutory authority); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (discussing the validity of a bankruptcy court's jurisdiction over a common law counterclaim); *Nixon*, 433 U.S. 425 (discussing the validity of a statute entrusting presidential tapes and papers to the General Service Administration); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (discussing the validity of the president's seizure of steel mills to prevent a strike impeding the war effort during the Korean conflict).

⁷⁴ The Office of Legal Counsel is a division within the DOJ that represents and advises the Office of the President.

⁷⁵ The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 20 (1996).

⁷⁶ *Id.* (quoting *Chadha*, 462 U.S. at 945). In *Chadha*, the Court held that legislation authorizing one house of Congress to veto action taken by the executive branch pursuant to delegation from Congress was a legislative action that could only be effective with bicameral action followed by presentation to the President for signature or veto, the Constitution being explicit and unambiguous as to the procedural requirements for valid legislative action. *Chadha*, 462 U.S. 19.

⁷⁷ Constitutional Separation of Powers, *supra* note 72. “The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). The Court held that legislation authorizing the Comptroller General, an officer removable only by congressional joint resolution or impeachment, to impose spending limitations on the President not only invaded the President’s executive power but did so by aggrandizing congressional power. *Id.*

⁷⁸ Constitutional Separation of Powers, *supra* note 72 at 6. “Legislation that affects the constitutional separation of powers but is consistent with the requirements of bicameralism/presentment, the Appointments Clause, and the anti-aggrandizement principle is subject to less searching scrutiny.” *Id.* When reviewing legislation that of this type, “the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.” *Nixon*, 433 U.S. at 443.

Part IV of this article demonstrates that citizen suits do not invade a power the Constitution explicitly and unambiguously conferred on the President. Moreover, citizen suits do not transfer any power from the President to Congress. Part V demonstrates that the Appointments Clause is inapplicable to citizen suit provisions. Part VI demonstrates that the benefits of citizen suits in increased enforcement of the pollution control statutes are significant and that the interference they may cause the executive in carrying out his constitutional functions are minimal, if they exist at all.

IV **PUBLIC AND PRIVATE LAW ENFORCEMENT: A LITTLE HISTORY**

To understand exactly what the framers of the Constitution intended in that document is sometimes a difficult task. It is elegantly written and speaks for itself well on issues it explicitly addresses. On many issues, however, the Constitution is silent; e.g., what is executive power and does it include prosecution? On other issues it may be ambiguous; e.g., do both the Vesting Clause and Faithful Execution Clause confer power on the President? Because the delegates to the Constitutional Convention did not maintain an official record of its debates and kept the Convention's proceedings secret, our knowledge of its debates is limited to notes kept by a few of its members, notably James Madison.⁷⁹ *THE FEDERALIST*, commonly referenced as evidence for the intent of the framers, was written after the convention by three of its delegates as propaganda aimed at the debate in New York over the ratification of the Constitution.⁸⁰ Many of the words the framers used in the Constitution may resonate differently today than they did in the late 1700s. For instance, "the Law of Nations" in Article I, Section 8(16), to a citizen of the late 1700s meant natural law and treaties, including arbitration panels established by bi-lateral treaties, as expounded by

⁷⁹ See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* xvii, 31–33 (2d ed. 2005); RICHARD B. MORRIS, *WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY AND THE CONSTITUTION* 186, 188–89, 198–99 (1996). The delegates were so concerned to maintain secrecy that they nailed shut the windows of Independence Hall in Philadelphia through the long hot summer. *Id.* at 198–99. See also JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 306–21 (1971).

⁸⁰ *THE FEDERALIST NO. 70*, *supra* note 6.

Vattel in his *Law of Nations*,⁸¹ while 200 years later it denotes a rich mix of customary law and treaties, including treaties establishing international organizations and international courts, organizations and courts not conceived of in the late 1700s. When the framers of the Constitution vested control over the Army and Navy in the President in Article II, Section 2[1], little did they suspect that today we would have military personnel and equipment hovering in air and space as well as on land and sea. So too, in all probability the framers conceived of “executive power” within the framework of the authority then wielded by the King of England and his royal governors in the American colonies, while we conceive of it with reference both to modern separation of powers doctrine and to the vastly expanded federal government we live with today.⁸² With this in mind, it is useful to begin our analysis of the relationship between private enforcement and public prosecution with an examination of how the framers probably would have perceived them.

The framers’ domestic perceptions were largely an outgrowth of the state of our country during their times. It consisted of four million people spread thinly along the Atlantic seaboard from Savannah, Georgia to Portland, Maine. The only means of communication from Savannah to Portland was by word of mouth, handwritten letters, or printed material moving by sailing ship, horseback, or stage coach. A stage coach took six days to go from Boston to New York, in part because of the almost complete lack of bridges.⁸³ The economy was largely agricultural, augmented by fishing and seagoing commercial endeavor in the north. England had largely suppressed manufacturing in the colonies to help promote it at home.

The Articles of Confederation, ratified in 1781, established a Congress in which each state had one vote,⁸⁴ nine votes were needed to take important actions,⁸⁵ and the vote of every state, together with a ratification of their legislatures, was necessary to amend the

⁸¹ Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1113–18 (2011).

⁸² See Lessig & Sunstein, *supra* note 15 for a more detailed exploration.

⁸³ MORRIS, *supra* note 79, at 122. From May to November, mail was dispatched three times a week from Maine to Virginia and twice a week from Virginia to Georgia and one time less a week at other times. Even the infrequent dispatches were unreliable, due to mail robbery and other causes. In February 1794, mail from the south arrived only twice in seven weeks. JENNINGS B. SANDERS, *EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1771–1789*, at 158, 161, 165 (1935).

⁸⁴ ARTICLES OF CONFEDERATION of 1781, art. V, para. 4.

⁸⁵ *Id.* at art. IX, para. 6.

Articles.⁸⁶ The Articles authorized Congress to wage war and peace, conduct foreign relations, mint money, spend money, undertake debt and run a post office, but not to levy or collect taxes or to regulate commerce. The Articles did not establish freestanding executive or judicial departments.⁸⁷ Article IX, however, authorized Congress to “appoint . . . committees and civil officers as may be necessary for managing the general affairs . . . under their direction.”⁸⁸ Under this authority the Confederation Congress established organizations for war, foreign affairs, finances, and the post office under the supervision of congressional committees or commissions.⁸⁹ Article IX also authorized Congress to establish courts for piracy, felonies committed on the high seas, and appeals regarding the law of capture, but it did not exercise that authority.⁹⁰ The Articles do not mention prosecution or prosecutors. Indeed, while Congress established mail robbery as a felony, it had to request that a state investigate, prosecute, and punish a mail robbery felon.⁹¹

A. Public and Private Prosecution

The Constitution, of course, established executive and judicial branches, in addition to a legislative branch. Mirroring the importance of defense, foreign affairs, finances, and the postal service to the Confederation Congress, the Constitution assigned national defense and foreign affairs powers variously between Congress and the

⁸⁶ *Id.* at art. XIII, para. 1.

⁸⁷ See THE FEDERALIST NO. 22 (Alexander Hamilton) (noting this as one of the glaring weaknesses of the Articles of Confederation).

⁸⁸ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.

⁸⁹ Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781–1789*, 41 AM. J. LEGAL HIST. 411, 426 (1997). The Post Office was headed by a Postmaster General, who was not a member of Congress, but was closely supervised by a congressional committee. The other organizations evolved quickly in frustration with the inefficiency of legislative administration. They began as congressional committees and generally developed into boards (congressional committees augmented by non-congressional experts and clerks) and eventually into free standing departments able to perform ministerial duties under close and continuing supervision by a congressional committee and generally unauthorized to exercise policy judgment. SANDERS, *supra* note 83, at vii.

⁹⁰ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1. Instead, it established rules and procedures to be applied by state courts. Ordinances for establishing Courts for the trial of piracies and felonies committed on the high seas, April 5, 1781. McCormick, *supra* note 89, at 424–25, 438.

⁹¹ SANDERS, *supra* note 83, at 161.

President, and assigned Congress the authority to enact financial and postal legislation. The First Congress followed suit, creating departments for foreign affairs, war, and treasury, as well as establishing a temporary post office,⁹² the new executive organizations generally assuming already functioning organizations from the Confederation Congress.⁹³

The President's war and foreign relations powers are often called "core executive powers" because the Constitution specifically conferred them on the President.⁹⁴ While some say that prosecution is a core executive power as well,⁹⁵ the Constitution did not specifically confer a prosecution or law enforcement power on the President. Indeed, the First Congress did not create a department of prosecution or even a department of law, in part, perhaps, because there was no functioning prosecution or law organization from the Confederation Congress for the new government to assume.

The First Congress eventually created positions for an Attorney General, a federal attorney for each judicial district, and a federal marshal in each district in the last sections of the last significant statute it enacted in its first session, entitled "An Act to establish the Judicial Courts of the United States,"⁹⁶ commonly known as the Judiciary Act of 1789. The initial draft of the Act by Oliver Ellsworth

⁹² 1 Cong. ch. 4, July 27, 1789, 1 Stat. 28 (1789); 1 Cong. ch. 7, August 7, 1789, 1 Stat. 49 (1789); 1 Cong. ch. 12, September 2, 1789, 1 Stat. 65 (1789); 1 Cong. ch. 16, September 22, 1789, 1 Stat. 70 (1789).

⁹³ SANDERS, *supra* note 83, at 107, 121, 127, 189. John Jay and General Knox were the last Secretaries of Foreign Affairs and War under the Continental Congress and the first under President Washington. The departments were unimpressive. Jay's Department of Foreign Affairs, for instance, consisted of an under-secretary, a doorman, a messenger, two clerks, and three interpreters. *Id.*

⁹⁴ *In re Sealed Case*, 838 F.2d 476, 528 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988) ("Core executive functions are described in Article II . . . [I]t seems fair to assume that the powers specifically mentioned were of central concern to the framers."). A recent and well-reasoned law review article noted the "longstanding tradition in OLC legal reasoning, most noticeably a tendency to evoke 'core' executive powers to support presidential action in the realm of foreign affairs or war powers." Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 463 (2009). See also John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 298, 306 (1993).

⁹⁵ *Morrison*, 437 U.S. at 688, 706 (Noting that the appellees and Justice Scalia held prosecution to be an executive power); See also Prakash, *The Chief Prosecutor*, *supra* note 13, at 529; Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 383 (2010).

⁹⁶ 1 Cong. ch. 21, Sept. 29, 1789, 1 Stat. 93 (1789).

authorized the Supreme Court to appoint an Attorney General and authorized District Court judges to appoint marshals and district attorneys for the United States (now U.S. Attorneys).⁹⁷ Ellsworth was a Senator from Connecticut who had been a delegate to the Constitutional Convention and later became the second Chief Justice of the Supreme Court.⁹⁸ Indeed, of the nine members of the committee drafting the Judiciary Act,⁹⁹ six had been delegates to the Constitutional Convention.¹⁰⁰ Although the final Act did not specify who would appoint or direct the Attorney General or the district attorneys,¹⁰¹ the President undertook to do so and no one objected.¹⁰² The final Act did not specify who appointed marshals in each district, but it did authorize judges to remove them at pleasure.¹⁰³ As enacted, the Judiciary Act did not place these officials in an executive department and did not provide the President or the Attorney General¹⁰⁴ with supervisory power over prosecution by the district attorneys, although they assumed such authority from time to time.¹⁰⁵ The President requested legislation giving the Attorney General supervisory control over district attorneys, but Congress did not enact it.¹⁰⁶ Indeed, the Secretary of State assumed supervisory authority over district attorneys from time to time.¹⁰⁷

⁹⁷ GOEBEL, *supra* note 79, at 490.

⁹⁸ WILLIAM GARRETT BROWN, THE LIFE OF OLIVER ELLSWORTH 118, 184–85, 238 (Da Capo Press 1970). Ellsworth did not sign the Constitution because he had to leave the convention before its end to attend to his law practice. He served as Chief Justice from 1796–1800. *Id.*

⁹⁹ GOEBEL, *supra* note 79, at 458.

¹⁰⁰ FARBER & SHERRY, *supra* note 79, at 609–19.

¹⁰¹ There is no indication of why the provision for appointment by the judiciary was dropped or who was supposed to do the appointment. GOEBEL, *supra* note 79, at 501.

¹⁰² Beale, *supra* note 15, at 393; Prakash, *The Chief Prosecutor*, *supra* note 13, at 552–65.

¹⁰³ 1 Cong. ch. 20, Sept. 24, 1789, 1 Stat. 87 (1789).

