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NOTE

Against the Article II Theory of Standing

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Abstract. While standing doctrine has traditionally been rooted in Article III's Case or Controversy requirement, there is growing support for the view that limits on plaintiffs' standing stem instead from the President's Article II duty to "take Care that the Laws be faithfully executed." Proponents of this theory argue that private enforcement actions unconstitutionally interfere with the Executive Branch's prosecutorial discretion, an essential component of executive power. The origins of this "Article II theory of standing" date back to the 1980s, but it has gained new traction in recent Supreme Court cases such as *TransUnion LLC v. Ramirez* and *Acheson Hotels, LLC v. Laufer*. Eleventh Circuit Judge Kevin Newsom has developed an originalist version of the theory, arguing that Article II's Vesting Clause and Take Care Clause prevent Congress from empowering private plaintiffs to sue for wrongs done to society in general and to seek remedies that accrue to the public.

This Note argues that originalist attempts to ground restrictions on plaintiffs' standing in Article II are inconsistent with the understanding of executive power at the time of the founding. Proponents of the Article II theory assume that suits for violations of public rights were originally understood to be exercises of the executive power. They also argue that a core aspect of this power was the exercise of case-by-case enforcement discretion, such as the criminal prosecutor's decision not to bring charges. Drawing on historical practice in England, the American colonies, and the early United States, this Note demonstrates that private parties routinely conducted criminal prosecutions, often without executive oversight. Where the federal government relied on public prosecution, Congress frequently empowered actors outside of the Executive Branch, such as state officials, to prosecute federal criminal offenses. This evidence suggests that, as an original matter, Article II likely did not limit law enforcement (and case-by-case discretion) to the Executive Branch. If criminal prosecution was routinely delegated to non-executive actors at time of the founding, there is reason to doubt that Article II bars Congress from authorizing suits by unharmed plaintiffs.

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Introduction

Standing doctrine has traditionally been rooted in Article III's Case or Controversy Clause. Yet there is growing support for the view that limits on plaintiffs' standing stem instead from the President's Article II duty to "take Care that the Laws be faithfully executed."[1] This theory suggests that some private enforcement schemes are unconstitutional delegations of the executive power. In *TransUnion LLC v. Ramirez*, the Supreme Court held that Congress cannot authorize lawsuits by plaintiffs who haven't suffered a tangible injury, as this would both violate Article III and infringe on the Executive Branch's prosecutorial discretion.[2] More recently, in *Acheson Hotels, LLC v. Laufer*, Justice Thomas argued that "tester" plaintiffs who proactively identify potential legal violations of the Americans with Disabilities Act (ADA) exercise this type of enforcement discretion that the Constitution reserves for the Executive.[3] Because Article II vests "[t]he executive Power"[4] in the President alone, according to this view, it is up to him or her to decide "how to prioritize and how aggressively to pursue legal actions against defendants."[5]

The idea that standing is limited by Article II's Vesting Clause has been developed most extensively by Eleventh Circuit Judge Kevin Newsom, who has criticized existing standing jurisprudence as ungrounded from the original meaning of the Constitution.[6] Drawing on recent Supreme Court decisions, Judge Newsom's account of Article II rests on the proposition that suits for violations of public rights were understood at the founding to constitute exercises of the executive power and were therefore nondelegable to private parties.[7] The paradigmatic exercise of the executive power for Newsom is criminal prosecution, though he argues that executive power extends to some actions we would today regard as civil.[8] Further, he contends that a core and nondelegable aspect of this executive power was the exercise of case-by-case

1. U.S. CONST. art. II, § 3.
2. *See* 141 S. Ct 2190, 2207 (2021).
3. *See* 144 S. Ct. 18, 26 (2023) (Thomas, J., concurring in the judgment).
4. U.S. CONST. art. II, § 1.
5. *TransUnion*, 141 S. Ct. at 2207.
6. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); Laufer v. Arpan LLC, 29 F.4th 1268, 1283-84 (11th Cir. 2022) (Newsom, J., concurring); *see also infra* Part I.B (describing Judge Newsom's theory of standing).
7. *See Sierra*, 996 F.3d at 1133-34, 1136 (Newsom, J., concurring); *Arpan*, 29 F.4th at 1288, 1292 (Newsom, J., concurring).
8. *See Sierra*, 996 F.3d at 1136 (Newsom, J., concurring) ("But Congress may not give to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public—paradigmatically (but by no means exclusively) criminal punishment or a fine."); *Arpan*, 29 F.4th at 1291 (Newsom, J., concurring) (citing *In re* Aiken County, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013)).

enforcement discretion, as exemplified by a prosecutor's decision not to bring charges.[9] Newsom's Article II nondelegation theory of standing has recently gained attention among academics[10] and on the Supreme Court, where it formed the core of Justice Thomas's concurrence in *Laufer* denying standing to tester plaintiffs.[11]

This Note argues that originalist attempts to ground restrictions on plaintiffs' standing in Article II are inconsistent with the founding-era history of law enforcement in England and America. While other scholars have shown that some civil actions such as qui tam suits (where plaintiffs sue on behalf of the government)[12] were routinely brought by parties with little connection to the underlying dispute,[13] this Note focuses on the purported core of the Executive's law enforcement power: criminal prosecution. Proponents of the Article II theory understand the Take Care Clause to confer exclusive discretion on the President to initiate and conduct criminal law enforcement.[14] At the time of the founding, though, criminal prosecution was generally conducted by private parties in England and the American colonies.[15] These private prosecutions were often initiated by victims or their families, independent of a public mandate.[16] The available evidence suggests that, as an original matter, Article II likely did not limit law enforcement (and case-by-case discretion) to the Executive Branch. If criminal prosecution was routinely

9. *See Arpan*, 29 F.4th at 1291-94 (Newsom, J., concurring).

10. *See, e.g.*, Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. 1, 18-25 (2024) (assessing Judge Newsom's proposal for standing doctrine); Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1896 (2022); Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. ONLINE 128, 149-50 (2024); Julian Gregorio, Note, *What's Originalism After* TransUnion*?: Picking an Originalist Approach that Gets Standing Back on Track*, 98 NOTRE DAME L. REV. 172, 199-202 (2023).

11. *See* Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 26 (2023) (Thomas, J., concurring) (citing *Arpan*, 29 F.4th at 1291 (Newsom, J., concurring)).

12. *See, e.g.*, Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774-77 (2000) (describing the history of qui tam).

13. *See, e.g.*, James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 FORDHAM L. REV. 469, 471-72 (2023) ("Private individuals were authorized to bring these actions, but they lacked any injury in fact within the parlance of modern standing law . . . ."); Steven L. Winter, *What If Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENV'T. L. & POL'Y F. 155, 156 (2001); Nitisha Baronia, Jared Lucky & Diego A. Zambrano, Private Enforcement and Article II, at 4 (May 8, 2024) (unpublished manuscript) (on file with author). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 701 (2004) (arguing that civil remedies for violations of public rights were only available to private plaintiffs who suffered a private injury).

14. *See infra* Parts I.A-.B.

15. *See infra* Parts II.A-.B.

16. *See infra* Part II.A.

delegated to non-executive actors at the time of the founding, there is reason to doubt that Article II bars Congress from authorizing suits by unharmed plaintiffs.

Although English writers like Blackstone understood the power of criminal law enforcement to be a component of the executive power, they assumed that "private prosecutors" were empowered to bring criminal suits on behalf of the Crown.[17] In fact, the King and his officers had little control over decisions to initiate criminal actions, and there were no local public prosecutors in England until 1879.[18]

This English practice carried over to the American colonies.[19] Private prosecution remained common in state courts into the nineteenth century, often carried out by lawyers hired by victims.[20] Where states appointed attorneys general or district attorneys, these officers largely played a judicial function rather than an executive function.[21] Although the federal government largely relied on public prosecution and quasi-public qui tam actions after the enactment of the Constitution, private parties continued to direct criminal prosecution in federal courts by lobbying grand juries or appearing before a judge to swear out a complaint against an alleged criminal.[22] Congress also empowered other actors outside of the Executive Branch, such as state officials, to prosecute federal criminal offenses.[23]

Part I.A of this Note begins with an overview of the origins of the Article II theory of standing, describing its roots in Supreme Court cases dating back to the 1980s. Part I.B argues that separation-of-powers concerns have gained new prominence in recent standing decisions, particularly *TransUnion LLC v. Ramirez* and *Acheson Hotels, LLC v. Laufer*. Part I.C turns to the comprehensive Article II theory of standing developed by Judge Newsom and Part I.D discusses examples of this argument in legal scholarship. Part II looks at the history of criminal law enforcement in England, the colonies, and the early United States, highlighting the prevalence of private prosecution at the founding as well as instances of federal prosecutions brought by state officials before concluding.

17. *See infra* Part II.A; 4 WILLIAM BLACKSTONE, COMMENTARIES *303.
18. *See infra* Part II.A.
19. *See infra* Part II.B.
20. *See infra* Part II.B.
21. *See infra* Part II.B.
22. *See infra* Parts II.B-.C.
23. *See infra* Part II.C.

I. The Article II Theory of Standing

This Part describes the Article II theory of standing as developed at the Supreme Court, in the lower courts, and by scholars. The theory rests on the proposition that only the Executive is authorized to file claims that seek to vindicate *public* rights, or rights whose remedies accrue to the public as a whole.[24] It also posits that only the Executive is empowered to exercise prosecutorial discretion in deciding "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[25] Consequently, when Congress authorizes unharmed plaintiffs to bring claims that seek remedies accruing to the public, it impermissibly empowers private parties to exercise a core executive function and interfere with the discretion guaranteed to the Executive by the Take Care Clause.

A. The Article II Theory at the Supreme Court

The first mentions of Article II as a limit on plaintiffs' standing date to the 1970s and 1980s, when modern standing doctrine began to coalesce around the constitutional requirements of injury in fact, causation, and redressability.[26] In the preceding decades, the traditional private law model of litigation, in which suits aimed to redress an individualized injury, had been supplanted by a "public law model" of adjudication where litigants sought to vindicate public values.[27] A new movement of public interest lawyers began to use litigation to

24. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); Laufer v. Arpan LLC, 29 F.4th 1268, 1283-84 (11th Cir. 2022) (Newsom, J., concurring); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021); Lujan v. Defs. of Wildlife, 504 U.S. 555, 576-77 (1992).

25. *TransUnion*, 141 S. Ct. at 2207.

26. *See, e.g.*, Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 13 (2021) ("Modern standing doctrine crystallized in the two decades between *Data Processing* in 1970 and [*Lujan*] in 1992."); Allen v. Wright, 468 U.S. 737, 751 (1984) (identifying the requirements of injury in fact, causation, and redressability). There has been substantial discussion of the longer history of the standing doctrined. *See, e.g.*, Woolhandler & Nelson, *supra* note 13, at 712-18 (describing nineteenth-century standing law); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1135-39 (2009) (describing standing doctrine prior to the 1970s); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436-38 (1988) (arguing that New Deal-era Justices invented and constitutionalized standing doctrine); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (same); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595-97 (2010) (providing an empirical study of the historical evolution of the Supreme Court's standing doctrine).

27. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283-84 (1976) (describing a shift from a bipolar, adversarial, and retrospective private law model to a multipolar, non-adversarial, and prospective public law model);
footnote continued on next page

advance their policy goals, intervening in the administrative process to raise environmental and safety concerns and to force agency action.[28] Congress spurred this shift by enacting "citizen suit" provisions in statutes like the Clean Air Act and Consumer Product Safety Act that deputized private litigants to enforce agency dictates and to serve as watchdogs over agency activities.[29] More broadly, in the late 1960s, Congress began to rely on private enforcement regimes as an alternative to administrative power, establishing what Sean Farhang has termed "the litigation state."[30]

Perhaps in response to concerns that a flood of public interest lawsuits would hamstring the government and divert the judiciary from its traditional role, the Court in the 1970s established new standing requirements that restricted the class of potential plaintiffs.[31] From the 1920s onwards, courts' inquiry into "standing" had focused on whether the plaintiff possessed a legal injury—such as a common law right or a private right of action.[32] In 1970, in *Association of Data Processing Service Organizations, Inc. v. Camp*, the Court held that a plaintiff no longer needed to show a legal injury to establish standing.[33] Instead, Justice Douglas wrote that standing existed for anyone who could demonstrate an "injury in fact, economic or otherwise."[34] *Data Processing* did not explain the legal source of this novel requirement.[35]

RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. METZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74-75 (7th ed. 2015) (dating the rise of public law model to the mid-twentieth century).

28. *See generally* PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021) (describing the history of the public interest movement).

29. *See* Magill, *supra* note 26, at 1187-89.

30. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 214 (2010).

31. *See* Magill, *supra* note 26, at 1195-98 (arguing that the Supreme Court's concern with "public interest" suits "provides a plausible—if admittedly somewhat speculative—explanation for the elimination of the standing for the public principle").

32. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179-83 (1992) (describing the "legal injury" test for standing between 1920 and the early 1960s).

33. 397 U.S. 150, 153 (1970).

34. *Id.* at 152. As Sunstein notes, the "injury in fact" language appears to be drawn from Kenneth Culp Davis's administrative law treatise, as an interpretation of the Administrative Procedure Act's "adversely affected or aggrieved" language. *See* Sunstein, *supra* note 32, at 185-86; 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02, at 211-13 (1958).

35. *See* Sunstein, *supra* note 32, at 186.

The Court eventually agreed that these new standing requirements were rooted in Article III.[36] As Elizabeth Magill notes, for several years after *Data Processing*, "majorities of the Supreme Court were unclear whether the newly minted injury-in-fact test was an interpretation of the judicial review provisions of the APA or an interpretation of Article III's case or controversy requirement."[37] For instance, in the 1972 case of *Sierra Club v. Morton*[38] and the 1973 case of *United States v. Students Challenging Regulatory Agency Procedures*,[39] the majorities treated the injury in fact requirement as merely an interpretation of the Administrative Procedure Act.[40] In 1974, however, the Court in *Schlesinger v. Reservists Committee to Stop the War* interpreted the injury in fact test as a constitutional requirement rooted in Article III and cited *Data Processing* as having established that proposition.[41]

Alongside the case-or-controversy rationale for modern standing doctrine, though, the Court in this era also suggested that Article II placed limitations on private enforcement. These cases pointed to the Take Care Clause as a restriction on courts' ability to order Executive branch compliance with its legal duties. In *Allen v. Wright*, decided in 1984, the Court held that the parents of African American schoolchildren lacked standing to challenge the Internal Revenue Service's alleged failure to enforce federal guidelines that required denying tax-exempt status to racially discriminatory private schools.[42] The Court found that the parents' alleged stigmatic injury was too abstract.[43] After all, they had not personally been denied equal treatment by the challenged

36. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) ("[W]hatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.'"); United States v. Richardson, 418 U.S. 166, 171 (1974) ("[T]he question of standing in the federal courts is to be considered in the framework of Article III . . . ."); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976) ("As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant His invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975))).

37. Magill, *supra* note 26, at 1163 & n.116.

38. 405 U.S. 727 (1972).

39. 412 U.S. 669 (1973).

40. *See Sierra Club*, 405 U.S. at 733 (interpreting *Data Processing* as holding that "persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact'" (citation omitted)); *Students Challenging Regul. Agency Procs.*, 412 U.S. at 686 (same).

41. 418 U.S. 208, 218 (1974) ("[T]he Court . . . held that whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.'" (citing Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970))); *see* Magill, *supra* note 26, at 1163 n.116.

42. *See* 468 U.S. 737, 743-45, 753 (1984).

43. *Id.* at 468 U.S. at 755-56.

conduct.[44] The parents' other contention—that the tax exemptions weakened their children's opportunity to receive an education in a racially integrated public school—was ruled too speculative to satisfy Article III standing.[45] As relevant here, the Court also suggested that Article II limited federal courts' power to hear cases brought "to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."[46] The Court wrote that "[t]he Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'"[47] If any concerned bystanders were allowed to challenge the Executive's failure to enforce its legal obligation, it would undermine this duty.[48] In *Allen*, the Court therefore concluded that the Take Care Clause limited the judiciary's power to entertain suits seeking to vindicate the rule of law rather than to remedy a particularized harm.

In *Lujan v. Defenders of Wildlife*, the Court suggested that Article II nondelegation concerns limited Congress's authority to establish private rights of action.[49] In an opinion by Justice Scalia, the Court denied standing to a conservation group that sought to challenge a regulation interpreting some of the Endangered Species Act's procedural requirements to apply only to projects located within the United States.[50] After dismissing the group's claims that members' interest in seeing or studying various animals conferred standing, the Court turned to whether Congress had created a procedural right that could support standing.[51] The Court suggested that Article III's grant of jurisdiction to the federal courts to adjudicate cases and controversies should be

44. *Id.* at 755 ("Our cases make clear, however, that such injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." (internal quotation marks omitted)).

45. *Id.* at 756-61 ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

46. *Id.* at 761; *see* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1844-45 (2016); Bayefsky, *supra* note 10, at 134.

47. *Allen*, 468 U.S. at 761 (quoting U.S. CONST. art II, § 3).

48. *See id.*

49. *See* 504 U.S. 555, 577 (1992); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 131 & n.2 (1993).

50. *See Lujan*, 504 U.S. at 578; Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 882 (codified as amended at 16 U.S.C. § 1536). The regulation interpreted Section 7 of the Endangered Species Act to require interagency consultation only for actions taken in the United States or on the high seas. William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 204 (2017).

51. *See Lujan*, 504 U.S. at 567 & n.3, 572-74.

read in light of Article II's grant of power to the Executive.[52] Scalia argued that the Take Care Clause assigns to the President alone the task of safeguarding the shared public interest in government fidelity to the Constitution and federal laws.[53] Allowing private plaintiffs to sue the Executive Branch based only on "the undifferentiated public interest in executive officers' compliance with the law," the Court held, would "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.'"[54] The Court's reliance on the Take Care Clause suggested that its objective was not to limit the number of people who could bring suit, but to prevent judicial involvement in certain classes of disputes.[55] *Lujan* treated Article II as a limit on Congress's ability to delegate enforcement of federal law to private litigants by creating new rights vindicable in court.

After *Lujan*, the Court continued to grapple with the extent of Congress's ability to rely on private enforcement. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the Court held that private plaintiffs had standing under the Clean Water Act's citizen-suit provisions to seek civil penalties payable to the Government.[56] The majority found that the penalties "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [Friends of the Earth's] injuries by abating current violations and preventing future ones."[57] In concurrence, though, Justice Kennedy expressed some skepticism regarding "whether exactions of public fines by private litigants, and the delegation of Executive Power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States."[58] In other words, a suit by injured plaintiffs might run afoul of Article II nondelegation where the remedies accrue primarily to the public.

52. *See id.* at 576-77; *see also* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1186 (1993) (describing *Lujan*'s separation-of-powers rationale).

53. *Lujan*, 504 U.S. at 576. To be sure, Scalia also rhetorically invoked Congress's interest in safeguarding the public interest. *See id.* ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

54. *Id.* at 577 (quoting U.S. CONST. art. II, § 3); *id.* at 604 (Blackmun, J., dissenting) ("To prevent Congress from conferring standing for 'procedural injuries' is another way of saying that Congress may not delegate to the courts authority deemed 'executive' in nature.").

55. Pierce, *supra* note 52, at 1188.

56. *See* 528 U.S. 167, 187-88 (2000).

57. *Id.* at 187.

58. *Id.* at 197 (Kennedy, J., concurring).

Because these issues had not been properly briefed, however, Justice Kennedy concluded that "these matters are best reserved for a later case."[59]

Despite these repeated invocations of Article II, the Court subsequently insisted that standing doctrine stemmed only from the case-or-controversy requirement of Article III. In *Steel Co. v. Citizens for a Better Environment*, Justice Scalia denied the claim from Justice Stevens's concurrence that the Court's decision was rooted in the "concern that this citizen's suit somehow interferes with the Executive's power to take Care that the Laws be faithfully executed."[60] Writing for a six-Justice majority,[61] Scalia declared that "[t]his case calls for nothing more than a straightforward application of our standing jurisprudence, which, though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II."[62] Scalia repeated this claim two years later in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, explaining that the Court need not decide whether qui tam suits violate Article II when holding that the plaintiff had standing to sue under the False Claims Act.[63]

Yet in recent cases the Supreme Court has invoked the separation of powers function of standing doctrine and explicitly relied on Article II to limit Congress's power to create rights of action. While many of the earlier cases dealt with the effects of suits against federal agencies on the President's Article II duties, recent cases have held that unharmed plaintiffs' suits against private parties also infringe on the Executive Branch's Article II authority.

In *TransUnion LLC v. Ramirez*, the Court heard a challenge brought under the Fair Credit Reporting Act against a credit reporting agency that had mistakenly placed an alert for creditors indicating that the members of the plaintiff class were part of a government-run terrorist database.[64] TransUnion had shared some of the plaintiffs' erroneous credit reports with businesses, but the majority of the class members did not have their credit files disseminated to anyone.[65] The Court ruled, in a five-to-four decision,[66] that this latter group of

59. *Id.*

60. 523 U.S. 83, 102 n.4 (1998) (internal quotation marks omitted).

61. *Id.* at 85.

62. *Id.* at 102 n.4; *see* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1319-20 (2014).

63. 529 U.S. 765, 778 n.8 (2000) ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3. Petitioner does not challenge the *qui tam* mechanism under either of those provisions, nor is the validity of *qui tam* suits under those provisions a jurisdictional issue that we must resolve here." (citing *Steel Co.*, 523 U.S. at 102 n.4)).

64. 141 S. Ct. 2190, 2200-02 (2021).

65. *Id.* at 2200.

