

COMMON INFORMERS AND GOVERNMENT BY LAWSUIT

Jared Lucky* & Diego A. Zambrano**

Stanford Law Review (forthcoming 2027)

Abstract

According to the Supreme Court, private litigation has run amok in America. At some point in the twentieth century, the Court believes, litigation transformed from a mechanism for resolving discrete disputes into a tool for regulatory enforcement and “government by lawsuit.”¹ The consequences of this transformation are everywhere: sprawling class actions, universal injunctions, and endless suits under environmental, civil rights, and antitrust statutes—all modern departures from traditional practice, according to the Court’s originalist majority. Justice Kavanaugh summed up this narrative when he asserted in *TransUnion* that “until the 20th century, Congress rarely created ‘citizen suit’-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm.”²

Building on this historical claim, the Court has embarked on an ambitious project to restore what it sees as litigation’s proper, pre-twentieth-century function: resolving discrete disputes between injured parties. This vision has driven recent decisions limiting standing, restricting class actions, curtailing national injunctions, and threatening qui tam provisions. If the Court’s history is correct, these interventions rest on sound originalist foundations. But if the history is wrong, the Court’s campaign rests on a fiction.

This Article offers an alternate historical account that inverts the Court’s narrative. Far from being a 1960s innovation, regulatory litigation was the dominant enforcement model in the Early Republic. Throughout the nineteenth century, Congress and state legislatures routinely empowered “common informers”—uninjured strangers—to enforce regulatory law by suing violators for statutory penalties. These informer provisions governed fisheries, usury, land transfers, customs enforcement, intellectual property, census compliance, and countless other regulatory domains. They were central to American governance. Even *McCulloch v. Maryland*—the canonical case establishing federal supremacy—reached the Supreme Court through an informer lawsuit. This evidence directly contradicts arguments by influential scholars, now adopted by Justice Thomas and lower court judges, that informer provisions vanished after the Founding era.

* PhD History Yale University ‘26, JD ‘22, Stanford University.

** Professor of Law, Stanford Law School. Authors listed alphabetically. For thoughtful comments or conversations, we thank the organizers and enthusiastic participants at several academic conferences at which the authors presented, including the Civil Procedure Conference . . .

¹ *United States v. Texas*, 599 U.S. 670, 704 (2023) (Gorsuch, J., concurring) (“The Constitution affords federal courts considerable power, but it does not establish ‘government by lawsuit.’”).

² *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

This Article tells the story of how the early American state implemented its regulatory ambitions through private enforcement and litigation rather than bureaucracy. To do so, we have systematically reviewed and distilled hundreds of Early Republic statutes, hundreds of cases, legal treatises, a wealth of primary sources, and the secondary literature on Early Republic civil litigation. We demonstrate that Congress enacted dozens of federal informer provisions during this period, with state and local governments enacting hundreds more. This nineteenth-century, *post-Founding* evidence fills a gap in legal historiography created by scholarly focus on “qui tam” as the relevant category, when nineteenth-century lawyers used broader terms like “penal statutes” and “popular actions.” The Article then explains why informers declined by the early twentieth century—not because of constitutional concerns related to the separation of powers, but because several practical forces made alternative enforcement mechanisms more attractive. Senator John Sherman’s evolution from championing informers in the 1870s to designing the injury-based private right of action in the Sherman Antitrust Act of 1890 illustrates this transition. Overall, the Article’s findings should put regulatory litigation and maybe even “government by lawsuit” on solid constitutional footing.

Introduction

“There is no country in the world where the law speaks a language as absolute as in America, nor is there one where the right to apply the law is divided among so many hands.”

Alexis de Tocqueville (1835)

According to the Supreme Court, private litigation has run amok in America. Over the past century, the Court believes, litigation transformed from a mechanism for resolving discrete disputes into a tool for regulatory enforcement and “government by lawsuit.”³ The consequences are everywhere: sprawling class actions, universal injunctions binding the government, endless private enforcement and citizen suits (under environmental, civil rights, antitrust statutes, and so on)—all modern departures from traditional practice, according to the Court’s originalist majority.⁴ Justice Kavanaugh summarized this view in *TransUnion*: “until the 20th century, Congress rarely created ‘citizen suit’-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm.”⁵

A rising strain of scholarship agrees, arguing that something fundamental changed in the 1960s and 1970s, leading to the birth of a new, regulatory conception of litigation.⁶ Expansive class actions from the 1966 Rule 23 amendments, and waves of statutory private rights of action emerged then, marking a culture shift that reimagined litigation as a tool for social problem-solving. This shift is often associated with figures like Ralph Nader and the public interest law movement.⁷ Throughout most of American history, this story goes,

³ *United States v. Texas*, 599 U.S. 670, 704 (2023) (Gorsuch, J., concurring) (“The Constitution affords federal courts considerable power, but it does not establish ‘government by lawsuit.’”).

⁴ Justice Barrett’s opinion in *Trump v. CASA* noted that “universal injunctions were not a feature of federal-court litigation until sometime in the 20th century.” *Trump v. CASA, Inc.*, 606 U.S. 831, 844 (2025). Justice Thomas was more precise: these injunctions “emerg[ed] for the first time in the 1960s.” *Trump v. Hawaii*, 138 S. Ct. at 2426. The consumer class action, Justice Scalia told us, was also an “adventuresome innovation” of the 1960s. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). In standing cases, Justice Gorsuch and others have complained about “government by lawsuit.” *United States v. Texas*, 599 U.S. at 704.

⁵ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

⁶ Robert A. Kagan, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2d ed. 2019) (arguing that twentieth century social movements led to the growth of litigation and adversarial legalism, with a “new” intensity in the 1960s); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE US* (2010) (“[w]hile the United States has relied heavily upon private litigation to enforce policies passed into law by Congress . . . the frequency with which it has done so exploded in the late 1960s.”); David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy*, 1981–1994, 86 *FORDHAM L REV* 1785, 1788 (2018) (tracing the emergence of the “regulatory” conception of class actions to the 1960s).

⁷ See PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* (2021); MARC J. DUNKELMAN, *WHY NOTHING WORKS: WHO KILLED PROGRESS—AND HOW TO BRING IT BACK* (2025) (arguing that a Jeffersonian movement embraced litigation in the 1960s and 70s).

litigation served a dispute-resolution function—addressing discrete controversies between private parties, not as a tool for ensuring compliance with regulatory statutes.

The Court has embarked on an ambitious project to restore what it sees as litigation’s proper, pre-twentieth century traditional function. Recent standing cases reject Congress’s power to create standing through novel statutory penalties, insisting that plaintiffs must suffer concrete injuries “closely analogous” to a “traditional” harm.⁸ As the Court explained in *TransUnion*, allowing Congress to authorize unharmed plaintiffs to sue—in an effort to regulate the misfeasance of companies—“would infringe on the Executive Branch’s Article II authority,” because private plaintiffs cannot be “charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.”⁹ *TransUnion* weakened private enforcement of countless regulatory statutes, from environmental laws to privacy protections to civil rights guarantees.¹⁰ For similar reasons, the Court has made it more difficult to certify class actions in recent decades because it rejects a “regulatory conception” of class litigation as a means of shaping public policy.¹¹ The class action must instead be understood as merely procedural, a joinder mechanism for aggregating similar claims.¹² Justices Thomas, Kavanaugh, and Barrett have also raised doubts about the constitutionality of *qui tam* lawsuits, on the grounds that “private relators may not represent the interests of the United States in litigation.”¹³ And debates in administrative law over public versus private rights reflect the same foundational assumption.¹⁴ Across these disparate doctrines, the decisions rest on a single theory: Litigation exists to remedy individual harms through dispute resolution, not to serve as a mechanism for regulatory law enforcement.

The Court, then, has embraced two historical claims: a narrow one, that Congress rarely deputized private enforcers before the 20th century; and a broad one, that nineteenth-century federal litigation was not really regulatory in the modern sense. If the Court is right that “government by lawsuit” emerged only in the 1960s, then its project to restore traditional dispute resolution has sound originalist footing. But if either claim is wrong, then the Court’s ongoing campaign to limit regulatory litigation, curtail standing for statutory

⁸ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

⁹ *Id.* at 428-29 (“In our view, the public interest that private entities comply with the law cannot ‘be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.’”) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576-77 (1992)).

¹⁰ See, e.g., Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. 269, 270 (2021) (arguing that *TransUnion* “places in doubt the ability to sue to enforce countless federal laws”); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. 62, 62 (arguing that *TransUnion* “significantly undermined the effectiveness of many privacy laws” by hobbling private rights of action).

¹¹ Marcus, *supra* note xx at 1788.

¹² *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (citing *Amchem*, 521 U.S. at 614).

¹³ *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442-52 (2023) (Thomas, J., dissenting); *id.* at 442 (Kavanaugh, J., concurring) (joined by Barrett, J.); *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 115, 126 (2025) (Kavanaugh, J., concurring).

¹⁴ See *Stern v. Marshall*, 564 U.S. 462, 488-93 (2011).

violations, restrict class actions, and constrain *qui tam* rests on a historical fiction. Both historical claims are central.

This Article offers an alternate account of litigation’s regulatory purpose in the nineteenth century, one that completely inverts the Court’s historical narrative. Far from being a 1960s innovation, regulatory litigation was the dominant model of law enforcement in the early Republic. Throughout the nineteenth century, Congress and state legislatures explicitly designed litigation to shape public behavior rather than remedy private wrongs, routinely empowering uninjured parties to enforce “general compliance with regulatory law.”¹⁵ The legal mechanism behind this has been largely forgotten: the common informer.

When state legislatures and Congress wanted to regulate behavior, they routinely delegated enforcement to any “common informer” who could bring a lawsuit against violators and collect a statutory penalty—or sometimes a portion of the penalty, called a “moiety.” Informer provisions governed fisheries, stage lines, usury, land transfers, revenue laws, environmental regulations and more—in short, they were used to implement both the full range of police powers exercised by the states, and the more limited enumerated powers of the federal government.¹⁶ Regulatory litigation was not invented in the era of Ralph Nader and public interest law; it predated and pervaded the early Republic. This Article explains how the early American state implemented many regulatory ambitions through private enforcement and litigation rather than bureaucracy, directly contradicting the Supreme Court’s assertions about twentieth-century innovations. To do so, we have systematically reviewed and distilled hundreds of Early Republic statutes, cases, legal treatises, newspapers and other primary sources, in addition to consulting secondary literature on nineteenth century American litigation and governance.

This nineteenth-century, *post-Founding* evidence for the continuing vitality of informers fills an important gap in American legal historiography, created in part by the warping effect of Supreme Court standing doctrine. Much recent work on informers has been colored by litigation over the False Claims Act (FCA), which permits any person who becomes aware of fraud against the federal government to “bring a civil action . . . for the person and for the United States,” and to recover a portion of the penalty.¹⁷ Since its passage in 1863, the statute has referred to such litigants as “qui tam plaintiffs.” After the Supreme Court tightened Article III standing rules in the 1980s and 1990s,¹⁸ defendants in FCA cases started to argue that these plaintiffs (who had not been injured by the defendant’s fraud) had not suffered a concrete harm sufficient to confer standing. The Court ultimately rejected that challenge, noting the prevalence of informer actions “in the period immediately before and

¹⁵ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021); see e.g., *Dogherty v. Anderson*, 3 N.J.L. 428, 428 (1808) (finding the complaint defective because it did not clarify “in what right the plaintiff below prosecuted, whether as a party injured, or as a common informer.”).

¹⁶ See Parts I and II.

¹⁷ 31 U.S.C. § 3730(b)(1).

¹⁸ See e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

after the framing of the Constitution.”¹⁹ But the debate called forth a seminal article from Ann Woolhandler and Caleb Nelson, acknowledging *qui tam*’s historical pedigree, but portraying the procedure as archaic and constitutionally meaningless. Woolhandler and Nelson claimed that after the 1790s “subsequent Congresses rarely used” *qui tam*,²⁰ citing earlier research claiming that Congress adopted only “seven *qui tam* statutes” in the entire 1800s.²¹ Following their lead, Justice Kavanaugh mistakenly asserted that “Congress rarely created ‘citizen suit’-style causes of action” by uninjured parties before the 20th century.²² Justice Thomas, too, dismissed the “*early* history of federal *qui tam* statutes” as an outlier that was squared away later in the nineteenth century.²³ On this view, the fact that *qui tam* suits predate the United States make them *less* useful for understanding early American legal culture; they were a dying ember quickly snuffed out under the new constitutional regime.

But the focus on ‘federal *qui tam* statutes’ has radically distorted the historical picture of private enforcement. First, that framing results in a confusion of terminology. In the eighteenth and nineteenth centuries, statutes creating rights of action for informers were called “penal statutes,” not because they were criminal in the modern sense, but because they assessed a penalty. “*Qui tam*” was just one of several mechanisms through which an informer could bring an action on a penal statute; strictly speaking, it referred to a form of pleading an informer needed to file to initiate a criminal proceeding called an information, in which he would split any penalty recovered with the sovereign. But most statutes authorized informers to bring suit through either civil or criminal process, and the most typical informer’s suit was a civil action of debt. As a prominent treatise in the mid-1800s noted, “[w]here a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, debt is sustainable; and *he need not declare qui tam . . .*”²⁴ While early American jurists sometimes used “*qui tam*” as a shorthand for all informers, for the most part, they litigated and legislated these actions using other terms: “penal statutes,” “popular actions,” common informers, and “actions on statutes.”²⁵

¹⁹ See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776 (2000) (Scalia, J.); see also Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 *Notre Dame L. Rev.* 1235 (2018); Nitisha Baronia, Jared Lucky & Diego A. Zambrano, *Private Enforcement at the Founding*, 114 *Calif. L. Rev.* (2026).

²⁰ Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 728 (2004). But see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371, 1395 (1988).

²¹ Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 *Wis. L. Rev.* 381, 387 & n.38 (2001) (“Over the next hundred years, Congress enacted seven *qui tam* statutes.”). Woolhandler and Nelson also cite others for the claim that there was infrequent *qui tam* litigation, based only on a Westlaw search for the term “*qui tam*.” J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 *N.C. L. Rev.* 539, 541–42 (2000). See also Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 *U. Chi. L. Rev.* 543 (1990) (“The extent of its early use is unclear, and Congress has seldom resorted to *qui tam* since the early 1800s.”).

²² *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

²³ *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting).

²⁴ J. Chitty, *A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading* 108 (1825) (emphasis added).

²⁵ This is why Woolhandler and Nelson’s database searches for “*qui tam*” say very little about the prevalence of informer litigation.

Looking only for the words “qui tam” improperly narrows the frame. Second, considering exclusively federal evidence also gives an incomplete picture. State and local governments, with their sweeping police powers, regulated far more actively than Congress in early America.²⁶ The ubiquitous use of informers in these jurisdictions shaped the assumptions about private enforcement which prevailed in the more limited domain of the early federal government.

Perhaps as a result of these blinders, legal historians have shown little interest in what became of informers after the 1790s, or why they gradually faded from view.²⁷ Litigants and judges hostile to private enforcement sometimes point to this gap in the literature as evidence that informers vanished *because* of the framing of the Constitution.²⁸ In other words, once Americans “liquidated” the meaning of the previously untested separation of powers provisions of the Constitution, they turned away from *qui tam* because it impermissibly entrusted private litigants with the power to vindicate public rights. The sources we have examined for this Article paint a very different picture. Here we attempt to correct the record.

Citizen-suit style claims by private plaintiffs who did not suffer a harm were not “rare[]” before the twentieth century, as Justice Kavanaugh claimed.²⁹ Quite the opposite: to early Americans, informer provisions were everywhere. To prepare the census of 1820, Congress instructed marshals to count the number of inhabitants and empowered informers to sue “every marshal failing to file the [census] returns . . . [to the tune of] one thousand dollars . . . one half thereof to the use of the United States, and the other half to the informer.”³⁰ If you happened to be involved in trade with indigenous peoples, you could not sell liquor or wine, or else an informer might sue you and “recover[] in an action of debt . . . the one half to the use of the informer, and the other half to the use of the United States . . .”³¹ Decades before the financial regulatory regimes of the twentieth century, Congress subjected banks in the District of Columbia³² to strict prohibitions on “issuing or paying out or offering in payment any bank note or other paper in discharge of their debts or liabilities of any kind”³³ under “pain of forfeiting for every such offence double the sum so paid out . . . one half to the informer.”³⁴ Congress continually adopted similar provisions throughout the century to regulate intellectual property, customs collection, Navy operations, land

²⁶ Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, Private Enforcement in the States, 172 U. PA. L. REV. 61 (2023).

²⁷ Cass Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 197, 211 (1992); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1395 (1988); Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689 (2004); Randy Beck, Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History, 93 Notre Dame L. Rev. 1235 (2018).

²⁸ See *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 S. Supp. 3d 1293, 1320-21 (M.D. Fla. 2024).

²⁹ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

³⁰ Act of Mar. 14, 1820, ch. 24, 3 Stat. 548, 548-51 (1820).

³¹ *Id.*

³² Act of Aug. 25, 1841, ch. 12, 5 Stat. 445, 449 (1841).

³³ *Id.* § 4, at 451.

³⁴ *Id.*

valuations, road building, state borders, naturalization, river surveys, and countless other matters of public concern.

Modern notions of *qui tam*—as an eccentric remedy for fraud against the government—wholly fail to capture how fundamental informer provisions were to the structure of American governance. Consider the canonical federalism case *McCulloch v. Maryland*, a case every law student learns as establishing federal supremacy and the scope of Congress’s implied powers. That monumental constitutional dispute reached the Supreme Court through . . . an informer lawsuit! Maryland’s statute taxing the Bank of the United States provided that any officer of an unauthorized bank who issued unstamped notes would “forfeit a sum of \$500 for each and every offence,” with “every penalty aforesaid, to be recovered by indictment, or action of debt . . . one-half to the informer, and the other half to the use of the state.”³⁵ The case that transformed American constitutional law was brought by John James, a private informer seeking his share of the penalty against James McCulloch, the cashier of the Bank’s Baltimore branch. The very architecture of federal-state relations was thus adjudicated through informer litigation. A private plaintiff was enforcing state regulatory law against a federal officer, with the prospect of splitting the penalty as his incentive. If informer provisions seem obscure today, they once served as the vehicle for resolving fundamental questions of constitutional structure.

Part I unearths the substantial body of law that governed informers throughout the nineteenth century. Countless penal statutes were enacted at the state, local, and federal level and extensively litigated throughout the nineteenth century. For this Article, we systematically reviewed federal informer statutes, identified many more state statutes, consulted numerous nineteenth century treatises, and reviewed hundreds of cases involving informers decided between 1800 and 1890 in state and federal courts. These sources reveal a rich body of doctrine governing every aspect of informer litigation: who could qualify as an informer, how penalties should be divided, what pleading standards applied, whether government officers could claim informer rewards, and how informer rights interacted with executive power. The volume of this case law demonstrates that informer provisions were a central feature of American legal practice. Courts developed detailed rules to manage this system of private enforcement, and litigants—from fishermen to revenue collectors to professional informers—regularly invoked these statutes to police regulatory compliance. While the law of informers continued to develop organically throughout the century, its basic contours remained in line with the thinking of the Founding Era.

Part I further argues that informers endured throughout the nineteenth century for much the same reason that they had been essential in the Founding Era; they were an indispensable counterweight to the extremely localized, non-bureaucratic forms of civil regulation that characterized English and American justice well into the twentieth century. Lean federal and state governments needed unpopular informers to enforce unpopular laws. Common informers were ideally suited to enforce regulations which local officials would be

³⁵ *McCulloch v. Maryland*, 17 U.S. 316, 321-22 (1819).

tempted to skirt, related to taxation, public morality, official misconduct, and consumer protection. Alexis de Tocqueville and other nineteenth century observers remarked on the Early Republic's preference for regulation-by-litigation, and noted that informer provisions were a core institution of American governance. As the Supreme Court noted in *Marvin v. Trout* (1905), "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government."³⁶

While Part I tells a story of continuity, Part II tells a story of change. Just five years after *Marvin v. Trout*, a newspaper editor in Washington State (incensed by the excesses of a local fish and game informer) could write that "[o]nly in out of the way corners like a game warden's office is it possible to find that mediaeval Iniquity, the 'informer,' who is paid for disclosing infringements of the law."³⁷ After a century in the mainstream, why had informers come to be seen as a "mediaeval Iniquity" by the early twentieth century? A comprehensive account of that shift, which spanned dozens of jurisdictions and many decades, falls beyond the scope of this Article. But the evidence we reviewed does suggest a few tentative explanations for the informer's decline.