¹⁰⁴ The Act charged the attorney general with representing the United States in the Supreme Court and acting as legal advisor to the President and heads of departments. 1 Stat. 93 (1789). Congress did not provide the Attorney General with supervisory authority over U.S. Attorneys until the Act of Aug. 2, 1861, ch. 37 sec. 1, 12 Stat. 285 (1861), and did not create the Department of Justice until the Act of June 27, 1870, ch. 150 sec. 1, 16 Stat. 162 (1870).

¹⁰⁵ Prakash, *The Chief Prosecutor*, *supra* note 13, at 552–64.

¹⁰⁶ Bloch, *supra* note 15, at 585–87.

¹⁰⁷ GOEBEL, *supra* note 79, at 611–13.

Congress in its first session included compensation for the Attorney General in a statute establishing compensation for judges,¹⁰⁸ rather than in the statute establishing compensation for executive officers,¹⁰⁹ and it repeated that pattern in its last session.¹¹⁰ It provided for compensation of the district attorneys in the Judiciary Act itself.¹¹¹ That compensation was not generous or indicative that the jobs were full time; both the Attorney General and the district attorneys supplemented their government income with private clients.¹¹² The First Congress in its first session also adopted the Northwest Ordinance enacted by the Confederacy Congress.¹¹³ The Ordinance provided an extensive list of officials to govern the Northwest Territories, including a governor, judges, a legislative council, and a secretary, but no prosecutors.¹¹⁴ Of the two thousand federal employees during the first administration,¹¹⁵ only sixteen were engaged in prosecution.¹¹⁶ Federal prosecution was an afterthought for the First Congress and at least some of its members were, at least initially, ambivalent over whether federal prosecutors were executive or judicial officials.

The First Congress assigned the district attorneys the “duty . . . to prosecute . . . *all* delinquents for crimes and offenses, cognizable under the authority of the United States, and *all* civil actions in which the United States shall be concerned.”¹¹⁷ While this appears to grant district attorneys exclusive authority to prosecute federal criminal and civil cases, it did not. Both before and after Congress enacted the Judiciary Act creating district attorney positions, it also enacted statutes containing *qui tam* provisions authorizing private

¹⁰⁸ 1 Cong. ch. 18, sec. 1, Sept. 23, 1789, 1 Stat. 72 (1789).

¹⁰⁹ 1 Cong. ch. 13, sec. 1, Sept. 11, 1789, 1 Stat. 67 (1789).

¹¹⁰ 1 Cong. ch. 22, sec. 1, March 3, 1791, 1 Stat. 216 (1789).

¹¹¹ 1 Cong. ch. 20, sec. 35, Sept 24, 1789, 1 Stat. 92-3 (1789).

¹¹² GOEBEL, *supra* note 79, at 613, 726.

¹¹³ 1 Cong. ch. 8, Aug. 7, 1789, 1 Stat. 50 (1789).

¹¹⁴ *Id.*

¹¹⁵ *Free Enterprise Fund*, *supra* note 14, at 3168 (Breyer, J., dissenting). In September 2009, there were a total of 2.8 million civilian federal employees, of which approximately 113,495 were employed by the Department of Justice, about 4%. U.S. OFFICE OF PERS. MGMT., FED. EMP’T STATISTICS, TABLE 2, 2009, <http://www.opm.gov/feddata/html/2009/September/table2.asp> (last visited Oct. 14, 2012).

¹¹⁶ See Lessig & Sunstein, *supra* note 15, The Attorney General, and one prosecutor for each district. By the end of the first Congress there were fifteen districts, one for each of the original 13 colonies and one each for newly admitted Kentucky and Vermont. 1 Cong. ch. 4, Feb. 4, 1791, 1 Stat. 189 (1791); 1 Cong. ch. 7, Feb. 18, 1789, 1 Stat. 191 (1789).

¹¹⁷ 1 Cong. ch. 20, sec. 35, Sept. 24, 1789, 1 Stat. 73, 92 (1789) (emphasis added).

enforcement of federal law, initially of all federal law subject to enforcement by federal district attorneys.¹¹⁸ Moreover, Congress conferred concurrent jurisdiction on state courts to assess forfeitures, fines, and penalties for some revenue offenses, presumably in actions brought by state or local prosecutors.¹¹⁹ To the extent that Congress granted enforcement authority to private individuals in *qui tam* provisions and prosecution authority to states in others, it could not have intended federal district attorneys to have exclusive prosecution authority against all violations, but only concurrent authority against most violations.

Nothing in the Constitution even hints that it vested prosecution in the executive branch. The Vesting and Faithful Execution Clauses do not mention prosecution, the remainder of Article II does not mention prosecution, and the remainder of the Constitution does not mention prosecution. Nothing in *THE FEDERALIST* even hints that prosecution is a constitutional executive function; indeed it does not mention prosecution. There is no evidence the framers of the Constitution believed that prosecution was an executive power, let alone a quintessential one.¹²⁰ Indeed, the most important English language dictionary available at the time of the framing of the Constitution does not mention prosecution in its definition of “executive.”¹²¹

¹¹⁸ See discussion *infra* Part IV.B.

¹¹⁹ 3 Cong. ch. 45, sec. 10, June 5, 1794, 1 Stat. 373, 375 (1794); 3 Cong. ch. 48, sec. 5, June 5, 1794, 1 Stat. 376, 378 (1794). Such actions were “dependent upon state officials in executing federal laws,” presumably state prosecutors. Krent, *supra* note 15, at 304.

¹²⁰ Notably, just because the executive does not hold all prosecutorial powers does not mean that it is released from taking care that the laws be faithfully executed as demanded by Art. II of the Constitution. For example, when signing the Foreign Relations Authorization Act into law, the President issued a concurrent statement that § 214 of the Act was merely advisory because it would “impermissibly interfere with the President’s [sole] constitutional authority” to recognize foreign sovereigns. Presidential Statement on Signing the Foreign Relations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1659 (Sept. 30, 2002). The Court of Appeals began its analysis of the issue by assuming that the statute was constitutional, which, by avoidance of the constitutional issue, effectively allowed the executive to selectively execute the law. *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1230 (C.A.D.C. 2009). When a branch of Government has at its disposal a mechanism to guard against incursions on its powers, courts are not precluded from adjudicating separation of powers claims and even routinely do so. *Id.* at 1238.

¹²¹ Definition of *appointment*, SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE, Vol. 1 (1755), available at <http://archive.org/stream/adictionaryengl00jamegoog#page/n278/mode/2up> (“1. Having the quality of executing or performing; active; not deliberative; not legislative; having the power to put in act the laws”) (last visited Jan. 16, 2013).

The complete lack of connection between prosecution and executive power in the wording and history of the Constitution suggests the framers of the Constitution had no intent to place prosecution in the executive power. It most strongly suggests the framers simply were not thinking of prosecution when they framed the Constitution and wrote *THE FEDERALIST* because they did not envision prosecution as a major federal function, executive or otherwise. There could be several reasons for this. First, they envisioned prosecution of traditional common law crimes as a state rather than a federal function.¹²² Second, they conceived of state and private parties performing many of the functions of federal prosecution.¹²³ Third, they viewed prosecution of federal criminal statutes as of limited importance, as they did not establish punishments for common law crimes within federal jurisdiction until its second session.¹²⁴ Finally, there had been no prosecutorial function under the Articles of Confederation.¹²⁵

If the framers of the Constitution weren't thinking of prosecution when they gave executive power to the President, what could they have had in mind by executive power? A review of the statutes enacted during the first session of the First Congress indicates what its members expected the President to do: collect duties on imported goods; regulate coastal commerce; conduct relations with foreign countries; repay states for funds loaned during and after the revolution; administer the Northwest Territories; build and maintain lighthouses, beacons, buoys and public piers; negotiate treaties with Indian tribes; pay federal employees; maintain public records and seals; collect taxes on distilled spirits; administer a postal system; pay

¹²² See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) ("The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.") *Id.*

¹²³ See *infra* Part IV.B.

¹²⁴ See *infra* note 140. Even then, the list was modest and the length of the initial criminal code was less than the statute on import duties Congress enacted in its first session. Compare *infra* note 145 with *infra* note 143. Moreover, every statute it enacted during the first session with criminal sanctions also authorized *qui tam* actions. See *infra* note 148, at 29.

¹²⁵ The Continental Congress routinely requested that the states prosecute criminal acts against federal interests. Prakash, *The Chief Prosecutor*, *supra* note 13, at 576.

pensions to invalid veterans; and provide for the national defense.¹²⁶ *THE FEDERALIST* No. 72 defines the President's powers and duties in similar terms, making no mention of prosecution.¹²⁷ These assignments all fit easily within the dictionary definitions of executive activities cited above. While prosecution may have been of benefit to some of these assignments, it was only ancillary to them,¹²⁸ as demonstrated by the tiny fraction of federal employees devoted to prosecution.¹²⁹

B. Private Enforcement of Federal Law

Private enforcement was an established part of the Anglo-American legal system at the time the Constitution was drafted and ratified. Criminal prosecution in England was commonly accomplished by private individuals prior to and at that time;¹³⁰ indeed, private prosecution remained common for English crimes well into the second half of the nineteenth century¹³¹ and is still

¹²⁶ UNITED STATES STATUTES AT LARGE Vol. 1 xvii (1845), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/lls1001.db&recNum=18> (last visited Dec. 27, 2012).

¹²⁷ "The administration of government . . . falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war, these, and other matters of a like nature constitute what seems to be most properly understood by the administration of government." *THE FEDERALIST* NO. 72 (Alexander Hamilton). Prakash observes that compared to prosecution, these are secondary aspects of execution of the law. Prakash, *The Chief Prosecutor*, *supra* note 13, at 552. The tiny portion of federal employees devoted to prosecution in comparison to the portion devoted to general administration suggests this observation is implausible. *See supra* notes 112–13.

¹²⁸ The statute on collecting duties on imported goods, for instance, provided for penalties for various violations and authorized the customs collector to sue in the name of the United States for penalties, fines, and forfeitures. The penalty provision, however, was at the end of the statute and occupied only three of its forty-eight sections. Act of July 31, 1789, ch. 5, §§ 36–38, 1 Stat. 48–49 (1789).

¹²⁹ *See supra* note 111.

¹³⁰ *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 128 (1998) (Stevens, J., concurring) ("[P]rivate persons regularly prosecuted criminal cases."); Krauss, *supra* note 15; Roger A. Fairfax Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 413 (2009).

¹³¹ *See* 1 James Fitzjames Stephen, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 495 (1883) ("Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else."); *see also* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 360–64 (1986).

possible today.¹³² Private prosecution carried over to the English colonies in North America¹³³ and persisted in the new states to varying degrees after the Constitution went into effect.¹³⁴ The notion that crimes could be prosecuted by private individuals at that time is understandable, since most early crimes were common law crimes for injuries to individuals and their property.¹³⁵

Private participation in the prosecution of federal crimes continued for some time.¹³⁶ Private citizens initiated criminal prosecutions by obtaining warrants for the arrest of defendants and presented evidence to grand juries to secure indictments of defendants.¹³⁷ Indeed, the second Attorney General, William Bradford, in 1794 advised the Secretary of State, on behalf of the British Consul in Norfolk, that a private citizen could force a district attorney to act on a privately obtained grand jury indictment, even though the district attorney had previously decided not to prosecute.¹³⁸

The *qui tam*¹³⁹ action is a distinct form of private enforcement: a statutory device authorizing private plaintiffs to sue of the sovereign to collect monies owing the sovereign, including debts and penalties for defrauding the sovereign. The statutes commonly provide for the deposit of funds recovered by private enforcers in the public treasury, with a percentage of the recovery going to the private plaintiff as a reward for services rendered to the government.¹⁴⁰ *Qui tam* actions were common in England for centuries before the framing of the

¹³² Jonathan Rogers, *Restructuring the Exercise of Prosecutorial Discretion in England*, 26 OXFORD J. LEGAL STUD. 775, 777, 801–02 (2006). See the website of the Crown Prosecution Service, http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/ (the right to prosecute privately is preserved, although the Crown Prosecution Service has the right to take over or terminate a private prosecution) (last visited Jan. 16, 2013).

¹³³ See Cardenas, *supra* note 131, at 367–71; Fairfax, *supra* note 130, at 421.

¹³⁴ Krent, *supra* note 15, at 291.

¹³⁵ See Act of April 30, 1790, ch. 9, 1 Stat. 112 (establishing punishments for crimes committed within federal jurisdictions, all of which were common law crimes).

