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STANDING AND THE ENGLISH PREROGATIVE WRITS: THE ORIGINAL UNDERSTANDING*

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"I am almost coming to the conclusion that all histories are bad. Whenever one turns from the historian to the writings of the people he deals with, there is always such a difference."

– *C.S. Lewis*

INTRODUCTION

In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,[1] Justice Felix Frankfurter attempted to ground principles of justiciability, specifically the require-

† Associate, Wiley, Rein & Fielding, Washington, D.C. I would like to thank Professor Jeffrey Jackson of Mississippi College School of Law for his invaluable assistance with this project, Karin Den Bleyker, Catalogue Librarian at Mississippi College School of Law, for her tireless search for obscure sources, Christopher Gacek for his comments on an earlier draft, Alina Loynab for her assistance with editing, and my wife, Millie Clanton, for her patience through it all. The views expressed herein are mine alone and do not necessarily represent the views of Wiley, Rein & Fielding.

[1] 341 U.S. 123 (1951).

ment that a litigant in federal court have "standing" to bring suit,[2] in our common law history. Justice Frankfurter asserted that federal courts must "not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was . . . the business of the Colonial courts and the courts of Westminster when the Constitution was framed."[3] Moreover, if the constraints of history were not in themselves enough to sustain his position,[4]

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[2] According to Justice Frankfurter, standing requires a litigant to be " 'interested in and affected adversely by the decision' of which he seeks review." *Id.* at 151 (Frankfurter, J., concurring) (quoting Braxton County Court v. West Virginia *ex rel.* Dillion, 208 U.S. 192, 197 (1908)). The interest "must not be wholly negligible," and the party "must show more than that 'he suffers in some indefinite way in common with people generally.' " *Id.* (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923)). More recently, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," and has three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court . . . . Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal citations and quotation marks omitted). Furthermore, *Lujan* provides that separation of powers principles limit Congress' ability to grant individuals standing by "convert[ing] the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts," as to do so would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577.

[3] *McGrath*, 341 U.S. at 150 (Frankfurter, J., concurring).

[4] In light of modern notions of constitutional interpretation, this was very wise indeed. *See, e.g.*, LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1307 (2d ed. 1988) (The Court must "decide, in this society and at this time, whether a person's choice to act or think in a certain way should be fundamentally protected."); William J. Brennan, Speech to the Text and Teaching Symposium of Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 17 ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems . . . . What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time."); Owen Fiss, *The Supreme Court 1978 Term Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979) ("The function of the judge is to give concrete meaning and application to our constitutional values.").

Justice Frankfurter attempted to moor the doctrine of standing in the separation of powers, stating that "[t]he scope and consequences of the review with which the judiciary is entrusted over the executive and legislative action require us to observe these bounds fastidiously."[5]

More recently, Justice Antonin Scalia has argued that standing has "deep roots in the common law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition."[6] Failure to observe its boundaries, according to Justice Scalia, does "substantial harm to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them."[7]

This view of standing became the law of the land in *Lujan v. Defenders of Wildlife*,[8] wherein the Court held that the "Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[9] The doctrine of standing, Justice Scalia wrote for the Court, is one of the "landmarks" which "set[s] apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III."[10] To ignore "the concrete injury requirement" would be "discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of courts rather than of the political branches."[11]

A few years after Justice Frankfurter wrote his concurring opinion in *McGrath*, the late Professor Louis L. Jaffe accused him of "exaggerat[ing] . . . the precision of the tradition."[12]

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[5] *McGrath*, 341 U.S. at 150 (Frankfurter, J., concurring).

[6] Honig v. Doe, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting).

[7] *Id.* at 342. Justice Scalia had previously published a law review article discussing his view of the relationship of standing and the separation of powers. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

[8] 504 U.S. 555 (1992).

[9] *Id.* at 559-60.

[10] *Id.* at 560.

[11] *Id.* at 576.

[12] Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961).