First, the decline of informers was not linear; penal statutes remained in vogue through midcentury, but fell from favor after the 1870s as lawmakers found them increasingly ineffective. This trend seems to reflect a crisis of legitimacy in which informers fell victim to their own success. Regulation grew more ambitious (and thus intrusive) throughout the nineteenth century; for example, in revenue laws, where governments increasingly tried to tax financial assets whose value could only be determined by reviewing a taxpayer's private books. At first, penal statutes seemed like the ideal vehicle for enforcing these unpopular initiatives, and legislators regarded informers as a vital tool of legal reform through at least the 1850s. But lawmakers found, especially after the Civil War, that informers engendered resistance from citizens who might have otherwise complied with new laws on their own. The result was less compliance overall; the mercenary character of informers, long a selling point, had become a liability. Growing doubts about the effectiveness of informers coincided with the rise of modern policing and a salaried bureaucracy of administrators, which gave legislators new public enforcement options. Informers remained on the table—particularly in fields of law which required less voluntary cooperation—but were no longer the main course. This explanation complements (and draws extensively upon) historical scholarship on American state formation which has demonstrated a similarly timed decline in bounty-style compensation schemes for public officers.³⁸

³⁶ *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

³⁷ T.J. Dillon, *The Informer--The Criminal--A Comparison*, SEATTLE STAR, Oct. 30, 1909, <https://www.loc.gov/resource/sn87093407/1909-10-30/ed-1/?sp=1&q=informer&r=0.316,0.869,0.557,0.406,0>.

³⁸ See generally Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (2013).

But a further question remains. Lawmakers did not turn exclusively to public enforcement; rather, they continued to rely heavily on rights of action which provided new remedies or liquidated damages to plaintiffs suffering a statutorily defined injury. Why did American jurisdictions turn from one form of private enforcement to another? We think that two technical developments internal to the law provide at least a partial answer. On the one hand, the evolving rules of witness competency gradually made it easier for injured parties to testify after midcentury, making statutory damages actions a viable regulatory alternative to informer proceedings. On the other hand, a longstanding principle of statutory interpretation favoring remedial statutes over penal ones gave judges wide latitude to tamp down on informers' actions. For much of the nineteenth century, positivist lawmakers (under the influence of Jeremy Bentham) attempted to defend informers from this judicial hostility with special legislation. But judges continued to disfavor penal statutes, and it appears that by the early twentieth century, legislators essentially threw in the towel, and turned decisively towards liquidated compensatory damages to shield their regulatory schemes from judicial interference. These doctrinal pressures made "penal" informer actions comparatively less effective, and pushed private enforcement into a remedial frame of putative statutory "injuries."

Finally, we conclude Part II with a case study, showing how these forces of change likely influenced the career of Senator John Sherman between 1874 and 1890, culminating in the powerful private right of action of the Sherman Act of 1890. The Sherman Act arguably marked the decline of informers as a major feature of American law, heralding the modern era of private enforcement. The Act deliberately limited standing to parties "injured in [their] business or property," avoiding the forces that undermined informers. That is, requiring an injury limited standing to plaintiffs who were affected by the lawsuit, not stranger bounty hunters; it ensured enforcers possessed direct knowledge and could testify; and it framed recovery as remedial compensation rather than sanctions. This injury-based model became the template for twentieth-century regulatory statutes, from the Clayton Act of 1914, the Fair Labor Standards Act of 1938, to the Civil Rights Act of 1964, RICO, and a flurry of environmental statutes in the 1970s. In short, informers disappeared because legislators turned to a superior version of private enforcement, for reasons apparently unrelated to the constitutional separation of powers.

Understanding the legal importance of informer claims in the Early Republic makes several contributions that we discuss in our conclusion. First, the historical evidence demonstrates that informer provisions were common, governed crucial social areas, and constituted an early form of a litigation state—there was no *laissez-faire* society waiting for an administrative state to emerge. This challenges both libertarian accounts of an unregulated early Republic and scholarly narratives tracing the origins of private enforcement to the late 1880s.³⁹ As discussed in a recent article, private enforcement of the law "defines American

³⁹ See Richard A. Epstein, *An Unapologetic Defense of the Classical Liberal Constitution*, 128 HARV. L. REV. F. 145 (2015); RICHARD BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION 1877-1900*, at 7

governance—almost uniquely in the world, federal and state governments deliberately empower private plaintiffs, not just public bureaucrats, to enforce most statutes,” with private litigation accounting for “over 90% of antitrust claims, 98% of civil rights claims, and a majority of wages and hours, environmental, and securities fraud claims. There are more than 350 federal private rights of action and more than 10,000 across the fifty states.”⁴⁰ Yet most scholars believed this system started in the 1960s or, at the earliest, with the Sherman Act.⁴¹ Of course, scholars like Jerry Mashaw, William Novak, Maggie McKinley, and Nicholas Parrillo, have pushed back on this account, highlighting the early origins of the administrative state,⁴² the regulatory role of the common law,⁴³ and other liability regimes that controlled government officials.⁴⁴ But even these accounts have largely overlooked the ongoing significance of informers through the Civil War and beyond. This Article shows that America’s reliance on private enforcement has been persistent since the Founding.

Second, and relatedly, the Article provides historical foundation for Article II and Article III debates over standing, *qui tam*, and congressional power to delegate enforcement to private parties. We demonstrate an unbroken history of informer statutes throughout the 1800s, giving originalists and liquidationists the “continuous, unbroken practice” that judges—including Justice Thomas and his former clerk Judge Katherine Mizelle—have demanded to uphold modern *qui tam* provisions. As mentioned above, Justice Thomas dismissed the “early history of federal *qui tam* statutes” as an outlier, perhaps liquidated away in the nineteenth century.⁴⁵ Justice Scalia, too, opened the door to an Article II challenge in a footnote in *Vermont Agency*, where he expressly reserved the question whether “*qui tam* suits violate Article II.”⁴⁶ Following their lead, Judge Mizelle declared the False Claims Act’s *qui tam* provision an unconstitutional delegation of executive power.⁴⁷ Mizelle dismissed the early practice of *qui tam* enactments because she believed that—after the Founding—there was no “continuous, unbroken practice throughout our Nation’s history” of empowering parties to sue on behalf of the government. She emphasized that the practice may have been confined to “early Congresses” and the statutes “quickly fell into disuse.”⁴⁸ There is every reason to believe that Mizelle’s decision (or another, similar case) will reach the Supreme

(“[T]he modern business enterprise described in this passage arose within a largely unregulated national market that was politically constructed by the Supreme Court.”); Farhang, *supra* note 5, at 31.

⁴⁰ Baronia, Lucky & Zambrano, *supra* note 24, at 107.

⁴¹ See e.g., Sean Farhang, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE US (2010) (“[w]hile the United States has relied heavily upon private litigation to enforce policies passed into law by Congress since the rise of the federal regulatory state in the late 1880s.”).

⁴² Jerry L. Mashaw, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1605 (2018); PARRILLO, *supra* note 35.

⁴³ Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1460-61 (2015) (quoting Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 451 (1987)).

⁴⁴ Nathaniel Donahue, *Officers at Common Law*, 135 YALE L.J. (2026); see generally PARRILLO, *supra* note 35.

⁴⁵ United States ex rel. Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 450 (2023) (Thomas, J., dissenting).

⁴⁶ *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 (2000).

⁴⁷ United States ex rel. Zafirov v. Fla. Med. Assocs. LLC, 751 F. Supp. 3d 1293 (M.D. Fla. 2024).

⁴⁸ *Id.*

Court in the next few years. The constitutional grounding for qui tam, then, may now turn on evidence of continuous Congressional adoption of that kind of provision well into the 1800s. This article shows exactly that: Congress adopted dozens of informer provisions between 1800-1891, connecting the colonial-era to the Sherman Act of 1890.⁴⁹

I. The Persistence of the Informer as an American Institution

Part I of this Article lays out the evidence for the continuing vitality of informer actions in the century after the Founding. Section I.A describes the role informers played in the American regulatory landscape, and explains why they retained their importance throughout the nineteenth century. Section I.B offers a partial survey of the robust nineteenth century caselaw governing informers, to demonstrate their substantial and continuing presence in American law.

A. The Enduring Need for Informers as a Non-Bureaucratic Enforcement Tool

Modern critics of qui tam assert that informer actions were an “archaic device” which shuffled into the nineteenth century almost by accident.⁵⁰ Quite the opposite. The informer’s action in the early United States was what today’s developmental economists would call an “institution,” a robust convention structuring “incentives in human exchange, whether political, social, or economic.”⁵¹ While the underlying procedural mechanisms dated back centuries, American lawmakers deployed informers flexibly throughout the nineteenth century in support of a wide range of policy goals. The reason for this was straightforward: informers were an indispensable legislative tool in a decentralized and litigation-centric system of government. As in the Founding Era, nineteenth century penal statutes recruited informers to enforce laws that officers couldn’t (or wouldn’t) execute, provided additional incentives for officers themselves to prosecute, and gave citizens a means of recourse against officers who failed to do their duty.

The use of informers by the first several Congresses in the 1790s has been extensively discussed by scholars and courts.⁵² But we found that Congress approved informer enforcement in *every decade* from the Founding through 1900.⁵³ Our systematic review of federal session laws confirmed (likely undercounting) the continuous adoption of these provisions: 1800s (5); 1810s: (8); 1820s: (4); 1830s (8); 1840s: (2); 1850s: (1); 1860s: (11); 1870s: (4); 1880s: (4); 1890s: (7). Notably, many of these statutes created multiple rights of

⁴⁹ Appendix A.

⁵⁰ Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 23-24 (1989) (“Qui tam suits fell into disfavor and, from the sixteenth century forward, their use was progressively curtailed.”); see Randy Beck, *Qui Tam Legislation and Article II*, 49 HARV. J.L. & PUB. POL’Y 34 (2026), 47-49 (discussing the Barr memorandum and its influence on more recent Article II challenges to qui tam).

⁵¹ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

⁵² See, e.g., Cong. Research Serv., *Qui Tam: The False Claims Act and Related Federal Statutes*, R40785, at 2 (Apr. 25, 2021) (“Qui tam statutes dot the work of the first Congresses of the new Republic, and qui tam cases appear among the cases of the early federal courts.”)

⁵³ Appendix A.

action. And (as we discuss further in Part II), while some of these provisions were culled in the statutory revisions of the 1870s, many others were preserved in substantially similar form well into the twentieth century.

As had been the case in the 1790s, informers continued to be used across a wide array of regulatory fields. Consider, as a representative sample, this list of federal informer provisions from the 1830s:

Title of Act	Year	Informer Provision
An Act to provide for taking the fifth census or enumeration of the inhabitants of the United States. ⁵⁴	1830	Any U.S. marshal who accepts improper consideration from assistants in preparing the fifth census “shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars, for each offence, to be recovered by suit or indictment in any circuit or district court of the United States, or the territories thereof, one half to the use of the government, and the other half to the informer[.]”
An Act to amend the several acts respecting copy rights. ⁵⁵	1831	Any person printing a work with a false copyright “shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognisance thereof.”
An Act to provide for the punishment of offences committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes. ⁵⁶	1831	“All penalties and forfeitures incurred under the provisions of this act [prohibiting cutting of navy timber] shall be sued for, recovered and distributed, and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one half to the informer or informers, if any, or captors, where seized, and the other half to the commissioners of the navy pension fund, for the use of the said fund[.]”
An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. ⁵⁷	1834	“[I]f any such spirituous liquor or wine is found [in possession of a person carrying on trade with the Indians], the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States[.]”

⁵⁴ Act of Mar. 23, 1830, ch. 40, 4 Stat. 383, 387.

⁵⁵ Act of Feb. 3, 1831, ch. 16, 4 Stat. 438.

⁵⁶ Act of Mar. 2, 1831, ch. 66, 4 Stat. 472, 472.

⁵⁷ Act of June 30, 1834, ch. 161, 4 Stat. 729, 732-33.

		“[A]ll penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found), the one half to the use of the informer, and the other half to the use of the United States[.]”
Treaty with the Saganaws ⁵⁸	1837	No “white man shall be allowed to settle” on specified lands reserved for the tribe, “under a penalty of five hundred dollars, to be recovered, at the suit of the informer; one half to the benefit of said informer, the other half to the benefit of the Indians.”
An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. ⁵⁹	1838	For “each and every violation of this section [i.e. operating a steamboat without a license], the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.” Other “penalties imposed by this act [including, e.g., failure to inspect hulls, open safety valves, carry appropriate life boats, use signal lights, etc.] may be sued for and recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one-half to the use of the informer, and the other to the use of the United States; or the said penalty may be prosecuted for by indictment in either of the said courts.”

⁵⁸ Treaty of Jan. 14, 1837, 7 Stat. 528, 529.

⁵⁹ Act of July 7, 1838, ch. 191, 5 Stat. 304, 304-06. In *U.S. v. The William Pope*, 28 F.Cas. 629 (Mo. 1852), informers provided information that led to the suit.

An Act to provide for taking the sixth census or enumeration of the inhabitants of the United States. ⁶⁰	1839	Any U.S. marshal who accepts improper consideration from assistants in preparing the sixth census “shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars for each offence, to be recovered by suit or indictment in any circuit or district court of the United States or the Territories thereof, one half to the use of the Government, and the other half to the informer[.]”;
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This cross-section reveals both the vitality and flexibility of the informer action, long after the constitutional separation of powers had presumably been “liquidated.” First, informers were deputized against a wide range of public ills: official corruption in census administration; illegal alcohol sales by Indian traders; violations of treaty rights; unsafe steamboat operators; fraudulent copyrights; and poachers of premium naval timber. Second, informer actions could take many shapes. Depending on the case, an informer might use civil, criminal, or admiralty process; and while most informers were authorized to proceed on their own initiative, some statutes required that suit be brought “under the direction” of a federal officer. Proceeds were usually split with the government, though sometimes the sovereign was excluded in favor of a charitable cause (e.g., the “navy pension fund”) or some injured party (“to the benefit of the Indians”). Finally, Congress used informers not only in traditional contexts—navy timber had been protected by penal statutes for centuries—but on the cutting edge of federal regulatory law, like the groundbreaking safety scheme laid out in the 1838 Steamboat Act.

These statutes were not just law on the books—litigants acted on them. There are reported federal decisions involving informers or informer statutes for nearly every year of the nineteenth century.⁶¹ The scattered records of early federal courts at the trial level make statistical assessments difficult, but there are many indications that informers’ actions comprised a substantial portion of the day-to-day work of federal justice. For example, in 1852, a federal judge sitting in admiralty jurisdiction observed that “[e]leven libels were filed against steam ferry boats for this term, by informers,” for violations of the 1838 Steamboat Act.⁶² In 1870, an Arkansas newspaper printed a list of the cases resolved in an ongoing sitting of the local federal district court. Of about sixty actions reported, ten specifically identified an informer litigant.⁶³

The continuity and significance of informers in federal law is not surprising; but it requires some historical context to understand. America’s ongoing need for informers stemmed, in the first instance, from the distinctively local and decentralized system of

⁶⁰ Act of Mar. 3, 1839, ch. 80, 5 Stat. 331, 336.

⁶¹ Appendix B.

⁶² *United States v. The Steamboat Planter* (D. Missouri, 1852) 1 Newberry’s Reports, p. 262

⁶³ *United States Court*, VAN BUREN FREE PRESS, May 17, 1870 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/resource/sn84022991/1870-05-17/ed-1/?sp=2&q=informer&r=0.003,0.05,0.48,0.35,0>).

regulatory law the nation inherited from the colonial era. In seventeenth and eighteenth-century England, most regulatory law was administered by a cast of “local notables,” drawn from the landholding gentry, particularly the justices of the peace.⁶⁴ As Blackstone observed, many statutes had “heaped upon” these amateur and generally unpaid officers “an infinite variety of business,”⁶⁵ including laying out highways, licensing innkeepers, apprehending fugitives, enforcing the law against “a few recognizable deviants” like vagrants and petty criminals, and settling minor legal disputes.⁶⁶ Co-opting local men of property to serve as jurors, sheriffs, and justices worked well for some forms of regulation.⁶⁷ These figures stood at the center of complex webs of patronage and social obligation, understood local politics, and could (usually) achieve cooperation from the populace for general law-and-order measures.⁶⁸

But these local elites were naturally disinclined to enforce laws which threatened their own commercial or personal interests, or which might undermine their standing in the community.⁶⁹ The central government could have created a new class of royal officers to tamp down local resistance from above.⁷⁰ Instead, Parliament turned to informers to enforce from below.⁷¹ By the eighteenth century, statutes authorizing strangers to sue and collect penalties against those who violated regulatory statutes constituted an important niche of legal practice, whose intricacies were explained at length in the leading English pleading manuals.⁷²

The numerous statutes policing gambling provide a classic example.⁷³ As William Blackstone observed, “gaming in high life” was particularly hard to regulate because of its private setting, and the “false sense of honour” which would discourage an elite gambler

⁶⁴ For “local notables,” see MAX WEBER, *POLITICS AS A VOCATION* 23-30 (Gerth & Mills tr. 1946) (1921) (contrasting modern “professional politicians” like party leaders and salaried officers with traditional “avocational” government by local notables). On the regulatory function and institutional role of Justices of the Peace in England, see HILTON ROOT, *THE FOUNTAIN OF PRIVILEGE: POLITICAL FOUNDATIONS OF MARKETS IN OLD REGIME FRANCE AND ENGLAND* 15-19, 151-54 (1994).

⁶⁵ 1 BLACKSTONE, *COMMENTARIES* *342.

⁶⁶ PARRILLO, *supra* note 35, at 25.

⁶⁷ See ROOT, *supra* note 43, at 16 (favorably contrasting English justices of the peace with French model); Timothy Besley, Dan Bogart, Jonathan Chapman & Nuno Palma, *Justices of the Peace: Legal Foundations of the Industrial Revolution* (Lewis Lab Working Paper 0011, University of Manchester, 2025), <https://jnchapman.com/assets/pdf/jps%20draft%20May%202.pdf> (arguing that justices of the peace “provided the British state with market-supporting legal enforcement throughout the eighteenth century.”)

⁶⁸ PARRILLO, *supra* note 35, at 25.

⁶⁹ See ROOT, *supra* note 43, at 16-17, 151 (“JPs, who were prominent members of the local gentry, were not paid for their work, so examples of their self-interested approach to the enforcement of regulations are abundant.”)

⁷⁰ *Id.* at 152 (noting that “Restoration England did not develop a system of central administration comparable to Colbert’s intendants” in France).

⁷¹ See, e.g., 3 BLACKSTONE, *COMMENTARIES* *160 (noting Parliament’s choice to “give the penalty to the subject” in penal statutes designed to “restrain the people from committing offenses, which are mala prohibita only, and not mala in se, being for the most part mere matters of police and domestic convicience[.]”)

⁷² See, e.g., William Hawkins, *Pleas of the Crown*, c. 26, § 1 (1716).

⁷³ 4 BLACKSTONE, *COMMENTARIES* *171-72.

from “appealing to the magistrate” against a fellow member of his class.⁷⁴ (Not to mention the fact that the magistrate might himself be seated at the card table.) Yet, he noted, “it is proper that laws should be, and be known publicly, that gentlemen may learn what penalties they willfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or if, unsuccessful, have it in their power to be still greater gainers by informing.”⁷⁵ He had in mind a 1664 statute, providing that any player losing more than 100 pounds in an unlawful game “shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer.”⁷⁶ In short, informers rushed in where “gentlemen” feared to tread; and the mere threat of such actions would induce most people to comply with the law, no public expenditure required.

