

## WHAT IF JUSTICE SCALIA TOOK HISTORY AND THE RULE OF LAW SERIOUSLY?

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The most appealing justifications for current standing law are that it preserves the separation of powers and protects the democratic process from the countermajoritarian intrusion of judicial review.<sup>1</sup> Both rationales, however, misconceive the relation between our core conceptions of democracy and the rule of law. Frank Michelman's recent work struggles with the paradox of constitutional democracy, in which self-rule is pitted against the rule of law as pronounced by an unelected and unaccountable judiciary.<sup>2</sup> Though we cannot escape this conundrum at the conceptual level, it can nevertheless be dissolved at the level of practice. The place where the conflict between democracy and the rule of law evaporates is the citizen suit, exemplified in its modern form by Section 1365 of the Clean Water Act.<sup>3</sup> From this perspective, the Supreme Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*<sup>4</sup> is more than a victory for the environment and those who are concerned about it—though that, too, is of the utmost importance. In heralding what appears to be a relative return to sanity in the law of standing, the decision in *Laidlaw* strikes a profound blow for a conception of democracy that is as radical as it is traditional.

Not everyone sees it that way, of course. In his dissent in *Laidlaw*, Justice Scalia expresses concern that the majority's decision holds "grave implications for democratic governance."<sup>5</sup> His fear is that the Court's "new" and "revolutionary" approach to standing

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1. See, e.g., *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("[A]llowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. . . . We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.").

2. See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999).

3. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1365(a), (g) (1994).

4. 528 U.S. 167 (2000).

5. See *id.* at 202 (Scalia, J., dissenting).

“will permit the entire body of public civil penalties to be handed over to enforcement by private interests.”<sup>6</sup> One must pause a moment to marvel at the irony: Private enforcement of civil penalties—as Justice Scalia has since conceded—has been a staple of Anglo-American jurisprudence since the fourteenth century.<sup>7</sup> These “popular actions,” Blackstone noted, “were given to the people in general.”<sup>8</sup> Both before the American Revolution and after, the so-called informer or *qui tam* actions enabled the ordinary citizen to “see that a public offence be properly pursued and punished, and that a public grievance be remedied.”<sup>9</sup> Indeed, in 1805, Chief Justice Marshall characterized private enforcement as the norm rather than the exception: “Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information.”<sup>10</sup>

In his majority opinion in *Lujan v. Defenders of Wildlife*,<sup>11</sup> Justice Scalia offhandedly dismissed the informer action as the “unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government’s benefit, by providing a cash bounty for the victorious plaintiff.”<sup>12</sup> Let us put aside for the moment the fact that some informer statutes did not allow the litigant to share in the bounty. (Most did.) Put aside, too, the fact that the informer action was not the only means by which a plaintiff could sue to vindicate issues of public rights and duties without having to demonstrate a personal stake in the outcome: under the English relator practice, as followed by nineteenth century American courts, any person might seek the prerogative writs of mandamus, prohibition, and quo warranto to redress the legal injuries of “refusal or neglect of justice.”<sup>13</sup> Put aside, as well, the fact that the Supreme

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6. *See id.* at 209 (Scalia, J., dissenting).

7. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1864 (2000) (citing the Statute Prohibiting the Sale of Wares After the Close of Fair, 5 Edw. 3, ch. 5 (1331)); *see also* 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 240 (1926) (citing 3 Henry 7, ch. 3 (1424)).

8. 3 WILLIAM BLACKSTONE, COMMENTARIES \*160 (emphasis in original).

9. *See People ex rel. Case v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837).

10. *See Adams, qui tam v. Woods*, 6 U.S. (2 Cranch) 336 (1805).

11. 504 U.S. 555 (1992).

12. *Id.* at 572-73.

13. *See Blackstone, supra* note 8, at \*109. For more detailed discussions, see Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 818-27 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 258-61 (1961); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1270 (1961) (“I have encountered no case before 1807 in which the standing of plaintiff is mooted, though the lists of the cases in the digests strongly suggest the possibility that

Court, in 1875, specifically approved of this public rights practice in a federal mandamus case against the Union Pacific—upholding the relators’ right to sue to enforce a statutory duty despite the railroad’s argument that they “had no interest other than such as belonged to others . . . and the duty they seek to enforce by the writ is a duty to the public generally.”<sup>14</sup> Rather, consider the fact that the very existence of these forms of action undercuts the central notion of modern standing law (as articulated in cases running from *Schlesinger v. Reservists Committee to Stop the War*<sup>15</sup> and *United States v. Richardson*<sup>16</sup> through *Lujan* and *Steel Company v. Citizens for a Better Environment*<sup>17</sup>) that “vindication of the rule of law—the ‘undifferentiated

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the plaintiff in some of them was without a personal interest.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1361, 1394-1409 (1988).