Professor Jaffe based this assertion on the use of certain prerogative writs in English courts during the eighteenth century.[13] Such writs were, according to Professor Jaffe, "used primarily to control authorities below the level of central government,"[14] and "in prerogative proceedings in King's Bench the character of the relator was often obscure or unstated."[15] Indeed, Jaffe wrote that "in the writ of prohibition, at least, there is overt authority for allowing anyone to initiate the proceeding."[16] Thus, according to Professor Jaffe, "the courts of Westminster" at the time the Constitution was framed entertained some proceedings wherein the party invoking the court's power was without any personal interest in the relief sought.

Professor Raoul Berger also criticized Frankfurter's view as "historically unfounded."[17] Berger asserted that "there may be policy arguments in favor of a 'personal interest' limitation on standing, but they cannot rest on historically-derived constitutional compulsions."[18] Professor Berger stated that "[g]iven a document which employed familiar English terms—e.g., 'admiralty,' 'bankruptcy,' 'trial by jury'—it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation."[19] And, after expanding on Professor Jaffe's research on the English prerogative writs, Berger concluded that "[a]t the adoption of the Constitution . . . the English practice in prohibition, certiorari, quo warranto, and

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[13] *Id.* at 1269.

[14] *Id. Cf.* 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 157 (3d ed. 1975). Holdsworth explains:

> [S]ince breaches of the law, arising either from misfeasance or non-feasance, were generally a cause of action *at the suit of the individual injured by them*, civil proceedings could be taken against all the officials of the local government *by persons who had been injured* by negligent or wilful breaches of the law committed by them. . . . This responsibility of the local government to the law, *at the suit of an injured individual*, had been a well-recognized principle of the medieval common law. . . . [The] liability of the officials of the local government to be sued *by aggrieved persons* may, in some cases, have pressed hardly upon them.

Id. (emphasis added).

[15] Jaffe, *supra* note 12, at 1308.

[16] Jaffe, *supra* note 12, at 1308.

[17] Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969).

[18] *Id.* at 840.

[19] *Id.* at 816.

informers' and relators' actions encouraged strangers to attack *unauthorized action.*"[20]

The conclusions reached by Jaffe and Berger have been eagerly accepted by legal scholars, with virtually no skepticism or dissent.[21] A few specific examples should suffice. Professor Steven L. Winter cites Berger without hesitation for the proposition that in pre-Revolution English practice, " 'standingless' suits against illegal government action could be brought via the prerogative writs of mandamus, prohibition, and certiorari issued by the King's Bench."[22] Professor Cass R. Sunstein quotes Jaffe's conclusion that the " 'English tradition of locus standi in prohibition and certiorari is that a "stranger" has standing.' "[23] In fact, Sunstein goes on to cite Berger's article extensively and with great deference,[24] to the point of accepting Professor Berger's statement that a 1724 case, *Arthur v. Commissioners of Sewers*,[25] "indicated that 'one who comes merely as a stranger' was entitled to discretionary relief" by writ of certiorari,[26] even though that case never mentions the term "stranger."[27] Professor Evan Tsen Lee asserts that "[a]rticles by Raoul Berger and Professor Louis Jaffe demonstrate that English practice permitted 'strangers' to bring actions vindicating the public interest in the enforcement of public obligations."[28]

Surprisingly (but then perhaps not), many of the same scholars who have so readily accepted the conclusions reached by Berger and Jaffe have used those same conclusions to ridi-

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[20] *Id.* at 827 (emphasis in original).

[21] *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300 (1979); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 638-39 (1992); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 1007 n.675 (1994); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151-53 (1993); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 171-73 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988).

[22] Winter, *supra* note 21, at 1396.

[23] Sunstein, *supra* note 21, at 171 (quoting Jaffe, *supra* note 12, at 1274).

[24] Sunstein, *supra* note 21, at 171-73.

[25] 88 Eng. Rep. 237 (K.B. 1724).

[26] Sunstein, *supra* note 21, at 171-72 (quoting Berger, *supra* note 17, at 821).

[27] *See* discussion *infra* notes 128-38 and accompanying text.