Nicholas Parrillo has described this dynamic between local notables and informers in terms of a dichotomy between “familiar impositions” and “alien impositions.”⁷⁷ In a familiar imposition, the state co-opts prominent members of the regulated community to enforce the law—in the process, smoothing and adjusting it to local conditions.⁷⁸ This works well when the sovereign’s law accords with community expectations. But frequently the state intervenes to advance more abstract, impersonal interests like “the public revenue, or national economic policy, or a certain concept of public morality.”⁷⁹ These initiatives are often so unpopular, or so contrary to local custom, that only an outsider can effectively enforce them.⁸⁰ Unconstrained by social obligation or respectability, the “common informer” seeks penalties that respectable community members would shirk from, enforcing unpopular laws to the letter.⁸¹ The archetypal common informer in England was a person “at the bottom of the socioeconomic ladder,” often a new arrival, who made a living by suing (or settling) under penal statutes.⁸² As most people held common informers in contempt, they were ideal candidates to impose “alien” regulations.⁸³ But since penal statutes generally permitted “any person” to sue, these laws also served to encourage others in the community to “turn” informer.⁸⁴ Often they provided an important source of compensation for law enforcement officers—like constables or customs collectors—who might otherwise be tempted to look

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ PARRILLO, *supra* note 35, at 25-26; Parrillo was primarily concerned with explaining bounty-based compensation for officers, but he also recognized that private informers played a similar role; *see also id.* at 25, n.54 (explaining how this distinction “between the familiar and the alien resonates” with the insights of other scholars, such as Robert Post’s distinction between community-oriented legislation and “managerial” legislation, and Charles Tilly’s distinction between direct and indirect rule.)

⁷⁸ *See id.* at 24.

⁷⁹ *Id.* at 25.

⁸⁰ *See, e.g.,* Jessica Warner & Frank Ivis, *Informers and Their Social Networks in Eighteenth-Century London: A Comparison of Two Communities*, 25 SOC. SCI. HIST. 563, 568 (2001) (noting that “justices with strong ties to their communities were more inclined to balk at enforcing the Gin Act,” a notorious piece of informer legislation in mid-eighteenth century England).

⁸¹ M. W. Beresford, *The Common Informer, the Penal Statutes and Economic Regulation*, 10 ECON. HIST. REV. 221, 221-38 (1957).

⁸² Warner & Ivis, *supra* note 68, at 563, 566.

⁸³ *See* PARRILLO, *supra* note 68, at 29-33.

⁸⁴ *See, e.g.,* Warner & Ivis, *supra* note 69, at 564.

the other way.⁸⁵ Conversely, many penal statutes created rights of action *against* public officials who failed to comply with some statutory duty.⁸⁶

There were variations on the theme. Some statutes gave the whole penalty to the informer; most required him to split it with the sovereign, or some relevant charitable entity. The word “common informer” contained an important ambiguity: some statutes (particularly in customs and excise enforcement) provided an award merely for furnishing information to an officer, while others required the informer to “sue” or “prosecute” the action himself. But in either case, Anglo-American jurists regarded the penalty as creating a property right—conditional upon the prerequisites laid out in the statute—which vested in the informer when the action commenced.⁸⁷ In essence, informer statutes worked by converting some widely distributed public interest into a multitude of contingent private rights.

The American colonies adopted (with some important regional variations) the English system of regulation rooted in local justice.⁸⁸ As a result, they also inherited the need for informer’s actions as a countervailing “alien imposition.” In some instances, Americans filed suit under British penal statutes that had not even been locally reenacted; even after Independence, informers in early federal Maryland invoked the same gambling statutes discussed by Blackstone.⁸⁹ But colonial lawmakers also drafted their own informer laws to circumvent local opposition. As a subcommittee of the Massachusetts colonial assembly observed in 1729, “the Laws already made directing the Size of Cask, Marking, Gauging and Packing” were not being “duly observed,” thus “if a greater part of the Forfeitures upon breach of those Laws were given to the Informers, it might have a good Tendency.”⁹⁰ Such measures reduced the need for salaried officers, to whom colonial assemblies objected on both fiscal and ideological grounds; the Declaration of Independence tapped a longstanding resentment when it excoriated the King for sending “hither swarms of Officers to harass our people, and eat out their substance.”⁹¹

⁸⁵ Warner & Ivis, *supra* note 68, at 566 (“Excisemen operated alongside informers—sometimes as informers in their own right, and sometimes as brokers or liaisons[.]”)

⁸⁶ See Beck, *supra* note 31, at 1310.

⁸⁷ 2 Blackstone Commentaries, at *438.

⁸⁸ See, e.g., James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: the Three Legal Systems of British America*, in 1 CAMBRIDGE HISTORY OF LAW IN AMERICA 556–82 (2008); Warren Billings, “Send Us . . . What Other Lawe Books You Shall Thinke Fitt”: Books That Shaped the Law in Virginia, 1600–1860, 120 VA. MAG. HIST. & BIOGRAPHY 314, 316–17 (2012); TOCQUEVILLE, *supra* note 1, at 122–26 (discussing the justice of the peace and local government system as he observed it in the New England states).

⁸⁹ Anna Price, *How a Statute Enacted in Great Britain Under Queen Anne Made Its Way to the D.C. Code*, LIBR. OF CONG.: IN CUSTODIA LEGIS (July 31, 2025), <https://blogs.loc.gov/law/2025/07/how-a-statute-enacted-in-great-britain-under-queen-anne-made-its-way-to-the-d-c-code/>. These laws remain on the books today, in slightly modified form.

⁹⁰ 9 MASS. HIST. SOC’Y, JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, 1729–1731, at 382 (1928) (describing a committee recommendation to “revive[]” a law providing for informer’s actions); see also PARRILLO, *supra* note 35, at 28 n.68 (identifying “several dozen” informer provisions passed between 1741 and 1750 in Virginia).

⁹¹ Declaration of Independence, para. 12 (U.S. 1776).

After the Revolution, municipal, state, and federal lawmakers continued to enact informer statutes on a prolific scale; we describe the jurisprudence that grew up around this body of law in greater detail in Section I.B..⁹² Towns and counties provided for informer's actions in "summary proceedings" before justices of the peace to regulate common nuisances and disorders.⁹³ State governments relied on informers to enforce laws regulating fish and game, commercial cheating, false marking, drinking establishments, vice legislation, revenue enforcement, smuggling, and elections.⁹⁴ Throughout the nineteenth century, these penal statutes comprised an important component of what Novak has described as the "well-regulated society"—a thick culture of local and state regulatory law that ordered economic life and public morality in the early United States.⁹⁵

Alexis de Tocqueville, on his travels throughout the northern states in the 1830s, was shocked by the absence of what "we call government or administration," in American life.⁹⁶ "In America, you see written laws; you see their daily execution; everything is in motion around you, and the motor is nowhere to be seen."⁹⁷ The secret, Tocqueville explained, lay partly in the highly decentralized system of local governance: town officers, "jointly with the justices of the peace and according to the needs of the localities, regulate the details of social existence and promulgate prescriptions relating to public health, good order and the morality of citizens."⁹⁸ But to enforce laws which might run counter to the vested interests of municipal authorities, Tocqueville observed that "American legislation appeals to the individual interest; that is the great principle found constantly when you study the laws of the United States."⁹⁹ After noting the ubiquity of informer actions against government officers for malfeasance or neglect, he observed: "Thrown into this extremity by their system, the Americans are forced to interest informers by calling them in certain cases to share in the fines. Dangerous measure that assures the execution of laws by debasing mores."¹⁰⁰

At a glance, Tocqueville perceived the fundamental paradox of private enforcement in America: informers themselves were considered immoral and degraded, but viewed collectively as a "principle" or institution, they filled a vital gap in the radically decentralized American system. While disreputable, the informer remained very much alive in "the laws of the United States."

⁹² See Baronia, Lucky, Zambrano, *supra* note 24, at 121; Randy Beck, *Qui Tam Litigation and Article II, State Constitutional Precursors to the "Take Care" Clause*, 49 HARV. J. L. & PUB. POL'Y 33, 37 (2026).

⁹³ 1 SIMON GREENLEAF, A TREATISE OF THE LAW OF EVIDENCE § 415, at 459 (1842) (noting that the statutes of many States "in divers summary convictions and trials for petty offences" gave the informer an interest in the penalty or forfeiture).

⁹⁴ See Baronia, Lucky, & Zambrano, *supra* note 24, at 142-43, 150, 159.

⁹⁵ NOVAK, *supra* note xx, at 1-2. Novak's pathbreaking study focused primarily on the work of local officials in administering regulatory law, but he recognized the importance of informers to this system; *see id.* at 173 (noting government's "the reliance on private prosecutors and informers" to implement "the well-regulated society.")

⁹⁶ Tocqueville, *supra* note 1, at 116.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 128.

¹⁰⁰ *Id.* at 129.

This was just as true for the federal government, in its more limited regulatory sphere of interstate commerce, intellectual property, taxation, foreign affairs, and Indian relations. It would have been surprising if informers had *not* figured prominently in national governance. The federal government in the nineteenth century was a “state of courts and [political] parties” with an extremely limited capacity for professional bureaucratic enforcement.¹⁰¹ The civilian employees in the federal government were overwhelmingly employed in building out government infrastructure—in the land office, the post office, and the patent office—rather than directly enforcing the many federal regulatory statutes touching commerce, interstate waterways, Indian affairs, and the like.¹⁰² By way of illustration, in 1861, more than 85% of the federal government’s civilian employees worked in the postal service.¹⁰³ In the era before the federal income tax, fiscal constraints made a large federal workforce of salaried regulators untenable. Many federal officers—notably customs collectors—were themselves paid on a piecework or bounty-style basis.¹⁰⁴ Justices of the peace and other local administrators answered to state governments, not to Washington. And the tiny corps of federal district attorneys—numbering well under 80 for the entire century—could never have brought enough actions to meaningfully enforce federal regulatory law over millions of Americans.¹⁰⁵ Ruling over a vast geographic area, the cash-strapped and leanly staffed national government had every reason to regulate on contingency, with private informers.

The basic premise of the informer action—the sense that informers were useful *because of* their treacherous greed for gain, not in spite of it—remained intact throughout the century. The career of South Carolina congressman L.M. Keitt provides a vivid illustration. Keitt is remembered today for brandishing a pistol on the floor of the United States Senate while his friend and fellow South Carolinian Preston Brooks savagely beat Massachusetts Senator Charles Sumner to avenge a perceived insult in one of Sumner’s antislavery

¹⁰¹ Stephen Skowronek, *Building a New American State: the Expansion of National Administrative Capacities, 1877-1920*, at 24, 26-27 (1982) (“It fell to the courts at each level of government to nurture, protect, interpret, and invoke the state’s prerogatives over economy and society as expressed in law.”)

¹⁰² See, e.g., Daron Acemoglu, Jacob Moscona & James A. Robinson, *State Capacity and American Technology: Evidence from the Nineteenth Century*, *Am. Econ. Rev.*, May 2016, at 61, 61-67 (discussing the importance of the postal service and the patent office); Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829-1861*, 117 *Yale L.J.* 1568 (2008); Desmond King and Robert C. Lieberman, *Ironies of the American State*, in *The Unsustainable American State* (Lawrence Jacobs & Desmond King eds 2009).

¹⁰³ *Historical Statistics of the United States, Colonial Times to 1970* (U.S. Bureau of the Census, 1975), Series Y 308–317. (https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p2-chY.pdf, p. 1103); see also Acemoglu, Moscona & Robinson, *supra* note 60, at 62.

¹⁰⁴ Parrillo, *supra* note 36, at 1-4.

¹⁰⁵ See Federal Judicial Center, “Snapshots of Federal Judicial History, 1790-1990,” (<https://www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990#glossary-1910>).

speeches.¹⁰⁶ After the caning, the House formally censured Keitt for assisting Brooks.¹⁰⁷ He answered his critics in a widely reprinted speech:

A majority in this House has passed a resolution of censure upon me. For what? Because I did not turn public informer [against Brooks]. . . What, sir! turn public informer against my friend, against my State? Sir, those who wish to be galvanised into walking satires upon honor and decency and fidelity may turn informers; I never shall.¹⁰⁸

Keitt captured the prevailing view of informers: the epitome of dishonor. But after South Carolina seceded from the Union, and Keitt joined the Confederate Provisional Congress, he routinely voted in favor of acts which relied on informers to enforce Confederate regulations.¹⁰⁹ This was nothing new; just as Edward Coke had denounced informers as “viperous vermin” while admitting their usefulness as a policy tool in the seventeenth century,¹¹⁰ nineteenth-century American statesmen continued to hate the player and love the game.

For reasons that we discuss at greater length in Part II, Americans’ longstanding revulsion toward informers gradually developed into a critique of their legitimacy and effectiveness as a policy tool in the decades following the Civil War. But this was a slow transition, and legislators continued to deploy informers when confronted with novel regulatory problems. An 1897 treatise for railroad attorneys catalogued a dizzying array of recent penal statutes subjecting railroads to informer actions for overcharging passengers and freight, failing to provide a “blackboard and register the time of arrival, lateness, etc., of each train,” and improperly confining livestock in transit.¹¹¹ The rationale for penal statutes in the late nineteenth century displayed remarkable continuity with conceptions of private enforcement at the Founding. The railroad law treatise—like many other contemporary judicial opinions concerning informers—relied on the same foundational passages in Blackstone’s *Commentaries* that had guided American jurists in the eighteenth century.¹¹² As the Supreme Court of Wisconsin observed in 1891, the system of “paying a moiety of fines in many penal actions to informers was in frequent use in England from very early times, and has been quite generally adopted in this country. . . . It is quite evident that, if it is not

¹⁰⁶ HOLT MERCHANT, *SOUTH CAROLINA FIRE-EATER THE LIFE OF LAWRENCE MASSILLON KEITT, 1824-1864*, at 51-52 (2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Speech of Hon. L.M. Keitt*, EDGEFIELD ADVERTISER (Edgefield, S.C.), July 30, 1856.

¹⁰⁹ See 1 JOURNAL OF THE CONFEDERATE STATES OF AMERICA 80-85 (South Carolina delegation voting in favor of act which penalized illegal importation of slaves into the Confederacy, “one half to the informer”); *id.* at 177-78, 181 (Keitt specifically recorded as a “yea” vote for a bill penalizing confederate privateering vessels which failed to keep a proper journal with a one thousand dollar penalty for each offense, “one moiety thereof to the Confederate States and the other to the informer”).

¹¹⁰ Woolhandler & Nelson, *supra* note 25, at 731 (quoting EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* *194).

¹¹¹ 2 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *TREATISE ON THE LAW OF RAILROADS*, §§ 713-14, at 1026-1030 (1st ed. 1897).

¹¹² *Id.* at 1026 n.2; *U.S. v. Griswold* (D. Or. 1877) 26 F.Cas. 42, 44.

made an object for some one to prosecute, many salutary laws would never be enforced, because no one would be interested in seeing them enforced.”¹¹³

B. The Law of Informers

This Part disinters the nineteenth century case law and doctrine on informers to clear up some present-day misunderstandings of their role. Hundreds of years of English and American precedent governed common informers. American courts in the 1800s continued to develop these longstanding principles, applying specialized canons to determine the breadth of informer statutes, articulating pleading standards, barring abusive or collusive suits, and deciding which procedural channels informers had to follow. These rules gave shape to the textually sparse informer provisions that American legislators enacted; the expansive treatment they received from lawyers and judges testifies to the importance of informers in nineteenth century American governance.

1. *Informers as a Regulatory Tool Spanning Statutory Law*

First and foremost, informers were creatures of statute, dependent on the legislature rather than common law. As a popular nineteenth-century treatise explained, without statutory authorization, “a common informer cannot sue.”¹¹⁴ Informer actions were synonymous with “penal *statutes*,” because they arose from positive legislation. By prohibiting or regulating a particular act and then providing a monetary penalty open to anyone willing to prosecute, legislatures created a property interest or debt, which could be collected through multiple procedural vehicles—typically a civil action of debt or a criminal information, or (for forfeiture of illicit goods) a libel *in rem*. In other words, informer lawsuits were statutory *rights of action*, which might proceed under one of several different *forms of action*.¹¹⁵

This was the value proposition of the informer action: it permitted legislatures to push beyond existing common law offenses and calibrate new penalties for deterrence, while still relying on a relatively well-established legal infrastructure. As legal positivism gained traction throughout the century, courts apparently regarded informer actions as fair game in any sphere in which a legislature was competent to make laws. As the federal Supreme Court observed in 1885, the “power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what

¹¹³ State v. Delano, 80 Wis. 259 (1891).

¹¹⁴ CHITTY, *supra* note 28, at 143; *see also* United States v. Stocking, 87 F. 857, 861 (D. Mont. 1898) (“There are authorities, however, which maintain that, unless authorized by statute, an informer cannot sue in his own name for a penalty.”); Jones v. Estis, 2 Johns. 379, 380 (N.Y. Sup. Ct. 1807) (“a penalty cannot be raised by implication, but must be expressly created and imposed.”).

¹¹⁵ CHITTY, *supra* note 28, at 108.

disposition shall be made of the amounts collected, are merely matters of legislative discretion.”¹¹⁶

Accordingly, informer provisions appeared across most domains of federal regulatory authority in the nineteenth century. Perhaps most prominently, nearly all tariff and revenue acts from the 1790s through the 1860s relied on informer and moiety provisions (dividing awards between the informer and a range of naval and treasury officers) to compensate for limited bureaucratic capacity.¹¹⁷ But the device extended much further. Federal informer provisions enforced Indian Trade and Intercourse Acts; maritime safety regimes (e.g., Steamboat Inspection Act and its successor); public lands and naval timber statutes; slave-trade prohibitions; the Second Bank of the United States charter; postal fraud statutes; and even statutes disciplining federal officers.¹¹⁸ On top of this, Congress included informers in District of Columbia regulations, ranging from bank regulations all the way to fisheries protection.¹¹⁹

While these penal statutes used well-established statutory forms, Congress was not mechanically copying historic models; legislators experimented, iteratively amending laws to adjust the scope of private enforcement. Federal informer provisions in the liquor excise provide one example.¹²⁰ The Internal Revenue Act of 1862 initially gave collectors and deputy collectors exclusive rights to informer rewards, providing that when sums were forfeited, “one moiety shall be to the use of the United States, and the other moiety to the use of the person who, if a collector or deputy collector, shall first inform of the cause, matter or thing.”¹²¹ Congress amended this scheme in 1865, opening informer rewards back up to any person who first gave information. By 1866, Congress modified the law again to give the Secretary of the Treasury regulatory power over the amounts. This evolution—from exclusive officer rewards back to a traditional informer scheme, with some officer supervision—illustrates both the wide legislative discretion to shape private enforcement, and the continuing appeal of informers deep into the nineteenth century.

State legislatures used the device in many of the same domains and in some additional ones unique to their police powers. Informers played a notable role in early forms of environmental enforcement, to prevent resource depletions and destructive fishing

¹¹⁶ *Missouri Pac. Ry. Co. v. Humes* (1885) 115 U.S. 512, 523

¹¹⁷ Appendix A.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *United States v. Six Thousand Two Hundred & Fifty Cigars*, 27 F. Cas. 1114, 1114 (D. La. 1869) (describing evolution of statutory scheme)..