¹³⁶ See, e.g., Virginia v. Dulany, 28 F. Cas. 1223 (C.C.D.C. 1802) (No. 16, 959).

¹³⁷ See Dangel, *supra* note 15, at 84; Krent, *supra* note 15, at 292.

¹³⁸ 1 Op. Att'y Gen. 42, 43 (1794). The episode is described in Krent, *supra* note 15, at 293–94.

¹³⁹ *Qui tam* is short for a Latin phrase meaning “who pursues this action on our Lord the King’s behalf as well as his own.” Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000) (internal quotation marks omitted).

¹⁴⁰ See Prakash, *The Chief Prosecutor*, *supra* note 13, at 527 for pejorative comments that *qui tam* actions harness “private greed to enforce the law,” which seem out of place since most of government enforcers that *qui tam* relators replaced, were paid in the same way. See statutes cited *infra* notes 143–50.

Constitution and had carried over to the English colonies in North America.¹⁴¹ The First Congress enacted several statutes authorizing *qui tam* actions,¹⁴² including statutes imposing duties on distilled spirits,¹⁴³ establishing the first census,¹⁴⁴ specifying the punishment for larceny,¹⁴⁵ regulating trade with Indians,¹⁴⁶ and harboring runaway seamen.¹⁴⁷ Moreover, the First Congress enacted a set of statutes granting bounties to informers whose information led to the recovery of funds by the government, including statutes establishing duties on imports,¹⁴⁸ statutes prohibiting conflicts of interest by employees of the Treasury Department,¹⁴⁹ and statutes prohibiting improper acts by employees of the Bank of the United States.¹⁵⁰ Justice Scalia noted in *Vermont Agency of Natural Resources*¹⁵¹ that the Court had earlier established that these informer statutes were the equivalent of *qui tam* statutes: “[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.”¹⁵² The fact that the amount awardable to informers, one half of the funds collected, was commonly the same in both sets of statutes also suggests that informers were able to prosecute under both sets of statutes.

Qui tam devices were not incidental enforcement provisions: the First Congress employed them throughout the nascent law code. Their host statutes occupy nearly half of the pages of statutes enacted by the

¹⁴¹ *Vt. Agency of Natural Res.*, 529 U.S. at 774–78.

¹⁴² See *id.* at 776–66; Matthew S. Brockmeier, *Pulling the Plug on Health Care Fraud: The False Claims Act After Rockwell and Allison Engine*, 12 DEPAUL J. HEALTH CARE L. 277, 279 (2009); Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 95 (1997); Prakash, *The Chief Prosecutor*, *supra* note 13, at 571–80.

¹⁴³ 1 Cong. ch. 15, § 44, March 3, 1791, 1 Stat. 199, 209 (1791).

¹⁴⁴ 1 Cong. ch. 2, § 3, March 1, 1790, 1 Stat. 101, 102 (1790).

¹⁴⁵ 1 Cong. ch. 9, § 9, 16, 17, April 30, 1790, 1 Stat., 112, 116 (1790).

¹⁴⁶ 1 Cong. ch. 33, § 3, July 22, 1790, 1 Stat. 137, 138 (1790).

¹⁴⁷ 1 Cong. ch. 2, § 1, 4, July 20, 1790, 1 Stat. 131,133 (1790).

¹⁴⁸ 1 Cong. ch. 5, July 31, 1789, 1 Stat. 29, 38, 44–45, 48 (1789); 1 Cong. ch. 35, § 55, 69, Aug. 4, 1790, 1 Stat 173, 177 (1790); 1 Cong. ch. 11, § 21, Sept. 1, 1789, 1 Stat. 55, 60. (1789).

¹⁴⁹ 1 Cong. ch. 12, § 8, Sept. 2, 1789, 1 Stat 67 (1789); 1 Cong. ch. 8, § 1, Mar. 3, 1791, 1 Stat. 215 (1791).

¹⁵⁰ 1 Cong. ch. 10, § 8, 9, Feb. 25, 1791, 1 Stat. 191,195–96 (1791).

¹⁵¹ *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 777 n.7 (2000).

¹⁵² *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943)).

First Congress.¹⁵³ Every one of the statutes enacted by the First Congress providing for government prosecution also provided for private enforcement through *qui tam* provisions.¹⁵⁴ The remaining statutes created no prosecutable offenses and therefore were not susceptible to *qui tam* provisions.¹⁵⁵

The prevalence of *qui tam* provisions no doubt reflects the paucity of federal employees available to enforce federal laws at the time.¹⁵⁶ Without adequate government enforcement personnel, the First Congress had no choice but to rely heavily on familiar and common private prosecutors. The fact that more than half of the members of the First Congress were fresh from participation in drafting or ratifying the Constitution¹⁵⁷ creates a strong presumption that when the First Congress enacted *qui tam* provisions in all enforceable statutes, it believed private enforcement did not unconstitutionally intrude on the executive power of the President. “[T]he interpretations

¹⁵³ Over one hundred of the approximately two hundred pages of statutes enacted by the First Congress. See 1 UNITED STATES STATUTES AT LARGE, *supra* note 126, at 23–224 (1845), available at <http://memory.loc.gov/ammem/amlaw/lwslink.html> (follow “List of Public Acts” hyperlink under “Volume 1: 1st-5th, 1789–1799”) (last visited Oct. 4, 2012).

¹⁵⁴ 1 Stat. 23–225 (1789). See e.g. *supra* notes 143–50. Not all of the statutes provided a *qui tam* remedy for every violation. For instance, the statute imposing penalties for common law crimes within the jurisdiction of the federal government provided a *qui tam* remedy only for larceny, presumably because it was the only common law crime involving the possible recovery of funds from which a bounty could be paid. *Supra* note 135. The statutes with the most extensive remedies for crimes against the government’s proprietary interests, the collection of duties on imported goods and distilled spirits, had catchall provisions applying *qui tam* remedies to all forfeitures, fines and penalties established throughout those statutes. See *supra* notes 143, 148. The statute dealing with duties on distilled spirits authorized the attorney for the United States to proceed by information (a criminal procedure) and the *qui tam* plaintiff to proceed by a civil action in debt. See *supra* note 143. Although the other statutes did not specify this difference, a similar distinction makes sense under the other statutes.

¹⁵⁵ For instance, the admission of North Carolina, Rhode Island, Vermont, and Kentucky (10 statutes); appropriations, salaries and compensation (19 statutes); lighthouses (5 statutes); dealing with the federal debt and accounting between states and the federal government (7 statutes). See *supra* note 149.

¹⁵⁶ GOEBEL, *supra* note 79.

¹⁵⁷ See Levine v. United States, 362 U.S. 610, 615 (1960) (of the ninety-five members of the First Congress, twenty had been delegates to the Philadelphia Convention that drafted the Constitution); see also Bowsher v. Synar, 478 U.S. 714, 724 (1986). Twenty-seven additional members also had attended state ratifying conventions for a total of more than 50% of the members of Congress having been involved in the adoption of the Constitution. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1524 (1986).

of the Constitution by the First Congress are persuasive”¹⁵⁸ Indeed, there is no indication that any member of Congress, the President, or the courts at the time objected to private enforcement or believed it unconstitutionally intruded on the executive power of the President. The implication of constitutionality is particularly strong under the Appointments Clause because the First Congress spent considerable time and attention at its outset determining whether the President could remove the principal officer of the Department of Foreign Affairs without the consent of the Senate and whether his power to remove the Secretary was inherent in the his Appointments Clause authority or had to be conferred by the Senate.¹⁵⁹ Ultimately deciding that the President’s removal power was inherent and not subject to Senate approval, Congress addressed the removal of a principal officer obliquely to avoid implying Congress had to authorize removal by the President.¹⁶⁰ Because the First Congress

¹⁵⁸ *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 283 (1991) (“[A]ctions by Members of the First Congress provide weighty evidence on the Constitution’s meaning.”); *Harmelin v. Michigan*, 501 U.S. 957, 980 (“The actions of the First Congress . . . are of course persuasive evidence of what the Constitution means.” (citing *Marsh v. Chambers*, 463 U.S. 783, 788–90 (1983)); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928); *Myers v. United States*, 272 U.S. 52, 175 (1926). *But see Van Orden v. Perry*, 545 U.S. 677, 726 n.27 (2005) (“The first Congress was just as the present Congress is capable of passing unconstitutional legislation.”); *see also Walz v. Tax Comm’n of New York*, 397 U.S. 664, 678 (1970); James T. Blanch, *The Constitutionality of the False Claims Act’s Qui Tam Provision*, 16 HARV. J.L. & PUB. POL’Y 701, 719–23 (1993).

¹⁵⁹ *See generally* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 455–586 (Gales and Seaton, 1834). *See also* Siakrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (providing detailed analysis of this debate and its resolution). The attention given to the “Decision of 1789” overshadows the more important lesson that the First Congress gives us about executive power from the different language it used in the statutes establishing the Departments of Foreign Relations and War, on one hand, and the Department of Treasury on the other hand. The differences suggest executive control over the first two and shared executive and legislative control over the latter—an altogether different picture than painted by the unitarians. Lessig, *supra* note 15.

¹⁶⁰ Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (“[A]n inferior officer, to be appointed by the said principal officer . . . who, whenever the said principal officer shall be removed from office by the President of the United States . . . shall”). In the Decision of 1789, the First Congress struck language from bills creating the Foreign Affairs, War, and Treasury Departments that would have provided for presidential removal of the principal officers of those departments, making it clear that such power was conferred on the President by Article II, not by statute. *See Myers*, 272 U.S. at 111–32; Prakash, *supra* note 13; CALABRESI & YOO, *supra* note 13, at 35–36; Lessig & Sunstein, *supra*, note 15, at 25–26; Bloch, *supra* note 15, at 573–76.

devoted so much attention to the appointment and removal power, it is unlikely it would simultaneously enact *qui tam* statutes that even one member remotely thought violated the Appointments Clause with nary a mention of the issue.

Currently, the primary *qui tam* statute is the False Claims Act (the FCA),¹⁶¹ authorizing private plaintiffs, styled relators, to sue in the name of the United States to recover for the United States payments it has made as a result of fraudulent claims and to recoup for the relators up to thirty percent of the funds recovered.¹⁶² The statute was enacted in 1863 to curb drastic abuse by contractors supplying goods to the army during the Civil War.¹⁶³ The FCA includes a number of provisions for the executive branch to override or control its *qui tam* actions,¹⁶⁴ while the *qui tam* actions created by the First Congress did not. The FCA authorizes the United States to file recovery actions on its own, which it often does, but over half of the recoveries under the FCA have been in actions filed under its *qui tam* provisions¹⁶⁵ and they have recovered considerable funds for the Treasury.¹⁶⁶ Thus, *qui tam* actions have proven to be as important in recovery of federal payments induced by fraud as citizen suits have proven in enforcing federal environmental laws. Nevertheless, as with citizen suits, the Supreme Court has long been hostile to *qui tam* actions.¹⁶⁷ Even so, a

¹⁶¹ 31 U.S.C. §§ 3729–33 (2006).

¹⁶² Brockmeier, *supra* note 142, at 279–80.

¹⁶³ *Id.* at 281–83.

¹⁶⁴ See 31 U.S.C. §§ 3729–33 (2006). The DOJ can bring a suit in the first place, foreclosing *qui tam* actions. 31 U.S.C. § 3730(a). When the *qui tam* relator files a complaint, he serves the DOJ, not the defendant. The complaint remains under seal for at least 60 days while the DOJ determines whether to intervene. *Id.* § 3730(b). If the government intervenes, it assumes primary authority for prosecuting the suit. *Id.* § 3730(c)(1). It may settle or dismiss the case over the objection of the relator *Id.* § 3730(c)(2). It may also decide to pursue the case by alternative means. *Id.* § 3730(c)(5). If the DOJ does not initially intervene, it can do so later and, in the meantime, can monitor the development of the case by requesting to be served with copies of all pleadings and discovery documents. *Id.* § 3730(c)(3).

¹⁶⁵ Brockmeier, *supra* note 142, at 279.

¹⁶⁶ *Id.* at 278. *Qui tam* actions recovered \$15 billion from 1987–2005.