For a contrary point of view of the English practice, see Bradley S. Clanton, *Standing and the English Prerogative Writs: the Original Understanding*, 63 BROOK. L. REV. 1001 (1997). Clanton’s argument, however, has four principal flaws. First, and most strikingly, he dismisses the significance of the English relator practice as “irrelevant” notwithstanding the relator’s lack of a personal interest because the King was understood to be the real party in interest. But this legal fiction rather begs the question of how unaffected “bystanders” would have standing to represent the state. See *infra* notes 50-60 and accompanying text (discussing *Vermont Agency*, 120 S. Ct. at 1861-66). Second, in canvassing the English relator practice, Clanton does not distinguish between private rights mandamus cases, where there was a personal interest requirement, and public rights mandamus cases, where there was not. Third, the fact that “strangers” often had some personal interest in the matter before the court does not establish that a personal stake was a prerequisite to suit. Indeed, he often infers a negative (that a stranger who lacked a personal interest could not sue) solely from the discussion of a positive (the legal status of a party with an interest in the matter); yet everyone agrees that the courts treated the former differently than the latter—i.e., one mandatory, the other discretionary. Fourth, whatever the antecedent English practices, Clanton does not consider their reception and implementation in this country where the predominant rule was that:

The question, who shall be the relator . . . depends upon the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator. . . . A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.

*County Comm’rs v. People ex rel. Metz*, 11 Ill. 202, 207-08 (1849). The United States Supreme Court explicitly endorsed *Metz*, noting that: “[t]here is . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such.” *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355 (1875).

14. *Hall*, 91 U.S. at 354-56.

15. 418 U.S. 208 (1974).

16. 418 U.S. 166 (1974).

17. 523 U.S. 83 (1998).

public interest' in faithful execution of" the law is not the proper province of the citizen plaintiff.<sup>18</sup>

For Justice Scalia, democracy and the rule of law require that private parties not be allowed to invoke the courts' power to see that the law is enforced. Why should this be? The immediate answer lies in a highly conventional, though somewhat rigid conception of the separation of powers. Courts are unelected and, to that extent, unaccountable; it follows that the "potent" power of judicial review should be used sparingly, only when the circumstances "genuinely" call for it.<sup>19</sup> "Any other conclusion," we are warned, "would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."<sup>20</sup>

We are on familiar ground so far. But what about the intimation that rule-of-law values counsel against the citizen suit? Here, Justice Scalia adds a fillip of his own. For the more standard ploy is to refer the would-be citizen plaintiff to the *political process*: In the familiar argument, a generalized grievance is by definition more appropriately the subject of democratic politics. But his is not the standard argument. Rather, Justice Scalia invokes the separation of powers concern of such cases as *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>21</sup> and *Allen v. Wright*<sup>22</sup> that the Executive Branch must be allowed its prosecutorial discretion. He cannot rest there, however, because the point of the Clean Water Act's citizen-suit provision is that Congress (remember Congress?) has affirmatively decided that official enforcement should be supplemented by citizen-initiated suits. Accordingly, Justice Scalia revives a notion he first floated in *Lujan*: that standing doctrine's concrete injury requirement is equally a matter of Article II's command that the President "take Care that the Laws be faithfully executed."<sup>23</sup> "By permitting citizens to pursue civil

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18. See *id.* at 106 (quoting *Lujan*, 504 U.S. at 577).

19. See *Richardson*, 418 U.S. at 191-92 (Powell, J., concurring).

20. *Id.* at 179 (majority opinion).

21. 426 U.S. 26 (1976).

22. 468 U.S. 737 (1984).