¹²¹ *United States v. Thirty-Four Barrels of Whiskey*, 28 F. Cas. 53, 54 (D. Mass. 1868); see also *United States v. Hook*, 26 F. Cas. 370, 371 (W.D. Pa. 1867) (“Whether the information is given from motives of gain or public policy, the government is indifferent, so that the culprit is arrested in his criminal career, and stripped of his ill-gotten treasure.”); *Dorsheimer v. United States*, 74 U.S. 166, 173 (1868) (“The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes.”)

practices.¹²² Connecticut's fisheries statute, for example, prohibited the use of "bush-seines" (a type of fishing net) in some rivers, imposing a penalty of sixty-seven dollars "for every such offence."¹²³ Common informers (like the successful plaintiff in *Eastman v. Curtis*) could collect half of the penalty against illegal netters, splitting the other half with the county treasury.¹²⁴ Informer actions were also used to enforce statutes encouraging investment in stage lines, ferries, and toll roads; states would grant a monopoly on the line to some operator, then relied on informer provisions to keep out would-be competitors. The Connecticut General Assembly, for instance, granted one entrepreneur an exclusive privilege to carry passengers by stage "on the post-road leading to Boston as far as the Massachusetts line."¹²⁵ To enforce this monopoly, the legislature empowered any common informer to sue violators for a penalty: forfeiture of "his stage and horses, or double the value thereof." An enterprising informer successfully collected \$692 from an interloping stage line (about half of what he requested from the jury). While the defendants challenged the grant itself as void, the Connecticut Supreme Court of Errors in 1802 upheld both the exclusive privilege and (implicitly, the informer provision) as valid exercises of legislative power.¹²⁶

Legislators also used informers to layer new statutory regulations onto traditional common law areas like property, contracts, or torts. Take *Wilmot v. Monson*, a case involving a mix of usury and contract law.¹²⁷ There, an informer brought an action against the defendant for violating the state's usury statute in a loan transaction with a third party named Wheeler. The informer was not a party to the contract, had suffered no injury from it, and had no personal stake in whether Wheeler paid usurious interest. Yet Connecticut law empowered the plaintiff to sue for the statutory penalty.¹²⁸ The Connecticut Supreme Court noted that informers occupied a different procedural position than parties to a contract, noting that "in an information on the statute, by a third person," there was no need to require all the same evidentiary "strictness . . . as where a party to a usurious contract pleads it by way of bar to an action."¹²⁹ The reason was straightforward: "the party is privy to the contract, but the informer is not."¹³⁰ Here was a stranger to a private lending agreement, authorized by statute to enforce regulatory limits on interest rates and pocket the penalty.

In *Marvin v. Trout* (1905), the federal Supreme Court looked back to nineteenth century practice when in affirming the constitutional power of Congress to create informer provisions.¹³¹ The case involved an Ohio gambling statute that allowed an informer to sue

¹²² See e.g., *Dogherty v. Anderson*, 3 N.J.L. 428 (N.J. 1808) (discussing "an act to prevent the waste of timber" with an informer provision); *Miller v. Stoy*, 5 N.J.L. 476 (N.J. 1819) (same).

¹²³ *Eastman v. Curtis*, 1 Conn. 323, 324 (Conn. 1815).

¹²⁴ *Id.* See also *Nye v. Lamphere*, 2 Gray 295 (Mass. 1854) (discussing a very similar statute in Massachusetts and finding that a common informer could sue in his own name).

¹²⁵ *Perrin v. Sikes*, 1 Day 19, 1802 WL 3111 (Conn. 1801)

¹²⁶ *Id.*

¹²⁷ *Wilmot v. Monson*, 4 Day 114, 116 (Conn. 1809).

¹²⁸ See *id.* at 118.

¹²⁹ *Id.* at 116-17.

¹³⁰ *Id.* at 117.

¹³¹ 199 U.S. 212 (1905).

over money used in illegal gambling. The appellant challenged the statute, arguing that it unconstitutionally took his property in violation of due process, and pressed that informer statutes could not be enforced by someone without a personal injury. The Supreme Court rejected these arguments, firmly holding that informer provisions were constitutional and deeply rooted in the nation's history. The Court explained that "to say that [gambling regulations] must be limited to a provision allowing a recovery of the money by the one who lost it would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions."¹³² The Court continued: "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government."¹³³ Far from being an outlier, the Court emphasized, "[t]he right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."¹³⁴

2. *Legislative Discretion in the Division of Penalties*

The statutory basis of informer actions also gave legislators discretion in the division of penalties. Some penal statutes could give "the whole of the penalty" to the informer while others split it with the poor, a town government, or the enacting sovereign.¹³⁵ Informer shares ("moieties") were usually divided equally between the government and informer. For example, one 1800 statute prohibited the importation of slaves through the seizure of vessels and empowered informers to the tune of "one moiety thereof to the use of the informer, and the other moiety to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States." Other statutes went further than that and specified more complex distributions. For example, under the Embargo Act of 1809 "one moiety is in general adjudged to the collector, naval officer, and surveyor of the port or such of those officers as exist in the district; but if the forfeiture is recovered in pursuance of information from a third person, such informer is entitled to one half of the moiety."

But, as had long been the case, moieties could also be divided in a way that excluded the sovereign entirely—like the informer action enforcing the Saganaw Treaty, discussed above. State legislators did this with some regularity. New York's usury statute, for instance, directed that penalties be split not just between the informer and the state, but between the informer and "the poor" of a municipality. When a common informer brought suit in *Morrell v. Fuller* (1811), he sued "as well for the poor of the city of Schenectady, as for himself" to recover on a usurious loan.¹³⁶ The statute thus conscripted private enforcers into funding a

¹³² *Id.* at 225.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 4 BLACKSTONE, COMMENTARIES *149 (Kerr ed. 4th ed.).

¹³⁶ *Morrell, qui tam, v. Fuller*, 1811 WL 1687 (N.Y. Aug. 1811). See also *Ferris v. Coles*, 3 Cai. R. 207 (N.Y. 1805) (discussing a statute for the inspection of flour and meal that allowed any person who would prosecute to get one half of the penalty, with "the other half to be paid to the overseers of the poor of the city or town where the fraud was detected").

rudimentary welfare system—informers pursued violators while simultaneously raising revenue for local poor relief.¹³⁷ The varying public uses to which qui tam penalties were applied throughout the century undermines some recent conceptualizations of qui tam that regard informer actions as merely a “partial assignment” of the government’s own private interest in a damages claim to an informer, as some scholars have recently argued.¹³⁸

3. *The Identity of the Informer: Both Strangers and Officials*

By their terms, informer actions permitted anyone to bring suit; injured parties and even government officials sometimes filed claims. But caselaw makes clear that the paradigmatic informer was a stranger. As discussed above, in *Wilmot v. Monson*, the plaintiff sued to enforce a usury prohibition even though they were “a third person,” not party to the contract (“the party is privy to the contract, but the informer is not”) and was not acquainted with the underlying parties as far as we can tell.¹³⁹ Along the same lines, the New York Supreme Court noted in 1809 that “[a] stranger, or common informer,” who brought a qui tam action for gaming penalties was entitled to “greater indulgence in pleading, for he may not always know the precise facts” of the violation.¹⁴⁰ The court reasoned that unlike the losing party who had direct knowledge of the gaming transaction, the informer was an outsider: “There was no contract or privity existing between him and the defendant.”¹⁴¹ The Supreme Court of Vermont and South Carolina similarly noted that “[w]here a statute gives an action to a stranger to recover a forfeiture, he is a common informer, and the action a penal action.”¹⁴²

Despite the prevalence of stranger-informers, early Americans also understood that lower-level officials sometimes performed their jobs by filing informer claims. For example, in June of 1808, Palmer, a resident of Little Neck Bay in Queens County, New York, waded into local waters teeming with clams.¹⁴³ Although Palmer may not have noticed, he raked clams below the ordinary low water mark, as he and others had likely done for years. But the town of Flushing had recently passed a regulation prohibiting anyone from raking clams within the town’s boundary line and, to enforce the regulation, provided a penalty of ten dollars—“half to the poor of the town,” and “half to any informer.” The town’s supervisor, Hicks, brought an action of debt against Palmer to recover the informer’s share.¹⁴⁴ Palmer admitted he had raked clams in the bay but denied that Flushing had any right to prohibit clamming below the low water mark.¹⁴⁵ The Justice of the Peace sided with Hicks, and Palmer sought review. No one doubted the power of informers to do this kind of thing; it was the way regulation worked in the early 1800s. The case turned instead on whether the town could regulate common resources in navigable waters. *Palmer v. Hicks* is a sample of how informer

¹³⁷ *Palmer v. Hicks*, 1810 WL 1125 (N.Y. Sup. Ct. 1810).

¹³⁸ See, e.g., Sarah Leitner, *The Private Rights Model of Qui Tam*, 76 Fla. L. Rev. 865 (2024).

¹³⁹ *Wilmot*, 4 Day at 116.

¹⁴⁰ *Cole v. Smith*, 4 Johns. 193 (N.Y. Sup. Ct. 1809).

¹⁴¹ *Id.*

¹⁴² *Hubbell v. Gale*, 3 Vt. 266, 271 (1830); *Trumbo v. Finley*, 18 S.C. 305, 312 (1882).

¹⁴³ *Palmer v. Hicks*, 1810 WL 1125 (N.Y. Sup. Ct. 1810).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

provisions operated at the local level, empowering enforcement of municipal regulations over everyday economic activities.

4. *Informer Actions vs. Qui Tam*

There were important differences between informer actions and qui tam claims. At the most basic level, an informer provision was a statutory penalty to be collected through a lawsuit. This makes it analogous to the modern private right of action: specific statutory language that confers a power to sue. Qui tam, by contrast, was just one form of pleading through which a private plaintiff might vindicate his statutory interest, by suing both for himself and on behalf of the crown or government. This makes it analogous to a modern class action: a procedure by which a private plaintiff can sue on behalf of others.¹⁴⁶ These two legal tools often overlapped, but they were distinct because the statutory power to sue differs from the procedure by which you bring suit.

Most legal observers, for instance, agreed that an informer provision that gave the entire penalty to the informer did not need to be operationalized through a qui tam suit. And so Joseph Chitty's influential treatise in the mid-1800s noted, "[w]here a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, [a civil action of] debt is sustainable; and he need not declare qui tam."¹⁴⁷ In other words, if the statute gave the informer a right to sue, he could sue in his personal capacity and not on behalf of the government. Blackstone and several federal courts agreed that a common informer claim could be filed in the plaintiff's own name and not necessarily as a qui tam suit on behalf of the government.¹⁴⁸

While these commentators agreed that informer claims and qui tam were different, they disagreed about when an informer was obligated to sue via qui tam. For Chitty, as we've seen, an informer could sue individually for the whole or even part of the bounty.¹⁴⁹ For Blackstone, however, the claim had to be qui tam if the statute gave "one part . . . to the crown, to the poor, or to some public use."¹⁵⁰ A late federal court opinion agreed with Blackstone that "informers were empowered to bring actions for penalties established by law in their own names, and, if part of the amount to be recovered was for the benefit of the [executive], the action was called a 'qui tam action.'"¹⁵¹

Along the same lines, some state courts agreed that an informer had an obligation to "declare specially qui tam" when a statutory penalty was given to the state or others. A New Jersey court in 1807 noted that "[a]lthough a common informer may bring an action generally

¹⁴⁶ The False Claims Act incoherently merges these two by naming qui tam in the statute.

¹⁴⁷ CHITTY, *supra* note 28, at 113.

¹⁴⁸ 3 BLACKSTONE, COMMENTARIES *149 (Kerr ed., 4th ed.); United States v. Stocking, 87 F. 857, 861 (D. Mont. 1898).

¹⁴⁹ CHITTY, *supra* note 28, at 113.

¹⁵⁰ 3 BLACKSTONE, COMMENTARIES *149 (Kerr ed., 4th ed.).

¹⁵¹ United States v. Stocking, 87 F. 857, 861 (D. Mont. 1898).

in his own name, yet when the penalty is either given to the State, the poor of the township . . . or others, he must declare specially *qui tam* in order that the interest of those who have right, may appear of record, and be asserted.”¹⁵² Addressing the issue head on, the Kentucky Court of Appeals in 1811 held that “[t]he rule is general, that in all actions for forfeitures, created by statute, the one-half to the informer, and the other to the county, the action should be *qui tam*.”¹⁵³ The case involved an action to recover a horse, saddle, and thirty dollars lost in gambling. Kentucky’s anti-gaming statute subjected such property to forfeiture, “to be recovered by any person suing for the same, one-half to his own use, and the other to the county.”¹⁵⁴ The plaintiff brought the action in his own name alone, but the court reversed, holding that when the informer was “entitled to a part only,” he could not “recover to his own use the whole.”¹⁵⁵ The court reasoned that allowing the informer to sue in his own name would violate pleading rules and create practical problems: “the county might be put to much inconvenience in recovering of the informer her portion of the forfeiture, which could be done only by another action.”¹⁵⁶ These cases show how courts sometimes struggled to police the distinctions between informer claims and *qui tam*.

5. *The Uneasy Relationship Between Informers and the Government*

Because informer actions were a major regulatory tool available to legislatures, there were difficult clashes between informers and the powers of the Crown, governors, and Presidents. A few common questions arose:

First, as in the context of *qui tam*, courts routinely addressed the power of the executive over common informers, before and after claims were filed. Some treatise writers differentiated between public and private enforcement based entirely on how the moieties were divided. Chitty’s treatise distinguished between information suits that are “partly at the suit of the king, and partly for the benefit of a subject” and those which “are only in the name of his majesty.”¹⁵⁷ The “former are usually brought upon particular acts of parliament, which inflict a penalty upon conviction, one part to the use of the king and the other to the use of the informer.”¹⁵⁸

Some courts read informers’ rights over statutory penalties as vesting only once an action was filed in court. The U.S. Supreme Court summarized in 1806 an earlier English case as standing for the proposition that “the right of the informer did not accrue till the action brought; but the whole had gone to the king by the forfeiture. The offense divests the property, but it is not vested in an informer until action brought. In the meantime it is in the

¹⁵² *Vandeventer v. Van Court*, 2 N.J.L. 168 (N.J. 1807)

¹⁵³ *Davidson v. Blunt*, 16 Ky. 128, 128 (1811).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see also *Prior v. Lucas*, 6 Ky. 96, 97 (1813).

¹⁵⁷ 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 166 (1832).

¹⁵⁸ *Id.*

king. The informer's right only vests by action."¹⁵⁹ That means that before an informer action was filed, the government could sue for the whole of the penalty. The Massachusetts Supreme Judicial Court applied this principle in *Commonwealth v. Howard* in 1816, a case involving defendants who cut down trees on Commonwealth lands.¹⁶⁰ The statute gave two-thirds of the penalty to the Commonwealth and one-third to the informer.¹⁶¹ The Attorney-General filed an information ex officio without naming any informer, but after conviction the trial court awarded one-third to Stephen Chase "as informer."¹⁶² The Supreme Judicial Court reversed, stating "[t]here is no question, that, where a statute inflicts a penalty, partly to the use of the Commonwealth, and partly to the use of an informer, the government may sue for the whole."¹⁶³ Chase had no vested right because he had not filed his own action first: "Had Chase, or any one else, commenced a prosecution *qui tam*, before the Attorney-General had filed his information, the latter must have failed. But that was not the case here."¹⁶⁴ The government's right to the penalty was defeated only if an informer filed first.

Congress routinely enshrined this basic understanding—that the government could take the whole share by filing a case first—in statutes, specifying: "the one half thereof to the use of the United States, and the other half to the informer; but where the prosecution shall be first instituted on behalf of the United States, the whole shall accrue to their use."¹⁶⁵

Second, once a case was filed, however, it was clear that the executive could not release the claim nor pardon it, unless the statute itself conferred such authority. Consider again Chitty's influential treatise, which states that "the prosecutor may release" the "civil actions of private individuals . . . but the king has no right to interfere."¹⁶⁶ Chitty extends this to apply to the pardon power as well: "Upon the same principle, [the King] can bar no right of entry, or of action, or any other legal interest or benefit actually vested in the subject; so that his pardon will be no plea to an action on a statute by the party grieved, or even by a common informer, if commenced before the indulgence of the crown was extended to the defendants. . . . But it seems, that before a penal action is brought by a common informer, the king may altogether discharge the offender."¹⁶⁷

6. *Prosecuting vs. Informing: The Muddled Status of Customs Informers*

Throughout most of the early 1800s, an "informer" was understood to be a party who brought suit to collect a statutory penalty, not merely someone who reported a violation

¹⁵⁹ *United States v. Grundy*, 7 U.S. 337, 348, 2 L. Ed. 459 (1806).

¹⁶⁰ *Commonwealth v. Howard*, 13 Mass. 221, 222 (1816).

¹⁶¹ *Id.* at 221.

¹⁶² *Id.*

¹⁶³ *Id.* at 222.

¹⁶⁴ *Id.*

¹⁶⁵ Act of Mar. 1, 1790 ch. 2, § 3, 1 Stat. 101; *see Francis v. United States*, 72 U.S. 338, 341 (1866) ("[An informer] cannot thrust himself into a proceeding instituted by the Attorney-General, for the sole use of the government, when it is resisted by such officer, who denies all his allegations, and refuses any further partnership with him.")

¹⁶⁶ CHITTY, *supra* note 121, at 763.

¹⁶⁷ *Id.*; *see also Governor v. Howard*, 5 N.C. (1 Mur.) (1810).

to authorities. To qualify for a share of the forfeiture or penalty, the informer had to prosecute the case. Blackstone said this explicitly, defining a “common informer” as “any such person as will sue” for a “forfeiture[] created by statute.”¹⁶⁸ Courts reinforced this understanding by referring to informers as “the person prosecuting” a case to collect a moiety,¹⁶⁹ and some (as discussed at greater length below) prohibited informers from serving as witnesses in their own cases, reasoning that they were “interested, and therefore, incompetent witnesses.”¹⁷⁰

At some point in the 1800s, Congress began to explicitly provide for moieties for “persons informing *and prosecuting* for the same,”¹⁷¹ or “to any person or persons *who shall sue* for the same.”¹⁷² Some courts noted that “that when a statute gives part of a penalty to any one *who will sue for the same*, an action or information of debt is the proper remedy.”¹⁷³

Yet, from the colonial period on, the term “informer” in the customs context could also refer to someone who merely provided information (i.e. a tipster) rather than litigation. One court focused on this distinction, noting that “[i]n its origin the word ‘informer’ may have meant only one who sues by way of an information . . . and in time, certainly, if not originally, a party so suing in whatever mode was known as an informer.”¹⁷⁴ But, in addition, “[t]he word also, no doubt, in some of its applications, includes a person who lodges information with a government officer which leads to a suit brought by the government itself. It is so used in the customs revenue laws.”¹⁷⁵

By mid-century, the tipster model may have become the more usual situation in customs and revenue cases. One federal court candidly acknowledged that “[i]t is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means.”¹⁷⁶ In revenue cases, government officials might seize smuggled goods and then “file[] a claim for the informer’s share in the value of the goods.”¹⁷⁷ Courts recognized that “an officer of the revenue may, in some cases, be an informer”¹⁷⁸ merely by providing information—though they were careful to note that “an officer cannot always be considered an informer merely because he as an officer acquires information useful to the government.”¹⁷⁹ The unique structure of customs and revenue enforcement, where seizures often preceded formal legal proceedings and multiple officials

¹⁶⁸ BLACKSTONE, COMMENTARIES *149 (Kerr ed. 4th ed.).

¹⁶⁹ *Caswell v. Allen*, 1813 WL 991 (N.Y. Sup. Ct. 1813).

¹⁷⁰ *The Thomas & Henry*, 23 F. Cas. 988 (C.C.D. Va. 1818); *Williamson v. State*, 16 Ala. 431, 432-33 (1849) (“witness . . . was no informer, and could have no interest in the case.”).

¹⁷¹ *United States v. Tilden*, 28 F. Cas. 179, 180 (C.C.D. Mass. 1859).

¹⁷² *United States v. Morris*, 26 F. Cas. 1321, 1322 (C.C.S.D. Ohio 1866).

¹⁷³ *Tilden*, 28 F. Cas. at 180.

¹⁷⁴ *Pollock v. The Laura*, 5 F. 133, 141 (S.D.N.Y. 1880), *aff’d sub nom.*, *The Laura*, 114 U.S. 411 (1885).

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. One Hundred Barrels of Distilled Spirits*, 27 F. Cas. 300, 301 (D. Mass. 1868)

¹⁷⁷ *Anonymous*, 1 F. Cas. 1010, 1010 (S.D.N.Y. 1872).

¹⁷⁸ *United States v. One Hundred Barrels of Distilled Spirits*, 27 F. Cas. 300, 302 (D. Mass. 1868).