¹⁶⁷ There is an extensive literature on *qui tam* provisions and Article II and Article III attacks on them. See Brockmeier, *supra* note 142; Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939 (2002); Gilles, *supra* note 39; Hamer, *supra* note 142; Blanch, *supra* note 158; Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989). Some of the judicial hostility to *qui tam* suits no doubt results from suspicion they are subject to abuse. See Brockmeier, *supra* note 142, at 282–84; Hamer, *supra* note 142, at 119; Blanch, *supra* note 158, at 757–58; Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 775 (2000).

unanimous Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹⁶⁸ in an opinion written by Justice Scalia, held that *qui tam* relators have Article III standing to sue, based in large part on the well established nature of *qui tam* actions when the Constitution was drafted and ratified.¹⁶⁹ “[T]his history [is] well nigh conclusive with respect to the questions before us here: whether *qui tam* actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”¹⁷⁰ Although the history of *qui tam* “well nigh” decided the issue, Justice Scalia’s first argument was that *qui tam* relators were partial assignees,¹⁷¹ consistent with representational standing.¹⁷² He noted that the history of *qui tam* actions was inconsistent with the Court’s latter day conception that standing “exists only to redress or otherwise to protect against injury to the complaining party.”¹⁷³ The relator, however, seeks standing only to sue for injury to another party, the United States. The assignee theory bridges this gap, as assignees stand in the shoes of their assignors. In Justice Scalia’s words, history confirmed the partial assignee theory.¹⁷⁴

¹⁶⁸ Although Justice Stevens filed a dissenting opinion in which Justice Souter joined, the dissent focused on whether the FCA authorized suit against a state and the dissenters agreed with the majority on the standing issue. *Vt. Agency of Natural Res.*, 529 U.S. 765, 775, 789 (Stevens, J., dissenting).

¹⁶⁹ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (the Court has a long history of looking to the laws of England and the states at the time of the framing of the Constitution to determine whether particular issues are “cognizable in the courts”).

¹⁷⁰ *Vt. Agency of Natural Res.*, 529 U.S. at 777 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)). Indeed, one of the chief proponents of the unitary executive theory concludes that the established character of *qui tam* actions before and at the time of the Constitution and its repeated adoption by the First Congress make arguments that it is unconstitutional “a little hard to stomach.” Prakash, *The Chief Prosecutor*, *supra* note 13, at 577.

¹⁷¹ Justice Scalia does not explain what he means by “partial assignee.” The relator is suing for all the debt the defendant owes the United States. Partial may signal assignment of federal rights, exclusive of the rights the federal government has to sue states that private parties lack under the 11th Amendment. See *Vt. Agency of Natural Res.*, 529 U.S. at 773 n.4. It could signal assignment of the government’s proprietary rights as opposed to its sovereign rights. Gilles, *supra* note 39, at 341–45.

¹⁷² *Vt. Agency of Natural Res.*, 529 U.S. at 772. He also considered whether relators might have representational standing as agents of the United States. Because the statute authorized relators to sue for themselves as well as for the United States, the agency theory did not entirely work. *Id.*

¹⁷³ *Id.* at 771 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis omitted)).

¹⁷⁴ *Id.* at 774, 778.

Although Justice Scalia noted the Court did not consider or decide whether the FCA's *qui tam* provision unconstitutionally intruded on the executive power conferred on the President by Article II,¹⁷⁵ it is difficult to see how or why this history would be any less "well nigh conclusive" under Article II than under Article III, especially when latter day concepts of standing are irrelevant to Article II analysis.¹⁷⁶ Coupled with this, the complete absence from the historical record of any suggestion the framers considered other types of private enforcement of federal law to be unconstitutional and the prevalence of private enforcement at the time of the Constitution should be "well nigh conclusive" that the framers did not consider private enforcement of the type authorized by citizen suit provisions to be unconstitutional.¹⁷⁷

Unitarians label all of this "scholarly revision[ism]."¹⁷⁸ Although they do not contest the historical record discussed here, they contend it is irrelevant because it does not disprove either that from the beginning the President controlled prosecution or that the Constitution conferred power over prosecution on the President.¹⁷⁹ Neither this article nor the so-called "revisionist scholars" suggest that once Congress enacted the Judiciary Act of 1789 the President did not appoint and exercise loose supervisory control over district attorneys prosecuting for the United States. They suggest, however, that the framers of the Constitution were not thinking of prosecution at all, much less thinking of it as an executive function. What else could explain why an important member of the Constitutional

¹⁷⁵ *Id.* at 779.

¹⁷⁶ Indeed, the dissenters commented that this history "is also sufficient to resolve the Article II question." *Id.* at 801. All courts of appeal considering the question have held that the FCA does not violate Article II. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001); *U.S. ex rel. Taxpayers Against Fraud v. Gen. Electric Co.*, 41 F.3d 1032 (6th Cir. 1994); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993). For a list of district court decisions to the same effect, *see Rogers v. Tristar Prods., Inc.*, 793 F. Supp. 2d 711 (E.D. Pa. 2011).

¹⁷⁷ Again, building on this, the complete absence in the historical record of any suggestion the framers considered prosecution to be an executive function and the indications that at least some of them considered it not to be, is well nigh conclusive that the Framers had no intent to place prosecution in a particular branch and certainly no intent to make it exclusively an executive function or a quintessential executive function.

¹⁷⁸ Prakash, *The Chief Prosecutor*, *supra* note 13, at 533 (referring to the works cited *supra* note 15). While Part IV of this article goes beyond the contributions of those authors in some respects, its consideration of the historical record is of the same nature and fits within what Prakash considers revisionism.

¹⁷⁹ Prakash, *The Chief Prosecutor*, *supra* note 13, at 536–39.

Convention,¹⁸⁰ while later in the Senate, drafted the initial version of the Act to have the judiciary appoint the Attorney General and the federal district attorneys? The conclusion that the framers did not regard prosecution as a quintessential executive function doesn't disturb the status of prosecution as an executive function; it certainly has come to be so today. But it does mean that prosecution is not a core executive function. While unitarians insist that the Constitution gives prosecutorial power to the President by vesting executive powers with him and requiring that he faithfully execute the laws,¹⁸¹ that is circular reasoning, it assumes prosecution is an executive function, while that is the very question under examination.

V THE APPOINTMENTS CLAUSE

Article II, Section 2, Clause 2 provides that the President "shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for [officials whose appointments require the advice and consent of the Senate], and which shall be established by Law; but Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Do the citizen suit provisions provide for the appointment of officers in contravention of the Appointments Clause? That depends on the meaning of "appoint," "appointment," "officer," and, inferentially, "office." The Constitution does not define any of these terms. *THE FEDERALIST* and the debates at the Constitutional Convention do not discuss their meanings.

The two major dictionaries that sandwich the framing and ratification of the Constitution illuminate the meaning of the words at that time. *Noah Webster's American Dictionary Of The English Language* defines "appointment" as, *inter alia*, a "designation to office" or "[a]n allowance to a person; a salary or pension, as to a public officer."¹⁸² *Samuel Johnson's Dictionary Of The English*

¹⁸⁰ *Supra* notes 96–97.

¹⁸¹ Prakash, *The Chief Prosecutor*, *supra* note 13, at 537–39.

¹⁸² Definition of *appointment*, 1828 EDITION OF WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, <http://1828.mshaffer.com/d/search/word,appointment> (last visited Jan. 16, 2013). Webster's definition of "appoint" provides no further illumination.

Language defines “appointment” as, *inter alia*, “[a]n allowance paid to any man; commonly used of allowances to public officers.”¹⁸³ These definitions both suggest that in the context of the Appointments Clause, “appointment” means designation of a person for a federal office and that the federal office provides some sort of allowance or remuneration.

The dictionaries’ definitions of “office” and “officer” reinforce and refine these suggestions. Webster defines “office,” *inter alia*, as “[d]uty or employment of a private nature”¹⁸⁴ and “officer,” *inter alia*, as “employment undertaken by commission or authority from government or those who administer it” and a “person commissioned or authorized to perform any public duty.”¹⁸⁵ The same definition notes that officers may be “civil, military, or ecclesiastical” and that [n]on-commissioned officers are nominated by their captain, and appointed by the commanding officers of regiments.¹⁸⁶ Similarly, Johnson defines “office,” *inter alia*, as “a public charge or employment” and “particular employment” and defines “officer,” *inter alia*, as “a man employed by the publick.”¹⁸⁷ The equation of “office” with “employment” in both of these dictionaries reinforces the suggestion that offices involve remuneration. And the equation of “officer” with designation by the government, or those administering it, together with the example of military offices, reinforces the suggestion that the Appointments Clause deals with the designation by a particular responsible government official of a particular person to fill a particular government position, with appropriate remuneration. The Court has deduced from a similar analysis that an Appointments Clause “office is a public station, or employment,

Definition of *appoint*, 1828 EDITION OF WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, <http://1828.mshaffer.com/d/search/word,appoint> (last visited Jan. 16, 2013).

¹⁸³ Definition of *appointment*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), available at <http://archive.org/stream/adictionaryengl00jamegoog#page/n541/mode/2up> (last visited Jan. 16, 2013).

¹⁸⁴ Definition of *office*, 1828 EDITION OF WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, <http://1828.mshaffer.com/d/search/word,office> (last visited Jan. 16, 2013).

¹⁸⁵ Definition of *officer*, 1828 EDITION OF WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, <http://1828.mshaffer.com/d/search/word,officer> (last visited Jan. 16, 2013).

¹⁸⁶ *Id.*

¹⁸⁷ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), available at <http://archive.org/stream/adictionaryengl00jamegoog#page/n518/mode/2up> (last visited Jan. 16, 2013).

conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”¹⁸⁸

Citizen suit provisions are not governed by the Appointments Clause. They do not designate any particular person to any particular office, and they do not authorize any particular government official or entity to do so. Indeed, they do not create an office to which an officer may be designated or appointed. No government official appoints citizen suit plaintiffs. The government does not employ citizen suit plaintiffs or confer a duty on them. The provisions do not confer any tenure or duration on them. Moreover, the government does not remunerate them for their services or provide them with other emoluments. While courts may assess penalties against defendants in citizen suits, defendants pay penalties to the United States Treasury, not to the citizen suit plaintiffs.¹⁸⁹ Citizen suit provisions simply create a cause of action and provide district courts with jurisdiction to hear such actions.

The inapplicability of the Appointments Clause to citizen suit provisions is further illustrated by statutes the Court has considered for possible violation of the Appointments Clause. Each of the statutes that have been considered for possible violation of the Appointments Clause by the Court authorized a particular government entity or official to appoint individuals to employment in particular government offices that provided remuneration and imposed particular duties.¹⁹⁰ Again, citizen suit provisions are quite different

¹⁸⁸ *United States v. Hartwell*, 73 U.S. 385, 393 (1867) (involving the Sub-Treasury Act in which Congress provided for the appointment of “officers” and finding a clerk to the assistant treasurer of the United States and appointed by the assistant treasurer to be an “officer”). *See also United States v. Germaine*, 99 U.S. 508 (1878).

¹⁸⁹ *See Clean Air Act § 304(g)(1), 42 U.S.C. § 7604 (2012).*

¹⁹⁰ *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (holding Sarbanes-Oxley Act of 2002 violated the Appointments Clause by creating a five member board and authorizing the Securities and Exchange Commission to appoint the members because they are Officers of the United States); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991) (holding statute did not violate the Appointments Clause by authorizing the Chief Judge of the Tax Court to appoint and assign special trial judges because they are “inferior Officers”); *Morrison v. Olson*, 487 U.S. 654 (1988) (holding statute authorizing a judicial panel to appoint a special prosecutor did not violate the Appointments Clause because the prosecutor was an inferior Officer); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding the Federal Election Campaign Act of 1971 violated the Appointments Clause because it created a six member Federal Election Commission and authorized the President pro tempore of the Senate and the Speaker of the House each to appoint two of the Commissioners, thus removing the power of appointment from the President, heads of executive departments, or the Judiciary, and

from these statutes because citizen suit provisions simply create a cause of action and provide courts with jurisdiction to hear such causes. Unlike statutes considered by the Court for possible violation of the Appointments Clause, citizen suit provisions do not authorize a government official or entity to appoint individuals to government offices and employment. Finally, while the Court was concerned in its decisions with whether the challenged statutes impaired a branch's ability to perform its constitutionally assigned functions, the Court never found a statute to violate the Appointments Clause unless the statute took from the President some or all of his constitutional appointment power and retained in Congress itself some or all of that power.¹⁹¹

If citizen suit provisions do not violate the specific terms of the Appointments Clause, it could still be argued that only officers, inferior officers, or employees of the United States have the constitutional authority to bring civil actions to enforce against violations of federal statutes. If so, citizen suit plaintiffs would not be allowed to do so.¹⁹² Of course, neither the Appointments Clause, the remainder of the Constitution, nor Supreme Court precedent establish that prohibition. The prominence of *qui tam* actions during the framing and ratification and in the First Congress suggest the argument is without merit. In any event, the argument is based on the Vesting Clause and the Faithful Execution Clause of Article II and is addressed in Part VI.