[28] Lee, *supra* note 21, at 638.

cule Justice Scalia's view that standing has "deep roots in the common law understanding." For example, after citing what he calls the "compelling efforts" of Berger and Jaffe, Professor Gene R. Nichol, Jr. states that in *Lujan*, "Justice Scalia, perhaps surprisingly (but then perhaps not), ignored the scholarship of the history of Article III."[29] Professor Nichol chides Justice Scalia for his hypocrisy in asserting that for purposes of substantive due process analysis, the limitations on the authority of democratic government may be found "only by exploring 'the most specific level at which [the] relevant tradition . . . can be identified,' "[30] while a " 'new' tradition finds a ready judicial home" for purposes of limiting the power of federal courts.[31]

Professor Lee also scolds Justice Scalia for failing to offer any "evidence that English practice in fact conformed to the dispute resolution model he exalted."[32] According to Lee, "Berger's and Jaffe's historical works thus disprove Justice Scalia's assertion that the common law understanding dispositively favors reading 'cases' and 'controversies' to impose a personal stake requirement."[33] Professor Sunstein states with absolute certainty that, "[a]s a matter of history, we have seen that Scalia's claim is not sound; in fact, it is baseless," as "courts had 'traditionally entertained' a wide variety of suits instituted by strangers."[34]

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[29] Nichol, *supra* note 21, at 1152. Professor Nichol also cites Professor Winter's article for the proposition that the prerogative writs did not require individual injury, Nichol, *supra* note 21, at 1151 (citing Winter, *supra* note 21, at 1397), and commends Professor Sunstein's efforts in "plow[ing] these same furrows." Nichol, *supra* note 21, at 1152 (citing Sunstein, *supra* note 21, at 177). Sunstein and Nichol both relied on the conclusions of Professors Berger and Jaffe, *see* Sunstein, *supra* note 21, at 171-72, and Nichol, *supra* note 21, at 1151-52, and therefore reached the same (erroneous) conclusions. Professor Nichol also cites an article which he believes demonstrates that "*qui tam* suits have enjoyed a long an unmolested history in the United States." Nichol, *supra* note 21, at 1152 (citing Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341 (1989)). Justice Scalia ignored these works, according to Nichol, in order to create the *Lujan* opinion perhaps "not . . . from whole cloth, but the source of its fabric is at least mysterious." *Id.* at 1153.

[30] Nichol, *supra* note 21, at 1153 (quoting Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989)).

[31] Nichol, *supra* note 21, at 1153.

[32] Lee, *supra* note 21, at 637.

[33] Lee, *supra* note 21, at 639.

[34] Sunstein, *supra* note 21, at 214.

Of course, one need not look long to discover exactly why many of these scholars have so eagerly accepted the version of history promoted by Berger and Jaffe, and why they use that history to attack Justice Scalia's (and now the Supreme Court's) view that standing has its origins in the common law understanding of the role of the judiciary. Professor Winter advocates a "dual model system of adjudication" which "recogniz[es] both private and public rights," and "provides one legal mechanism through which we can seek and attempt to maintain a sense both that we are individuals and that what happens to varied communities upon which we depend matters very much to each of us."[35] This dual system will help to overcome the "individualist ideology embedded in the social construct of standing" which is part of the "fragmented" society in which "[w]e are less and less capable of bridging the gaps of race, wealth, and sectional need."[36] One engaged in the pursuit of these lofty aims certainly cannot allow the "social construct" of standing to get in the way.

Professor Sunstein has concluded that the current standing doctrine is "an invention of federal judges" and a "misinterpretation of the Constitution."[37] He believes that "injury in fact is neither a necessary nor a sufficient condition for standing," and "is a form of Lochner-style substantive due process."[38] Indeed, Sunstein advocates the "intriguing possibility" that Congress "create property rights in the benefits provided by regulatory statutes and . . . establish standing to vindicate those property rights,"[39] or that "Congress create a system of bounties for citizens in cases involving both private defendants and the executive branch."[40] This is certainly not as dramatic as Professor Winter's assertion, but nevertheless revealing.

Professor Lee supports a "public values" model of adjudication, wherein "the primary task of a judge is not to resolve the dispute at bar, but rather to give concrete meaning to our

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[35] Winter, *supra* note 21, at 1514-15.

[36] Winter, *supra* note 21, at 1514.

[37] Sunstein, *supra* note 21, at 166.