¹⁷⁹ *Id.*

might be involved, created pressure to expand the category of “informer” beyond the person who actually prosecuted the case. Some revenue statutes even specified that certain government officials “were the only persons who could be informers.”¹⁸⁰ As discussed further below, after the 1870s, statutory language began to prioritize information over prosecution, enacting statutes that explicitly gave “the informer’s share to the one who furnishes the original information which shall lead to the recovery of the fine.”¹⁸¹ Nonetheless, as late as 1943, the Supreme Court (examining older authorities) concluded that that “[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.”¹⁸²

II. The End of Informers: From Penal Statutes to Private Rights of Action

The evidence marshaled in Part I demonstrates that informer provisions were ubiquitous throughout the 1800s and beyond. But it is equally clear that penal statutes had grown less familiar, and more controversial, by the early twentieth century. If informers were so prevalent and constitutionally uncontroversial for so long, why are they so obscure today?

The handful of scholars to have pondered the decline of *qui tam* have generally emphasized the growth of state power as an alternative to informers: “*qui tam* provisions were initially useful as a supplement to public law enforcement in the fledgling nation, but were more trouble than they were worth when public enforcement mechanisms became more competent in their own right.”¹⁸³ Undoubtedly, the rise of modern policing, public prosecutors, salaried bureaucrats and the administrative state in the late nineteenth century made it easier to break up with informers. In 1884, the entry for “Informer” in a British encyclopedia noted that “since the establishment of the police force, the common informer’s vocation has almost fallen into desuetude.”¹⁸⁴ A similar process was clearly unfolding in the United States. As one judge told the *New York Sun* in 1913, “we are improving so rapidly by our system of legal procedure that we are further away than ever from the necessity of clothing the informer with robes of justice.”¹⁸⁵ While citizens regarded the informer as a “rascal, a man unequal to the test of association with the rights of citizenship,” the judge observed that “no one objects to the energy of a District Attorney . . . and the people *usually sustain his methods*, whatever they may be.”¹⁸⁶

¹⁸⁰ *United States v. Thirty-Four Barrels of Whiskey*, 28 F. Cas. 53, 54 (D. Mass. 1868).

¹⁸¹ *United States v. Simons*, 7 F. 709, 712 (E.D. Mich. 1881); *United States v. George*, 25 F. Cas. 1277 (C.C.S.D.N.Y. 1869); *U.S. v. Card*, 25 F.Cas. 284, 285 (D. Me. 1881) (defining informer as the person who “first gives to a person authorized to receive it” information).

¹⁸² *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943).

¹⁸³ Sarah Leitner, *The Private Rights Model of Qui Tam* (citing Beck’s 1972 Note on *Qui Tam*, at p. 101).

¹⁸⁴ *The National Encyclopedia* (1884), Vol. VII, entry for “Informer,” p. 763.

¹⁸⁵ *Danger in Inquisitions: Judge Foster Denounces Investigations Undertaken by Individuals Outside of the Usual Course*, *THE SUN* (New York), Mar. 9, 1913, <https://www.loc.gov/resource/sn83030272/1913-03-09/ed-1/?sp=32&q=informer&r=0.02,0.372,0.455,0.332,0>.

¹⁸⁶ See *New York Sun*, *supra* note xx at xx.

But the development of public enforcement does not, by itself, explain why legislators abandoned informers. In fact, lawmakers *continued* to choose private enforcement after the emergence of a more bureaucratic regulatory state, but increasingly in a different form: remedial rights of action for damages. Private plaintiffs were charged with enforcing many of the most consequential federal laws passed between the 1870s and the early twentieth century, including the Civil Rights Act of 1871,¹⁸⁷ the Interstate Commerce Act of 1887,¹⁸⁸ the Sherman Antitrust Act of 1890,¹⁸⁹ and the Federal Employers Liability Act of 1908,¹⁹⁰ to name just a few examples. While formulated in terms of private injuries, these statutes were just as concerned with shaping public policy. The question, then, is why legislators came to prefer one style of private enforcement (remedial statutes) over another (penal statutes). In this section, we offer some tentative explanations as to both the timing and the causes of this transformation.

Part II.A argues that informers did not gradually decline as legislators implemented the Constitution's vision of republican government, as some Article II critics of *qui tam* have suggested. On the contrary, informer actions remained firmly rooted from the Founding through the 1870s. Only in the following decades did penal statutes begin to fall into disfavor. In other words, rather than experiencing linear decline, informer provisions sputtered out after something of a nineteenth century renaissance. We propose three explanations for this trend. First, the dramatic expansion of informer activity appears to have sparked a backlash: the hostility and resistance informers engendered undermined the legitimacy of new regulatory efforts, and paradoxically *reduced* compliance with laws that depended on voluntary cooperation. Second, complex developments in the law of witness competency made it easier, after about midcentury, for injured plaintiffs to testify and prevail in damages actions than informers in penal statutes. Finally, a longstanding rule of construction providing for the "strict" construction of penal statutes and the "liberal" construction of remedial laws encouraged lawmakers to cast new regulatory laws in remedial terms to avoid judicial interference. These explanations suggest that the transition from informer provisions to modern private rights of action was simply an evolution in regulatory technique. Legislators did not abandon the idea that private parties might enforce the law to benefit the public—they simply recalibrated who could sue and what they could recover.

¹⁸⁷ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (subjecting any person acting under color of law who deprives another of constitutional rights to be "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

¹⁸⁸ Interstate Commerce Act of 1887, ch. 104, § 8, 24 Stat. 379, 382 (making violating common carriers "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," alongside a reasonable counsel fee).

¹⁸⁹ Sherman Antitrust Act of 1890, ch. 647, § 7, 26 Stat. 209, 210 (providing that any person injured in their business or property by an unlawful monopoly or restraint of trade may sue in federal court and "shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee").

¹⁹⁰ Federal Employers' Liability Act of 1908, ch. 149, § 1, 35 Stat. 65, 65 (establishing that common carrier railroads are "liable in damages to any person suffering injury while he is employed by such carrier... or, in case of the death of such employee, to his or her personal representative" for injuries resulting in whole or in part from company negligence).

Part II.B, then traces how Senator John Sherman's experience with these forces between 1874 and 1890 likely led him to support the Sherman Antitrust Act's injury-based private right of action, launching the modern era of private enforcement.

A. The Decline of Informers: Legitimacy, Evidence, and Interpretation

In this section we offer a tentative explanation of the relative decline of penal statutes, looking both to the broader historiography of the American state, and to technical developments in the law. In short, lawmakers turned away from penal statutes not because they came to see them as unconstitutional, but because they came to see them as comparatively ineffective. Note, however, that there were other important forces that we will not explore here, including the rise of bureaucratization (including the modern customs service), a set of scandals that portrayed informers as rapacious, the emergence of a legal profession with its own distinctive economic interests, and the rise of multiple damages fees.

1. Declining Legitimacy

The first explanation for the late nineteenth century decline of informers concerns their legitimacy. Initially, nineteenth century regulators believed that informers could provide the surveillance and deterrence required to encourage most people to comply with the law voluntarily. But a backlash against the excesses of informers after the Civil War convinced many legislators that the adversarial nature of the informer system was actually encouraging otherwise law-abiding citizens to resist ambitious new law, at least in some fields of regulation.

Nicholas Parrillo has demonstrated this process in the evolving compensation of public officers,¹⁹¹ showing that “bounty-seeking” schemes for compensating officers flourished in the nineteenth century but ultimately failed when ambitious regulatory experiments required cooperation rather than antagonism.¹⁹² A need for cooperation, then, forced legislators to shift to a salary model for government officers. It appears similar sentiments encouraged late nineteenth century lawmakers to recall informers from some regulatory domains where they had once been prominent.

Developments in federal tax enforcement sparked an important—though not categorical—turn against informers in the 1870s. Customs and revenue enforcement had an outsized significance for the early federal government, and so most federal informers in the early republic probably targeted importers and tax dodgers. During the fiscal stresses of the Civil War, Congress turned to “moiety men”—private contractors for the Treasury Department who were not only entitled to a portion of delinquent taxes and duties they collected, but were given powers to compel importers and taxpayers to produce their books

¹⁹¹ See generally Parrillo, *supra* note 38.

¹⁹² See *id.* at 4, 251 (describing the use of informers to enforce the law as a method “characteristic of the bounty-seeking special agent”).

and papers.¹⁹³ Rather than furnishing tips to the Treasury, the moiety men coordinated with treasury officials to obtain dubious lists of delinquent taxpayers and then demanded to review their books. Graft and overreach caused a public outcry that did much to delegitimize informers in the eyes of the broader public. As the New York Chamber of Commerce complained to Congress in January 1874, “the demoralizing system of rewarding informers by moieties, and with the arbitrary powers vested in officers who are themselves informers to seize books and papers . . . too commonly serve[s] as a trap for honest importers and an encouragement to corruption, oppression, and private bribery.”¹⁹⁴

A few months later, Congress finally upended the traditional property-right paradigm of customs moieties, abolishing all moieties to informers for the customs laws. Instead, a fund was appropriated to the treasury department, out of which the secretary was authorized to pay an informer up to one-half of the net proceeds of the seizure he facilitated.¹⁹⁵ While this was superficially similar to the system that preceded it, there was an important conceptual difference: from here on out the “professionals” at the Treasury Department would *employ* informers as needed, rather than competing with freelance informers for a share of the spoils.

We suspect that the “moiety men” episode played an important role in pushing informers to the margins of federal law. First because the customs and excise laws had been among the most heavily litigated federal penal statutes, the traditional common law scaffolding of the informer action probably grew less familiar to legislators and litigators in the decades following the Anti-Moiety Act. More fundamentally, as Nicholas Parrillo has ably explained, the moiety men taught nineteenth century legislators an important new lesson in legitimacy. Legislators sensed that the rapacity of the customs informers was not enough to compensate for the revenue lost as a result of taxpayer resistance. More information intensive forms of taxation required a degree of voluntary cooperation incompatible with private enforcement on the profit model. Notably, in the revision of the United States Code completed in 1874, many older informer actions were quietly repealed.

This critique gradually dominoed into other fields regulated by informers. The incensed editor of the *Seattle Star*—who likened a game warden to the Inquisition—captured this dynamic in 1907:

Between the man who catches a fish out of season and the man who ‘informs’ on him there is no comparison. One is a lawbreaker, but the other is odious, something worse, and any statute which gives informers the right to exist as such is a disgrace to the state. If it is a question as to whether we shall have no fish without informers, let the fish go.¹⁹⁶

¹⁹³ See discussion in Parrillo, *supra* note 38, pp. 221-54.

¹⁹⁴ H. Misc. Doc. 43-72, https://www.govinfo.gov/app/details/SERIALSET-01618_00_00-021-0072-0000

¹⁹⁵ 18 Stat. 186

¹⁹⁶ T.J. Dillon, *The Informer--The Criminal--A Comparison*, SEATTLE STAR, Oct. 30, 1909,

Like the disgruntled taxpayers of the 1870s, the depredations of one informer left the Star's (ostensibly law abiding) editor ready to abandon *all* fish and game regulation. This argument that informers were a "disgrace to the state" was distinct from the centuries-old social antagonism against informers. Some historians have assumed that informers lost out because simply because they were "vexatious," mercenary, and widely despised.¹⁹⁷ But informers had always been unpopular. From the sixteenth century on, informers had caused riots and were widely seen as "vermin."¹⁹⁸ That was the point: nineteenth century legislators had first embraced informers to expand the reach of the state in new ways, precisely because they were mercenaries who would enforce regulatory law against community opposition. But that very project aroused so much hostility that law abiding citizens began to reject informers more broadly, even in traditional informer strongholds like fish and game law.

This was an important shift—but not a wholesale rejection, as the broader universe of informer's actions makes clear. Outside the domains of customs and some maritime regulation, informers continued to serve as a catchall policy tool along relatively traditional lines. That is, awards were not subject to remission by the Treasury Secretary, and informers generally prosecuted their own cases. Several of these laws endured into the twenty-first century. The Indian Intercourse Act of 1834 created a *qui tam* provision permitting civil actions against anyone undertaking an unauthorized transaction with an Indian tribe.¹⁹⁹ Though it was amended in 1874—at the height of the outcry against the moiety men—the informer provision remained unchanged, and a successor *qui tam* penalty survives to this day at 25 U.S.C. § 201.²⁰⁰ The Patent Act of 1842 created an informer action against those who falsely marked unpatented products as patented, which was re-enacted without change in the Patent Act of 1870, and preserved for nearly 170 years until it was eliminated by section 16 of the America Invents Act of 2011.²⁰¹ And of course, the False Claims Act, enacted in 1863, remains on the books today. There is even some evidence that informers were represented by a specialized bar in the later years of the century, like the "reputable lawyer" retained by four informers in a high-profile FCA action against Carnegie Steel in 1894.²⁰²

In other words, Congress had no sudden epiphanies about Article II in the 1870s that foreclosed penal statutes across the board; just a dawning recognition that informers were ineffective, and indeed counterproductive, in what had previously been their most

<https://www.loc.gov/resource/sn87093407/1909-10-30/ed-1/?sp=1&q=informer&r=0.316,0.869,0.557,0.406,0>.

¹⁹⁷ See, e.g., Gerald Hurst, *The Common Informer*, 147 CONTEMP. REV. 189, 190 (1935); Warner, Jessica, and Frank Ivis, *'Damn You, You Informing Bitch': Vox Populi and the Unmaking of the Gin Act of 1736*, 33 J. SOC. HIST. 299, 300 (1999).

¹⁹⁸ *Id.*

¹⁹⁹ Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733

²⁰⁰ Rev. Stat. § 2124 (1st ed. 1875).

²⁰¹ Patent Act of 1842, ch. 263, § 5, 5 Stat. 543, 544; Patent Act of 1870, ch. 230, § 39, 16 Stat. 198, 203; Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 16, 125 Stat. 284, 329 (2011).

²⁰² House Document 53-160, Letter from the Secretary of the Navy on Violation of Armor Contracts, p. 1. https://www.govinfo.gov/content/pkg/SERIALSET-03226_00_00-061-0160-0000/pdf/SERIALSET-03226_00_00-061-0160-0000.pdf

important application: customs and revenue. But in other regulatory domains they remained viable. The lesson may be that in areas which required cooperation to enforce some *malum prohibitum*—like tax assessment, or fishery regulation—informers became a net drag on enforcement, because they alienated subjects who might otherwise be disposed to submit. Redefining regulatory offenses as private harms—suable only by injured parties, not informers—restrained overenforcement, and thus overall compliance, in these areas. But informer actions still made sense when deployed against offenders who could already be assumed to be deceitful or hostile to law—like false patent markers, rogue Indian traders, or contractors defrauding the government.

2. *The Law of Witness Competency*

Changes in the law of witness competency also appear to have undermined informer provisions after midcentury, albeit indirectly. For much of the eighteenth and early nineteenth centuries, informers enjoyed a potential evidentiary advantage over injured parties: while common law rules barred interested witnesses from testifying, courts and legislatures frequently exempted informers from this prohibition on grounds of public necessity. But this advantage was always contested, required active legislative maintenance, and ultimately disappeared when jurisdictions abolished the interest disqualification entirely in the mid-nineteenth century.

Today, parties and interested witnesses are freely admitted to testify, where the jury can assess their credibility, and counsel can expose any bias through cross-examination. But between the late 1500s and the mid 1800s, English and American courts considered such witnesses too unreliable to take the stand at all, and feared that the parties, in particular, could not resist the temptation to perjure themselves.²⁰³ Any person with a pecuniary interest in the outcome of a case was considered incompetent to give testimony. A related rule barred the parties themselves from testifying.

One might expect common informers—the plaintiffs with the most direct pecuniary interest in a case imaginable—would clearly be disqualified.²⁰⁴ But the reality was more complex. Some early cases and treatises did indeed find informers incompetent to testify, raising concerns about the effective enforcement of Parliamentary regulations.²⁰⁵ This practical difficulty soon called forth a judicial exception. In a landmark treatise first published in 1754, English judge Geoffrey Gilbert suggested that, as a matter of necessity and public policy, at least some informers had to be exempted from the interest disqualification: “Where

²⁰³ GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 132 (xxxx) (“That, the Plaintiff or Defendant can’t be a Witness in his own Cause, for these are the Persons that have a most immediate Interest, and it is not to be presumed that a Man who complainss without Cause, or defends without Justice, should have Honesty enough to confess it.”).

²⁰⁴ (Robert Ferguson, *A Letter to the Right-Honorable My Lord Chief Justice Holt, Occasioned by the Noise of a Plot* (1694), quoted in Richard Mowery Andrews, *1 Law, Magistracy, and Crime in Old Regime Paris, 1735-1789* 316-83 (Cambridge, 1994).)

²⁰⁵ Cite Hale; *Rex v. Tilly*; *Queen v. Muscat* (case report recounting Attorney General’s worries about effect on law enforcement).

a Statute Law could receive no Execution unless a Party interested were a Witness, there he must be allowed, for the Statute must not be rendered ineffectual by the Impossibility of Proof.”²⁰⁶

To the extent eighteenth-century legislators agreed that “the Rules of the Common Law are presumed to be laid aside by the Statute” in cases of necessity, they might have been inclined to draft penal rather than remedial statutes—an informer would (paradoxically) have a better chance of giving testimony and prevailing than a plaintiff characterized as an aggrieved party. As late as 1800, in an action on a statute which forbade the exportation of manufacturing equipment, “an informer was held to be competent on a presumption, as it seems, that the legislature, in imposing penalties, meant to admit the testimony of informers, as being essential to effectuate the statute.”²⁰⁷

However, Gilbert’s rule was not universally accepted and the law remained muddy in England. His near contemporary, William Hawkins (and Hawkins’ later editors through at least 1762) thought that a person usually cannot testify when “he may have an Action on the Statute,” but conceded that “the Rules of Evidence concerning this Matter seem not to be clearly settled.”²⁰⁸ In 1804, Thomas Peake’s *Compendium of the Law of Evidence* summarized Gilbert’s rule, but noted that the majority of English cases in the intervening years “establish the contrary opinion,” excluding most informers.²⁰⁹ A decade later, the influential treatise of Samuel March Phillipps treated Gilbert’s argument from necessity as good law.²¹⁰ But Phillipps limited the rule’s application to “particular provisions or policy of several acts of parliament,” rather than a general principle of statutory construction applying to most or all informer actions.²¹¹ Earlier works were updated by their nineteenth-century editors to reflect that change. For example, Francis Buller’s 1772 guide to trial practice had referred in general terms to the necessity exception for interested witnesses.²¹² The editor of a posthumous 1817 edition, however, felt the need to append a footnote, warning that while “substantially interested” persons had sometimes been examined as witnesses, “the extent of such an exception should be very accurately defined.”²¹³ By 1824, Thomas Starkie’s evidence treatise rejected Gilbert explicitly and concluded that informers were “obviously interested, and therefore incompetent.”²¹⁴

²⁰⁶ GILBERT, *supra* note 152, at 131.

²⁰⁷ THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* 157 n.d. (1842) (citing *King v. Teasdale*, 3 Esp. C. 68 (1800), which cited the statute as 21 Geo. 3, c. 37, s. 31). Starkie may have been alluding to details of the opinion were not reported in the published version of Espinasse’s Reports, which gives a sparser account of the reasoning.

²⁰⁸ 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 433 (4th ed. 1762).

²⁰⁹ THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 103 (1804).

²¹⁰ S. M. PHILLIPS, *A TREATISE ON THE LAW OF EVIDENCE* (2d ed. Gould and Banks 1820).

²¹¹ *Id.* at 90-99 (discussing five specific statutes).

²¹² FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (1772).

²¹³ FRANCIS BULLER, *AN INTRODUCTION TO THE LAW, RELATIVE TO TRIALS AT NISI PRIUS* 286 (R. Pheney and S. Sweet 1817).

²¹⁴ 1 THOMAS STARKIE, *A PRACTICAL TREATISE ON THE LAW OF EVIDENCE* 157 (1824).