VI THE VESTING AND TAKE CARE CLAUSES

Articles I (legislative power) and II (executive power) have parallel three stage structures: an initial clause vesting power; successive

transferring it to members of Congress); *United States v. Eaton*, 169 U.S. 331 (1898) (holding statute did not violate the Appointments Clause by authorizing the President to appoint and fix the compensation for “vice [counsels]” without confirmation by the Senate because they were not Officers of the United States due to their temporary and subordinate nature); *Ex parte Siebold*, 100 U.S. 371 (1879) (holding statute authorizing courts of appeal to appoint supervisors of elections for representatives in Congress did not violate Appointments Clause because the supervisors were inferior officers).

¹⁹¹ See *Buckley*, 242 U.S. 1.

¹⁹² Indeed, many statutes beyond the pollution control statutes authorize private parties to enforce federal law. See, e.g., 42 U.S.C. § 1983 (2012); Title VII, 42 U.S.C. § 2000e-5 (2012); 18 U.S.C. § 1981 (2012); Family and Medical Leave Act, 29 U.S.C. § 2617 (2012); Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. § 1964 (2012); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132 (2012).

clauses governing election to and terms of office; and final clauses granting specific powers. The initial Vesting Clauses in both are very similar: I) “[a]ll legislative Powers herein granted shall be vested in a Congress . . .”¹⁹³ and II) “[t]he executive Power shall be vested in a President . . .”¹⁹⁴ The wordings of the third stage clauses granting specific powers are virtually the same: I) “Congress shall have Power To . . .”¹⁹⁵ and II) “[t]he President shall have Power to . . .”¹⁹⁶ In both Articles, there are apparent redundancies if both the vesting and granting clauses confer power. If the granting clauses confer all power in Article I, there is no need for the vesting power; it is totally redundant. If the Vesting Clause confers all power in Article II, there is no need for the granting clauses; they are totally redundant. It may be relevant that Article I confers a much longer list of powers on Congress than Article II confers on the President.

Unitarians argue the presence of a limitation in the Vesting Clause in Article I and the lack of a limitation in the Vesting Clause in Article II signifies that the Constitution grants only limited legislative power to the Congress, but grants unlimited executive power to the President, necessitating a much smaller list of specific powers to be conferred on the President.¹⁹⁷ This is too facile. The long list of enumerated powers in the granting clauses of Article I also are the dividing line the Constitution established between federal and state power.¹⁹⁸ The short list of granted executive powers in part reflects the derivative nature of executive powers to execute whatever laws Congress enacts. But why is the short list needed at all if the Vesting Clause already confers all executive power?

A similar question arises regarding the relationship between the Vesting Clause¹⁹⁹ and the Granting Clause,²⁰⁰ requiring that the President “take Care that the Laws be faithfully executed.” Do the Vesting Clause and the Faithful Execution Clause both confer

¹⁹³ U.S. CONST. art. I, § 1.

¹⁹⁴ U.S. CONST. art. II, § 1, cl. 1.

¹⁹⁵ U.S. CONST. art. I, § 8, cl. 1.

¹⁹⁶ U.S. CONST. art. II, § 2, cl. 3.

¹⁹⁷ CALABRESI & YOO, *supra* note 13, at 55.

¹⁹⁸ See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

¹⁹⁹ U.S. CONST. art. II, § 1, cl. 1.

²⁰⁰ U.S. CONST. art. II, § 3.

executive power on the President? If so, are they redundant? If the general Vesting Clause also vests power on the President, what power is left for the Faithful Execution Clause to confer? The answer may lie in Section 3, which mentions neither vesting nor power. Although one of its five clauses appears to be a power,²⁰¹ the other four describe activities the President “shall” undertake,²⁰² suggesting they are duties rather than powers. In general, the difference may be that duties are mandatory, while powers are discretionary. Thus, the Faithful Execution Clause may be most easily read to place a duty on the President in all of the actions he takes under powers conveyed on him elsewhere, to take those actions in faithful conformity with the law.²⁰³

Alternatively, Daniel Webster argued the Vesting Clause confers no power, but merely establishes that the executive power granted to the President elsewhere in Article II is vested in only one person,²⁰⁴ “*a President*” (emphasis added).²⁰⁵ That resonates with the focus of the debate among the framers on whether the Constitution should confer executive power on one executive, two or more executives, or even an executive council.²⁰⁶ That would leave the Faithful Execution Clause as one of the powers enumerated in Article II, establishing both the duty and power of the President to faithfully execute the laws of the land: the Constitution, treaties, and statutes. The concept of executive power based on the Faithful Execution Clause is more limited than one focusing on the Vesting Clause, because it is confined to executing duties specified by Congress rather than having possible “inherent” aspects of the executive function itself. This interpretation, however, would read the Article II Vesting Clause as if it was conditioned with “herein granted,” as the Article I Vesting Clause is. It also fails to explain why Article I vests power in “*a*

²⁰¹ U.S. CONST. art. II, § 3, cl. 2, authorizing the President to convene and recess Congress under particular circumstances.

²⁰² U.S. CONST. art. II, § 3, cls. 1, 3–5, providing that the President shall give information to Congress, receive Ambassadors, faithfully execute the nation’s laws, and commission officers of the country. The latter, although a “shall” clause, appears to be more of a power than a duty.

²⁰³ See Lessig & Sunstein, *supra* note 15, at 61–70; Dangel, *supra* note 15, at 1077–88; Caminker, *supra* note 167, at 356.

²⁰⁴ Myers v. United States, 272 U.S. 52, 150–51 (1926). The majority opinion discounted Webster’s argument, assuming that it deprived the Vesting Clause of meaning. As explained above, however, it does not.

²⁰⁵ U.S. CONST. art. II, § 1, cl. 1.

²⁰⁶ THE FEDERALIST NO. 70, *supra* note 6 (Alexander Hamilton).

Congress," in the absence of a debate in the Constitutional Convention about whether to have more than one legislature.

A final explanation for the Faithful Execution Clause is that it was intended to make clear that the President did not have the prerogative claimed by earlier English Kings to annul or not to enforce acts of Parliament.²⁰⁷ Under this interpretation, the clause neither grants a power nor confers a duty on the President, rather it prohibits him from exercising a royal prerogative.

If presidential power to execute the laws derives from the Faithful Execution Clause rather than the Vesting Clause, the argument that citizen suits do not intrude on executive functions is significantly easier because the President's authority to execute statutes is no broader than the congressional enactments themselves, with whatever caveats and limitations they include, for example, citizen suit provisions. Unfortunately, the wording and history of the Constitution do not further illuminate the interrelation of the Vesting and Faithful Execution Clauses.²⁰⁸ While the Court has on occasion made off-hand comments that the Faithful Execution Clause confers executive authority²⁰⁹ or that the clause imposes a duty,²¹⁰ it has not considered at any depth the interrelationship between the two clauses or the extent to which both confer power on the President.²¹¹ Because the

²⁰⁷ See Prakash, *Executive Power*, *supra* note 7; Johnson, *supra* note 8, at 389, n.40. The concept is fully developed by Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws; Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 869–74 (1994).

²⁰⁸ Dangel, *supra* note 15, at 1071.

²⁰⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed" (emphasis added)).

²¹⁰ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3152 (2010) ("It is *his responsibility* to take care") (emphasis added); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (The Executive "*is charged* by the Constitution to 'take Care'" (emphasis added)); *Morrison v. Olson*, 487 U.S. 654, 658 (independent counsel "does not interfere with the President's . . . constitutionally appointed *duty* to 'take care that the laws be faithfully executed'" (emphasis added)); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("[I]t is to the President . . . that the Constitution entrusts the *responsibility* to 'take Care'" (emphasis added)); *Myers v. United States*, 272 U.S. 52, 117, 132 (1926) (The President "*is charged* specifically to take care" and is "*[R]esponsible* under the Constitution for the effective enforcement of the law" (emphasis added)).

²¹¹ *Myers*, 272 U.S. at 118, 137–39, 151 (outlining the views of Madison, Jefferson, and Webster, on the relationship between the Vesting Clause and the Appointments Clause but not considering the relationship between the Vesting Clause and the Take Care Clause). Holmer, dissenting, considered the role of the Vesting Clause in relation to all of the remaining clauses in sections 2 and 3, including the Take Care Clause. He agreed with

argument that citizen suits do not interfere with the exercise of the executive prosecution function is relatively easy if the power to exercise that function is conferred by the Faithful Execution Clause, this article proceeds on the assumption that it is conferred instead by the Vesting Clause.

Several defenders of citizen suits from Vesting and Faithful Execution Clause attacks circumvent this analysis entirely, arguing that citizen suits do not intrude on executive power at all because citizen suits protect private rights, not public rights.²¹² Their argument turns the Scalia-developed Article III restrictions on citizen suit standing into a defense of citizen suits under Article II. As long as citizen suit plaintiffs have “individuated injur[ies],”²¹³ which they must to have Article III standing, they are not suing to vindicate public rights, the role of the executive, but to vindicate private rights, the role of injured individuals. Thus, citizen suits are much like private actions to abate public nuisances, long recognized as legitimate actions.²¹⁴ Because that argument is articulated so well elsewhere, there is no reason to repeat or expand on it here.

Formalists, their unitarian allies, and functionalists approach the issue of whether a statute conferring citizen suit jurisdiction violates separation of powers doctrine using quite different analyses. Formalists, such as Justice Scalia dissenting in *Morrison v. Olson*, ask only two questions about the contested statute. “(1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) [If so,] [d]oes the statute deprive the President . . . of exclusive control over the exercise of that power?”²¹⁵ If the answer to both questions is positive, the statute is unconstitutional. Unitarians would expand the functionalist position by arguing that civil enforcement is on a par with criminal enforcement in separation of powers analysis and that the President cannot achieve his constitutional duty of assuring the

Webster that the Vesting Clause only indicated who exercised executive authority and that the remaining clauses defined executive authority. *Id.* at 228–30 (Holmer, J., dissenting).

²¹² See Craig, *supra* note 8; Johnson, *supra* note 8; Sunstein, *supra* note 8.

²¹³ Americans United for Separation of Church & State, Inc. v. HES, 619 F.2d 252, 254 (3d Cir. 1980).

²¹⁴ William H. Rodgers, Jr., ENVIRONMENTAL LAW at 112-13 (1994) (“To a surprising degree, the legal history of the environment has been written by nuisance law”). This is perhaps the reason that the earliest Article II attack on citizen suits focused on their penalty component rather than their injunctive component. See Lewis, *supra* note 5.

²¹⁵ *Morrison*, 487 U.S. at 705.

faithful execution of the law unless he has control over every civil and criminal case enforcing the law. Functionalists, e.g., the majority in *Morrison v. Olson*, first ask if prosecution is a core executive function.²¹⁶ If not, they next ask: 1) whether Congress had legitimate goals for placing some prosecution functions outside of the executive branch and 2) whether the President is still reasonably able to accomplish his constitutional duties or, if not, whether the accomplishment of the congressional goals outweighs the interference with the executive's constitutional functions. If the answer to either question is positive, the statute is constitutional.

A. The Formalist Argument

The formalist argument that citizen suits are unconstitutional is fairly straightforward. Article II vests all executive power in the President. Criminal prosecution is a uniquely executive function because of its importance in protecting the country's sovereign interests from treason and internal violence and because it has always and everywhere been regarded as executive in nature. Congress may not place the authority for criminal prosecution anywhere but in the executive branch. Therefore, Congress' authorization for citizens to prosecute violations of the environmental statutes is unconstitutional.

Although Justice Scalia asked in his *Morrison v. Olson* dissent whether prosecution²¹⁷ is a "purely" executive power, he left no doubt of his belief that it is a purely executive function. The majority concluded that prosecution was an executive function only because "in practice" criminal prosecution had long been conducted by the executive. Justice Scalia rejected the majority conclusion:

In what *other* sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and

²¹⁶ See Prakash, *The Chief Prosecutor*, *supra* note 13, at 582. Prakash argues that civil and criminal prosecution are on par for this analysis. Those who argue citizen suits are unconstitutional necessarily adopt this view. *See supra* note 5.

²¹⁷ His view of prosecution is not confined to presenting the government's case at trial. It explicitly includes investigation and impliedly includes a multitude of prosecutorial discretionary choices, such as whether to initiate prosecutions, what offenses to charge, what evidence to use, what plea bargains to bargain for and accept, etc. *Morrison*, 487 U.S. at 705.

always by the executive. . . . Governmental investigation²¹⁸ and prosecution of crimes is a quintessentially executive function.