[38] Sunstein, *supra* note 21, at 236.

[39] Sunstein, *supra* note 21, at 168.

[40] Sunstein, *supra* note 21. Although such a "bounty" system would not violate the "personal stake" requirement of standing, it would likely violate other constitutional principles. *See* discussion *infra* note 47 and accompanying text.

public values, to illustrate how our public and constitutional values play out in the real world."[41] In Lee's world, adjudication "is the process through which the meaning of our public values is revealed or elaborated."[42] There is certainly no room for an "injury in fact" requirement when one is attempting to "give concrete meaning to our public values."

Dean Nichol also favors "public law litigation"[43] wherein lawsuits are brought for "the vindication of constitutional or statutory interests," rather than "private, common law right[s]."[44] He criticizes the injury requirement as "amorphous, complex, and value-laden,"[45] and concludes that "nothing in the Constitution demands a private rights model of adjudication—not its language, not its history, nor its structure, and not the standards fashioned to measure access."[46]

The simple fact of the matter is that none of these scholars has, for obvious reasons, seriously questioned the conclusions reached by Berger and Jaffe regarding the English prerogative writs during the eighteenth century. On the contrary, the research of Berger and Jaffe has been eagerly accepted by those who reject the "private rights" model of adjudication, and who advocate a more active role for the courts in defining our "public values." The purpose of this Article is to perform that difficult task for them by closely examining the English prerogative writ practice during the eighteenth century. That examination will reveal that "standingless" proceedings were not commonplace, as Professors Jaffe and Berger concluded, but that a "personal stake" or standing was indeed necessary to invoke the power of English courts in prerogative proceedings during the eighteenth century.[47]

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[41] Lee, *supra* note 21, at 627-28.

[42] Lee, *supra* note 21, at 627-28.

[43] Nichol, *supra* note 21, at 1166.

[44] Nichol, *supra* note 21, at 1166.

[45] Nichol, *supra* note 21, at 1157.

[46] Nichol, *supra* note 21, at 1169.

[47] Professor Jaffe stated that the "English tradition of *locus standi* in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary." Jaffe, *supra* note 12, at 1274. Jaffe did, however, note that in all of the cases he analyzed the "so-called 'strangers' . . . were technical strangers to the record but otherwise persons with a special interest." Jaffe, *supra* note 12, at 1274. Jaffe also suggested that the writ of mandamus "might" have been available to a stranger, but his only authority for this proposition was his belief that "the list of cases in the digests strongly suggest the possibility that the plaintiff in

I. THE WRIT OF PROHIBITION

Professor Berger first cited the writ of prohibition as "the clearest example" of "pre-Constitution English law" that demonstrates that "attacks by strangers on action in excess of jurisdiction were a traditional concern of the courts in Westminster."[48] Likewise, Professor Jaffe stated that the "English tradition of *locus standi* in prohibition . . . is that 'a stranger' has standing, but relief in suits by strangers is discretionary."[49] Berger quoted as authority Sir Edward Coke's account of the Third Answer of the judges in a document known as the *Articulo Cleri*:

> "Prohibitions by law are to be granted at any time to restraine a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary . . . . And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution as before."[50]

Berger stated that "[n]o English court, so far as I can discover, has ever rejected the authority of *Articulo Cleri* or denied that a writ of prohibition may be granted at the suit of a stranger."[51] Furthermore, according to Berger, "Coke was cited by the 18th century Abridgments."[52]

Well, it is likely true that no one has ever rejected the authority of the *Articulo Cleri*. And it is also likely true that no English court ever denied that the writ of prohibition was available to a "stranger." The question then becomes (a ques-

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some of them was without a personal interest." Jaffe, *supra* note 12, at 1274. Berger, on the other hand, cited (without reservation) the writs of "prohibition, certiorari, quo warranto, and informers' and relators' actions" as actually "encourag[ing] strangers to attack *unauthorized action*." Berger, *supra* note 17, at 827. Because Professor Berger more fully developed the proposition suggested by Jaffe, many (if not most) of my comments will be directed toward the conclusions reached by Professor Berger.