23. See *Lujan*, 504 U.S. at 577:

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed. . . .'

penalties payable to the Federal Treasury,” Justice Scalia observes in *Laidlaw*, “the Act . . . turns over to private citizens the function of enforcing the law.”<sup>24</sup>

With this contention, the separation of powers argument has taken a new turn. In cases such as *Simon, Allen v. Wright*, and *Lujan* the question of standing is a question whether citizens can invoke the powers of the Court to intrude on Executive decision-making with respect to how the law should be enforced. The related concern is that the courts will become “continuing monitors of the wisdom and soundness of Executive action.”<sup>25</sup> Here, in contrast, no such concerns are at stake. The courts are not being asked to second-guess any Executive decision; they are being asked only to enforce a statute’s proscription on primary behavior. The Justice Department, moreover, retains supervisory authority over the suit—including the power to take over the suit and to review any settlement.<sup>26</sup>

But, if the separation of powers argument has taken a new turn, it is one in which rule-of-law and democratic values ostensibly cohere. For in arguing that Article II grants the Executive the *exclusive* power of law enforcement, Justice Scalia is also arguing that the enforcement of the law should be subject to democratic governance. His complaint is that citizen suits go forward “without meaningful public control.”<sup>27</sup> An exclusive power to enforce the law, in contrast, places that power in Executive officials accountable to the electorate.<sup>28</sup> This

24. *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting). In a footnote in his majority opinion in *Vermont Agency*, Justice Scalia purported to preserve the Article II argument for the future. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1865 n.8 (2000).

25. See *Allen*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

26. Under the Clean Water Act, the government can foreclose a citizen suit by filing its own action. See 33 U.S.C. § 1365(b)(1)(B) (1994). And, under § 1365(c)(2), the Administrator of the EPA can “intervene as a matter of right” if the government opposes a citizen suit. Similar safeguards are obtained under the False Claims Act, the statute at issue in *Vermont Agency*. See 31 U.S.C. §§ 3729, 3730(b), (c) (1994 & Supp. IV 1998).

It is not the case, however, that citizen suits have no impact on Executive decision-making: Clearly, the citizen’s decision to bring a suit abrogates any decision by law enforcement officials not to prosecute.

27. See *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting).

28. “Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.” *Id.*, at 210 (Scalia, J., dissenting). See also *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (“Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect.”).

In other contexts, however, Justice Scalia has questioned the Justice Department’s authority to exercise prosecutorial discretion. See *Davis v. United States*, 512 U.S. 452, 464 (1994)

argument may appear sound, but there are some problems. The first problem is that the Article II argument does not escape the historical objection: The same informer actions and public mandamus cases that give the lie to the Court's Article III jurisprudence also refute the claim that the Framers intended to give the President sole and conclusive authority over the enforcement of the laws.<sup>29</sup> Within two months of assuming their roles as members of the first Congress, the Framers passed a customs house informer statute.<sup>30</sup> A few months later, they provided for federal jurisdiction over informer suits in the Judiciary Act of 1789.<sup>31</sup>

The second problem is that the argument ignores some powerful instrumental reasons for employing citizen suits as a supplementary mechanism of enforcement. For one thing, there is the problem of limited resources: Neither the Justice Department nor the EPA has the wherewithal to monitor every discharge from every plant in the United States.<sup>32</sup> For another, there is the problem of capture so fa-

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(Scalia, J., concurring) ("The Executive has the power (*whether or not it has the right*) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion.") (emphasis added).

29. This problem has since been noted by the dissent in *Vermont Agency*. See 120 S. Ct. at 1878 ("The historical evidence. . . , together with the evidence that private prosecutions were commonplace in the 19th century, . . . is also sufficient to resolve the Article II question.") (Stevens, J., dissenting).

30. See Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45 (informer action against custom collectors who failed to post fee and duty schedules or who overcharged individuals). Justice Scalia's majority opinion in *Vermont Agency* identified another seven such statutes enacted by the first Congress: Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124-25 (action by author or proprietor for penalty for violation of copyright); Act of Mar. 1, 1790, ch. 2, § 6, 1 Stat. 102 (action by census taker for penalty for failure to cooperate); Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (informer action for failure to file census return); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (action for carriage of seamen without contract or illegal harboring of runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137-38 (action for forfeiture of goods used in unlicensed trade with Indian tribes); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209 (informer action for violation of spirits duties); Act. Of Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116 (informer action in cases of larceny or receipt of stolen goods). See 120 S. Ct. at 1865 nn.5-6.

31. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (authorizing federal district court jurisdiction "of all suits for penalties and forfeitures incurred, under the laws of the United States"). Other actions with respect to informer suits taken by the early Congresses included: Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277 (providing rules for the award of costs in cases brought by "any informer or plaintiff on a penal statute to whose benefit the penalty or any part thereof if recovered is directed by law"); Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (informer action to enforce certain prohibitions on the slave trade); and Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733 (codified as amended at 25 U.S.C. § 201 (1994)) (informer action to enforce regulations with respect to trade with Indian tribes).

32. Elsewhere, Justice Scalia has quoted Justice (and former Attorney General) Jackson's observation that:

[N]o prosecutor can even investigate all of the cases in which he receives complaints.

miliar from the administrative law and rational choice literature.<sup>33</sup> Indeed, *Laidlaw* itself provides a nice illustration: The company asked the South Carolina Department of Health and Environmental Control to file a suit against it in order to bar the citizen suit that had already been threatened.<sup>34</sup> The company's lawyer then drafted the Department's complaint, and the company paid the Department's filing fee.<sup>35</sup> Just one day before the citizen suit could be filed, the Department and the company settled the enforcement suit for a paltry \$100,000 in civil penalties.<sup>36</sup>

There is, however, a more fundamental problem with the Article II argument—one that derives directly from the rule-of-law ideal itself. Ours is “a government of laws, and not of men.”<sup>37</sup> But, what does that mean? The conventional understanding of the rule-of-law ideal focuses principally on constraints on official decision-making. A government of laws is one in which official action is governed by pre-existing legal rules of sufficient clarity and generality that they are capable of precluding the arbitrary whim of individuals or the brute impositions of power. Thus, the rule-of-law ideal is closely entwined with law's traditional tendency toward formalism. This, for example, is the view promoted in Justice Scalia's well-known article *The Rule of Law as a Law of Rules*,<sup>38</sup> which insists that standards, totality of circumstances, and multi-factor balancing tests are not “‘law,’ properly

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If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning.

*Morrison*, 487 U.S. at 727-28 (Scalia, J., dissenting).

33. See George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1973) (“[R]egulation is acquired by the industry and is designed and operated primarily for its benefit.”).

34. See *Laidlaw*, 528 U.S. at 176. The described action is barred by 33 U.S.C. § 1365(b)(1)(B) (1994).

35. See *Laidlaw*, 528 U.S. at 176-77.

36. See *id.* at 177.

37. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The origins of the phrase trace back to Aristotle by way of James Harrington. See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 (1986) (quoting JAMES HARRINGTON, *The Commonwealth of Oceana*, in THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J. Pocock ed., 1977)).

38. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). The relationship between Justice Scalia's narrow view of rules, his Article III jurisprudence, and his plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is discussed in my essay, *Making the Familiar Conventional Again*, 99 MICH. L. REV. (forthcoming May 2001).

speaking.”<sup>39</sup> Second, and relatedly, the rule-of-law ideal insists that no one be above the law; even the highest officials are subject to legal strictures.<sup>40</sup> Third (and this is the more general principle of which the previous is a corollary), the rule-of-law ideal maintains that every person is governed by the *same* law without regard to status or person: “Equal justice under law”—that is, one law for rich and poor, black and white, gentleman and commoner alike.

But there is another, often overlooked dimension of the rule-of-law ideal that emphasizes the *ordinariness* of law. Thus, in his classic formulation of the rule of law, A.V. Dicey identified as well the quality of ordinary law administered by ordinary tribunals.<sup>41</sup> This is the sense in which great issues of constitutional law can be raised and determined in an ordinary trespass action, as in *Entick v. Carrington*<sup>42</sup> or *Luther v. Borden*,<sup>43</sup> or a simple action for assault, as (more notoriously) was the case in *Dred Scott v. Sandford*.<sup>44</sup> It is the sense in which we recognize the rule of law as vindicated when General Pinochet is detained by regular municipal police officers acting on the authority of an arrest warrant issued by the Bow Street magistrates’ court, one of London’s local criminal courts.<sup>45</sup>

This sense, I want to insist, is no contingent feature of the rule-of-law ideal but a central and constitutive dimension. Consider another aspect of the paradox of constitutional democracy: “In a constitutional democracy,” Michel Rosenfeld points out, “the rule of law on the one hand depends on the state for its implementation and enforcement while, on the other hand, it serves as the citizen’s most le-

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39. Scalia, *supra* note 38, at 1182. A discussion and critique of this view can be found in Chapter 8 of my book, *A CLEARING IN THE FOREST: LAW, LIFE & MIND* (forthcoming Sept. 2001).