Prosecution is an executive function because it has always and everywhere been an executive function.²¹⁹ Once prosecution is found to be an executive power, he concludes it cannot be entrusted outside the executive; the vesting power “does not mean *some of* the executive power, but *all of* the executive power” is vested in the President.²²⁰ Under this argument, citizen suits cannot constitutionally usurp the executive prosecutorial function.

There is a strong and equally simple counterargument within the formalist framework, even within Justice Scalia’s reasoning: citizen suit actions are not criminal prosecutions. *Morrison v. Olson* was a separation of powers challenge to a criminal statute and Justice Scalia addressed it as such. Citizen suit provisions authorize private civil enforcement and civil actions are not criminal prosecution. The First Congress was aware of the difference between civil and criminal enforcement when it authorized recovery of the same forfeitures, fines and penalties by federal attorneys in criminal actions and by private citizens in *qui tam* civil actions for debt.²²¹ Congress continued to

²¹⁸ *Id.* at 706.

²¹⁹ *Id.* Justice Scalia is demonstrably wrong in proclaiming that prosecution everywhere and forever has been an executive function. Much of what is considered criminal prosecution was a judicial function in the classical civil law model on continental Europe, although it has evolved into executive and hybrid judicial/executive functions in many modern European systems. See John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: ‘Myth’ and Reality*, 87 YALE L.J. 1549 (1978); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three ‘Inquisitorial’ Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977). The classical continental criminal procedure was inquisitional in that a judge conducted the investigative as well as the adjudicative and sentencing phases of a criminal case. Although reforms began in many continental systems in the early 1800s, Latin American countries kept the older system. See Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT’L L. & COM. REG. 363, 370–71 (2010); Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 627–30 (2007). It is curious that Justice Scalia should emphatically proclaim that prosecution was always and everywhere an executive function, when his own decisions clearly referred to American colonial court procedures including “private judicial examination.” Civil law prosecution “condones examination in private by judicial officers,” and proclaimed “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure.” Moreover, prosecution has been and remains an independent function in many states in which attorneys general and district attorneys are elected officials and do not report to the chief executive of the state or county. *Crawford v. Washington*, 541 U.S. 36, 43, 47–48, 50 (2004).

²²⁰ *Morrison*, 487 U.S. at 705.

²²¹ *Supra* note 132.

authorize dual federal attorney criminal actions and private citizen civil actions for the same violations of federal law and continues to do so today, both in private civil *qui tam* actions²²² and citizen suit enforcement,²²³ and in parallel criminal prosecutions by federal prosecutors.²²⁴ There is need for greater executive control over criminal than over civil prosecution because criminal prosecution alone can deprive defendants of their life and liberty, which the Bill of Rights recognizes by granting more individual liberties in criminal than in civil prosecutions,²²⁵ even when civil sanctions appear to be punitive.²²⁶

There is a secondary formalist argument that private civil enforcement of environmental statute violations interferes with the President's prosecutorial ability to carry out his duty to see that those statutes are faithfully enforced, either by removing particular violations from his purview or by resulting in a bad precedent. The simple answer is that the filing of a civil citizen suit against a particular environmental offense does not remove that violation from the President's purview; the executive may still commence and prosecute a criminal action for the same offense.²²⁷ Moreover, the executive may bar the private action entirely by first commencing a federal civil action against the violation.²²⁸ Additionally, the executive may intervene in the civil action²²⁹ and pursue its case there or seek a stay until it has completed a criminal or other action of its choice.²³⁰

²²² 31 U.S.C. § 3730 (2012).

²²³ See, e.g., 42 U.S.C. § 7604 (2012).

²²⁴ False Claims Act, 18 U.S.C. §§ 286–287 and 1001–02 (2012); Clean Air Act, 42 U.S.C. § 7613(c) (2012).

²²⁵ See U.S. CONST. amends. IV–VIII.

²²⁶ See *United States v. Ward*, 448 U.S. 242 (1980) (Noting that although civil penalties are the same as criminal fines in all but name, the Court honors the name Congress gives them in determining whether to apply constitutional protections in criminal prosecutions); *see also Hudson v. United States*, 522 U.S. 93, 100 (1997).

²²⁷ See 42 U.S.C. § 7604(c)(2) (2012). The government may pursue civil and criminal actions at the same time or successively. See *S.E.C. v. Novaferon Labs, Inc.*, No. 91-3102, 1991 WL 158757 (6th Cir. 1991). EPA has a guidance document for its enforcement officials to conduct such proceedings. U.S. ENVTL. PROT. AGENCY, PARALLEL PROCEEDINGS POLICY, (Sept. 24, 2007). If the government itself can conduct simultaneous or successive enforcement actions, there is no reason it cannot do so with citizen suits.

²²⁸ 42 U.S.C. § 7604(b)(1)(B) (2012).

²²⁹ *Id.* § 7604(b)(c)(2).

²³⁰ *S.E.C. v. Nicholas*, 569 F. Supp. 2d 1065 (C.D. Cal. 2008) (The Securities and Exchange Commission (SEC), which has its own civil litigation authority, commenced the

B. The Unitarian Argument

The unitarian argument expands the formalist approach from focusing on criminal prosecution to encompassing all enforcement authorities available to the executive.²³¹ This broader focus derives from the President's duty to take care to faithfully execute the laws, which is not confined to criminal prosecution. Faithful execution includes assuring that enforcement is uniform, consistent and fair across the country. Uniformity and consistency mean using the same remedy and exacting the same sanctions for similar violations. Fairness means using the remedy and exacting the sanction appropriate to each violation, which sometimes means no remedy or sanction. Almost by definition, citizen enforcement cannot always be consistent with executive enforcement and cannot always use the appropriate remedy, because the executive has a broader range of remedies and sanctions than the injunctive relief and civil penalties available to citizens.²³² Moreover, while citizen suits might be very useful in augmenting the executive's admittedly limited enforcement resources, the President cannot assure faithful execution of the law when a multitude of private parties can bring civil actions for injunctions and penalties free from presidential control. In particular, when citizen plaintiffs may file actions at will, the President cannot prevent prosecution of the innocent, collusive prosecution, or prosecution against cooperative violators.²³³ However, if the executive could terminate private enforcement when it was inconsistent with the executive's enforcement policy, it would be within his control and would be constitutional.²³⁴ This is a more complex and sophisticated argument, making the counter argument correspondingly more complicated.

Unitarians argue that from the beginning of the country both criminal and civil enforcement of federal laws have been entrusted to

civil action and the U.S. Attorney successfully moved, without opposition by the SEC, to intervene and for stay of the civil proceeding pending completion of his pending criminal action).

²³¹ See Prakash, *The Chief Prosecutor*, *supra* note 13, at 540.

²³² See, e.g., 42 U.S.C. § 7413(c) (2012) (Executive may at least prosecute criminally); 42 U.S.C. § 7606 (2012) (Executive may debar from government contracts and grants); 42 U.S.C. § 7413(a) & (d) (2012) (Executive may issue administrative compliance and penalty orders or the Executive may issue informal warnings. The Executive may also do nothing).

²³³ These seem to be particular fears for Prakash. Prakash, *The Chief Prosecutor*, *supra* note 13, at 580, 589.

²³⁴ See *id.* at 578, 583.

the executive. The Faithful Execution Clause does not differentiate between criminal and civil enforcement. The Judiciary Act of 1789 authorized federal district attorneys to prosecute all *criminal* and *civil* matters before the district courts.²³⁵ On the other hand, as we have seen, the Judiciary Act did not place either criminal or civil enforcement solely in the executive branch, but shared them with private citizens and states.²³⁶ Moreover, insofar as both the Court and commentators have regarded enforcement as being a core executive power, they have emphasized criminal, as opposed to civil, enforcement.²³⁷

The notion that faithful execution of the law includes uniform, consistent, and fair enforcement has an equal protection ring to it and alludes to the very purpose of separation of powers doctrine: the prevention of tyranny. Although undesirable, however, irregular, inconsistent, and unfair enforcement is tyrannical only at its extremes. Moreover, equal protection is embedded in the Bill of Rights, not in the Constitution as ratified, with its notion of separation of powers. There is nothing in the Faithful Execution Clause or its history suggesting it requires uniform, consistent, and fair enforcement. Indeed, when unitarians propound that proposition, they cite no authority for it. As a practical matter, we all know that enforcement is not, never has been, and probably never will be uniform and consistent. There are not enough enforcement resources to achieve uniform enforcement, and federal enforcement is too decentralized to assure consistency. Indeed, the Supreme Court does not view prosecution to be unconstitutional because it is inconsistent or even selective except in the most extreme instances, when it runs afoul of the Equal Protection Clause, not the Faithful Execution Clause.²³⁸

²³⁵ See *supra* note 111.

²³⁶ See *supra* note 112.

²³⁷ Justice Scalia began the inquiry in his dissent to *Morrison v. Olson* by asking, “Is the conduct of a *criminal* prosecution . . . the exercise of purely executive power?” 487 U.S. 654, 705 (1988) (emphasis added). He concluded it was. *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 755–56 (5th Cir. 2001).

²³⁸ *Wayte v. United States*, 470 U.S. 598, 602–03, 608 (1985). (holding the defendant must prove not only that he was the victim of disparate treatment, but also that the disparate treatment was the result of an improper motive, such as race, religion or other improper classification). In *Wayte*, the defendant proved that he was one of only thirteen out of more than half a million indicted for failure to register for the draft. Without proving an improper motive for his prosecution, however, he did not establish an unconstitutional prosecution. *Id.*

Outside of these extreme cases, the Court regards inconsistency as part of the prosecutorial discretion inherent in the executive's powers.²³⁹

Fairness is somewhat in the eyes of the beholder, and few defendants in enforcement actions acknowledge the fairness of the sanctions imposed on them. In any event, the judiciary and the jury are the ultimate insurers of fairness, not the executive. The most pronounced case of the potential unfairness of private enforcement discussed by the unitarians is prosecution of the innocent.²⁴⁰ Of course, we know that executive supervision does not prevent occasional prosecution of the innocent by federal prosecutors, and that the ultimate protections of the innocent, again, are the judiciary and jury. Civil prosecution of the innocent, of course, smacks less of tyranny than criminal prosecution of the innocent. Even so, unitarians cite no instances of citizen suits against the innocent, nor do other citizen suit critics. Citizen suits against innocent members of the regulated public are extremely unlikely for two reasons. First, citizen plaintiffs usually rely on data generated by defendants and reported to the government for proof of violation;²⁴¹ such data are virtual admissions by the defendants that they are not innocent. Second, if courts find defendants innocent, they will not sanction the defendants. Moreover, they will deny plaintiffs' motions for attorney fees, and they may grant defendants' motions against plaintiffs for attorney fees. They may even impose sanctions on the plaintiffs and their attorneys under Rule 11 of the Federal Rules of Civil Procedure. This encourages plaintiffs' attorneys in citizen suit cases to take care not to file complaints against an innocent defendant or for harassment purposes, for if they do so, they will be uncompensated for their legal services and may be liable for the defendants' attorney fees or even worse sanctions.²⁴²

²³⁹ See *McCleskey v. Kemp*, 481 U.S. 279, 289–90, 306–07 (1987); *Wayte*, 470 U.S. at 602–03; *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

²⁴⁰ Prakash, *The Chief Prosecutor*, *supra* note 13, at 539, 580, 589, 595–96.

²⁴¹ Roy S. Belden, *Preparing for the Onslaught of Clean Air Act Citizen Suits: A Review of Strategies and Defenses*, 1 ENVTL. LAW 377, 383–84, 389 (1995) (noting that citizen plaintiffs routinely use discharge monitoring reports filed by defendants with EPA as *prima facie* evidence of violations of the Clean Water Act, and predicting the same practice will emerge under the then newly amended Clean Air Act).

²⁴² Caminker, *supra* note 167, at 373–74 (concluding, for many of the same reasons, that “civil *qui tam* actions pose no greater risk of oppressive law enforcement than do the vast array of privately prosecuted civil enforcement actions routinely initiated by self-interested plaintiffs to vindicate their own rights.”).