[48] Berger, *supra* note 17, at 819.

[49] Jaffe, *supra* note 12, at 1274.

[50] Berger, *supra* note 17, at 819 (quoting 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797)).

[51] Berger, *supra* note 17, at 819.

[52] Berger, *supra* note 17, at 819. (citing 4 J. COMYNS, DIGEST, "*Prohibition*" (E) (1766); and 4 MATTHEW BACON, ABRIDGMENT, "*Prohibition*" (C) (3d ed. 1768)).

tion Berger failed to answer): What *meaning* did the term stranger have to the judges in the *Articulo Cleri*? Berger simply assumed that by "stranger" they were referring to a person with no interest in obtaining the writ. This was, as shall be demonstrated herein, a risky assumption.

Professor Jaffe's authority for the proposition that strangers could seek a writ of prohibition is a book by Professor S.A. de Smith, a law professor at Cambridge.[53] Jaffe recognized, however, the fact that the word "stranger" is not unambiguous, as he noted that in all of the cases cited by Professor de Smith, "the so-called 'strangers' . . . were technical strangers to the record but otherwise persons with a special interest."[54] Professor de Smith himself wrote that

> [i]n the various assertions that a 'stranger' has *locus standi* it is not always clear who is understood to be a stranger. Sometimes the term seems to mean merely a person who was not a party to the proceedings sought to be prohibited; it does not necessarily follow that the court would have been prepared to accord standing to someone who had no personal interest whatsoever to protect in moving for a prohibition.[55]

Professor de Smith in turn cites the work of Professor S.M. Thio for this proposition.[56]

Professor Thio also traced the history of the notion that a "stranger" could seek a writ of prohibition to the judges' response to the third objection of the *Articulo Cleri,* quoted in Coke's *Institutes*.[57] However, according to Thio, the term "stranger" as used by the judges in the *Articulo Cleri*, was "in contradistinction to a party to the proceedings sought to be prohibited. In other words, a stranger denotes a non-party."[58] Furthermore, Thio found that it "is not clear from the cases

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[53] Jaffe, *supra* note 12, at 1274 n.35 (citing S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 308 (1959)).

[54] Jaffe, *supra* note 12, at 1274. This statement will prove to be somewhat prophetic.

[55] S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 368 n.33 (3d ed. 1973).

[56] *Id.* (citing S.M. THIO, LOCUS STANDI AND JUDICIAL REVIEW 79 (1974)).

[57] S.M. THIO, LOCUS STANDI AND JUDICIAL REVIEW 81-2 (1971).

[58] *Id.* at 82. The exact language quoted by Coke was that "the kings [sic] courts . . . may award prohibitions, being informed either by the parties themselves, or by any stranger." Berger, *supra* note 17, at 819 (quoting 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *602 (1797)).

whether the term 'stranger' as employed by the courts denotes any non-party to a dispute irrespective of his interest, or only a non-party who possesses some interest in the dispute."[59] It is this ambiguity that Professors Berger and Jaffe failed to address.

Clearly one does not have to look hard in the legal writings of the eighteenth century to find language supporting the proposition that a "stranger" could obtain a writ of prohibition. In addition to the language cited by Berger from Coke, Thomas Wood wrote that prohibition issued

> out of Chancery, King's Bench or Common Pleas to Forbid a Judge, &c. in the *Spiritual* Court, *Admiralty*, Court of *Chivalry*, &c. to Proceed in a Cause that belongs to the Common Law-Courts, or that belongs not to their Jurisdiction, tho' the Courts at law can give no Remedy; Or it may Forbid a Judge of any Temporal Court to proceed in a Cause depending before him, upon Suggestion that the Cognizance of the Cause does not belong to Him. The King's Courts, that may award Prohibitions, being informed by Plaintiff or Defendant, or by any Stranger, That any Court temporal or Ecclesiastical do Hold Plea where They have no Jurisdiction, may lawfully prohibit that Court, as well after Judgment and Execution as before.[60]

Matthew Bacon wrote that the purpose of the writ of prohibition was to "preserve the Right of the King's Crown and Courts, and the Ease and Quiet of the Subject."[61] The writ of prohibition, which most held was discretionary, would issue out of the "Superior Courts of Westminster, having a Superintendency over all Inferior Courts."[62] Moreover, the Chancery Court could issue the writ,[63] and the king could sue for a writ of prohibition,

> tho' the Plea in the Spiritual Court be between two common Persons, because the Suit is in Derogation of his Crown and Dignity. So if the Ecclesiastical Court will hold Plea of any Matter which belongs not to their Jurisdiction, upon Information thereof to the

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[59] THIO, *supra* note 57, at 82.