40. Cf. J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 324 (1975):

If laws can attain the status of reason . . . then laws must rule and not men. . . . But the argument is in danger of becoming circular: laws ensure that reason rules and not particular passions, but they are invented and maintained by men and can prevail only when men are guided by reason to the public good and not by passion to private ends. The laws must maintain themselves, then, regulating the behavior of the men who maintain them. . . .

41. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 179-92 (1908).

42. 95 Eng. Rep. 807 (K.B. 1765).

43. 48 U.S. (7 How.) 1 (1849).

44. 60 U.S. (19 How.) 393 (1856).

45. Maurice Chittenden, *Pinochet Held by London Police on Murder Charges*, *SUNDAY TIMES* (London), October 18, 1998, at 1.

gitimate and effective weapon against the state.”<sup>46</sup> The citizen would be up the creek without the proverbial paddle were it not for the commitment of ordinary courts to apply ordinary law without regard to the official status of even the highest governmental actors. Ordinary law administered by ordinary tribunals even in extraordinary cases.

It is this dimension of the rule-of-law ideal that I wish to contrast with Justice Scalia’s wholly ahistorical suggestion that Article II confers on the Executive the exclusive power to vindicate the rule of law. What is striking about this position is its elitist and deeply authoritarian character. Only the President and his immediate subordinates are authorized to enforce the law. One can almost hear him, in a deadpan paraphrase of McMurphy’s mocking comment in *One Flew Over the Cuckoo’s Nest*: “Anybody enforcing the law whenever they feel like it? Why, why, . . . that would be anarchy!”<sup>47</sup> For Justice Scalia, the idea that a lowly citizen with no interest other than a passion for justice might stand before the bar of the court and invoke the majesty of the law against a public wrongdoer is a kind of sacrilege to be condemned; it is the exploitation of the high mission of the law for merely personal gain. “Thus,” he says, “is a public fine diverted to a private interest.”<sup>48</sup> Citizen suits, he continues, represent “the use of public remedies for private wrongs.”<sup>49</sup>

His, then, is an imperial vision of the law that leaves us—the citizens and ostensible rulers—as its passive and alienated subjects. To be clear, it is not just that this vision has no room for a citizen’s standing to insist upon the public’s interest in the faithful execution of the law. It is rather that this view treats such plainly other-regarding action as a transgression: the hijacking of a public right for private purposes. Should one of us have the temerity to take legal action—to insist that it is our air, our water, our *law*—she will be greeted with the kind of condemnation usually reserved for the antisocial: stranger, officious intermeddler, special interest, protection racket, corruption.

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46. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy* 4 (1999) (unpublished manuscript, on file with author).

47. KEN KESEY, *ONE FLEW OVER THE CUCKOO’S NEST* 84-85 (1962) (Upon being told that the toothpaste is kept under lock-and-key until 6:45 because “it’s ward policy,” McMurphy exclaims: “You’re saying people’d be brushin’ their teeth whenever the spirit moved them. . . . And, lordy can you imagine? Teeth bein’ brushed at six-thirty, six-twenty—who can tell? maybe even six o’clock. Yeah, I can see your point”).

48. *Laidlaw*, 528 U.S. at 210 (Scalia, J., dissenting).

49. *See id.*

Given this attitude, it is instructive (if not a little amusing) to watch Justice Scalia struggle with the dissonance in his opinion for the Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.<sup>50</sup> “[T]he long tradition of *qui tam* actions in England and the American Colonies” and their prevalence “in the period immediately before and after the framing of the Constitution” make the “history well nigh conclusive” on the constitutional question of the informer’s standing.<sup>51</sup> Hamstrung by history, Justice Scalia is at a loss to square the informer action with the notion of private interest that undergirds his Article III jurisprudence. Recall that, in *Lujan v. Defenders of Wildlife*, he had suggested that the Congress “created a concrete private interest in the outcome . . . by providing a cash bounty for the victorious [informer].”<sup>52</sup> But, he is forced to reject that analysis here: “the same might be said of someone who has placed a wager upon the outcome.”<sup>53</sup> Moreover, in *Steel Company*, Justice Scalia had held that “an interest that is merely a ‘byproduct’ of the suit itself cannot give rise to a cognizable injury in fact.”<sup>54</sup> So, too, Justice Scalia observes that it “would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States,” but then concludes that this “analysis is precluded by the fact that the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery.”<sup>55</sup> Instead, he determines—without explanation—that the informer’s standing can be based on “the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.”<sup>56</sup> He reasons that the False Claims Act “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”<sup>57</sup>

Though a delightful legal fiction, the assignment gambit is for three reasons quite unreasonable. First, the doctrine upon which Justice Scalia relies concerns the standing of commercial assignees of

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50. 120 S. Ct. 1858 (2000).