66. *Id.* at 2197.

plaintiffs had not demonstrated a "concrete harm" and thus lacked standing to sue.[67] To satisfy the "concreteness" inquiry, the Court announced that plaintiffs must identify a "close historical or common-law analogue" for the injury they allege.[68] This requirement effectively forecloses Congress's ability to establish private rights of action for claims beyond the traditional domains of American courts.

In his majority opinion in *TransUnion*, Justice Kavanaugh framed the standing requirement as an Article II nondelegation doctrine.[69] He argued that "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."[70] Kavanaugh suggested that the exercise of prosecutorial discretion is a nondelegable executive function, writing that "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)."[71] "Private plaintiffs are not accountable to the people" or tasked with a duty to ensure general compliance with the law, Kavanaugh argued, and therefore it is improper for Congress to

67. *Id.* at 2200. The Court's analysis in *TransUnion* built on its prior ruling in *Spokeo, Inc. v. Robins*, where the Court reiterated that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 578 U.S. 330, 341 (2016). The Court in *Spokeo* also wrote that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 340.

68. *TransUnion*, 141 S. Ct. at 2204. The Supreme Court has adopted "history and tradition" tests in a range of contexts. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-30 (2022) (adopting a history-and-tradition test for the Second Amendment); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (holding that substantive due process protects only rights "deeply rooted in this Nation's history and tradition" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (holding that the Establishment Clause must be "interpreted by 'reference to historical practices and understandings'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))). The parameters of the "history and tradition" inquiry—including the level of generality at which courts should conduct this inquiry—are unclear at this point. *Compare* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) (holding that the methodological inquiry involves discerning "the principles that underpin our regulatory tradition" and that "[t]he law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin'" of traditional practices (quoting *Bruen*, 142 S. Ct. at 2133)), *with Dobbs*, 142 S. Ct. at 2236, 2253-54 (focusing on whether states banned abortion in 1868 and rejecting "attempts to justify abortion through appeals to a broader right to autonomy . . . . at a high level of generality").

69. *TransUnion*, 141 S. Ct. at 2207.

70. *Id.*

71. *Id.*

delegate enforcement discretion to private parties.[72] Therefore, the Court held that most members of the class—those who had not yet had their false files shared with third-parties—lacked standing to sue.[73] Kavanaugh's focus on Executive Branch enforcement discretion strongly suggests that the *TransUnion* majority viewed standing as an Article II nondelegation doctrine.[74]

Justice Kavanaugh reiterated the Article II underpinnings of standing doctrine in *United States v. Texas*.[75] This case considered Texas's standing to challenge guidelines for immigration-related proceedings issued by the Department of Homeland Security in January 2021.[76] These immigration enforcement policies prioritized the arrest and removal of noncitizens who are suspected terrorists or dangerous criminals.[77] Texas and Louisiana filed suit, claiming that the guidelines violated two federal statutes that require the Department to arrest more noncitizens pending their removal.[78] The Court eventually took up the question of whether the states possessed Article III standing to challenge the guidelines.[79] Writing for the majority, Justice Kavanaugh held that precedent and "longstanding historical practice" established that the states' suit "is not the kind redressable by a federal court."[80] He argued that "lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law."[81] Like in *TransUnion*, Kavanaugh argued that the Take Care Clause grants the Executive Branch exclusive discretion over whether to

72. *Id.*

73. *Id.* at 2214.

74. Outside of the context of standing doctrine, the Court has also suggested that Article II places other limits on Congress's ability to create private rights of action; in this sense, the rise of the Article II theory of standing is part of a broader development in constitutional law. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) ("In so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."); *cf.* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) ("There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation.").

75. 143 S. Ct. 1964 (2023).

76. *Id.* at 1968.

77. *Id.*

78. *Id.*

79. *Id.* at 1970.

80. *Id.* at 1971.

81. *Id.*

pursue legal actions against those who violate the law.[82] Unlike most of the cases discussed above, *United States v. Texas* did not concern Congress's ability to authorize private enforcement of civil law.[83] But in the context of immigration enforcement, the Court again turned to Article II as a constraint on standing.

B. Judge Newsom's Article II Theory of Standing

Drawing on these Supreme Court cases, Eleventh Circuit Judge Kevin Newsom has developed the most elaborate and comprehensive justification for limiting plaintiffs' standing based on Article II, which he claims reflects the original meaning of the Constitution.[84] In a pair of concurring opinions, Judge Newsom argues that standing to sue in federal court should exist where a plaintiff "has a legally cognizable cause of action, regardless of whether he can show a separate, stand-alone factual injury."[85] In other words, he would ditch the tripartite standing analysis and the requirement that plaintiffs demonstrate actual injury. Congress does not have free rein, though, to authorize citizen suits or deputize "private attorney[s] general" to "sue for wrongs done to society in general."[86] Judge Newsom suggests that Congress's authority is constrained by Article II's vesting of the executive power in the President.[87] In particular, Congress may not authorize suits that would delegate to private parties the Executive Branch's authority to enforce federal law.[88] Newsom argues that his approach is more consistent with the original public meaning of Article III.[89]

In setting out the argument for Article II limits on standing, Judge Newsom "start[s] from the uncontroversial premise that certain kinds of

82. *Id.* Justice Kavanaugh also listed specific exceptions to the Court's no-standing holding, including where the Executive brings selective prosecutions in violation of the Equal Protection Clause, where Congress "elevates *de facto* injuries to the status of legally cognizable injuries," where executive branch agents wholly abandon their duties to arrest or prosecute, and where the challenge also involves the Executive Branch's provision of legal benefits or legal status. *Id.* at 1973-74.

83. *See supra* Part I.A.

84. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); Laufer v. Arpan LLC, 29 F.4th 1268, 1283-84 (11th Cir. 2022) (Newsom, J., concurring).

85. *See Sierra*, 996 F.3d at 1115 (Newsom, J., concurring); *Laufer*, 29 F.4th at 1283 (Newsom, J., concurring).

86. *See Laufer*, 29 F.4th at 1290 (Newsom, J., concurring); *Sierra*, 996 F.3d at 1115 (Newsom, J., concurring).

87. *See Sierra*, 996 F.3d at 1133 (Newsom, J., concurring).

88. *See id.* (citing United States v. Nixon, 418 U.S. 683, 693 (1974)).

89. *See id.* at 1121-23, 1138-39.

lawsuits inherently involve the exercise of executive power."[90] The paradigmatic example is a criminal prosecution,[91] in which a representative of the public "seek[s] a remedy that accrues to the public, such as imprisonment or a fine to be paid into the treasury."[92] Newsom notes that Blackstone's *Commentaries on the Law of England* distinguished between "'private wrongs' and 'public wrongs,'" treating "'the right of punishing crimes' . . . as the power to 'put [the laws] in execution.'"[93] By contrast, a common-law tort or contract suit involves no exercise of executive power, because the would-be plaintiff merely seeks a legal remedy "that will accrue to him personally."[94]

Under Judge Newsom's approach, Congress may authorize private causes of action whereby individuals pursue private claims, but "Congress may not give to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public—paradigmatically (but by no means exclusively) criminal punishment or a fine."[95] Granting a private plaintiff the power to bring such an action would unconstitutionally delegate Article II executive power.[96] Newsom notes that "few deny that the Vesting Clause grants the President and his subordinates the exclusive authority to bring criminal prosecutions as a means of executing the laws."[97]

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90. *Id.* at 1133.

91. Criminal prosecution and qui tam actions are an obvious exception to Article III standing's injury in fact requirement. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) ("Federal courts regularly adjudicate government enforcement actions that would lack 'injury in fact' if brought by private plaintiffs."); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999) (noting that in federal criminal prosecutions, the federal government asserts only "an 'abstract . . . injury to the interest in seeing that the law is obeyed'" (quoting FEC v. Akins, 524 U.S. 11, 24 (1998))).

92. *Sierra*, 996 F.3d at 1133 (Newsom, J., concurring).

93. *Id.* at 1134 (first quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *1; and then quoting 4 BLACKSTONE, *supra* note 17, at *7). Others have cast doubt on the relevance of Blackstone's doctrinal distinctions for understanding early American conceptions of "public" and "private" in the context of public rights. *See, e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of Private Land Claims*, 74 STAN. L. REV. 277, 280-89 (2022); Gordon S. Wood, Lecture, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1437-40 (1999).

94. *Sierra*, 996 F.3d at 1133-34 (Newsom, J., concurring); *see also* Woolhandler & Nelson, *supra* note 13, at 696 (noting that a violation of the law can "potentially [give] rise to two separate kinds of actions—the individual victim's tort action for compensation . . . and the public's criminal action for punishment").

95. *Sierra*, 996 F.3d at 1136 (Newsom, J., concurring).

96. *Id.*

97. *Id.* at 1137.

Judge Newsom supplemented this Article II theory in *Laufer v. Arpan LLC*, where he argued that "case-by-case enforcement discretion is a core and nondelegable component of the executive power."[98] *Laufer* concerned a claim by a disability "tester" who brought suit against hotels that failed to provide accessibility information even though she had no intention of patronizing the businesses.[99] In a concurring opinion, Judge Newsom wrote that *Laufer* was "one of the (perhaps rare) circumstances in which a plaintiff's suit may satisfy all Article III requirements but nonetheless constitute an impermissible exercise of 'executive Power' in violation of Article II."[100] The problem, as Judge Newsom articulated it, is that tester plaintiffs violate Article II by exercising the forms of enforcement discretion that the Constitution reserves to the Executive Branch.[101] He wrote that "Founding-era and early historical evidence strongly indicates that as originally understood, the Constitution protected private citizens from arbitrary—'tyrannical'—exercises of government power, at least in part, by vesting enforcement discretion in the President and his subordinates."[102] A tester's vigorous enforcement could frustrate the discretion of public officials mandated to ensure faithful execution of the laws. And unlike Executive Branch officials, private testers "are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[103]

In Judge Newsom's view, the Executive Branch's exclusive enforcement discretion "is firmly rooted in Founding-era history and practice."[104] Montesquieu and Blackstone, as well as delegates to the Constitutional Convention, believed that dividing the law-making and law-enforcing power was essential to preserving individual liberty.[105] Early history also reveals broad consensus, Newsom claims, that the President was empowered to decide which criminal prosecutions to ignore or terminate, and that "'[f]ederal prosecutors . . . claimed from the beginning authority to decline enforcement of federal statutes in particular cases.'"[106] An originalist approach to standing

98. Laufer v. Arpan LLC, 29 F.4th 1268, 1292 (11th Cir. 2022) (Newsom, J., concurring).

99. *Id.* at 1270 (majority opinion).

100. *Id.* at 1284 (Newsom, J., concurring).

101. *Id.* at 1291.

102. *Id.* at 1294.

103. *Id.* at 1291 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021)).

104. *Id.* at 1292.

105. *Id.* (first citing 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 182 (J.V. Prichard ed., Thomas Nugent trans., 1900); and then citing 1 WILLIAM BLACKSTONE, COMMENTARIES *146).