Unitarians are particularly concerned that the executive cannot assure faithful execution of the laws because citizen suits may be collusive.²⁴³ Again, neither the unitarians nor other critics of citizen suits cite examples of collusive citizen suits. Ironically, the only collusive suits on record are between states and defendants calculated to bar citizen suits against the defendants.²⁴⁴

Unitarians²⁴⁵ and even the Court²⁴⁶ are concerned that citizen suits may make it more difficult for the executive to negotiate settlements with violators if citizens can later sue the violators for the same violations. Their favorite example is a settlement, accomplished by unspecified means, in which the violator agrees with the government to provide more pollution reduction than required by law in return for the government not seeking penalties for past violations. If citizens can sue such a violator, critics say it is not only unfair to the violator, but it will make other violators weary about making such deals with the government. The easy answer to this problem is that the government and the violator can completely bar a subsequent citizen suit by the simple expedient of embodying their agreement in a consent decree and entering it in court.²⁴⁷

All of the situations unitarians raise are theoretically possible, but if they ever occur, they are not frequent occurrences. If they were, unitarians and other critics of citizen suits would cite them. Indeed, if they significantly interfered with or prevented the executive's ability

²⁴³ Prakash, *The Chief Prosecutor*, *supra* note 13, at 589.

²⁴⁴ See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

²⁴⁵ Prakash, *The Chief Prosecutor*, *supra* note 13, at 589.

²⁴⁶ Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60–61 (1987). The Court's example did not justify its decision that the CWA's citizen suit provision authorized suit only against on-going violations, not wholly past violation. A citizen suit will not interfere with a government action regarding a wholly past violation any more than it will interfere with a government action regarding an on-going violation. There are several other problems with the conclusions the Court drew from this example. See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 488–90 (2004).

²⁴⁷ 42 U.S.C. § 7604(b)(1)(B) (2012). Even so, a citizen suit in this situation does not interfere with the government's enforcement discretion. The citizen suit does not prevent the government from making its enforcement choice or getting the benefits the government expected from it: the government has already made its choice and accomplished its goals. The citizen suit may frustrate the violator's goals, but separation of powers primarily protects the executive's power to faithfully execute the laws, not the violator's pocketbook.

to perform its constitutional duty to faithfully enforce the environmental laws, at least one of the Presidents from Nixon to Obama, their Attorneys General, their Administrators of EPA, or the chief enforcers of environmental law at DOJ or EPA would have said so. Yet they have not. Instead, the executive supported the inclusion of citizen suit provisions in the CAA and the Clean Water Act.²⁴⁸ The President signed the CAA without objecting to—or even mentioning—citizen suits. When President Nixon vetoed the CWA, he did so as a budget buster for its authorization of billions of dollars to construct sewage treatment plants, without mentioning its citizen suit provision.²⁴⁹ The executive branch has frequently supported citizen suits and citizen suit provisions in briefs filed with the Supreme Court.²⁵⁰ EPA’s enforcement office acknowledges that citizen enforcement extends the effectiveness and augments the deterrent

²⁴⁸ Sen. Comm. On Public Works, 93rd Cong., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, p. 211. 214, letter from Nixon administration to Sen. Jennings Randolph, Chair Senate Committee on Public Works, “[W]e do not object to its [the citizen suit provision’s] enactment. Such suits can contribute to the effective enforcement of air pollution control measures.” Sen. Comm. On Public Works, 95th Cong., A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, p. 1179, 1206, letter from the Nixon Administration to John A. Blatnik, Chair House Committee on Public Works, “We generally agree with the provisions of section 505,” although suggesting the deletion of 505(b)(B).

²⁴⁹ PUBLIC PAPERS OF THE PRESIDENT RICHARD NIXON 1970, Item 552, pp. 990–93 & 1972, Item 485, pp. 1166–68. It is within the power of the Judiciary to decide the constitutionality of a statute. *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1428 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)) (addressing the power of the courts to decide the constitutionality of § 214 of the Foreign Relations Authorization Act). All three branches have duties to interpret and uphold the Constitution, but the Judiciary has the final word on the constitutionality of a statute. The Constitution requires both the President and members of Congress to take an oath of office, including support of the Constitution, requiring them to make their best efforts to determine if proposed legislation is constitutional and to not support unconstitutional legislation. Congress does not enact statutes it believes to be unconstitutional and the President does not sign statutes he/she believes to be unconstitutional. Both Congress and the President may believe a statute to be constitutional, but the Judiciary may disagree and its opinion on the matter trumps the other two branches. If either of the political branches believes a law to be unconstitutional, then, presumably, it will never become law and will never face judicial discretion. *Id.*

²⁵⁰ Brief for the United States as Amicus Curiae Supporting Respondent Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998) (No. 96-643) 1997 WL 348166; Brief for the United States as Amicus Curiae Supporting Affirmance Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49 (1987), (No. 86-473) 1987 U.S. S. Ct. Briefs Lexis 369; Brief for the United States as Amicus Curiae, Milwaukee v. Illinois, 451 U.S. 304 (1981), (No. 79-408) 1980 U.S. S. Ct. Briefs Lexis 2324; Brief for the United States as Amicus Curiae Supporting Petitioners, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000), (No. 98-822) 1999 U.S. S. Ct. Briefs Lexis 652.

value of its own limited enforcement resources.²⁵¹ The Court should not rule that citizen suits unconstitutionally prevent the executive from faithfully executing the laws when such interference is theoretical, not real, when the executive can prevent theoretical interference by citizen suits, and when the executive does not believe citizen suits interfere with its faithful execution of the laws.²⁵²

Unitarians concede that if the President can terminate private enforcement actions, the President can control the actions, and they are constitutional.²⁵³ Doing so solves the troubling unitarian problem of reconciling the historically-based unitary executive theory that the executive controls and always has controlled all prosecution with the historical fact that statutory *qui tam* provisions were common both before and after the Constitution and at that time contained no authority for the executive to override private *qui tam* actions. The unitarians postulate that the President could nevertheless terminate the actions by use of his constitutional power to pardon²⁵⁴ or by the use of the ancient writ of *nolle prosequi*.²⁵⁵ If that is true, the President can similarly terminate citizen suits and they suddenly have no Article II barriers, at least not for the unitarians.²⁵⁶

C. The Functionalist Argument

In the enforcement of environmental and other regulatory programs, functionalists conceive of the Faithful Execution Clause in a fundamentally different way than formalists and unitarians.

²⁵¹ See *Hodas*, *supra* note 35, at 1576 n.121.

²⁵² See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977). The fact that neither President Ford nor President Carter supported former President Nixon's claim that the release of his presidential papers would intrude on the executive function detracted from the weight of his claim. *But see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010).

²⁵³ See Prakash, *The Chief Prosecutor*, *supra* note 13, at 578.

²⁵⁴ U.S. CONST. art. II, § 2, cl. 1.

²⁵⁵ Prakash, *The Chief Prosecutor*, *supra* note 13, at 579.

²⁵⁶ *Id.* Unfortunately, it is not so easy. First, the unitarians cite no precedents in which presidential pardon or *nolle prosequi* were used to terminate a *qui tam* action and they cite no authority from the constitutional period that pardon or *nolle prosequi* could be so used. *Id.* at 587, 590. "We do not know how many federal prosecutions were brought in the early years. Nor do we know what portion of these were popular actions. . . . [W]e do not know whether early presidents ever terminated (or unsuccessfully sought to terminate) popular prosecutions." *Id.* at 587. Second, it's not clear that a pardon erases civil, as opposed to criminal, liability. *Id.* Third, it's not clear that *nolle prosequi* is or ever was available for this purpose in the United States. *Id.*

Functionalists view faithful execution as developing standards that meet the statutory requirements, establishing regulatory mechanisms to achieve those standards, and assuring compliance by the regulated public with the regulatory programs, often by enforcement actions against violators. The President faithfully executes the law when he accomplishes all of these activities, to achieve the statutorily mandated level of protection for the public, whether a level of air pollution or of other social goals. The measure of faithful execution in enforcement for formalists and unitarians is fairness to violators of the statute, while the measure of faithful execution for functionalist is fairness to the public protected by the statute.

Functionalists understand that the executive never has enough resources to enforce against all significant violators to achieve congressionally mandated goals—safe levels of air pollution, for example—and would allow private enforcement to help achieve congressional objectives, as long as citizen enforcement does not aggrandize Congress' own power and does not prevent the President from carrying out his own constitutional functions. If the President lacks sufficient resources to faithfully enforce air pollution or other laws to achieve their public welfare objectives, citizen enforcement helps the President achieve his duty and does not hinder him from doing so.

The functionalist argument begins by analyzing separation of powers differences between criminal prosecution and civil enforcement, with criminal prosecution powers being more central to the executive than civil enforcement powers.²⁵⁷ That flows from the purpose of separation of powers to protect the people from tyranny, a purpose served by diffusing among all three branches a power that can adversely affect citizens, such as the power to prosecute criminally. Thus, prosecution requires action by all three branches: the legislature to enact a criminal statute, the executive to prosecute a defendant, and the judiciary to convict the defendant. Protection from tyranny is more important to defendants in criminal than in civil prosecution because only criminal conviction can deprive them of life and liberty.

The Court in *Heckler v. Chaney*²⁵⁸ identified the similarities and differences between civil and criminal prosecution. In both, “an agency’s decision not to prosecute or enforce . . . is a decision

²⁵⁷ See *supra* note 216.

²⁵⁸ Heckler v. Chaney, 470 U.S. 821 (1985).

generally committed to an agency's absolute discretion.²⁵⁹ In short, the decision is not subject to judicial review. However, the decisions not to institute civil and criminal actions are similar only "to some extent,"²⁶⁰ because the reasons they are generally not subject to judicial review are wholly different. The lack of judicial review of decisions not to indict criminally is grounded on separation of powers and the Faithful Execution Clause.²⁶¹ Judicial review of an agency's decisions not to enforce civilly or administratively, however, is based on the judicial review provisions of the Administrative Procedure Act.²⁶² These provisions make final agency actions subject to judicial review, except when they are "committed to agency discretion by law."²⁶³ One talisman of discretion is the absence in a statute of criteria for agency decision-making, giving no law for courts to apply in judicial review. Civil enforcement provisions in statutes are typically silent on when agencies should or should not enforce.

The Court in *Heckler v. Chaney* carefully pointed out that a decision not to enforce civilly "is only presumptively unreviewable" because Congress may provide enforcement guidelines, establish enforcement priorities, or "circumscrib[e] an agency's power to discriminate among issues or cases it will pursue."²⁶⁴ Moreover, an agency's decisions not to enforce may be "so extreme" they may be an abdication of responsibility, not committed to its discretion.²⁶⁵ Thus the Court recognizes that Congress has considerable latitude in structuring the executive's civil and administrative enforcement programs and decisions. The lesser constitutional centrality of civil enforcement to executive power is reflected in the congressional creation of the independent agencies that engage in a range of civil enforcement although they are removed to varying extents, and sometimes almost completely, from executive control.²⁶⁶

²⁵⁹ *Id.* at 831.

²⁶⁰ *Id.* at 832.

²⁶¹ *Id.* (quoting U.S. CONST. art. II, § 3). The constitutional provision referenced by Rehnquist in *Heckler*, commonly referred to as the "Faithful Execution Clause" or "Take Care Clause," states that the President "shall take Care that the Laws be faithfully executed." *Id.*

²⁶² 5 U.S.C. §§ 701–706 (2012).

²⁶³ *Id.* § 701(a)(2) (2012).

²⁶⁴ *Heckler*, 470 U.S. at 833.

²⁶⁵ *Id.* at 833 n.4.

²⁶⁶ See Glicksman, *supra* note 11, at 11,006–07; Lessig & Sunstein, *supra* note 15, at 106–11; Prakash, *The Chief Prosecutor*, *supra* note 13, at 530–31, 573–74.

Supplementing the executive's civil enforcement capabilities with citizen suits is a far less drastic encroachment on the executive's prosecutorial power than placing enforcement powers in independent agencies.²⁶⁷

With that background, functionalists would ask, does the Constitution explicitly vest the prosecution function in the President? If not, do the citizen suit provisions aggrandize the power of Congress? If not, do citizen suits prevent or interfere with the President's performance of his constitutional powers or his ability to take care that the laws are faithfully executed? If not, citizen suits are free from Article II impediments. If they do interfere with the executive's performance of its duty, do citizen suits help Congress achieve an important goal and, if so, does that goal outweigh their interference with the President's performance of his powers and duties?²⁶⁸ If so, citizen suits are also free from Article II impediment.

The Constitution does not explicitly vest prosecution with the President, although he performs that function and we have come to regard it as an executive function. Because the Constitution does not specifically vest prosecution, it is not a core executive function. Citizen suits do not aggrandize the power of Congress. While they make it more likely that Congress' legislative goals will be achieved, they give neither Congress, nor its members, nor its subordinates one iota of power. While citizen suits may have some effect on the President's performance of his prosecutorial functions, that effect is minimal. Once we have developed a more detailed understanding of citizen suits on executive action, we can balance the benefits of citizen suits against any such negative effect.