[60] THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 570 (3d ed. 1724) (emphasis in original) [hereinafter WOOD'S INSTITUTE].

[61] 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 240 (1736) [hereinafter BACON'S ABRIDGEMENT].

[62] 4 BACON'S ABRIDGEMENT *supra* note 61, at 241 (italics omitted).

[63] 4 BACON'S ABRIDGEMENT, *supra* note 61, at 241.

> King's Courts, either by the Plaintiff, Defendant, or by a meer [sic] Stranger, a Prohibition will issue.[64]

Other sources contain the same language.[65]

However, nothing in any of these eighteenth century writings suggests that the term "stranger" was used to refer to an individual with no personal interest in the relief sought. In fact, statements from authoritative legal writings of eighteenth century England reveal that a "stranger" could not, as Berger and Jaffe assumed, seek a writ of prohibition "without . . . a showing of injury to his personal interest."[66] Rather, the "stranger" who could seek a writ of prohibition was one who was neither the plaintiff nor defendant in the proceedings in the court below (nor in privity with the plaintiff or defendant), but who nevertheless had some significant personal interest in obtaining the writ of prohibition.

One of the most authoritative and illuminating expressions of this personal stake requirement is found on the very next page of *Bacon's Abridgment* after the "stranger" language appears. Bacon wrote, with notable clarity, that "no Man is entitled to a Prohibition *unless he is in Danger of being injured by some Suit actually depending.*"[67] Moreover, not only was personal injury necessary, Bacon said that the harm had to be imminent, as "[a] Prohibition *quia timet* does not lie."[68] Thus, according to Bacon, one had to allege that he was in imminent danger of being personally injured by proceedings in an inferior court in order to obtain a writ of prohibition.

Blackstone's discussion of the writ of prohibition also supports the conclusion that a "stranger" had to assert some immi-

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[64] 4 BACON'S ABRIDGEMENT, *supra* note 61, at 243.

[65] *See, e.g.*, THOMAS CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771) (Court may grant prohibition "upon information thereof to the King's courts, either by the plaintiff, defendant, or by a meer [sic] stranger") [hereinafter CUNNINGHAM'S DICTIONARY].

[66] Berger, *supra* note 17, at 820.

[67] 4 BACON'S ABRIDGMENT, *supra* note 61, at 244 (emphasis added). *See also* CUNNINGHAM'S DICTIONARY, *supra* note 65, at *Prohibition* ("But no man is intitled [sic] to a prohibition unless he is in danger of being injured by some suit actually depending . . . ").

[68] 4 BACON'S ABRIDGMENT, *supra* note 61, at 244. "Quia timet" literally means "because he fears." 8 THE OXFORD ENGLISH DICTIONARY 13 (1989). In law it refers to "[a]n action brought to prevent possible future injury." *Id. See also* BLACK'S LAW DICTIONARY 1247 (6th ed. 1990) (quia timet means literally "[b]ecause he fears or apprehends").

nent personal injury in order to obtain a writ of prohibition. Blackstone's discussion of the writ of prohibition is found at the beginning of the section of his commentaries wherein he would "consider such *injuries* as are cognizable by the courts of the common law. . . . For it is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and *every injury its proper redress.*"[69] Before going into all of the "numerous injuries" and "their respective legal remedies," however, there were, according to Blackstone, "two species of injuries, which will properly fall now within our immediate consideration."[70]

The "first of these injuries" was the "refusal or neglect of justice" which was "remedied either by writ of *procedendo*, or of *mandamus*."[71] The second injury was "that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause."[72] Such an injury was "a grievance, for which the common law has provided a remedy by the writ of *prohibition*."[73] According to Blackstone, the writ of prohibition was

> a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.[74]

Blackstone never suggested that one without any interest in the proceedings could seek a writ of prohibition.