51. *Id.* at 1863-65.

52. *See* 504 U.S. 555, 573 (1992); *see also supra* note 12 and accompanying text.

53. *See Vermont Agency*, 120 S. Ct. at 1862 (quoting *Lujan*, 504 U.S. at 573). Thus, he explains that: “[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing. . . . The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.” 120 S. Ct. at 1862.

54. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998).

55. *Vermont Agency*, 120 S. Ct. at 1862.

56. *Id.* at 1863.

57. *Id.*

business enterprises and other such property interests.<sup>58</sup> In all those cases, the assignee—who, one would assume, paid good money for the assets at issue—had at stake bona fide financial interests that pre-existed (i.e., were not merely the byproduct of) the lawsuit itself. Second, it is difficult to see how the assignment fiction avoids the Article II objection Justice Scalia first raised in *Lujan* and repeated in *Steel Company* and *Laidlaw*—by “assigning” the right to enforce a governmental “damages claim,” “Congress has done precisely what we have said it cannot do: convert an ‘undifferentiated public interest’ into an ‘individual right’ vindicable in the courts.”<sup>59</sup> Third, there is nothing in the lengthy history of the informer action that even suggests the assignment theory. Quite the contrary, the informer was merely one of several kinds of relators authorized to “see that a public offence be properly pursued and punished, and that a public grievance be remedied.”<sup>60</sup> Indeed, in 1875, the Court explicitly recognized the right of the relator to sue “to enforce a public duty, not due to the government as such.”<sup>61</sup> Obviously, the government cannot assign rights or duties to which it has no claim. Yet, the *Hall* Court had no problem either with the constitutionality of the statute authorizing suit in that case nor with the right of the relators to pursue the action in the absence of any demonstrated personal interest.

Justice Scalia’s *Vermont Agency* decision may follow the dictates of history, but it does not understand its lesson: Citizens are neither agents nor assigns of the government; they are—that is, *we* are—its *principal*. Citizen suits, therefore, stand on a different conceptual and constitutional footing than actions asserting mere private rights. Justice Scalia treats informer actions anachronistically in terms of a modern understanding that recognizes only the polar extremes of, on one hand, self-interested private action and, on the other, public interest pursued by the official organs of an exclusive authority. But this is the very understanding that pits self-rule against the rule of law. The lesson instantiated in the historical practice of the citizen’s

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58. See *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962) (assignee of defunct UHF station brought antitrust action against businesses that allegedly conspired to put the station out of business); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) (assignee of patent licenses brought suit for royalty payments); *Hubbard v. Tod*, 171 U.S. 474 (1898) (assignee of bank loans).

59. See *Laidlaw*, 528 U.S. at 205 (Scalia, J., dissenting) (quoting *Lujan*, 504 U.S. at 561; *Steel Co.* 523 U.S. at 106).

60. See *People ex rel. Case v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837).

61. See *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355 (1875).

suit is that, in a democratic legal order, there should be no jurisdictional line separating the rulers from the ruled.

This was the view of earlier generations of Americans more alert to the values of citizen participation. “[W]here the object is the enforcement of a public right,” wrote one nineteenth century court, “the People are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.”<sup>62</sup> For these earlier generations, democracy and the rule of law were not in tension because the rule of law was a common, public good to be employed democratically by the citizenry at large. And they were quite right to see it thus. For the vision of the rule of law as ordinary law invoked by ordinary people is a vision of law as a leveling agent. No one above the law and everyone, even the least amongst us, able to use its power to unsettle the wealthy and the powerful. The popular actions of these earlier generations are, rightly, the historical antecedents of Roberto Unger’s notion of destabilization rights,<sup>63</sup> the noble legal implements of a constitutional democracy more radical and, in some ways, more democratic than our own.

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62. *County Comm’rs v. People ex rel. Metz*, 11 Ill. 202, 207-08 (1849). See *supra* note 13.

63. See ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530-35 (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 39, 52-56 (1986).