The trend in the United States during these years was apparently similar. An 1810 digest of American cases, marketed as a companion to Peake's Compendium, observed that "the cases on the point, of who shall be rejected as witnesses on account of their interest in a cause, the cases in the American reports, as in those of Great Britain, 'are so contradictory that it is impossible to reconcile them.'"²¹⁵ The American digester nonetheless concluded, following Peake, that an "informer who is evidently and nearly interested in the event of a suit is disqualified as a witness."²¹⁶

This sharpening of the rules of witness competency raised serious doubts about the efficacy of penal statutes on both sides of the Atlantic by the 1820s. In an influential work on evidence published in 1827, Jeremy Bentham lambasted what he perceived to be the judiciary's "impudent" nullification of the legislature: "All instances of the exclusion of witnesses on prosecutions for offences created by statute, are acts of usurpation committed by the judicial authority against the legislative."²¹⁷ As a result of judge-made competency rules, he complained, the "only man who knows of the transgression is forbid to tell of it," and "the law, which [judges] are sworn to execute, shall remain unexecuted."²¹⁸

In the early 1830s, three commissioners tasked with updating the statute law of Massachusetts made precisely the same point to explain why they had eliminated a number of informer's actions from their proposed revision:

[W]here the penalty is intended as a punishment of the offender and not as a remuneration to the party injured, the public interest will generally be quite as well secured by appropriating it wholly to the town, county, or Commonwealth—as by giving a part to the informer; which (among other inconveniences) would most commonly defeat a prosecution—by making the best witness for the public inadmissible on account of his interest or bias in the cause.²¹⁹

The commissioners' concern provides a partial answer to the puzzle of the penal statute: as the law of evidence crystallized, courts applied the disqualification for interest more rigorously and undermined the effectiveness of informers as a law enforcement tool. This apparently resulted in the abolition of some old informer statutes.

But there was an easy fix: as Starkie's 1824 treatise observed, legislatures could simply declare the informer competent to testify in "an express provision" accompanying the right of action.²²⁰ That's precisely what happened in Massachusetts. In the revised code ultimately

²¹⁵ (Digest, 99)

²¹⁶ (112 citing Peak's Compendium of the law of evidence, 160).

²¹⁷ JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 363 (1827).

²¹⁸ *Id.* at 366.

²¹⁹ 1 REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH 211 (Dutton and Wentworth 1835).

²²⁰ *Id.*

enacted in 1836, the remaining informer provisions explicitly guaranteed the competency of informers. For example, penal statute targeting brothels provided that an informer against a “house of ill fame” could testify under oath, despite being entitled to half the statutory penalty.²²¹ This probably explains why the revision commissioners still recommended retaining *qui tam* actions in “many cases,” despite their concerns about judicial exclusion of informer testimony.²²² Other states, and the federal government, did the same,²²³ in a trend well documented by English and American evidence treatises carefully noted. Thus, while many older penal statutes were probably culled from the statute books, the informer’s action survived the competency debates of the 1820s and 30s more or less intact.

Second, and perhaps more surprisingly, Gilbert’s rule of necessity—that informers had to be exempted from the regular rules—appears to have made a comeback in America, just as it was fading from the scene in England. Simon Greenleaf was “the leading mid-nineteenth-century expert on the American law of evidence,” and the author of the first treatise composed in the United States on the law of evidence.²²⁴ In 1842, Greenleaf wrote that “where the penalty or provision for restitution is evidently introduced for the sake of the *party injured*, rather than to insure the detection and punishment of the offender, the party is held incompetent.”²²⁵ But in statutes where the legislature had introduced a penalty for “public purposes,” matters were different.²²⁶ In such cases, the fact that an informer may be entitled to a “portion of the fine or penalty inflicted, is not admitted as a valid objection to his competency.”²²⁷ That is, the legislature’s grant of a reward to the informer “virtually continued” his competency as a witness. “[I]t would defeat the object of the legislature,” Greenleaf reasoned, “to narrow the means of conviction, by means of those rewards, and to exclude testimony, which otherwise would have been admissible.”²²⁸

While some authorities disputed Greenleaf’s implied competency rule,²²⁹ it may have influenced judicial practice. In an 1852 usury case, the New Jersey Supreme Court assumed that an injured borrower’s action would “fail for want of evidence” but that an informer’s

²²¹ See Mass. Rev. Stat. ch. 130, § 8, 740-41 (1836) ; *see also id.* at 387 (same for informer suits to recover back money lost in illegal gambling house); *id.* at 307 (same for informer in suits in which usury is pleaded).]

²²² REPORT OF THE COMMISSIONERS, *supra* note 184, at 211.

²²³ LUCIUS Q. C. ELMER, DIGEST OF THE LAWS OF NEW JERSEY (2d ed., J.B. Lippincott & Co. 1855), <https://babel.hathitrust.org/cgi/pt?id=njp.32101072863739&seq=5&q1=competent+witness&start=1> (quoting Act of March 16, 1854) (“[S]uch person shall forfeit the sum of twenty dollars for each offence, to be recovered in an action of debt, by any person who shall sue for the same, the one-half to the prosecutor, who shall be a competent witness in such case, and the other half to the use of the state, before any justice of the peace of any of the counties in this state, with the costs of prosecution”).

²²⁴ Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489, 491 (2009).

²²⁵ GREENLEAF, *supra* note 80, § 403, at 449.

²²⁶ *Id.* § 412, at 456.

²²⁷ Citing Gilbert, (§ 411, p. 519)

²²⁸ *Id.* § 412, at 456.

²²⁹ See JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES (1856). (“When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not a competent witness, accordingly as the statute creating the penalty has or has not made him so.”)

action would not—despite the statute containing no explicit competency provision.²³⁰ The court apparently presumed that Greenleaf's public necessity principle would permit the informer to testify.

But the comparative advantage conferred on informers by the competency rules soon vanished. Beginning in the 1850s, American jurisdictions began abolishing interest disqualification rules entirely, permitting all parties and interested witnesses to testify. By century's end, this reform had swept through every state and the federal system.²³¹ The result was that informers and injured parties could both take the stand, where their credibility could be assessed by the jury. Ironically, the abolition of competency rules was heavily influenced by Bentham's defense of informers; Senator Charles Sumner (recovered from his encounter with Keitt) cited Bentham in 1864, when he introduced the bill that would ultimately abolish the interest disqualification in the federal courts.²³² But the change probably hurt informers in practice, because of their vulnerability to withering cross-examination. Once injured parties testify freely about their own harms, late nineteenth century legislators had one less reason to prefer informers to remedial rights of action and liquidated damages.

3. *The Law of Statutory Construction*

A third force pushing legislators away from penal statutes was a longstanding interpretive canon. Courts applied strict construction to "penal" statutes while construing "remedial" statutes liberally—that is, in favor of the injured party. This principle was the forerunner of what is today called the "rule of lenity," but it extended much more broadly, to the wider category of "penal statutes" that included informer laws.²³³ A judge's labeling of an action as either "penal" or "remedial" was often outcome determinative, and English and American appellate courts wrestled with the issue in published opinions on informer's actions throughout the eighteenth and nineteenth centuries.

While many features of informer actions were strongly associated with a penal purpose—division of the award with the sovereign, forfeiture language, and mechanical per-violation monetary awards—the line was often blurry. As an 1787 English treatise on penal statutes (reprinted in the United States in 1822) observed, "statutes usually termed remedial are in some respects penal," because a law might give a "remedy to the party grieved for the injury" while *also* "inflicting a penalty on the party by whom a breach of the statute has been committed."²³⁴ Rights of action providing for treble damages, for example, were difficult to categorize. The hybrid nature and terminological confusion of many statutes left great room for lawyerly creativity. Consider one Massachusetts law from 1860, which imposed a \$100

²³⁰ *Phillips v. Bevans* (N.J. Sup. Ct. 1852) 23 N.J.L. 373.

²³¹ See 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § xx, at xx (1904); Abraham; Fisher.

²³² See Senate Report, Feb. 29, 1864 (reproduced in Works of Charles Sumner, p. 27, (<https://www.gutenberg.org/files/48376/48376-h/48376-h.htm>))

²³³ As the Supreme Court explained at length in *Huntington v. Atrill*.

²³⁴ Isaac Espinasse, Treatise on the Law of Actions on Penal Statutes, at p. 3, 8.

penalty on anyone removing or destroying a “buoy, beacon, or floating guide” in navigable waters: “Said forfeitures may be recovered by an action of tort, complaint, or indictment, before any court competent to try the same; one-third accruing to the informer or complainant, and the other two-thirds to the county in which the trial shall be had.”²³⁵ Was the informer helping to punish a criminal, or seeking a remedy from a tortfeasor? A clever litigant could make a case for either. The public purpose of such laws—protecting government navigation aids—was obvious. But (as the Secretary of the Treasury noted when urging Congress to adopt similar legislation) buoy vandalism frequently left pilots “perplexed,” imposed extra costs on local harbor masters, and might even cause a shipwreck. An informer might well argue that the statute was designed to *remediate* such harms—and thus plead for liberal, rather than strict, construction, of issues relating to the burden of proof, the statute of limitation, or the recovery of costs. As one court put it, a “statute which is penal to some persons, provided it is beneficial generally, may be equitably construed.”²³⁶

Such ambiguities often resulted in the muted or inconsistent application of regulatory laws; in the words of one treatise, “if there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.”²³⁷ For much of the century, this made informer’s actions something of a *cause célèbre* for legal positivists, who emphasized the deference that judges owed to legislatures. As Jeremy Bentham (always a friend to informers) put it:

The legislature, satisfied that, without a factitious inducement, a man who has not the interest of revenge to prompt him, will not subject himself to the trouble, expense, and odium of bringing to punishment an offender, whose offence, how prejudicial soever to the public, produces no mischief that comes home in the shape of suffering to any particular individual,—orders that a reward to a certain amount shall be given by the judges to him by whom the information requisite for that purpose shall have been given. When the man comes for his reward, the judges refuse to give it him.

Under the sway of such arguments, American legislatures struck back when they perceived the courts as undoing their work. In 1802, Tennessee’s legislature declared that its anti-gambling informer statute was to be interpreted as “remedial,” overturning a recent judicial

²³⁵ An Act To Protect The Beacons, Buoys And Floating Guides On The Coast Of Massachusetts, Acts and Resolves 183, ch. 53, <https://archives.lib.state.ma.us/server/api/core/bitstreams/48a7efdd-0e8e-4907-945c-fe84deb171fc/content>. Remarkably, this law’s successor remains on the books today and retains the *qui tam* structure. Mass. Gen. Laws ch. 266, § 135. (“One third of all fines which accrue under this section shall be paid to the complainant and two-thirds to the commonwealth.”).

²³⁶ *Sickles v. Sharp*, 14 John. 497, quoted and criticized in Sutherland (1891), § 359, at p. 455. <https://archive.org/details/statutesstatutor00suth/page/454/mode/2up?q=penal>

²³⁷ Sutherland (1891), § 353, p. 444.

decision.²³⁸ In the following decades, as American jurisdictions increasingly codified their laws, they routinely included statutory abolitions of the rule of strict construction for penal statutes more broadly.²³⁹

But despite these frequent attempts at abolition, the principle endured, as judges either ignored the statutes, or strained to preserve the old canon.²⁴⁰ The analysis only grew more complex as more statutes provided for legislatively-determined damages. As one railroad law treatise explained in 1897, it “is often a close question whether the statute in prescribing an amount to be paid to the person injured by its disregard contemplates the enforcement of a penalty or the liquidation of damages.”²⁴¹ Because of the “widely different rules of construction which apply respectively to penal statutes and to statutes creating or defining a civil liability,”²⁴² lawyers representing corporate interests were well advised to portray private enforcement schemes as penal whenever possible.

Of course, the rule disfavoring penal statutes long predates the precipitous decline of informers in the late nineteenth century. As Justice Marshall observed in 1820, the “rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”²⁴³ But this canon seems to have taken on outsize importance just as broader public opinion was turning against the informer’s action; it was deployed frequently against regulatory statutes before the Supreme Court in the closing decades of the nineteenth century. For example, industrial interests claimed that state laws permitting a decedent’s next of kin to bring suit as “penal” (and thus unenforceable out-of-state),²⁴⁴ corporate directors made the same objection to laws governing the fraudulent conveyance of stock,²⁴⁵ and railroads invoked the principle in challenges to state laws penalizing them for harming livestock.²⁴⁶ These challenges were not always successful, but they do help explain why informers began to seem like a liability for *fin de siècle* lawmakers interested in giving teeth to regulatory law. In a telling slip, the 1897 railroad treatise declared that “[t]he practice of giving penalties to informers has been condemned by able jurists[.]” In fact, the “able jurists” cited were just decades-old cases applying the traditional rule of strict construction. But, writing at the turn of the century, the compiler seemed to read those cases as an attack on the legislative institution of the informer writ large.

²³⁸ Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: “What A Long Strange Trip It’s Been”*, 28 Geo. Mason L. Rev. 49 (2020)

²³⁹ *Id.*; see, e.g., Cal. Penal Code § 4 (first enacted 1872) (“The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code.”)

²⁴⁰ See *id.* (noting that no equivalent federal provision was ever enacted); Lloyd Hall, *Strict or Liberal Construction of Penal Statutes*, 6 La. L. Rev. 1 (1935) (describing judicial resistance).

²⁴¹ Elliott, p. 1032; see also Sutherland § 359, at p. 454.

²⁴² Elliott, p. 1032 (noting the importance of this for practitioners of railroad law)

²⁴³ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

²⁴⁴ *Dennick v. Railroad Company*, 103 U. S. 11; *Texas & Pacific Railway v. Cox*, 145 U. S. 593; *Stewart v. Baltimore & Ohio Railroad*, 168 U. S. 45.

²⁴⁵ *Huntington v. Attrill*, 146 U.S. 657 (1892)

²⁴⁶ *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889)

In the face of increasing judicial barriers against penal statutes and preferential treatment of “remedial” schemes, legislators simply recast regulatory offenses as “remedial” statutes that redressed private injuries rather than imposed public penalties. A revealing case study of this development at the federal level is the 1909 Copyright Act.²⁴⁷ The original Copyright Act of 1790 had many characteristics that we associate with *qui tam* practice today: it provided a mechanical per-page penalty for against works infringing a copyright, with half of the proceeds payable to the government, and provided for seizure of pirated works, described these remedies as “penalties” and “forfeitures” and sharply distinguished them from “damages,” made recoverable in a separate section via “a special action on the case.”²⁴⁸ That hybrid structure persisted throughout the century, even as copyright law expanded in scope. This created a recurring interpretative conundrum, because many copyright actions arose from borderline and technical violations which might not survive strict construction. As a federal circuit court judge observed in 1843, the “statutes made to secure the copyright to authors in their works are somewhat obscurely expressed . . . [T]hough these acts are penal, yet they are remedial also, and made in favor of the aggrieved party, and to secure his rights, and the forfeiture goes in part to him.”²⁴⁹ In 1849, the Supreme Court had assumed in passing that the copyright statutes had to be treated as penal,²⁵⁰ but it was finally called upon to clarify the issue in a pair of 1899 cases.

In *Brady v. Daly*,²⁵¹ the copyright holder of a play won more than \$13,000 in damages against another dramatist who allegedly plagiarized a climactic scene in which a character was narrowly rescued from the path of an oncoming train. At the time, Section 4966 of the Revised Statutes provided that “any person” performing a copyrighted dramatic composition without authorization “shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just.” The defendant challenged the award on the ground that the plaintiff had failed to comply with the technical jurisdictional requirements of a penal statute: federal district courts had exclusive jurisdiction of all “penalties and forfeitures,” but the plaintiff had proceeded in federal circuit court. The Supreme Court held that the action was genuinely remedial, despite the partial liquidation of damages, and upheld the award: “Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff and gives the right of action solely to him, the fact that it also provides that such damages shall not be

²⁴⁷ Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909); see discussion in Samuelson & Whitehead, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439 (2009), pp. 446-551.

²⁴⁸ Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790)

²⁴⁹ *Dwight v. Appleton* (C.C.S.D.N.Y. 1843) 8 F.Cas. 183.

²⁵⁰ *Backus v. Gould*, 48 U.S. 798, 811 (1849) (“This is a *qui tam* action . . . An action of debt was brought by Gould & Banks to recover certain penalties alleged to have been incurred by the invasion of the copyright of the plaintiffs in twelve volumes of law reports . . . As this is a penal section, it must be construed strictly.”)

²⁵¹ 175 U.S. 148 (1899)

less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute.”

The plaintiff in *Bolles v. Outing Company*,²⁵² was not so fortunate. There the copyright holder had taken a photo of a yacht, which a magazine reproduced without permission. He brought an action under Rev. Statutes § 4965, which imposed a penalty of one dollar for every infringing copy of a photograph “found in [the infringer’s] possession . . . one-half to the use of the proprietor and the other half to the use of the United States.” The plaintiff had obtained a single copy of the magazine, but had evidence that more than 40,000 copies had been sold. The trial court refused to admit that evidence because the copies had already been distributed and thus were not “found” in the defendant’s possession under the strict terms of the law. The Supreme Court agreed: “This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually sustained by him or of the profits realized by the defendant, and in the further provision that one-half of the amount recovered shall be to the use of the United States.” Being penal, “the statute must be construed with such strictness as to carefully safeguard the rights of the defendant . . . if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial.” Thus, the trial court had rightly excluded the evidence of the already-distributed copies, because that evidence was irrelevant to the statute as strictly construed.

Bolles and *Brady* made it clear that “penal” (or potentially penal) remedies in copyright had become almost prohibitively difficult to enforce, and set off a decade of handwringing in Congress, the publishing industry, and the newly created office of the Registrar of Copyrights. In a 1905 conference, a prominent copyright litigator complained to the Registrar that “practically speaking our penalties today and our penal statutes today are of no effect.” He recalled a hearing from a Judge in another high-profile copyright matter that:

“ . . . where a man came into court seeking to transfer a million dollars from another man’s pocket to his own, not because of a service which he had rendered to him, but as an informer, the Court would not make his way easy or his burden light. So there you have conflicting positions. On the one hand there is a distinct need in some way to protect certain classes of property, and on the other hand you have the impossibility of getting the courts to enforce drastic laws, and I trust that the wisdom of the Librarian and the Register of Copyrights and the wisdom of this Association or this meeting will find some way out of it.”²⁵³

The following year, in a 1906 Congressional hearing on a proposed amendment to the copyright laws, the chairman of the copyright committee of the American Bar Association proposed revising rights of action in copyright to employ the exact remedial language the

²⁵² 175 U.S. 262 (1899),

²⁵³ 1 E. Fulton Brylawski, and Goldman, Abe & Fred B. Rothman Co., Legislative History of the 1909 Copyright Act 70.)

Court had approved in *Brady*, “in order that we might be sure that under no subsequent construction would that language be held to be penal rather than liquidated damage.”²⁵⁴ In 1907, the Supreme Court found another forfeiture provision in the copyright laws to be penal, and reiterated that the courts must take “especial care to work no extension of its provisions by construction.”²⁵⁵

Finally, Congress responded with the Copyright Act of 1909, a sweeping modernization that more clearly separated the compensatory and punitive functions of copyright law.²⁵⁶ The new act eliminated all provisions requiring plaintiffs to share copyright awards with the government, created a regime of liquidated damages ranging between \$250 and \$5,000 per violation where actual damages or infringing profits were too difficult to prove, capped damages at a much lower level for unwitting infringements, and explicitly stated that its statutory damages “shall not be regarded as a penalty.” The Act retained one element of penal enforcement, but cabined it completely from the private right of action: willful infringements for profit could be prosecuted as a misdemeanor.

In short, remedial framing secured liberal construction while preserving the benefits (in terms of both cost-savings to the government and deterrence) private enforcement. This interpretive shift was doctrinal and strategic, not constitutional. Courts did not conclude that penal statutes violated separation of powers—they simply construed them narrowly to limit what judges viewed as overenforcement and abuse. Legislators, in turn, adapted their drafting to secure broader judicial construction. Lawmakers were receptive to the change, because they already harbored doubts about the legitimacy and effectiveness of informers, and because witness competency reforms had made liquidated damages actions, sounding in tort, a viable alternative. The result was the displacement of informer provisions by injury-based private rights of action—a change in regulatory technique that preserved private enforcement while avoiding the interpretive pitfalls of penal statutes.