Indeed, Blackstone's most telling statement for our purposes was made when he was describing the "methods of proceeding upon prohibitions":

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[69] 3 WILLIAM BLACKSTONE, COMMENTARIES 109 (emphasis added) [hereinafter BLACKSTONE'S COMMENTARIES].

[70] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 109. Blackstone had just finished discussing the jurisdiction of the admiralty courts.

[71] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 109 (emphasis in original). For a thorough treatment of the writ of mandamus, see discussion *infra* notes 263-96 and accompanying text.

[72] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 111 (emphasis in original).

[73] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69 (emphasis in original).

[74] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 112.

> *The party aggrieved in the court below* applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea.[75]

Furthermore, Blackstone wrote that "if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, *to repair the party injured in damages.*"[76]

Blackstone was clearly familiar with Coke's *Institutes*, as he cited Coke on the same page that he made these statements,[77] and must have been aware of the use of the word "stranger" in the context of the writ of prohibition. This is very persuasive evidence that a "stranger" was not understood to be one without a personal interest in obtaining a writ of prohibition.

Other legal writings from eighteenth century England also support the proposition that the "stranger" who could seek a writ of prohibition was one with some personal interest in obtaining the writ, but was not a party in interest in the proceedings in the inferior court. Indeed, according to Giles Jacob, the term "stranger" was widely understood to be a term of art, and had "[i]n the Law . . . a special Signification, for him that is not *privy* to an Act: As a *Stranger* to a Judgment, is he to whom a Judgment doth not belong; and in this Sense it is directly contrary to *Party* or *Privy*."[78] "Parties" were defined as "Persons which are named in a *Deed* or *Fine, viz.* that make the Deed or levy the *Fine*; and also to whom made and levied.

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[75] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 113 (first emphasis added).

[76] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69 (emphasis added). Richard Burn, another eighteenth century legal scholar, used similar terms to describe the method of obtaining a writ of prohibition. Burn wrote that *"the party aggrieved in the court below* applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint." RICHARD BURN, A NEW LAW DICTIONARY 249 (1792) (emphasis added) [hereinafter BURN'S DICTIONARY].

[77] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 113.

[78] GILES JACOB, A NEW LAW DICTIONARY (5th ed. 1744) (emphasis in original) [hereinafter JACOB'S DICTIONARY].

The *Parties to a Suit*, are the Plaintiff and Defendant who carry on the same."[79]

According to Jacob, a "stranger" was one who had "either a *present* or *future* right; or an apparent *possibility* of right, growing afterwards, &c."[80] Strangers to deeds could "not take advantage of conditions of entry, &c. as parties and privies may; but they are not obliged to make their claims on a Fine levied until five years."[81] Thus the "stranger" who could seek a writ of prohibition was by definition one with "either a present or future right," rather than one with no interest whatsoever in the particular proceeding in question.

Jacob cited Woods' *Institute* for the proposition that strangers were those with "either a present or a future right,"[82] and Wood used almost the exact same language to describe a stranger: "*Strangers* to Fines are those that are neither Parties nor Privies. Strangers have either a *Present* or *Future* Right; or an apparent *Possibility* of Right growing afterwards, or a Right to something *Issuing* only *out* of Lands."[83] Strangers who had a present right were "Bound by five Years after Proclamations, if they make not their Claim, within that Time,"[84] but strangers with "a *Future* Right, upon a Precedent Cause, and whose Right and Title cometh to them after the Proclamations . . . have five years after the coming of such Rights to enter and make their claim."[85] Those who were strangers with "neither Present nor Future Right, but only a *Possibility* at the Time of Levying the Fine, or whose Right groweth either entirely after the Proclamations, or partly before and partly after, may Enter and Claim when they please."[86]

Similarly, Blackstone stated that "[s]trangers to a fine" were "all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose *their claim*;