It is also important to query whether citizen suits prevent or interfere with the executive's performance of its prosecutorial functions. The prosecutorial function involves a whole range of prosecutorial decisions, including the decision to investigate,²⁶⁹ the decision to prosecute,²⁷⁰ what charges to bring,²⁷¹ when to bring

²⁶⁷ Some unitarians argue there are no distinctions in executive discretion to make civil and criminal enforcement decisions, although they build their case for executive discretion on criminal examples. *See Prakash, The Chief Prosecutor, supra* note 13, at 540.

²⁶⁸ *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 856–57 (1986); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

²⁶⁹ *See United States v. Derrick*, 163 F.3d 799, 824–25 (4th Cir. 1998).

²⁷⁰ *See Wayte v. United States*, 470 U.S. 598, 607 (1985).

²⁷¹ *See United States v. LaBonte*, 520 U.S. 751, 762 (1997).

them,²⁷² where to bring them,²⁷³ whether to grant immunity,²⁷⁴ and whether to negotiate or agree to a plea bargain.²⁷⁵ The Court reached these decisions in criminal cases and prosecutorial discretion is normally thought of as a function of criminal prosecution. But in regulatory programs, the executive has discretion whether to enforce in a criminal action, a civil action, or an administrative action. Within civil and administrative enforcement, the executive has a range of discretion similar to that he has in criminal prosecution. As the Court commented in *Heckler v. Chaney*, with regard to administrative enforcement:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.²⁷⁶

Many, if not most, discretionary prosecution decisions, whether in the context of criminal, civil, or administrative enforcement, involve resource allocation, policy, strategy, or a combination of them. When a citizen sues a violator who the executive has not enforced against, the reason why the executive has not enforced is critical to whether the citizen suit potentially interferes with the executive's faithful execution of the law. If the executive has not enforced against the violator because of the executive's resource allocation, it is difficult to see how the citizen suit interferes with the executive's faithful execution. Perhaps this is easiest to understand in the extreme case in which Congress has appropriated no funds for the executive to enforce a particular statute, but has authorized citizen enforcement. The executive cannot use resources from another appropriation to enforce against violations of that statute. For a government official to do so would be a criminal offense.²⁷⁷ A citizen enforcement action against such a violation can hardly interfere with executive

²⁷² See *United States v. Lovasco*, 431 U.S. 783, 792 (1977).

²⁷³ See *United States v. Parson*, 955 F.2d 858, 873 (3d Cir. 1992).

²⁷⁴ See *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982).

²⁷⁵ See *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

²⁷⁶ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

²⁷⁷ 31 U.S.C. § 1341 (2012).

prosecutorial discretion, for the executive can take no action. Of course, most cases are not this stark. But while the executive may have considerable resources to enforce against violations of a particular statute, it rarely has enough to enforce against all significant violations. It must then allocate its resources to achieve the best compliance and environmental results for the resources expended. This will involve prioritizing the violations enforced against, often reflecting the environmental impact of the violations, and the type of enforcement action to take, often reflecting the executive resources required by different actions.²⁷⁸ A citizen action against a violation for which the executive lacks the resources to pursue on its own can hardly interfere either with the executive's allocation of its own resources or with its prosecutorial discretion.²⁷⁹

While a citizen suit, of course, can interfere with the executive's policy choices or strategy in a particular case, it is important to remember that the President has no absolute power to control all aspects of even criminal prosecution.²⁸⁰ Even so, the citizen suit provisions authorize the executive to protect its policy and strategy choices in a number of ways. The first is to file and diligently pursue a civil action, barring the subsequent filing of a citizen suit.²⁸¹ If the executive cannot move fast enough to cut off the citizen suit at the outset, it can file a subsequent suit and move to consolidate the citizen suit²⁸² or intervene in the citizen suit by right.²⁸³ If the executive does not wish to intervene, it can file an *amicus* brief on contested issues of law. If the citizen plaintiff and the defendant settle the case, as almost all do, the consent decree cannot be entered until it has been served on

²⁷⁸ U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, THE ENFORCEMENT MANAGEMENT SYSTEM, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (CLEAN WATER ACT) (1989), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/emsawa-jensen-rpt.pdf> (last visited Jan. 17, 2013).

²⁷⁹ See Prakash, *The Chief Prosecutor*, *supra* note 13, at 495. (acknowledging the President cannot "cast aside" private enforcement assistance because he would prefer Congress allocate resources differently).

²⁸⁰ See *United States v. Nixon*, 418 U.S. 683, 706 (1974); *Morrison v. Olson*, 487 U.S. 654 (1988).

²⁸¹ 42 U.S.C. § 7604(b)(1)(B) (2012).

²⁸² While citizen suit provisions bar citizen suits when the government has commenced and is diligently pursuing a civil action, *e.g.*, 42 U.S.C. § 7604(b)(1)(B), neither the citizen suit provisions nor the EPA enforcement provisions, *e.g.*, 42 U.S.C. § 7413, bar an EPA action when a citizen has commenced a citizen suit.

²⁸³ *Id.* § 7604(c)(2).

the executive and he has had an opportunity to comment on it or to intervene to oppose it.²⁸⁴

In *Morrison v. Olson*, the Court held that the executive retained sufficient control over the special prosecutor appointed under the Ethics in Government Act of 1978²⁸⁵ to avoid unconstitutional interference with the executive's faithful execution of the laws because 1) no special prosecutor could be appointed until the Attorney General had investigated the matter and concluded that a special prosecutor should be appointed for a particular potential defendant,²⁸⁶ 2) the special prosecutor was required to follow DOJ "policy unless it [was] not 'possible' to do so,"²⁸⁷ and 3) the Attorney General could remove the special prosecutor for good cause.²⁸⁸ This gave the Attorney General some control over the initiation of the special prosecutor's investigation, some control over the special prosecutor's investigation and prosecution, and the ability to terminate the special prosecutor for cause. The Court did not hold that only this combination of executive controls would allow the executive to faithfully execute the laws when Congress entrusted prosecution powers to others, but that it was sufficient for the particular statute in question. Indeed, this set of controls might not be appropriate or even possible for other situations, such as citizen suits. Nonetheless, the executive controls under the Ethics in Government Act of 1978 can be compared to the executive controls under citizen suits as a point of reference.

Comparing citizen suits to special prosecutions demonstrates that executive controls over citizen suits, although different, are as great or greater than those over special prosecutions even though citizen suits are civil, thereby warranting less controls than special prosecutions

²⁸⁴ *Id.* § 7604(c)(3).

²⁸⁵ 28 U.S.C. §§ 49, 591 (2012).

²⁸⁶ The Attorney General did not have complete discretion in the matter, however. If he received information that a person covered by the statute had committed a crime, he was required to conduct an investigation and, within ninety days to report the result to a special court. If he determined "there [were] no reasonable grounds to believe that further investigation is warranted," he was required to report that to the special court, but it had no authority to appoint a special prosecutor. *Morrison v. Olson*, 487 U.S. 654, 661 (1988) (quoting 28 U.S.C. § 592(b)(1)). If the Attorney General concluded there were reasonable grounds to believe further investigation was warranted, however, he was required to report that to the court and it was required to appoint a special prosecutor. *Id.* at 660–61, 696.

²⁸⁷ *Id.* at 696; 28 U.S.C. § 594(f) (2012).

²⁸⁸ *Morrison*, 487 U.S. at 692 (referencing 28 U.S.C. § 596(a)(1) (2012)).

that are criminal. At the initiation stage, the executive must make a positive finding that triggers the appointment of a special prosecutor and there is no judicial review available for a negative finding. In theory, the executive thereby has complete control over whether a special prosecutor is appointed, while it has no control over whether a citizen will initiate a private enforcement action.

How much control does a negative finding give the executive? These incidents play out in the media and the public eye. To make a negative finding in the face of publicly known evidence of wrongdoing is virtually an admission of corruption. On the other hand, potential citizen plaintiffs must notify the executive of their intent to commence citizen suits and the executive can completely bar a citizen suit by initiating and diligently pursuing its own enforcement action. The executive's control over special prosecutions at this stage is theoretically stronger, but in reality, it is stronger over citizen suits. During the supervision stage, the executive binds the special prosecutor with the terms of the referral and the policies of DOJ. But the executive may intervene by right in citizen suits, playing a role thereafter in its prosecution, perhaps the dominant role given the greater resources of the government and its greater credibility before the judge.

Alternatively, the executive could begin its own civil action and move to consolidate the citizen suit, placing the executive in the dominant position among plaintiffs. If the executive does not intervene, he may review any proposed settlement and comment on it to the judge or even intervene by right to oppose its entry. During the supervision stage, the executive's controls over citizen suits are overwhelmingly stronger than over special prosecutions. At the termination stage, the executive may remove the special prosecutor by right, although the grounds for removal are narrow and removal will not end the prosecution because the judicial committee will presumably appoint a new special prosecutor to continue the investigation and prosecution. The executive has no means to terminate a citizen plaintiff, although he has several means, described above, to prevent or in varying degrees to control a citizen suit and its ultimate disposition. The executive's control over the disposition of citizen suits, although indirect, is stronger than over special prosecutions.

The legislative history of the Clean Air Act (CAA) citizen suit provision spells out the purpose of Congress in enacting the citizen suit provisions. It is more extensive than the legislative history of

comparable provisions in subsequent environmental statutes, which often incorporated the CAA citizen suit provision with minimal changes. Indeed, courts refer to the CAA legislative history to help interpret citizen suits in other statutes.²⁸⁹ Proponents of the provision championed it as an antidote both to “restrained” enforcement of former air pollution legislation²⁹⁰ and to the inevitable lack of sufficient governmental resources by even the most well-intentioned enforcement agencies to assure compliance with the legislation.²⁹¹ There are not enough federal and state resources to enforce against all significant violations of the environmental statutes and there never will be. “Privatizing” enforcement is a natural legislative response, augmenting government enforcement resources at little or no cost to the government. That alternative is particularly attractive at the present time, when we are struggling to reduce governmental costs at all levels, from local to national. All studies of the incidence of citizen suits indicate that they are an important component of environmental enforcement, at times surpassing the government’s civil actions, allowing it to concentrate its resources on criminal and administrative actions.

VII CONCLUSION

Citizen suit provisions are constitutional under Article II’s Vesting, Take Care, and Appointments Clauses. Also, citizen suit provisions do not violate Article II of the Constitution because they do not aggrandize congressional or executive power and they do not take away any power from the executive that is unambiguously and explicitly conferred on the President by the Constitution. While some citizen suits may interfere with executive enforcement policy by

²⁸⁹ See, e.g., *N. Slope Borough v. Andrus*, 515 F. Supp. 961, 964, (D.D.C. 1981), *rev’d on other grounds*, *Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982).

²⁹⁰ Congress, in enacting the CAA amendments of 1970, added citizen suits for the first time to the pollution control statute’s arsenal of enforcement devices, and also recognized that earlier federal enforcement authorities were ineffective and cumbersome and replaced them with streamlined and effective enforcement provisions for the government. This resulted in insufficient government enforcement resources being the dominant reason for citizen suits. REPORT OF THE COMMITTEE OF PUBLIC WORKS ACCOMPANYING S. 4358 397, 421–23.

²⁹¹ See *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 727–30 (D.C. Cir. 1974) (comments on the Senate floor by Senator Muskie (on Sept. 21, 1970) and Senator Hart (on Sept. 22, 1970)).

targeting violations the government would not target, the government's reason not to target them is usually lack of resources. In such cases citizen suits do not interfere with government enforcement, they augment it. In cases where citizen enforcement could interfere with executive enforcement policy, the citizen suit provisions give the government sufficient authority to avoid significant interference.

The government has not complained that citizen suits hamper its faithful execution of the laws. If anything, the executive branch has supported citizen suits as a means of helping its faithful enforcement. Citizen suit plaintiffs have brought hundreds of civil actions to enforce the environmental laws, contributing to the protection of both public health and the environment.²⁹² Moreover, Congress would have to considerably increase the resources allotted to governmental enforcement to achieve the same level of pollution control without private enforcement through citizen suits. Citizen suit provisions provide considerable cost savings to the government and fulfill congressional objectives. They also do not undermine the executive's ability to perform his or her Constitutional duties. Considering the benefits of citizen suits, that citizen suit provisions are constitutional and there is no evidence showing that the framers of the Constitution considered private enforcement to be unconstitutional, the balance weighs heavily in favor of citizen suits.

²⁹² See *supra* note 36.