B. The Three Forces of Change and the Road to the Sherman Act

The three forces described above—the legitimacy paradox, witness competency reforms, and the remedial-penal distinction—likely shaped legislative choices in the late nineteenth century, pushing lawmakers away from informer provisions and toward a new model of private enforcement. Modern private enforcement emerged in the Sherman Act of 1890, which embraced a powerful damages private right of action rather than an informer provision.²⁵⁷ As discussed in this section, the career of Senator John Sherman illustrates the transition between informers and PRAs. Between 1874 and 1890, Sherman moved from enthusiastic supporter of informers to skeptic of their costs, to designer of a new approach

²⁵⁴ 6 E. Fulton Brylawski, and Goldman, Abe & Fred B. Rothman Co., Legislative History of the 1909 Copyright Act, at 176.

²⁵⁵ *Werckmeister v. American Tobacco Co.*, 207 U.S. 375, 381 (1907).

²⁵⁶ See Samuelson, *supra*, at 448-49.

²⁵⁷ Sherman Antitrust Act, Pub. L. No. 51-647, 26 Stat. 209, 210 (1890) (codified at 15 U.S.C. §§ 1-7).

that would define modern private enforcement. His journey from the customs debates of the 1870s to the Sherman Antitrust Act of 1890 reveals how legislators learned from informers' failures and crafted private rights of action that avoided all three problems: they limited standing to injured parties (sidestepping the legitimacy crisis), ensured plaintiffs could testify about their own harms (exploiting competency reforms), and characterized the cause of action as remedial rather than penal (securing liberal construction). The Sherman Act was regulatory litigation for a new era, launching a republic of private enforcement.

1. *The Customs Revenue Act of 1874 and John Sherman's Education*

Sherman's education in the limits of informers began well before the customs debates. In the decades leading up to the Sherman Act, Congress had experimented with two major private enforcement statutes: the False Claims Act of 1863 and the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.²⁵⁸ During the Civil War, the Army was plagued by contractors delivering defective supplies—from worn-out horses to gunpowder adulterated with sawdust.²⁵⁹ The False Claims Act authorized private enforcement through a *qui tam* mechanism, permitting suits to be brought by “any person, as well for himself as for the United States.”²⁶⁰ Legislative debate over the enforcement provision was minimal. Congress probably chose the *qui tam* form because the cases involved recovery of government property. Senator Jacob Howard argued on the floor:

The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act . . . I have based [the *qui tam* provisions] upon the old-fashion idea of holding out a temptation, and “setting a rogue to catch a rogue,” which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.²⁶¹

A few years later in 1871, Congress passed the Civil Rights Act, creating a private right of action against state officials for civil rights violations.²⁶² The statute responded to systematic violence and discriminatory enforcement targeting freedmen and their supporters throughout the South.²⁶³ While proponents argued that neutral state laws were being selectively enforced, critics, including Indiana Representative Michael Kerr, warned that the

²⁵⁸ False Claims Act of 1863, 12 Stat. 696 (codified at 31 U.S.C. §§ 3729-3733); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871).

²⁵⁹ H.R. REP. NO. 111-97, at 2 (2009) (citing CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863)).

²⁶⁰ Act of March 2, 1863, ch. 67, 12 Stat. 696, 698 (1863); see CHARLES DOYLE, CONG. RSCH. SERV., R30785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES (2021).

²⁶¹ CONG. GLOBE, 37th Cong., 3d Sess., 952-60 (1863).

²⁶² Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871).

²⁶³ CONG. GLOBE, 42d Cong., 1st Sess. 505 (1871); see also *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

private enforcement mechanism would spawn “numerous vexatious and outrageous prosecutions . . . more reckless and dangerous to society than the alleged offenses” themselves.²⁶⁴ Following several days of debate, both chambers approved the measure on April 20, 1871, and President Grant signed it into law that same day.²⁶⁵

These two statutes, the False Claims Act and Civil Rights Act, show that Congress was adept at deploying private enforcement during and after the Civil War, using *qui tam* for one kind of problem (government fraud) and a modern private right of action for another (state discrimination against freedmen). Both tools were in the arsenal of legislation, but the three forces discussed above began tipping the balance in favor of the latter. As discussed above, in the 1870s and 1880s, legislators debated whether to ditch informer claims completely.²⁶⁶ John Sherman—a senator from Ohio from 1861 to 1877, Secretary of the Treasury between 1877 and 1881, and senator again between 1881 and 1897—participated vigorously in these debates.²⁶⁷

Sherman’s involvement in the 1874 Customs Revenue Act debates reveals his evolving stance on informer enforcement. The statute’s stated objective was to abolish moiety payments to parties who assisted in enforcing customs laws. The enacted legislation terminated such bounties, specifying that informers would no longer receive shares of “fines, penalties, or forfeitures.”²⁶⁸ During floor debate, Sherman endorsed elimination of these informer provisions, contending that the moiety system generated substantial “mischief” requiring legislative correction.²⁶⁹ As Senate Finance Committee Chairman,²⁷⁰ Sherman exercised significant control over the bill’s amendments.²⁷¹ His remarks demonstrated an understanding of informer law, including references to moiety provisions in other revenue statutes that Congress had previously abolished.²⁷²

The 1874 Act’s structure shows Congress experimenting with enforcement alternatives that might avoid the problems plaguing traditional informer suits. Rather than simply eliminating private enforcement, legislators reconfigured it: the Act substituted rewards for providing information to government officials (giving tips) in place of the abolished moiety system for private litigants (filing claims). This shift responded to the legitimacy crisis surrounding informers—paying tipsters to assist federal prosecutors avoided

²⁶⁴ CONG. GLOBE, 42d Cong., 1st Sess. 505, App’x 40.

²⁶⁵ *The Ku Klux Klan Act of 1871*, US HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ (last visited July 23, 2025).

²⁶⁶ See 2 CONG. REC. 4678 (1874).

²⁶⁷ *Id.*

²⁶⁸ Act of June 22, 1874, ch. 391, 18 Stat. 186, 186 (1874).

²⁶⁹ *Id.*

²⁷⁰ HISTORY OF THE COMMITTEE ON FINANCE: UNITED STATES SENATE, S. DOC. NO. 95-27, at 43 (1877), <https://www.finance.senate.gov/imo/media/doc/Sdoc95-27.pdf> (noting how John Sherman was “Finance Committee member for 33 of the 37 years from 1861 to 1897, and Chairman from 1867 to 1877.”)

²⁷¹ 2 CONG. REC. 4674 (1874).

²⁷² *Id.* at 4678.

the spectacle of private parties prosecuting cases for profit. The Treasury Secretary gained discretion to compensate those who disclosed violations to authorities under Section 4:

whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs-revenue . . . such compensation may . . . be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of five thousand dollars; which compensation shall be paid, under the direction of the Secretary of the Treasury, out of any money appropriated for that purpose.²⁷³

The same provision extended rewards to customs officers and others who accomplished actual seizures:

whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise in the act of being smuggled . . . he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure ²⁷⁴

Though moieties for private prosecution disappeared, Congress preserved financial incentives for supplying enforcement intelligence to government officials. Sherman called Section 4's purpose as vesting the Treasury Secretary with funds "to reward the actual detection of fraud"—compensating discovery rather than litigation. This redesign maintained private participation in enforcement while sidestepping the "vulture" problem: tipsters assisted government prosecution rather than pursuing cases themselves.

Congressional debate over the customs bill revealed broad consensus—even among the Act's critics—that the informer system was becoming illegitimate. Senators described informers as predatory opportunists who exploited enforcement for personal gain. Senator Bayard of Delaware, condemned how "moiety of spoils" were "divided among spies and informers" without producing actual prosecutions. Instead, he argued, targets simply bought off informers: "Settlement with the informer . . . [means that] Public justice was sold and delivered over to the private profit of officials and informers."²⁷⁵ Senator Saulsbury, also of Delaware, deployed even harsher rhetoric, branding informers as "robbers" and "vultures" who exploited government authority to plunder merchants.²⁷⁶ "The men whom [the informers] propose to rob to a certain extent for their own benefit," Saulsbury protested,

²⁷³ Act of June 22, 1874, ch. 391, 18 Stat. 186, 186-87 (1874). This provision can be seen in action in *Ramsey v. U.S.*, 14 Ct. Cl. 367, 373 (1878) ("It is clear that the statute makes the Secretary of the Treasury the sole judge as to whether there is an informer"). See also, *Kellogg v. U.S.*, 15 Ct.Cl. 372 (1879) (finding that informers can get their share by submitting to the jurisdiction of the Secretary of the Treasury and allow the money to be distributed under his direction).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 4680 (emphasis added).

²⁷⁶ 2 CONG. REC. 4801 (1874).

“have some rights as well as these informers, and I propose to protect that class of merchants against these men who have become vultures to prey upon them.”²⁷⁷ The system, he contended, authorized informers “to prosecute . . . an improper action in order to put money in their own pockets.”²⁷⁸ Senator Carpenter concurred that informers had “become odious.”²⁷⁹

The debates also exposed how eliminating informer suits created an evidentiary gap that government prosecutors would struggle to fill. Sherman’s defense of Section 5—a controversial provision allowing compelled document production in revenue cases—exposes this concern. The section permitted courts to order defendants to produce their business records in non-criminal proceedings, with failure to comply resulting in adverse inferences. Sherman called this coercive discovery mechanism as “absolutely necessary to the due collection of the revenue,” precisely because abolishing informer provisions meant “there will be no means by which the Government can pursue an alleged fraud by a merchant so as to secure the production of his books and papers.”²⁸⁰ The provision aimed to compensate for what informers had provided: an enforcement mechanism with access to evidence. Private informers—often merchants, officers, or competitors—possessed or could obtain business records and intelligence that government prosecutors lacked. And informers could (maybe) testify about what they discovered. Eliminating informer suits without addressing this evidentiary advantage would cripple enforcement. Congress attempted to solve the problem through enhanced government subpoena power, though the Supreme Court later invalidated the disclosure procedure as an unconstitutional search and seizure.²⁸¹

Congress ultimately adopted the reforms: abolishing moieties and expanding government subpoena authority.

Yet by 1877, Sherman (by then Secretary of the Treasury) reversed course.²⁸² In an extensive Treasury Department report on customs enforcement, he documented the failure of the 1874 reforms.²⁸³ Eliminating moieties, Sherman concluded, had produced effects that were far from “salutary”—violations were being “detected in” significantly lower numbers than before repeal.²⁸⁴ The New York customs collector reported revenue losses “of many millions to the Government” attributable to weakened enforcement.²⁸⁵ The legitimacy paradox had materialized: informers were despised, but without them, compliance collapsed.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 4802.

²⁸⁰ 2 CONG. REC. 4680 (1874).

²⁸¹ 116 U.S. 616 (1886); see Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49 (2013).

²⁸² ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR XXVIII 1877.

²⁸³ *Id.* at XXVIII-XXIX.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at XXIX.

Sherman's proposed solution, however, did not involve restoring traditional informer litigation. Instead, he recommended increasing compensation for tipsters who provided intelligence to customs officials, alongside technical reforms to "secure simplicity and uniformity in the collection of the revenue."²⁸⁶ This approach attempted to preserve private participation in enforcement—addressing the evidentiary and compliance gaps—while avoiding the public disapproval attached to informer suits. During his tenure as Treasury Secretary (1877-1881), Sherman thus championed a reconfigured model of private enforcement: one that compensated information provision rather than litigation.²⁸⁷

2. *From Customs Enforcement to Antitrust: The Sherman Act's Design*

By 1890, Sherman had spent over a decade grappling with the practical problems of private enforcement—first as a senator voting for the 1874 Anti-Moiety Act, then as Treasury Secretary documenting its costs, and finally as a senator drawn into the antitrust debates of the late 1880s. Whether his customs experience directly shaped his support for the private right of action in the Sherman Act, or whether he simply absorbed state and English precedents, is impossible to determine with certainty. What is clear is that by 1890 Sherman publicly defended the injury-based structure of the antitrust bill, and his trajectory illustrates the broader transition we have traced.

Let's back up to the 1880s to understand the context behind the Sherman Act. By the late 1880s, the concentration of economic power in massive trusts had become a national problem. Standard Oil, the sugar trust, and similar combinations controlled entire industries, fixing prices and stifling competitors. State antitrust laws proved largely ineffective—either unenforced due to political capture, or evaded as trusts reorganized across state lines. Common law doctrines against restraints of trade rendered anticompetitive agreements void and unenforceable, but provided insufficient mechanisms for injured parties to recover damages or for the government to dissolve combinations. Public anxiety mounted as citizens recognized that big oil and big sugar threatened not just market competition but democratic governance itself. Sherman, returning to the Senate in 1881 after his Treasury tenure, confronted the question of how to enforce antitrust law across state boundaries where neither state attorneys general nor existing federal enforcement machinery could reach.

The bill that became the Sherman Act was introduced by Senator Sherman in 1889, but it was substantially redrafted in the Senate Judiciary Committee, where other senators played important roles. The goal of the Sherman Antitrust Act of 1890 was to prohibit contracts, combinations, and conspiracies in restraint of interstate commerce, as well as banning monopolization of markets. To enforce these prohibitions, Sherman and his

²⁸⁶ *Id.* at XXIX-XXX.

²⁸⁷ US DEP'T OF THE TREASURY, *John Sherman (1877-1881)*, <https://home.treasury.gov/about/history/prior-secretaries/john-sherman-1877-1881> (last visited July 20, 2025).

collaborators created both criminal penalties and a private civil remedy. The private right of action eventually provided:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sherman defended this provision as necessary “to give to private parties a remedy for personal injury caused by such a combination,” with treble damages making suits “commensurate with the difficulty of maintaining a private suit against a combination.”²⁸⁸ The structure was deliberate: rather than empowering any informer to pursue statutory penalties, the Act limited enforcement to persons actually injured in their business or property—a restriction that would prove critical in addressing the problems that had undermined informer provisions. But, on top of that, the statute provided multiple damages, a big incentive for injured parties and their lawyers to file suit.

The Sherman Act's private right of action represented a deliberate evolution, preserving private enforcement's advantages while avoiding the problems that had plagued informer provisions. The statute authorized suits only by persons “injured in [their] business or property”—not any stranger seeking a bounty.²⁸⁹ This injury requirement addressed the legitimacy crisis: plaintiffs would be actual market participants harmed by anticompetitive conduct, not despised “vultures” extracting settlements for profit. The framers modeled the provision on the English Statute on Monopolies of 1623 as well as state antitrust statutes—which had their own private rights of action—deliberately limiting standing to avoid the social antagonism that had doomed informer suits in customs enforcement.²⁹⁰

The Act's structure also exploited the changing evidentiary landscape. By restricting standing to injured parties, the statute ensured plaintiffs would possess direct knowledge of anticompetitive conduct and could testify about their own harm—precisely what the evolving witness competency rules now permitted. A competitor squeezed out by predatory pricing, or a customer subjected to monopoly overcharges, had personal experience of the violation. This stood in contrast to stranger-informers, whose effectiveness as witnesses (as we've seen) had become increasingly questionable and who often lacked firsthand knowledge

²⁸⁸ 21 CONG. REC. 2456 (1890).

²⁸⁹ Sherman Antitrust Act, Pub. L. No. 51-647, 26 Stat. 209, 210 (1890) (codified at 15 U.S.C. §§ 1-7).

²⁹⁰ Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2031 (2026) (citing WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 269 (1965)).

of violations. The injury requirement thus aligned with reforms abolishing the interest disqualification while ensuring enforcers possessed relevant evidence.

Finally, by framing the cause of action as remedial rather than penal, Congress secured favorable judicial construction. Although the treble damages provision echoed the 1623 Statute of Monopolies and earlier penal statutes, the Sherman Act carefully branded recovery as compensation for injury rather than a penalty split with the government. This remedial framing—“damages sustained”—avoided the strict construction that courts applied to penal statutes, giving judges latitude to interpret the Act’s broad language expansively.

So here’s where we land: it appears that Sherman’s own observations of debates over the False Claims Act, Civil Rights Act, and Customs Revenues Act, shaped his thinking around private enforcement. The journey from moieties to the Sherman Act perhaps demonstrates a sophisticated evolution in private enforcement. Legislators learned from informers’ failures and crafted a mechanism—with an equally long track record in both English and American law—that preserved regulatory litigation while sidestepping the legitimacy paradox, witness competency problems, and interpretive disfavor that had begun eroding the informer system. This embrace of private rights of action for injured parties proved so successful that it became the template for twentieth century private enforcement. Of course, Congress continued adopting several informer provisions in the 1890s.²⁹¹ But over time, the private right of action—limiting standing to parties actually harmed by regulatory violations—displaced informer provisions almost entirely, establishing the model that persists in modern statutes from securities laws to environmental regulations.

And so informers did not vanish because Americans concluded that private litigation could not serve regulatory ends. Nor did their disappearance have anything to do with conceptions of presidential power or Article II. The ancient informer vanished because legislators simply embraced a better way, more adapted to evolving legal norms and doctrines, to achieve the same goals.

Conclusion

We began this Article with Justice Kavanaugh’s confident assertion in *TransUnion* that “until the 20th century, Congress rarely created ‘citizen suit’-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm.”²⁹² That claim rests on a fundamental misreading of American legal history. The evidence presented here demonstrates that Justice Kavanaugh has it exactly backward. Before the 20th century, Congress *routinely* created causes of action for uninjured plaintiffs—dozens of federal informer provisions between 1800 and 1891 alone, plus hundreds more at the state and local levels. These provisions empowered strangers to enforce regulatory law across

²⁹¹ See Appendix A. Informer provisions did not “vanish” with the Sherman Act; they persisted, but only in specialized contexts.

²⁹² *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 n.1 (2021).

virtually every area of government jurisdiction. If there was a 20th century innovation, it was not regulatory litigation by private parties, but its limitation to injured parties.

Litigation's fundamental role in early American governance has been obscured by the modern dichotomy of private law (comprising Torts, Contracts, and Property) and public law (comprising Administrative, Constitutional, and Criminal Law). Today's lawyers are trained to see this division as the traditional background from which contemporary legislation has either deviated or remained true. But, again, that gets things exactly backwards. The sharp distinction between public and private law is the modern innovation; regulatory law entrusting private litigants with public rights was the historic norm.

Understanding the legal importance of informer claims in the Early Republic makes two key contributions to the history of the American state and doctrinal debates regarding present day-private enforcement:

First, it provides significant historical evidence that informer provisions were common, governed a range of important social areas, and constituted an early form of a litigation state. This finding fills the picture of an Early Republic that did, indeed, have major forms of government by lawsuit before the administrative state. There was no *laissez faire* society. The constellation of informer statutes reflects America's early reliance on litigation as a regulatory tool. At a time when public officers operated in a decentralized manner and agencies were non-existent, Congress relied on informers to do the work of governing. This further cements the United States as a "Republic of Private Enforcement."²⁹³

The Article, then, challenges scholarly accounts of the Early Republic that portray it as a largely unregulated society, lying in wait for an administrative state to spring up later in the century.²⁹⁴ To libertarians and classical liberals, the early 1800s was a land of *laissez faire*, where early industries and commerce were unconstrained by small governments that had yet to discover public bureaucracies. Some scholars trace the origins of private enforcement to the late 1800s, often noting that "the United States has relied heavily upon private litigation to enforce policies passed into law by Congress since the rise of the federal regulatory state in the late 1880s."²⁹⁵ Of course, legal scholars have pushed back on this account, highlighting the early origins of the administrative state,²⁹⁶ the regulatory role of the common law,²⁹⁷ and other liability regimes that controlled the work of government officials.²⁹⁸ But even these scholars have generally underestimated the significance of informers throughout the Early Republic.

²⁹³ Diego A. Zambrano, *HOW AMERICANS ENFORCE THE LAW*.

²⁹⁴ Epstein, *supra* note 35; BENSEL, *supra* note 35, at 7 ("[T]he modern business enterprise described in this passage arose within a largely unregulated national market that was politically constructed by the Supreme Court.")

²⁹⁵ FARHANG, *supra* note 5, at 12.

²⁹⁶ Bill Novak; Maggie McKinley; etc.

²⁹⁷ Sherry, *supra* note 37, at 1460-61 (quoting Sunstein, *supra* note 37, at 451)

²⁹⁸ See generally Donahue, *supra* note 38; PARRILLO, *supra* note 38.