106. *Id.* at 1293 (quoting Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676 (2014)).

would therefore limit courts to hearing cases in which private plaintiffs enforce their own rights and seek remedies that accrue to the plaintiff herself, which raise no concern under Article II.

C. *Acheson v. Laufer* and Tester Standing

In December 2023, the Supreme Court gave further support to the Article II theory in *Acheson Hotels, LLC v. Laufer*, where Justice Thomas, writing in concurrence, grounded restrictions on "tester standing" in Article II and adopted Judge Newsom's comprehensive Article II theory.[107] Justice Thomas' adoption of the Article II theory is notable because he had dissented in *TransUnion LLC v. Ramirez*,[108] where the majority framed the standing requirement as an Article II nondelegation doctrine.[109] Because this recent case suggests growing support for the Article II theory—especially in its originalist version—and illustrates its practical implications, it is worth discussing in slightly greater depth.

In *Laufer*, the Supreme Court was poised to resolve the issue of whether a plaintiff under the ADA has standing to challenge a hotel's failure to provide legally-required accessibility information where the plaintiff has no intention of visiting the hotel.[110] Plaintiff Deborah Laufer, a person who uses a wheelchair, reviewed a reservation website run by Acheson Hotels and found that it did not contain required accessibility information.[111] According to Laufer, this deficiency violated a Department of Justice regulation known as the Reservation Rule, which requires hotels to "[i]dentify and describe accessible features . . . in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[112] The Reservation Rule was promulgated under Title III of the Americans with Disabilities Act of 1990, which creates a private cause of action that permits "any person who is being subjected to discrimination on the basis of disability" to sue for violations.[113] Laufer brought suit to obtain injunctive relief directing the hotel to modify its reservation website to comply with the ADA, along with attorney's fees.[114]

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107. 144 S. Ct. 18, 26 (2023) (Thomas, J., concurring in the judgment) (citing Laufer v. Arpan LLC, 29 F.4th 1268, 1291 (11th Cir. 2021) (Newsom, J., concurring)).

108. *See* 141 S. Ct. 2190, 2214 (2021) (Thomas, J., dissenting). Justice Thomas' dissent was joined by Justices Breyer, Sotomayor, and Kagan. *Id.*

109. *See id.* at 2207, 2214 (majority opinion).

110. *See Laufer*, 144 S. Ct. at 20.

111. *Id.* at 23 (Thomas, J., concurring in the judgment).

112. 28 C.F.R. § 36.302(e)(1)(ii) (2022).

113. 42 U.S.C. § 12188(a)(1) (1990).

114. *See Laufer*, 144 S. Ct. at 22-23 (Thomas, J., concurring in the judgment).

Acheson Hotels sought to dismiss on the ground that Laufer lacked Article III standing.[115] The hotels argued that she was not harmed by the lack of information on its website, since she had no concrete plans to visit.[116] Laufer had "disclaimed any intent to travel to" the hotel, instead acknowledging that she was a "tester" who has apparently filed hundreds of similar cases.[117] The District Court dismissed Laufer's complaint, but the First Circuit reversed and held that Laufer had standing.[118] The First Circuit relied primarily on *Havens Realty Corp. v. Coleman*, where the Supreme Court found that a tester had standing to sue under the Fair Housing Act.[119] According to the *Havens* Court, the Fair Housing Act created "a legal right to truthful information about available housing."[120] The Black tester in *Havens* therefore satisfied the injury in fact requirement based on an injury to her right to truthful housing information, since she alleged that she was falsely told that no apartments were available.[121]

In finding standing, the First Circuit exacerbated a circuit split generated by Laufer herself. The Second, Fifth, and Tenth Circuits had "held that she lacks standing," while the Fourth and Eleventh Circuits had "held that she has it."[122] The Supreme Court granted certiorari to resolve the standing issue in March 2023.[123]

The case became moot, however, a few months after the Supreme Court granted review. Laufer voluntarily dismissed all her pending claims after her lawyer was suspended from the practice of law for unethical conduct in his handling of her cases.[124] While the court remained free to resolve the standing

115. *See* Laufer v. Acheson Hotels, LLC, No. 20-cv-00344, 2021 WL 1993555, at *2-3 (D. Me. May 18, 2021), *rev'd*, 50 F.4th 259 (1st Cir. 2022), *rev'd*, 144 S. Ct. 18 (2023).

116. *Id.* at *3.

117. *See Laufer*, 144 S. Ct. at 23 (Thomas, J., concurring in the judgment).

118. *Id.*; *see* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 263 (1st Cir. 2022).

119. *See Laufer*, 50 F.4th at 268-70 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982)).

120. *Havens*, 455 U.S. at 373.

121. *Id.*

122. Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 20 (2023). *Compare* Harty v. W. Point Realty, Inc., 28 F.4th 435, 443-44 (2d Cir. 2022) (finding a lack of standing for a different tester plaintiff), Laufer v. Looper, 22 F.4th 871, 879-81 (10th Cir. 2022) (finding a lack of standing), *and* Laufer v. Mann Hosp., L.L.C., 996 F.3d 269, 273 (5th Cir. 2021) (finding a lack of standing), *with* Laufer v. Arpan LLC, 29 F.4th 1268, 1273-75 (11th Cir. 2022) (finding standing), *and* Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 158 (4th Cir. 2023) (finding standing).

123. *Laufer*, 144 S. Ct. at 21; *see also* Laufer v. Acheson Hotels, LLC, 143 S. Ct. 1053 (2023) (mem.) (granting certiorari).

124. *Laufer*, 144 S. Ct. at 21.

issue, since standing and mootness are both jurisdictional issues,[125] a majority of the Court opted to resolve Laufer's case on mootness grounds.[126] Acheson warned that dismissing the case for mootness could invite future litigants to manipulate the Court's jurisdiction, but the majority found no effort on Laufer's part to evade the Court's review.[127] The Court ultimately seemed persuaded by Laufer's argument that "mootness is easy and standing is hard," opting to resolve the case on simpler grounds.[128]

Justice Thomas concurred in the judgment, arguing that the Court should instead have dismissed on the grounds that Laufer lacks standing.[129] Thomas began by distinguishing Laufer's claim from that of the tester in *Havens Realty*.[130] While the Fair Housing Act created a "legal right to truthful information about available housing,"[131] Thomas argued that the ADA "provides no such statutory right to information."[132] Laufer could therefore not claim that the denial of information itself amounted to an Article III injury. As Justice Thomas acknowledged, Laufer had argued that the regulation requiring hotels to disclose their disability accommodations conferred an entitlement to accessibility information, even if the ADA did not.[133] He brushed this argument aside, however, arguing that Laufer would lack standing "even assuming a regulation could—and did—create such a right."[134]

Justice Thomas then turned to a more novel claim: Laufer's efforts as an advocate impermissibly interfered with the President's Article II duty to "take Care that the Laws be faithfully executed."[135] He argued that Laufer operates as a "private attorney general" who sues not to remedy a concrete injury but to vindicate the public interest in hotels' compliance with the Reservation Rule.[136] Quoting *Lujan*, Thomas wrote that "'[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive,' however, not private plaintiffs."[137] Thomas cited Judge Newsom's argument against tester standing

125. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007).

126. *See Laufer*, 144 S. Ct. at 22.

127. *See id.*

128. *Id.* at 21.

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

130. *Id.* at 25-26.

131. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

132. *See* Laufer, 144 S. Ct. at 25-26 (Thomas, J., concurring in the judgment).

133. *See id.* at 26.

134. *Id.*

135. *Id.* (quoting U.S. CONST. art. II, § 3).

136. *Id.*

137. *Id.* at 13 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992)).

in *Laufer v. Arpan LLC*,[138] discussed above, quoting the latter's explanation that "[t]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch."[139] Thomas explained that an official "could have informed" Acheson that its website did not comply with the ADA, allowing the hotel to rectify its mistake.[140] Laufer, however, exercised no discretion and chose to "enforce" (by lawsuit) every minor infraction of the Reservation Rule that she discovered.[141]

D. The Scholars' Article II Theory

Alongside the theory of standing developed by jurists, academics have also argued that Article II prevents Congress from delegating the Executive Branch's authority to exercise prosecutorial discretion. Tara Leigh Grove has argued that standing doctrine ought to be understood as an "Article II nondelegation doctrine" that prohibits Congress and the Executive Branch from delegating "discretionary enforcement authority to private parties."[142] According to Grove, standing doctrine's injury in fact requirement prohibits a private plaintiff from asserting "abstract grievances" that would "allow her to sue any person . . . for any violation of the law."[143] In a similar vein, Harold Krent and Ethan Shenkman have argued that "Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation."[144] While in private practice, future-Chief Justice John Roberts also wrote that standing doctrine "ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed."[145]

138. 29 F.4th 1268 (11th Cir. 2022) (Newsom, J., concurring).

139. *See* Laufer, 144 S. Ct. at 26 (Thomas, J., concurring in the judgment) (quoting *Laufer*, 29 F.4th at 1291).

140. *See id.*

141. *See id.*

142. Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 783 (2009).

143. *Id.* at 790.

144. Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993).

145. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993).

II. Founding-Era History and the Article II Theory

The Article II theory of standing, at least as articulated by Judge Newsom and Justice Thomas, purports to reflect the original meaning of the Constitution's text and founding-era practice.[146] Even Justice Kavanaugh's opinion in *TransUnion* attempts to root standing doctrine in longstanding tradition and practice,[147] an example of the Roberts Court's recent turn to "living traditionalism."[148] But the founding-era understanding of executive power and law enforcement is more complicated than it would initially appear, and it poses problems for any originalist effort to ground limits on plaintiffs' standing in Article II.[149] The Article II theory rests on the proposition that certain suits constituted exercises of the executive power that were nondelegable to private parties—most paradigmatically criminal prosecutions, but also some actions we would today regard as civil.[150] Further, the theory holds that a core and nondelegable aspect of this executive power

146. *See, e.g.*, Laufer v. Arpan LLC, 29 F.4th 1268, 1294 (Newsom, J., concurring) ("In sum, it seems to me that the Founding-era and early historical evidence strongly indicates that as originally understood, the Constitution protected private citizens from arbitrary—'tyrannical'—exercises of government power, at least in part, by vesting enforcement discretion in the President and his subordinates.").

147. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (requiring a "harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016))).

148. *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1499 (2023) (citing *TransUnion*, 141 S. Ct. at 2200).

149. This Note focuses on the original meaning of Article II and founding-era practice. But one could raise several other challenges to the Article II theory of standing. Rachel Bayefsky argues that the theory cannot identify the reasons why—and when—tester plaintiffs threaten executive enforcement discretion. *See* Bayefsky, *supra* note 10, at 149-50. The distinction between public and private rights may also prove to be unstable. If the Executive alone is empowered to seek remedies that accrue to the public, how can proponents explain the long tradition of private law remedies that serve a deterrent function, like punitive damages? *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."). Of course, the tenability of the public/private distinction, and the extent to which the private law system is premised on the public interest in social welfare versus the private interest in corrective justice, are core debates in private law theory. *Compare* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 25 (7th ed. 2007) ("[T]he common law is best (not perfectly) explained as a system for maximizing the wealth of society."), *with* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 134 (1995) ("Tort liability reflects corrective justice."), *and* Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 289-90 (2011) (noting that punitive damages are inconsistent with the role of rights in corrective justice and that the theory therefore cannot account for the role of non-compensatory damages in American tort law).

150. *See Laufer*, 29 F.4th at 1293 (Newsom, J., concurring).

was the exercise of case-by-case enforcement discretion, as exemplified by the prosecutor's decision not to bring charges.[151] English history and founding-era practice at the state and federal levels cast doubt on these claims.[152]

At the federal level, it is now settled law that private parties cannot initiate or pursue criminal prosecutions. As the Supreme Court stated in *United States v. Nixon*, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[153] That is because the Court has assumed that criminal prosecutions are "a quintessentially executive function"[154] or "the special province of the Executive Branch."[155] Correspondingly, case law has recognized that "private parties . . . have no legally cognizable interest in the prosecutorial decisions of the Federal Government."[156]

At the founding, however, private criminal prosecutions were routine in England and the American colonies.[157] Although writers like Blackstone understood the power of law enforcement to be a component of the executive power, they assumed that unharmed "private prosecutors" were empowered to bring criminal suits on behalf of the Crown.[158] This English practice carried over to the American colonies, where private prosecution remained prevalent in state courts throughout the nineteenth century.[159] Where states appointed attorneys general or district attorneys, these officers largely played a judicial function rather than an executive function.[160] Many of these states' constitutions contained analogous Executive Vesting and Take Care Clauses.[161] Even assuming, arguendo, that the Vesting Clauses are exclusive

151. *Id.* at 1292.

152. *See infra* Parts II.A-.C.

153. 418 U.S. 683, 693 (1974) (citations omitted); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that "an agency's refusal to institute proceedings" is part of the Executive Branch's Article II powers).

154. Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

155. *Heckler*, 470 U.S. at 832; *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996) (describing discretion of enforcing the Nation's criminal laws" lie within the "'special province' of the Executive" (quoting *Heckler*, 470 U.S. at 832)); *In re* Aiken County, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (stating that "criminal prosecution decisions" are "an exclusive Executive power").

156. Maine v. Taylor, 477 U.S. 131, 137 (1986); *see* Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); United States v. Texas, 143 S. Ct. 1964, 1970 (2023).

157. *See infra* notes 170-72 and accompanying text.

158. *See infra* notes 182-89 and accompanying text.

159. *See infra* notes 205-24 and accompanying text.

160. *See infra* notes 225-30 and accompanying text.

161. *See infra* notes 237-39 and accompanying text.

and indefeasible grants of substantive power,[162] state practice suggests that the original public meaning of Article II did not regard criminal prosecution as a nondelegable, core executive power.[163] Although the federal government after 1789 largely relied on public prosecution and quasi-public qui tam actions,[164] private parties continued to direct criminal prosecution by directly lobbying grand juries or appearing before a judicial official to initiate complaints against alleged criminals.[165] Congress also empowered other actors outside of the Executive Branch, such as state officials, to prosecute federal criminal offenses.[166] This evidence suggests that, as an original matter, Article II likely did not limit law enforcement (and case-by-case discretion) to the Executive Branch.[167]

A. British Practice of Private Enforcement of Criminal Law

Proponents of the Article II theory of standing like Judge Newsom and Justice Thomas misconstrue the history of the English legal system, which they suggest influenced the Framers of the Constitution.[168] The Article II theory rests on a distinction between "public" and "private wrongs" drawn from Blackstone's *Commentaries* to delineate the suits that may be brought by

162. For reason to reject this assumption, see Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1483-91 (2022) (arguing that the ordinary meaning of "vesting" was as an ordinary grant of power, not an exclusive or indefeasible authority); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 34 (1994) (arguing that the inclusion of the Opinions Clause in Article II is "decisive evidence against the unitary conception" of the Vesting Clause).

163. *See infra* notes 237-39 and accompanying text.

164. Given the contested legality of qui tam statutes and the fact that remedies in qui tam actions accrued to private parties, their implications for standing doctrine are beyond the scope of this paper.

165. *See infra* notes 267-76 and accompanying text.

166. In a variety of preemption cases, the Supreme Court has recently sanctioned state execution of federal law. *See* Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1290 (2015).

167. Others have made versions of this claim in different contexts. *See, e.g.*, Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 315 (1993) ("Litigation on behalf of the polity is shared with private citizens in the United Kingdom and many states (which even today allow private prosecution), and the *qui tam* action, a survivor of the eighteenth century, shows that litigation has never been a prerogative confined to executive officials."); Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990); Lessig & Sunstein, *supra* note 162, at 16-21.

168. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1134 (Newsom, J., concurring) (describing the influence of Blackstone and Locke on the Framers); *id.* at 1123 (looking to English legal practice).

the Executive and by private plaintiffs, respectively.[169] But in the eighteenth and nineteenth centuries, prosecutions for criminal offenses—which all agree were public wrongs—were almost exclusively pursued by private parties.[170] Victims or their families, often assisted by private attorneys, initiated criminal charges against the accused, presented evidence to the grand jury, and later provided evidence to be used at trial.[171] As James Fitzjames Stephen wrote in 1883, almost a hundred years after the Constitutional Convention, "[i]n England . . . the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons."[172] English practice therefore does not support the claim that criminal prosecution was a nondelegable power exercised only by the Executive.

Seventeenth- and eighteenth-century English sources agreed that criminal prosecution was a component of the executive power. Blackstone described "the right of punishing crimes" as the power to "put [the laws] into execution,"[173] and John Locke described the punishment of crimes as incident to "the executive power."[174] In his *Commentaries*, Blackstone wrote that "the

169. For a discussion of originalists' use of Blackstone, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 552-54 (2006).

170. *See* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317 (1973) ("For a very long time, really into the nineteenth century, the English relied upon a predominant, although not exclusive, component of private prosecution."); David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 476 (1995).

171. *See* Langbein, *supra* note 170, at 317-18; Friedman, *supra* note 170, at 476 ("In practice, the prosecutor was usually the victim. It was up to him to file charges with the local magistrate, present evidence to the grand jury, and, if the grand jury found a true bill, provide evidence for the trial."); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359 (1986) ("The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family.").

172. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493 (1883).

173. 4 BLACKSTONE, *supra* note 17, at *7.

174. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 127, 157-58, 164 (Thomas I. Cook ed., 1947) (1689). Locke's writings likely have little relevance for interpretation of the U.S. Constitution, and they are discussed here only to illuminate one view of the executive power in seventeenth-century England. Scholarship has emphasized the extent to which Locke's *Two Treatises* was shaped by his political and intellectual context, including the Revolution of 1688 and the Exclusion Controversy. *See generally* JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT' (1969) (arguing that Locke's political thought must be understood within the specific historical context of Calvinist natural theology and late seventeenth-century English politics rather than as abstract philosophical principles); Peter Laslett, *The English Revolution and Locke's 'Two Treatises of Government,'* 12 CAMBRIDGE HIST. J. 40 (1956) (arguing that Locke wrote the *Two*

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king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence."[175] This would seem to suggest the Crown's exclusive power to redress public wrongs.

But in practice, the Crown's power to redress public wrongs relied on a system of private enforcement, in which criminal prosecutions in the name of the Crown were brought and conducted by private parties. Under eighteenth-century English law, any Englishman was permitted to prosecute any crime.[176] Almost all prosecutions in cases that involved violence or the theft of personal property were initiated and pursued by a private prosecutor, who was expected to prepare for trial (perhaps with the assistance of private counsel), assemble witnesses, and lay out evidence in court.[177] Until the 1750s, private prosecutors were often incentivized by rewards, such as statutes decreeing that the owner of stolen goods could recover those goods upon successful prosecution of the thief, and by magistrates, who might require a plaintiff who accused a defendant of felony to prosecute a bill of indictment.[178] A 1752 provision permitted the court to reimburse prosecutors for the expense of a successful prosecution, although such reimbursement was not always forthcoming.[179] To overcome the costs of mounting a court case, it became common in the second half of the eighteenth century for propertied men to join "prosecution associations" to share the costs of apprehending and

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Treatises primarily as a response to the Exclusion Crisis of 1679-1681 rather than as a justification for the Glorious Revolution of 1688).

175. 4 BLACKSTONE, *supra* note 17, at *2. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring) ("Blackstone explained that in England, the king alone, as the representative of the community and wielder of the 'executive power,' was the 'proper prosecutor for every public offense.'" (quoting 4 BLACKSTONE, *supra* note 17, at *2)). Once the people have established a political society, only the sovereign can bring legal actions on behalf of the community for remedies that accrue to the public. It enjoys the *exclusive* executive power.

176. *See* Friedman, *supra* note 170, at 476; *see also* 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 1 (1819) ("In general, however, every man is of common right entitled to prefer an accusation against a party whom he suspects to be guilty.").

177. *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 35-36 (1986).

178. *See* Norma Landau, *Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions*, 17 LAW & HIST. REV. 507, 507-08 (1999); Friedman, *supra* note 170, at 477 (discussing rewards); Cardenas, *supra* note 171, at 360 (same); 1 CHITTY, *supra* note 176, at 4 ("[E]very magistrate has a power, at least on a charge of felony, to bind them over to prosecute and give evidence, and to commit them upon their refusal.").

179. *See* BEATTIE, *supra* note 177, at 42-44; Friedman, *supra* note 170, at 477.

prosecuting offenders.[180] Public prosecutors were not established in England until 1879, when the office of Director of Public Prosecution was created, although newly-established professional police forces began to take over the job of prosecuting criminals in the mid-nineteenth century.[181]

Blackstone's *Commentaries* reflect this basic feature of eighteenth-century English law. In describing the conduct of a grand jury, for instance, Blackstone noted that indictments were "preferred to them in the name of the king, but at the suit of any private prosecutor."[182] While the Attorney General had the power to bring prosecutions for public misdemeanors, Blackstone suggested that this category was limited to "such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions."[183] The English treatise writer Joseph Chitty wrote in the early nineteenth century that the king "most frequently exercises this power in cases of libels on government, or high officers of the Crown, obstructions of revenue officers, breaches of quarantine, bribery and offering to bribe public officers."[184] Informations—which permitted a prosecutor to bring charges directly to the court—were not permitted for felony offenses, which required indictment by a grand jury.[185] Aside from cases of special importance to the Crown, the power and burden of prosecution was left to private parties.[186]

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180. *See* BEATTIE, *supra* note 177, at 48-55; Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries*, 48 AM. SOCIO. REV. 796, 797-98 (1983).

181. *See* Friedman, *supra* note 170, at 476-78. As late as 1858, an article in the *Edinburgh Review* stated that:

> Except in cases of high treason or sedition, or offences against the revenue, it is no part of the official duty of the Attorney-General to institute a prosecution . . . . But in all other cases it is left to the committing magistrate to determine who the prosecutor shall be. Sometimes it is the party injured, or, if he be dead, his friends or representatives. Sometimes it is the policeman who has been employed to get up, as it is called, the evidence. And often the prosecution is dropped altogether because nobody feels sufficient interest to go on with it.