Second, the Article provides a more solid foundation for Article II and Article III debates over standing rules, *qui tam*, and the power of Congress to delegate enforcement of the law to private parties. This Article focused specifically on the 1800s and provided a systematic review of Congressional legislation and key historical documents, showing that Congress adopted dozens of informer provisions between 1800-1891.²⁹⁹ This “unbroken record” connects informer claims in 1790 to the dawn of the modern conception of private enforcement embodied in the Sherman Act of 1890.

Demonstrating the ongoing importance of informer statutes throughout the 1800s (and the reasons for their later decline) is a particularly significant new finding for the Article II debates. This Article has answered the challenge posed by originalist judges—that to establish the constitutionality of modern *qui tam*, it is not enough that early Congresses adopted *qui tam* provisions in the 1790s. Judge Katherine Mizelle, for instance, declared the False Claims Act’s *qui tam* provision an unconstitutional delegation of executive power.³⁰⁰ Mizelle dismissed the early practice of *qui tam* enactments because she believed that—after the Founding—there was no “continuous, unbroken practice throughout our Nation’s history” of empowering parties to sue on behalf of the government. She emphasized that the practice may have been confined to “early Congresses” and the statutes “quickly fell into disuse.”³⁰¹ In other words, a proper constitutional grounding for *qui tam* would need to show continuous Congressional adoption of that kind of provision well into the 1800s.³⁰² That is exactly what we have shown here: informer claims and *qui tam* were prevalent throughout the century, even as the remedial alternative embodied in the Sherman Act gradually moved to the fore.

By focusing on informer claims, our findings correct the methodological error that has distorted judicial understanding of nineteenth century private enforcement. The exclusive focus on “federal *qui tam* statutes” meant that legal historians missed the most important developments in law. Woolhandler and Nelson’s influential claim that Congress “rarely used” *qui tam* after the 1790s likely stemmed from this terminological confusion. That error began earlier, in Justice Scalia’s *Vermont Agency* opinion, which listed only four “extant *qui tam* statutes”—equivocating between informer statutes and *qui tam*, since some of those four do not even contain the words “*qui tam*” in its text.³⁰³ The terminological narrowing that distorted later scholarship may trace directly to that footnote. Early American jurists sometimes used “*qui tam*” as shorthand for all informer actions, but they more

²⁹⁹ *Id.* at 202-07.

³⁰⁰ U.S. ex rel Zafirov v. Florida Medical Associates LLC, 751 F.Supp.3d 1293 (M.D. Fla. 2024).

³⁰¹ *Id.*

³⁰² Again, the key question for them is whether there was an “unambiguous and unbroken history” of Congressional reliance on informer statutes such that there is “no doubt that the practice . . . has become part of the fabric of our society.” Or, alternatively, whether informer claims (and *qui tam*) was a left-over from the pre-founding, quickly discarded in the 1800s.

³⁰³ *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 765 n1. (2000).

commonly litigated and legislated using different terms. By searching only for “qui tam,” scholars missed dozens of federal informer provisions enacted between 1800 and 1891, plus hundreds of state and local statutes, and the extensive body of case law interpreting them. This narrow framing created an artificial gap in the historical record—a gap that critics of private enforcement then exploited to argue that informers vanished after the Founding. Our systematic review of penal statutes demonstrates that no such constitutional repudiation occurred. Informers remained central to American regulatory law throughout the nineteenth century. This finding should put regulatory litigation and maybe even “government by lawsuit” on more solid constitutional footing.

Appendix A

Table 1 Sample Informer Provisions in the 19th Century (Federal)

Year	Statute Title and Citation	Informer Provision (quoted)
1801	Act of Mar. 3, 1801, ch. 24, 2 Stat. 115 An Act supplementary to the act intituled "An act concerning the District of Columbia."	<i>"all fines penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt, in the name of the United States and of the informer; one half of which fine shall accrue to the United States, and the other half to the informer."</i>
1803	Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 "An Act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited."	<i>"Vessel, &c. to be forfeited if any prohibited person of colour be landed therefrom. A moiety of the forfeiture to the informer."</i>
1809	Act of Jan. 9, 1809, ch. 5, 2 Stat. 506 An Act to enforce and make more effectual an act, intituled "An act laying an embargo on all ships and vessels, in the ports and harbors of the United States," and the several acts supplementary thereto.	<i>"this section shall not be construed to extend to any person or persons, not being the owner or owners of such specie, goods, wares or merchandise, who shall first inform and make complaint to the collector of the district of any such offence committed within the same district: and any informer or informers, not being the owner or owners as aforesaid, upon conviction of the offenders, shall be entitled to one half of the fine aforesaid."</i>
1812	Act of June 26, 1812, ch. 107, 2 Stat. 759 An Act concerning Letters of Marque, Prizes, and Prize Goods.	<i>"such commanders, respectively shall forfeit for every such offence the sum of one thousand dollars, one moiety thereof to the use of the United States, and the other to the informer."</i>
1813	Act of Dec. 17, 1813, ch. 1, 2 Stat. 88 An Act laying an embargo on all ships and vessels in the ports and harbours of the United States	<i>"any informer or informers, not being the owner or owners aforesaid, upon conviction of the offenders, shall be entitled to one-half of the fine aforesaid, when the same shall be received by the United States, and shall be entitled to a certificate for that purpose from the court before whom the conviction shall be had."</i>
1815	Act of Jan. 9, 1815, ch. 23, 3 Stat. 164 "An Act to prohibit intercourse with the enemy, and for other purposes.	<i>"in all cases where such penalties and forfeitures shall be recovered, in pursuance of information given to such collector, naval officer, or surveyor, by any private informer, the one half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor."</i>

1816	Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 An Act to incorporate the subscribers to the Bank of the United States.	<i>"all and every person and persons who shall have been concerned as parties or agents therein, shall forfeit and lose treble the value of the goods, wares, merchandise and commodities in which such dealing and trade shall have been, one half thereof to the use of the informer, and the other half thereof, to the use of the United States, to be recovered in any action of law with costs of suit."</i>
1816	Act of Apr. 29, 1816, ch. 166, 3 Stat. 332 An Act supplementary to the "Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."	<i>"all articles of peltry, of provisions, or of any other kind purchased by foreigners from Indians or tribes of Indians, contrary to the provisions of this act, shall be and the same are hereby forfeited, one half thereof to the use of the informer, and the remainder to the United States."</i>
1818	Act of Apr. 20, 1818, ch. 88, 3 Stat. 447 An Act in addition to the "Act for the punishment of certain crimes against the United States," and to repeal the acts therein mentioned. (The Neutrality Act of 1818.)	<i>"every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."</i>
1819	Act of July 7, 1838, ch. 259, 2 Stat. 741 An Act to revive with amendments, an act to incorporate the Medical Society of the District of Columbia	<i>"under the penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment; one half for the use of the society and the other for that of the informer."</i>
1819	Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 An Act in addition to the acts prohibiting the slave trade.	<i>"the informer or informers, who shall have lodged the information, shall be entitled to receive, over and above the portion of the penalties accruing to him or them by the provisions of the acts in such case made and provided, a bounty of fifty dollars, for each and every negro, mulatto, or persons of colour, who shall have been delivered into the custody of the United States."</i>
1820	Act of Mar. 14, 1820, ch. 24, 3 Stat. 548 An Act to provide for taking the fourth census or enumeration of the inhabitants of the United States, and for other purposes.	<i>"every marshal failing to file the [census] returns... [shall forfeit] one thousand dollars... one half thereof to the use of the United States, and the other half to the informer."</i>
1822	Act of May 6, 1822, ch. 58, 3 Stat. 682 An Act to amend an act, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth March, one thousand eight hundred and two.	<i>"if any ardent spirits shall be so found, all the goods of the said traders shall be forfeited, one half to the use of the informer, the other half to the use of the government, his license cancelled, and bond put in suit."</i>
1825	Act of Mar. 3, 1825, ch. 107, 4 Stat. 132 An Act concerning wrecks on the coast of Florida.	<i>"all and every forfeiture or forfeitures, which shall be incurred by virtue of the provisions of this act, shall accrue one moiety to the informer or informers, and the other to the United States, and may be mitigated or remitted, in manner prescribed by the act, entitled "An act to provide</i>

		<i>for mitigating or remitting the forfeitures, penalties, and disabilities, accruing in certain cases therein mentioned.””</i>
1830	Act of Mar. 23, 1830, ch. 40, 4 Stat. 383 An Act to provide for taking the fifth census or enumeration of the inhabitants of the United States.	<i>“shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars, for each offence, to be recovered by suit or indictment in any circuit or district court of the United States, or the territories thereof, one half to the use of the government, and the other half to the informer.”</i>
1831	Act of Mar. 2, 1831, ch. 66, 4 Stat. 472 An Act to provide for the punishment of offences committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes.	<i>“all penalties and forfeitures incurred under the provisions of this act shall be sued for, recovered and distributed, and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one half to the informer or informers, if any, or captors, where seized, and the other half to the commissioners of the navy pension fund, for the use of the said fund.”</i>
1832	Act of July 14, 1832, ch. 233, 4 Stat. 597 An Act to amend the act entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned."	<i>“If there is no informer, the United States have one-half, and the officers of the customs the other. If there is an informer, the informer has a fourth, and the custom-house officers a fourth. If the informer is an officer of a revenue cutter, the United States have a fourth, one-fourth to the custom-house officers, and the officer of the revenue cutter one-half.”</i>
1834	Act of June 30, 1834, ch. 161, 4 Stat. 729, 732-33 An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.	<i>“if any such spirituous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States... all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same... the one half to the use of the informer, and the other half to the use of the United States.”</i>
1837	Treaty of Jan. 14, 1837 (Saganaws), 7 Stat. 528 Treaty with the Saganaws (Saginaws / Ojibwe).	<i>“during which time no white man shall be allowed to settle on said tracts, under a penalty of five hundred dollars, to be recovered, at the suit of the informer; one half to the benefit of said informer, the other half to the benefit of the Indians.”</i>
1838	Act of July 7, 1838, ch. 191, 5 Stat. 304 An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.	<i>“for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat</i>

		<i>or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel."</i>
1839	Act of Mar. 3, 1839, ch. 80, 5 Stat. 331 An Act to provide for taking the sixth census or enumeration of the inhabitants of the United States.	<i>"shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars for each offence, to be recovered by suit or indictment in any circuit or district court of the United States or the Territories thereof, one half to the use of the Government, and the other half to the informer."</i>
1841	Act of Aug. 25, 1841, ch. 12, 5 Stat. 445 An Act to revive and extend the charters of certain banks in the District of Columbia	<i>"under pain of forfeiting for every such offence double the sum so paid out or offered in payment of its own debt or debts; one half to the informer, and one half to the use of the town or city in which the offending bank may be situated, to be recovered by action of debt in any court of competent jurisdiction in the District of Columbia."</i>
1864	Act of July 4, 1864, ch. 249, 13 Stat. 390 An Act further to regulate the Carriage of Passengers in Steamships and other Vessels.	<i>"in case such owners or master shall neglect or refuse to comply with provisions of this section, he or they shall furthermore forfeit and pay for each offence one hundred dollars, and such fine shall be a lien upon the vessel until paid. ...That informers shall be entitled to one half of any penalty or fine collected under this act, or the said act of March third, eighteen hundred and fifty-five, upon their information."</i>
1855	Act of Feb. 13, 1855, ch. 98, 10 Stat. 612 An Act to refund to the late Officers of the Customs of the District of Passamaquoddy, and Informers, their proportion of the net proceeds of certain moneys.	<i>"the Secretary of the Treasury be, and hereby is, authorized and directed, out of any moneys in the treasury not otherwise appropriated, to pay to the late officers of the customs of the district of Passamaquoddy, and informers, their proportion of the net proceeds of sale, by virtue of existing laws, arising from the condemnation of the schooners "L'Etang" and [others]."</i>
1863	Act of Mar. 3, 1863, ch. 71, 12 Stat. 701 An Act to amend the laws relating to the Post-Office Department.	<i>"Penalty for sending [periodicals etc.] to others than subscribers, &c. One half to informer."</i>
1864	Act of June 30, 1864, ch. 173, 13 Stat. 223 An Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, andfor other Purposes.	<i>"the collector of the district may seize any cigars, or tobacco for making cigars, which may be found in possession of such person, and the same shall be forfeited to the United States and sold; and one half of the proceeds paid to the United States, one fourth to the informer, and the other fourth to the collector making the seizure."</i>

1864	Act of June 27, 1864, ch. 225, 13 Stat. 375 An Act in addition to the several Acts concerning Commercial Intercourse between loyal and insurrectionary States, and to provide for the Collection of captured and abandoned Property, and the Prevention of Frauds in States declared in Insurrection	<i>“so much of the fifth section of the act approved May twenty, eighteen hundred and sixty-two, and the fourth section of the act approved March twelve, eighteen hundred and sixty-three, as directs the manner of distributing fines, penalties, and forfeitures, is hereby repealed, and that, in lieu of the distribution thereby directed to be made to informers, collectors, and other officers of the customs, the court decreeing condemnation may award such compensation to customs-officers...”</i>
1865	Act of Mar. 3, 1865, ch. 78, 13 Stat. 469 An Act to amend an Act entitled “An Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, and for other Purposes,” approved June thirtieth, eighteen hundred and sixty-four.	<i>“and where any penalty is paid without suit, or before judgment, and a moiety of the same is claimed by any person as informer, the Secretary of the Treasury, on application to him, under such regulations as he shall prescribe, shall determine whether any claimant is entitled to such moiety.”</i>
1866	Act of July 13, 1866, ch. 184, 14 Stat. 98 An Act to reduce Internal Taxation and to amend an Act entitled "An Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, and for other Purposes," approved June thirtieth, eighteen hundred and sixty-four, and Acts amendatory thereof.	<i>“the penalty recovered shall be awarded and distributed by the court between the United States and the informer, if there be any, as provided by law, who, in the judgment of the court, shall have first given the information of the violation of the law for which such penalty has been recovered.”</i>
1866	Act of July 23, 1866, ch. 208, 14 Stat. 191 An Act making Appropriations for the Legislative, Executive, and Judicial Expense of the Government for the Year ending the thirtieth of June, eighteen hundred and sixth seven, and for other Purposes.	<i>“Appropriation to pay certain informers their part of fines, penalties, and forfeitures.</i>
1866	Act of July 3, 1866, ch. 162, 14 Stat. 81 An Act to regulate the Transportation of Nitro-Glycerine, or Glonoin Oil, by Land or Water.	<i>“any person, company, or corporation who shall knowingly violate the provisions of this section, shall be liable to a fine of not less than one thousand nor more than ten thousand dollars, at the discretion of the court, one half to the use of the informer.”</i>
1867	Act of Feb. 5, 1867, ch. 26, 14 Stat. 383 An Act to punish certain Crimes in Relation to the Public Securities and Currency, and for other Purposes.	<i>“any person or persons offending against the provisions of this section shall be subject to a penalty of one hundred dollars, to be recovered by an action of debt, one half to the use of the informer.”</i>
1867	Act of Mar. 2, 1867, ch. 188, 14 Stat. 546 An Act to regulate the Disposition of the Proceeds of Fines, Penalties, and Forfeitures incurred under the Laws of the United States, and for other Purposes.	<i>“into the treasury of the United States, and distributed, under the direction of the Secretary of the Treasury, in the manner following, to wit: one half to the United States; one fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty, and if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure;</i>

		<i>and the remaining one fourth to be equally divided between the collector, naval officer, and surveyor.”</i>
1868	Act of July 20, 1868, ch. 186, 15 Stat. 125 An Act imposing Taxes on distilled Spirits and Tobacco, and for other Purposes.	<i>“Penalty upon revenue officers for extortion or wilful oppression, &c. Dismissal from office, fine, and imprisonment. One half of fine to the United States and one half to informer.”</i>
1871	Act of Feb. 28, 1871, ch. 100, 16 Stat. 440 An Act to provide for the better Security of Life on board of Vessels propelled in whole or in part by Steam, and for other Purposes.	<i>“if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars for each offence, one half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offence.”</i>
1872	Act of June 6, 1872, ch. 315, 17 Stat. 230 An Act to reduce Duties on Imports, and to reduce Internal Taxation, and for other Purposes.	<i>“Law permitting moieties to informers be, and the same is hereby, repealed; and the commissioner of internal revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums...”</i>
1872	Act of June 8, 1872, ch. 335, 17 Stat. 283 An Act to revise, consolidate, and amend the Statutes relating to the Post-Office Department.	<i>“all fines and penalties imposed for any violation of the postal laws, except such part as may by law belong to the informer or party prosecuting for the same; and all money derived from the sale of waste paper or other public property of the Post-office Department, shall be deposited in the treasury.”</i>
1874	Act of June 22, 1874, ch. 391, 18 Stat. 186 An Act to amend the customs-revenue laws and to repeal moieties.	<i>“Claim of informer where judicial proceedings instituted to be certified by court. Certificate not conclusive. Proof of claim where forfeiture collected without judicial proceedings. Punishment of officer receiving part of informer's [share, except in cases of smuggling].”</i>
1880	Act of Apr. 6, 1880, ch. 47, 21 Stat. 71 An act for protection of the Potomac fisheries in the District of Columbia and for the preservation of shad and herring in the Potomac River.	<i>“shall be fined not less than ten nor more than one hundred dollars for each offense and shall forfeit to the District his nets, boats and other apparatus, which shall be sold and the proceeds of such sales and all fines accruing under this act shall be paid into the Treasury, and therefrom, to the informer, in each case where conviction ensues, shall be paid the sum of ten dollars.”</i>

1886	Supplemental Estimates of Appropriation, Supplemental estimates of appropriations for the fiscal year ending June 30, 1886, &c.—Continued;	<i>“To pay W. G. Holden, inspector of customs at Corpus Christi, Texas, the one-half, due him as informer's fees under section forty-two hundred and thirty-four of the Revised Statutes, of several penalties collected of vessels at that port, and covered into the Treasury, ninety-five dollars.”</i>
1888	Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565 An Act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-eight, and for prior years.	<i>“the act approved February twenty-sixth, eighteen hundred and eighty-five, entitled “An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia,” be, and the same is hereby, amended so as to authorize the Secretary of the Treasury to pay to an informer who furnishes original information that the law has been violated such a share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per cent[um].”</i>
1890	Act of Sept. 4, 1890, ch. 875, 26 Stat. 425 An Act in regard to collision at sea.	<i>“any person; one-half such sum to be payable to the informer and the other half to the United States.”</i>
1892	Act of July 13, 1892, ch. 159, 27 Stat. 116 An Act to punish the carrying or selling of deadly or dangerous weapons within the District of Columbia, and for other purposes.	<i>“And one half of every fine imposed under this section shall be paid to the informer, if any, whose information shall have led to the conviction of the person paying said fine.”</i>
1895	Act of Feb. 11, 1895, ch. 80, 28 Stat. 651 An Act to establish a national military park at the battlefield of Gettysburg.	<i>“shall, for each and every such offense, forfeit and pay a fine, in the discretion of the justice, according to the aggravation of the offense, of not less than five nor more than five hundred dollars, one-half for the use of the park and the other half to the informer.”</i>
1895	Act of Feb. 19, 1895, ch. 102, 28 Stat. 672 An Act To adopt special rules for the navigation of harbors, rivers and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, supplementary to the Act of August nineteenth, eighteen hundred and ninety, entitled “An Act to adopt regulations for preventing collisions at sea.”	<i>“Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.”</i>
1896	Act of June 10, 1896, ch. 398, 29 Stat. 321 An Act Making appropriations for current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth,	<i>“All the fines accruing under this paragraph shall be paid into the Treasury, and the informer in each case of conviction shall be paid the sum of twenty-five dollars.”</i>

	eighteen hundred and ninety-seven, and for other purposes.	
1898	Act of May 11, 1898, ch. 295, 30 Stat. 405 An Act To amend section five of an Act entitled "An Act to punish the carrying or selling of deadly or dangerous weapons within the District of Columbia, and for other purposes," approved July thirteenth, eighteen hundred and ninety-two.	<i>"—penalty for dealing without license. Register of sales, etc., to be kept. —penalty for failure. Half of fine to informer."</i>