Criminal Procedure in Scotland and England, 108 EDINBURGH REV. 343, 353 (1858); *see* Philip B. Kurland & D.W.M. Waters, *Public Prosecution in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 494-95 (discussing *Criminal Procedure in Scotland and England*, *supra*).

182. 4 BLACKSTONE, *supra* note 17, at *303.

183. *See id.* at *308-09. Douglas Hay notes that "the extant powers of the Attorney-General, such as the ability to proceed by way of *ex officio* informations, were the targets of strong parliamentary criticism as a dangerous inheritance from the past." *See* Douglas Hay, *Controlling the English Prosecutor*, 21 OSGOODE HALL L.J. 165, 171 (1983).

184. 1 CHITTY, *supra* note 176, at 687.

185. *Id.* at 136; *see also id.* at 686 ("Informations, however, lie for misdemeanours only, nor can any man be convicted of treason or felony on this mode of proceeding.").

186. *See* 4 BLACKSTONE, *supra* note 17, at *304.

Alongside ordinary criminal prosecutions, Blackstone also describes the extant but little-used procedure of the appeal, in which a private party initiated suit in his own name to impose criminal penalties.[187] Unlike other criminal prosecutions, an appeal could only be brought for crimes committed either against the parties themselves or their relations.[188] Blackstone noted that:

> If the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject . . . the king can no more pardon it, than he can remit the damages recovered in an action of battery.[189]

As the passage above indicates, the Crown did exercise some control over prosecutions brought in the King's name. The Attorney General was empowered to file a writ of nolle prosequi (meaning "unwilling to pursue") to dismiss any criminal prosecution.[190] But, as a practical matter, this offered the King little power to monitor and oversee private prosecutions. Douglas Hay writes that "[t]he law officers of the Crown knew nothing of the vast majority of prosecutions and there was no administrative machinery to provide that information. The nolle prosequi was a practical nullity in day-to-day prosecutions."[191] Ann Woolhandler and Caleb Nelson likewise suggest that the King retained control over criminal prosecutions only through "the king's ability to grant pardons and Parliament's ability to enact statutes that effectively scuttled prosecutions."[192] It was not always possible for the King to grant a pardon, however, as Blackstone's discussion of the appeal demonstrates.[193]

The Article II theory misconstrues Blackstone's conception of executive power and the separation of powers. The *Commentaries* do not support the concern, expressed in cases like *Lujan*, that private enforcement would "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.'"[194] In eighteenth-century English law, there was no clear distinction

187. *See id.* at *312.

188. *See id.*

189. *Id.* at *316.

190. Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, ENCYCLOPEDIA.COM, https://perma.cc/8GGF-P5V4 (archived Dec. 17, 2024).

191. Hay, *supra* note 183, at 171.

192. Woolhandler & Nelson, *supra* note 13, at 698.

193. *See supra* note 189 and accompanying text.

194. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

between executive and judicial power.[195] Blackstone described the separation of powers as a binary, rather than tripartite, division in which the judiciary was considered part of the executive power alongside the Crown.[196] Blackstone wrote that:

> [T]hough the constitution of the kingdom hath intrusted [the King] with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power.[197]

On this view, judicial power was merely a subset of the executive power.[198] Judges acted by commission from the Crown, but they could not be removed.[199] Blackstone stressed that "by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts," which he argued was "one main preservative of the public liberty."[200] Delegation of the executive power to persons outside the control and supervision of the Crown was seen as a safeguard against royal excess. As a result, it is misleading to suggest, as Judge Newsom does, that eighteenth-century writers' commitment to "a separation of the law-*making* and law-*enforcing* powers" naturally required a commitment to public enforcement of criminal law.[201]

Historians have suggested that similar concerns with executive tyranny motivated English hostility to public prosecution and the persistence of private prosecutors.[202] Douglas Hay argues that because the right of private prosecution was viewed as a protection against abuse of the executive power, "[i]t was almost inconceivable that the Attorney-General should act as the protector of the ordinary citizen from oppressive prosecutions."[203] Likewise,

195. *See* Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANITIES 125, 167-68 (2022) ("[T]he English thought executive power included judicial power."); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1238 (2019).

196. *See* 1 BLACKSTONE, *supra* note 105, at *146 (defining legislative authority as the "right of making . . . the laws" and the executive authority as the right of "enforcing" them).

197. *Id.* at *277.

198. John Locke likewise divided government into legislative, executive, and federative powers. *See* LOCKE, *supra* note 174, at 194.

199. *See* Shugerman, *supra* note 195, at 168-69 (noting the implications of this conception for debates over the removal power).

200. 1 BLACKSTONE, *supra* note 105, at *267, *279.

201. Laufer v. Arpan LLC, 29 F.4th 1268, 1292 (11th Cir. 2022) (Newsom, J., concurring).

202. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

203. Hay, *supra* note 183, at 171.

Allyson May writes that "historic, deep-rooted mistrust of an authoritarian state, and fear of abuses of state power" explain "why criminal prosecutions remained in the hands of private individuals well into the nineteenth century."[204]

Given the tradition of private prosecution in eighteenth-century England, it is unlikely that the Framers understood the concept of "executive power" to entail an exclusive and nondelegable authority to redress public wrongs. The Crown did not exercise the kind of proactive enforcement discretion that the Article II theory views as an essential component of executive power, and in practice it had limited control over most prosecutions.

B. State Practice of Private Criminal Law Enforcement

Criminal prosecutions in colonial America largely followed the English model, with private parties bearing responsibility for prosecuting criminal suspects.[205] The Plymouth Colony, for instance, provided in its constitution that criminal trials would be conducted "according to the precedents of the law of England, as near as may be."[206] The Massachusetts Bay Colony also modeled its court system on the English system.[207] Allen Steinberg writes that "[p]rivate prosecution dominated criminal justice during the colonial period. Criminal cases were initiated by the complaint of a private citizen, usually before a justice of the peace, and the responsibility to pursue the case to its conclusion rested primarily with the private citizen who began the process."[208] Court records from seventeenth-century Virginia and Massachusetts show that "an enormous number" of criminal cases—for offenses like assault and battery, burglary, and libel—were prosecuted by private individuals.[209] Massachusetts even permitted some moral crimes with no clear injured victim, like cruelty to animals, to be prosecuted privately.[210] In his study of the Middlesex County (Massachusetts) Sessions Court between 1728 and 1803, Hendrik Hartog found

204. Allyson May, *Advocates and Truth-Seeking in the Old Bailey Courtroom*, 26 J. LEGAL HIST. 71, 77 (2005).

205. *See, e.g.*, Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292 (1989) ("[P]rivate citizens were primarily responsible for criminal law enforcement in the period prior to the ratification of the Constitution."); Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673-77 (2010).

206. *See* Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 127 (2022) (quoting PLYMOUTH COLONY CONST. of 1636, art. 17).

207. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 13 (1980).

208. Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571 (1984).

209. *See* Barth, *supra* note 206, at 125-27.

210. *See id.* at 127.

that the court relied on private parties to initiate prosecutions and provided "a number of more or less explicit encouragements to criminal litigants and litigation."[211] In Virginia, the formal commission of Justices of the Peace—local magistrates—"stated explicitly that in criminal cases both the plaintiff and defendant were private parties."[212]

Some colonies developed forms of public prosecution in the seventeenth and eighteenth centuries, but these did not displace the practice of private prosecution. New York and New Jersey, which were Dutch colonies until 1664, adopted the Dutch inquisitorial system of law, which included public prosecution.[213] An officer called the *schout* had limited powers of arrest; the officer performed tasks like stating the charges against the accused and presenting the court with evidence against the defendant.[214] But when the English gained control of the colonies they adopted the adversarial system of criminal justice, producing what Jonathan Barth describes as "a hybrid system of public and private prosecution."[215] In the eighteenth century, other colonies established public prosecutors while continuing to allow private prosecution.[216] In 1662, Connecticut became the first colony to appoint a public prosecutor.[217] Yet private prosecution remained the norm in Connecticut in the second half of the eighteenth century.[218] When Pennsylvania and North Carolina appointed prosecuting attorneys, they likewise established a hybrid system where public and private prosecution existed alongside one another.[219] Even in cases of public prosecution, moreover, evidence suggests that private parties continued to play a key role; the complaining witness often paid the District Attorney for services rendered,

211. *See* Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 318 (1976).

212. Barth, *supra* note 206, at 125.

213. *Id.* at 128-29.

214. JACOBY, *supra* note 207, at 14; W. Scott Van Alstyne, Jr., *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 129-30. *But see* JACOBY, *supra* note 207, at 14 (arguing that the schout "served more as a central figure who controlled access to the court than as an officer who initiated prosecutions").

215. Barth, *supra* note 206, at 132 (emphasis omitted).

216. *Id.* at 134.

217. *See* JACOBY, *supra* note 207, at 16; JOHN D. BESSLER, PRIVATE PROSECUTION IN AMERICA, at xxv (2022).

218. Barth, *supra* note 206, at 137 ("Private prosecution for crimes with actual victims remained standard practice in Connecticut after 1704. . . . What we see here in Connecticut, then, is a hybrid system, where neither public nor private prosecution possessed an exclusive monopoly.").

219. *See id.* at 139-42.

including empaneling a jury, searching for evidence, and drafting legal documents.[220]

State constitutions gradually began to recognize offices dedicated to public prosecution after the Constitution's ratification in 1789, but private prosecution persisted in many states during the first half of the nineteenth century.[221] Carolyn Ramsey concludes that "[t]he idea that public prosecution had become firmly established as the American system by 1789 does not bear scrutiny. . . . Indeed, private citizens continued to initiate and litigate criminal prosecutions in New York until the 1840s or 1850s . . . ."[222] It wasn't until the second half of the nineteenth century that public prosecutors began to displace private ones, although private prosecution remained available in many jurisdictions.[223] According to Robert Ireland, by the end of the nineteenth century, the high courts of fifteen states had upheld the legality of privately funded prosecutors.[224]

Where states established attorneys general to undertake public prosecutions, these positions were not clearly understood to be executive in nature—casting doubt on claims by proponents of the Article II theory that the Framers would have understood prosecution to be an inherently executive function.[225] Among the original thirteen state constitutions, only five included the mention of an attorney general—and all within the article discussing state judges.[226] In the early Republic, state constitutions in Georgia, Illinois, Indiana,

220. Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1326 (2002).

221. *See* Barth, *supra* note 206, at 150-51, 155-56 (describing the persistence of private prosecution in the states during the early national and antebellum periods).

222. *See* Ramsey, *supra* note 220, at 1325-26; BESSLER, *supra* note 217, at xxi ("Many nineteenth-century criminal prosecutions in American states were still being initiated and directed by private citizens, not lawyers or government-paid attorneys, although it became commonplace for crime victims—commonly called 'private prosecutors' in newspapers—to retain counsel to assist in such prosecutions if they could afford to do so."). *But see* JACOBY, *supra* note 207, at 19 ("By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies . . . ."); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816-17 n.2 (1987) (Scalia, J., concurring in the judgment) (claiming there is little to no evidence of private prosecutions of federal crimes in the United States).

223. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 518 (1994).

224. Ireland, *supra* note 202, at 49.

225. *See* PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 36 (2022).

226. Steinberg, *supra* note 208, at 587 n.4; *cf.* SHANE, *supra* note 225, at 36 ("Six of the first thirteen state constitutions specifically mention an attorney general, and each of them speaks of the attorney general in the same breath, as it were, as it refers to state judges.").

Louisiana, Maryland, Tennessee, and Virginia likewise placed attorneys general and prosecutors under the judicial articles.[227] Perhaps as a result, "early attorneys general and district attorneys functioned more as legal advisors than actual prosecutors," rendering legal advice to other government officers or performing administrative tasks for the courts.[228] Prosecuting attorneys were often appointed by the legislative branch of state government, and in Connecticut the judiciary was charged with appointing prosecutors,[229] suggesting that they were not understood to play an executive function. That is, if state prosecutors were exercising executive power, one might expect them to be appointed by governors.[230] New Jersey, North Carolina, and Virginia's state constitutions, all enacted before 1787, provided for the legislative appointment of Attorneys General (as did the 1796 Tennessee Constitution).[231] In North Carolina, a 1777 statute gave *judges* the power "to appoint some practising [l]awyer properly qualified to prosecute . . . as attorney for the State,"[232] even though the new state constitution, enacted the previous year, provided that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[233] A 1784 Connecticut statute likewise gave county courts the power to appoint the state's attorneys, a practice that persisted until at least 1854,[234] in spite of the fact that the state's 1818 constitution mandated that "[t]he powers of government shall be divided into three distinct Departments, and each of them confined to a separate magistracy."[235] In Vermont, the state's attorneys were appointed by the courts.[236]

227. *See* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 130 & n.36 (2014) (collecting early state constitutions).

228. O'Neill, *supra* note 205, at 677.

229. *See* SHANE, *supra* note 225, at 36-37.

230. *See id.* at 36 ("If the founding generation thought state prosecutors were inherently exercising executive power, one would have expected state attorneys general or other state prosecutors to be appointed by governors and made legally accountable to them."). *But see* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 151 & n.251 (2020) (arguing that legislative and judicial appointment of prosecutors is consistent with these officers exercising executive power).

231. SHANE, *supra* note 225, at 36-37.

232. *See* Barth, *supra* note 206, at 145 (quoting Acts of the North Carolina General Assembly, 1777 (Apr. 7-May 9, 1777), *in* 24 THE COLONIAL STATE RECORDS OF NORTH CAROLINA 1, 37 (William L. Saunders ed., 1886)); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 348 (2016).

233. N.C. CONST. of 1776, art. IV.

234. *See* Shane, *supra* note 232, at 348.

235. CONN. CONST. of 1818, art. II.

236. *See* SHANE, *supra* note 225, at 37.

State practice, both before and after 1789, should inform how we read Article II of the Federal Constitution, and it casts some doubt on the proposition that criminal prosecutions were paradigmatic exercises of the executive power and nondelegable to private parties. As Peter Shane has demonstrated, early state constitutions contained both Executive Power Vesting Clauses and clauses equivalent to Article II's Take Care (or "Faithful Execution") Clause.[237] Moreover, Shane shows that state constitutions adopted after 1787 largely followed the same textual approach in organizing the Executive Branch as both pre-1787 state constitutions and Article II of the Federal Constitution.[238] And yet, given that private prosecution remained common in state courts throughout the nineteenth century, it would appear that interpreters of state Vesting and Faithful Execution Clauses did not see these provisions as inconsistent with private criminal prosecution.[239] To reject the relevance of this state practice, an original public meaning originalist would need to argue that readers of Article II understood its text to convey a different meaning from identical language used in pre-1787 state constitutions, and that readers of state constitutions adopted after 1787 would have understood identical language in the new state constitutions to mean something distinct from Article II.[240]

Some participants in the ratifying debates seem to have assumed that the President's power to "take Care that the Laws be faithfully executed" was analogous to the power held by state executives. At the Virginia Ratifying Convention, Edmund Randolph compared the federal executive to state executives in order to "consider whether the Federal Executive be wisely constructed."[241] Randolph asked, "What are his powers? To see the laws executed. Every Executive in America has that power."[242] Similarly, the Federal Farmer agreed that in "[e]ach state in the union . . . the execution of [the

237. *See* Shane, *supra* note 232, at 329. Shane finds that the sixteen state constitutions in his sample all contained Executive Power Vesting Clauses, and the relevant state constitutions of Connecticut, Delaware, Kentucky, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Vermont also contained Take Care Clauses. *See id.* at 338, 341 & n.62.

238. *Id.* at 329.

239. *See* SHANE, *supra* note 225, at 37 ("If the wording of the federal Constitution implied complete presidential power over criminal prosecution, it seems weird that states after 1787 would adopt essentially identical wording but take control over state legal officers away from their respective governors.").

240. *Id.*

241. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1097 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

242. *Id.* at 1098.

laws was left], principally, to the direction and care of one man."[243] James Bowdoin of Massachusetts stated that "[t]he executive powers of the President are very similar to those of the several states, except in those points which relate more particularly to the Union, and respect ambassadors, public ministers, and consuls."[244] The pre- and post-ratification practice of private criminal prosecution would suggest, then, that Article II was not understood to prohibit the delegation of federal law enforcement power to private individuals.

More broadly, we should resist the temptation to assume that founding-era Americans understood the separation of powers in the terms supplied by contemporary formalists. As Jonathan Gienapp argues, eighteenth-century commentators were more concerned with the kinds of power an Executive ought to wield than with the inherent definition of executive power.[245] Anglo-American constitutional debate in this period was still conducted in the language of mixed constitutionalism, more concerned with achieving constitutional balance than separating powers based on their function.[246] As the varied classification of state prosecutors reveals, the lines between judicial and executive power were not always clear, or particularly salient. Just as Blackstone considered the judiciary to be part of the executive power,[247] founding-era Americans likewise tended to see judges as lesser magistrates beneath the chief magistrate.[248] Gordon Wood writes that colonial Americans considered judges "essentially as appendages or extensions of royal authority

243. 2 THE COMPLETE ANTI-FEDERALIST 310 (Herbert J. Storing ed., 1981). The Federal Farmer also noted, though, that each state "generally directed the first executive magistrate to act in certain cases by the advice of an executive council." *Id.* And many of the original states had plural executive branches, with independent executive offices whose occupants were selected by the legislature. *See, e.g.*, N.J. CONST. of 1776, art. XII (providing that the "Provincial Secretary" and the "Provincial Treasurer" "shall be severally appointed by the Council & Assembly"); N.C. CONST. of 1776, art. XXII (providing that "the General Assembly shall . . . appoint a Treasurer or Treasurers for this State").

244. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 128 (Jonathan Elliot, ed., J. B. Lippincott Co. 2d ed. 1891) (1838); *cf.* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot, ed., J. B. Lippincott Co. 2d ed. 1891) (1838) (reproducing the remarks of James Iredell in North Carolina during which he noted that "I believe most of the governors of the different states have powers similar to those of the President").

245. *See* Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229, 231 (2023).

246. *See id.* at 242.

247. *See supra* notes 195-200 and accompanying text.

248. *See, e.g.*, Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 789-90 (1999). I am indebted to Jonathan Gienapp for this point.

embodied in the governors, or chief magistrates."[249] Following Blackstone, John Adams argued in 1766 that there were fundamentally only two powers in any polity: "those of legislation and those of execution."[250] For Adams, "the administration of justice" was a component of "the executive part of the constitution."[251] The shifting and contested understanding of the separation of powers in founding-era America suggests that formalistic accounts of the executive power—including the extent to which it encompassed an exclusive power of law enforcement—are not warranted.

C. Private Enforcement of Federal Criminal Law

If English and colonial state practice both cast doubt on the view that prosecution was a nondelegable executive power, early federal practice likewise poses problems for the Article II theory of standing. At the outset, it is worth noting that the text of Article II does not say whether prosecution is a power that falls within the term "executive Power."[252] In the face of textual ambiguity, early practice helps to reveal the original meaning of Article II.[253] And, as Cass Sunstein and Lawrence Lessig write, early practice shows that the founding generation "did not understand prosecution to be within the notion of 'executive Power' exclusively, and therefore did not understand it to be within the exclusive domain of the President."[254]

In contrast to the states, a robust private right of prosecution did not develop in the federal system. In the years after ratification, Congress enacted several qui tam measures that empowered private individuals to bring suits pursuant to federal criminal statutes.[255] But the Judiciary Act of 1789, which

249. *Id.*; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 159 (1969).

250. Wood, *supra* note 248, at 790 (quoting 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 480 (Charles Francis Adams ed., 1851)).

251. *Id.* (quoting 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, *supra* note 250, at 481-82).

252. *See* U.S. CONST. art. II.

253. In one version of this claim, some scholars have argued that post-ratification practice can settle the meaning of terms that might have been underdetermined or ambiguous at the time of ratification. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3-4 (2019); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10-14 (2001). The practices at issue here did not produce the kind of constitutional settlement necessary for constitutional liquidation.

254. Lessig & Sunstein, *supra* note 162, at 15-16.

255. *See* Krent, *supra* note 205, at 296.

established the U.S. federal judiciary, also gave district attorneys the power to bring federal prosecutions.[256]

The scope of federal criminal law was very narrow in the early republic,[257] perhaps making it more feasible to rely exclusively on public enforcement. Congress passed the first federal criminal statute in 1790, which criminalized a small number of acts, including: treason; forgery or counterfeiting of public securities; theft or forgery of judicial records; perjury in federal courts or in depositions taken pursuant to federal law; bribery of federal judges; obstructing the service or execution of process, warrants, or court orders; aiding the escape of federal prisoners convicted of capital crimes; and attempts to arrest or imprison foreign ministers.[258] The Act also made it a crime against the United States to engage in murder, manslaughter, robbery, mutiny, piracy, theft of federal implements of war, the harboring of felons, or the receiving of stolen property—but only if committed on federal land, navigable waters, or the high seas.[259] It was "commonly assumed" that federal authority over criminal law was limited to offenses specified by statute.[260]

The Judiciary Act of 1789 established an exclusive system of public prosecution, but it was not foreordained that these officers would be part of the Executive Branch. The Act established the position of the Attorney General[261] and the office of district attorney, who was to be a person "learned in the law" entrusted to "prosecute in [a] district all delinquents for crimes and offences, cognizable under the authority of the United States."[262] The Bill introduced in the Senate provided that district attorneys would be appointed by "each District Court" and the Attorney General would be appointed by the Supreme Court.[263] But the Senate ultimately decided against lodging the appointment power with the federal judiciary, and the final version of the Act made no mention of who would appoint these officers[264]—leaving in place the

256. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (codified as amended in scattered sections of 5 and 28 U.S.C.).

257. *See* ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939, at 10 (2011).

258. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 1-33, 1 Stat. 112 (1790).

259. *Id.*

260. Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 227 (1986). The Supreme Court held in 1812 that federal courts lack jurisdiction over common-law crimes. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 32-33 (1812).

261. Ch. 20, § 35, 1 Stat. 73, 93 (codified as amended in scattered sections of 5 and 28 U.S.C.).

262. *Id.* at 92.

263. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 107 (Maeva Marcus ed. 1992).

264. *Id.* at 106.

constitutional default of presidential appointment.[265] We do not know why Congress ultimately opted not to vest the appointment of the district attorneys and Attorney General in the federal judiciary, but the existence of this draft suggests that the First Congress did not think it obvious that presidential appointment was constitutionally required. Instead, it suggests that the role of prosecutors was unsettled at this time.

The Judiciary Act did not presume that district attorneys would exercise discretion in deciding which legal violations to prosecute. Instead, the Act mandated prosecution of all offenders, and compensated district attorneys with a fee for each prosecution brought[266]—creating incentives at odds with contemporary conceptions of enforcement discretion.

Although Congress never gave victims a legally cognizable right to bring prosecutions under federal law, private citizens continued to participate in federal criminal prosecutions. Private citizens could "present evidence of various crimes before the magistrate" in federal court and receive "a bench warrant for the arrest of the accused."[267] Private citizens in the early Republic could then directly initiate prosecutions by contacting the grand jury and attempting to persuade it to issue presentments, bypassing the Executive Branch.[268] In a 1794 opinion, Attorney General Bradford suggested that a private citizen could compel a district attorney to act on a grand jury presentment.[269] Responding to a request made by the Secretary of State on behalf of a British consul stationed in Virginia, Bradford wrote that the victim "ought not to be concluded by my opinion or that of the district attorney" that charges were not warranted.[270] Instead, "he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to *present* the offence in that court, it will be the duty of the district attorney to reduce the presentment into form."[271] Bradford apparently believed that private citizens could use this procedure to "put [a case] in a train for *judicial* determination," even after the district attorney had declined to prosecute.[272] During the Republic's first few decades, private individuals could also "appear before a federal or state judicial official and swear out a complaint against a

265. *See* U.S. CONST., art. II, § 2.

266. *See* Price, *supra* note 106, at 719.

267. *See* Barth, *supra* note 206, at 152 (citing Krent, *supra* note 205, at 292).

268. *See* Krent, *supra* note 205, at 293.

269. *See id.* at 294 (citing 1 Op. Att'y Gen. 43 (1794)).

270. *Id.* (quoting 1 Op. Att'y Gen. 43 (1794)).

271. *Id.* (quoting 1 Op. Att'y Gen. 43 (1794)).

272. *Id.* (quoting 1 Op. Att'y Gen. 43 (1794)).

suspected criminal."[273] As a result, public prosecutors did not always control the initiation of criminal proceedings.

As the examples above indicate, grand juries and judges often had significant power to structure federal criminal prosecutions. Circuit Justice James Iredell in 1798 told a federal grand jury that it was "'certainly . . . not confined to prosecutions commenced by the attorney of the United States, or to such evidence as he may lay before you.'"[274] Judges also exhorted grand juries to issue presentments against particular individuals, or to investigate them, without any involvement of the district attorney.[275] There is also some evidence that judges in the early republic conducted prosecutions; Jed Shugerman notes that federal judges led "what appeared to be prosecutions" during the Whiskey Rebellion of 1794, and initiated prosecutions under the Alien and Sedition Acts.[276] The judiciary's extensive role in initiating prosecutions casts doubt on the idea that prosecution was a quintessentially executive function.

Federal criminal prosecutions were also sometimes directed by officials outside of the Executive Branch. As Jerry Mashaw writes, early law enforcement had a "radically coordinate structure."[277] In the absence of a robust federal bureaucracy, federal departments often resorted to hiring private attorneys to prosecute criminal cases on behalf of the government.[278] Federal revenue collectors, for instance, paid fees to private counsel to enforce collection cases.[279]

Congress also allowed state officials, far removed from Executive Branch control, to direct federal prosecutions.[280] In the early 1800s, Congress regularly enacted provisions permitting or requiring federal criminal cases to be prosecuted in state courts.[281] For instance, Congress in 1799 vested jurisdiction

273. *Id.*

274. Price, *supra* note 106, at 721 (quoting 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 260 (Maeva Marcus ed., 1990)).

275. *See* Krent, *supra* note 205, at 293.

276. *See* Shugerman, *supra* note 227, at 129.

277. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 83 (2012).

278. *See* Dangel, *supra* note 167, at 1083 (citing HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 225, 229 (1937)).

279. *See* Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 75 (1983).

280. *See* Leslie B. Arffa, Note, *Separation of Prosecutors*, 128 Yale L.J. 1078, 1089 (2019); Lessig & Sunstein, *supra* note 162, at 18.

281. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 213 (1985) (citing Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925)).

to hear criminal offenses against the postal laws in "the justices of the peace, magistrates, and other judicial courts of the several states" and mandated that "such justices, magistrates, or judiciary, shall take cognizance thereof, and proceed to judgment and execution as in other cases."[282] When granting concurrent jurisdiction to state courts, the first Congresses also "assigned state officials auxiliary law enforcement tasks."[283] This concurrent jurisdiction led to federal prosecutions "initiated and carried out by state officials."[284] To be sure, this practice was contested, and some doubted the constitutionality of delegating federal criminal jurisdiction to state tribunals.[285] These constitutional arguments centered, however, on the proper interpretation of Article III—not the constitutionality of prosecution by state officials.[286]

Even within the early Executive Branch, the president had little supervision or control over prosecution, and certainly did not exercise what the *TransUnion* majority described as "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[287] As has been frequently noted, the early Executive Branch was not unitary.[288] The Judiciary Act of 1789 provided for the President to appoint a "meet person learned in the law" in each judicial district to "act as attorney for the United States in such district" and to appoint a "meet person, learned in law" to "act as

282. Warren, *supra* note 281, at 553-54 (citing to An Act to Establish the Post-Office of the United States, ch. 43, § 28, 1 Stat. 733, 740-41 (1799)).

283. *See* Krent, *supra* note 205, at 303.

284. *Id.* at 306.

285. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1750 (1833). The Supreme Court affirmed concurrent jurisdiction in consenting state courts in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-29 (1820). *But see* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 272 (2011) ("[I]t is difficult to read *Houston v. Moore* as clear precedent upholding the state courts' ability to entertain prosecutions of federal crimes.").

286. *See, e.g.*, 3 STORY, *supra* note 285, § 1750; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31, 337 (1816) (arguing that delegating federal criminal prosecutions to state courts would impermissibly vest "the judicial power of the United States" in non-Article III courts).

287. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021). At the very least, this suggests that early practice was inconsistent with strong versions of the "unitary executive" theory, which hold that all exercises of the executive power must be under the supervision and control of the President. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (describing this view).

288. *See, e.g.*, MASHAW, *supra* note 277, at 43-44, 293 (describing how early administrative practices included dispersed and overlapping authority, with administrators exercising significant independent discretion); Shane, *supra* note 232, at 325; Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 91-95; Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 757 (2023).

attorney-general for the United States . . . ."[289] But the Act did not provide the Attorney General—let alone the President—with authority over the district attorneys.[290] The Attorney General exercised no control over the district attorneys for the next eight decades.[291] Nor was the structure of the district attorney office conducive to case-by-case enforcement discretion; like most federal officials, district attorneys in the nineteenth century were paid by fees—on a per-conviction basis until 1896—rather than by salary.[292] In fact, the shift to a fixed salary in 1896 stemmed from concerns that district attorneys were not able to exercise prosecutorial discretion.[293]

As a result of the Judiciary Act of 1789, district attorneys in the early republic held the exclusive power to bring federal prosecutions.[294] Yet private citizens, judges, and state officials continued to wield significant power over the initiation and proceeding of criminal prosecutions. Even within the early Executive Branch, there was little presidential control over the district attorneys, and the fee-based structure of these officers' compensation provided little role for prosecutorial discretion.

Conclusion

The Article II theory of standing, advanced by jurists like Judge Newsom and Justice Thomas, assumes that the "Executive Power" at the founding entailed an exclusive power over the direction of law enforcement, with criminal prosecution being the paradigm case of a public wrong. They further argue that the Executive alone is empowered to exercise enforcement discretion in bringing suits to enforce the laws. As a result, they hold that the Vesting and Take Care clauses of Article II limit the ability of private plaintiffs to enforce federal civil law. As this Note demonstrates, the eighteenth-century history of criminal law enforcement in England, the Colonies, and the early United States casts doubt on these claims. In England and the United States, the executive power over prosecutions was routinely delegated to private parties

289. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93 (codified as amended in scattered sections of 5 and 28 U.S.C.); *see* Shugerman, *supra* note 227, at 129.

290. *See* DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 6 (1980).

291. *See* Shugerman, *supra* note 227, at 129.

292. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 272-73 (2013); *cf.* MASHAW, *supra* note 277, at 61 (noting that "enforcement personnel responsible for prosecuting violators of tax and many other statutes were entitled to a share of the fines or forfeitures collected" (footnote omitted)).

293. PARRILLO, *supra* note 292, at 279.

294. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

with little practical oversight by executive officials. Even though the Judiciary Act of 1789 gave district attorneys the exclusive power to bring federal criminal prosecutions, victims and other private parties were not shut out of the process. Moreover, the structure of the district attorney office was not consistent with the proactive, case-by-case enforcement discretion that the Article II theory asserts is a core component of the executive power.

This evidence that criminal prosecution and the corresponding exercise of enforcement discretion were not exclusively reserved to the Executive Branch at the founding may also have broader doctrinal implications beyond standing. For instance, the majority in *Trump v. United States*[295] treats prosecutorial discretion as the clearest example of a core executive function.[296] After holding that the president is "absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority,"[297] Justice Roberts turned to consider the conduct alleged in the indictment of Donald Trump.[298] This included the allegation that Trump attempted to use the Justice Department to conduct "sham election crime investigations" and to send a letter falsely claiming that the Justice Department had identified significant concerns with the election results.[299] The majority concluded that such conduct was absolutely immune.[300] Citing standing cases like *TransUnion* and *United States v. Texas*, Justice Roberts argued that "the Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime."[301] Of course, this is perfectly true as a matter of precedent and settled practice. But the long history of prosecution by private parties and state officials might require us to rethink the scope of the president's Article II power, including, ironically, his immunity from prosecution itself.

295. 144 S. Ct. 2312 (2024).

296. *See id.* at 2335 (2024).

297. *Id.* at 2328.

298. *Id.* at 2334.

299. *Id.* at 2324 (citation and internal quotation marks omitted).

300. *Id.*

301. *Id.* at 2334 (quoting United States v. Nixon, 418 U.S., 683, 693 (1974)).