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[79] JACOB'S DICTIONARY, *supra* note 78.
[80] JACOB'S DICTIONARY, *supra* note 78 (emphasis in original).
[81] JACOB'S DICTIONARY, *supra* note 78.
[82] JACOB'S DICTIONARY, *supra* note 78.
[83] 2 WOOD'S INSTITUTE, *supra* note 60, at 245 (emphasis in original).
[84] 2 WOOD'S INSTITUTE, *supra* note 60, at 245.
[85] 2 WOOD'S INSTITUTE, *supra* note 60, at 246 (emphasis in original).
[86] 2 WOOD'S INSTITUTE, *supra* note 60, at 246 (emphasis in original).

provided they are under no legal impediments, *and have then a present interest in the estate.*"[87] Numerous other contemporaneous authorities defined "stranger" in this manner.[88] Indeed, the overwhelming weight of authority supports the proposition that the "stranger" who was allowed to obtain a writ of prohibition was one who, while not a party or privy to a party, was, in Bacon's words, "in danger of being injured by some suit actually depending."

The research of Professor Thio[89] also supports the proposition that the "stranger" who could seek a writ of prohibition was a non-party with some personal interest in obtaining the writ. According to Thio, the original purpose of the writ of prohibition "was to confine courts *stricto sensu* within their powers."[90] And, since "implicit in any proceeding before a court *stricto sensu* is the existence of a lis, the applicant for an order of prohibition is invariably a party to the dispute."[91] Indeed, after examining all of the cases according "strangers" standing to seek a writ of prohibition, Thio found only two cases where the applicant was "completely lacking in interest in the subject matter of the suit sought to be prohibited,"[92] and in only one of these cases, *Worthington v. Jeffries*, was the applicant successful.[93] *Worthington* was not decided until 1875, and thus tells us nothing about the eighteenth century understanding of a disinterested stranger's ability to obtain a writ of prohibition.

Furthermore, Thio found cases decided within a decade of *Worthington* which, although acknowledging the right of "strangers" to seek a writ of prohibition, rejected the parties' claims due to a lack of sufficient interest. Although these cases

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[87] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 356.

[88] *See, e.g.*, CUNNINGHAM'S DICTIONARY, *supra* note 65 (stranger is "directly contrary to *party* or *privy*," as "a *stranger* to a judgment. . . is he to whom a judgment: doth not belong"); JOHN COWELL, A LAW DICTIONARY (1672) (same) [hereinafter COWELL'S DICTIONARY]; THOMAS BLOUNT, A LAW DICTIONARY AND GLOSSARY (3d ed. 1717) (same) [hereinafter BLOUNT'S DICTIONARY].

[89] *See* THIO, *supra* note 57.

[90] THIO, *supra* note 57, at 79.

[91] THIO, *supra* note 57, at 79.

[92] THIO, *supra* note 57, at 82-83 (citing Worthington v. Jeffries (1875) L.R. 10 C.P. 379; and Chambers v. Green (1875) L.R. 20 Eq. 552).

[93] THIO, *supra* note 57, at 83 (citing Worthington v. Jeffries (1875) L.R. 10 C.P. 379).

are not relevant to demonstrate the eighteenth century practice, they do demonstrate that the holding in *Worthington* was not necessarily "the rule of law" as late as 1875. In the first case, *Forster v. Forster and Berridge*,[94] the co-respondent to a suit for dissolution of a marriage sought a writ of prohibition against the matrimonial court. A statute required that an adulterer be made a co-respondent in a suit for divorce in order to pay the costs of the proceedings.[95] According to Thio, Chief Justice Cockburn "drew a distinction between a stranger applying for prohibition and an aggrieved party, ruling that the grant of the remedy is discretionary in the case of the former, and that it issued *ex debito justitiae* in the case of the latter."[96]

Chief Justice Cockburn's opinion in *Forster* is revealing as to whether a disinterested stranger could obtain a writ of prohibition. Cockburn stated that "[t]he applicant, the co-respondent, is a stranger, being aggrieved, on his own shewing, only in so far as he has been decreed to pay all the costs of the suit, including those of the wife, in resisting the suit for the dissolution of the marriage."[97] The co-respondent was "only aggrieved in respect of being ordered to pay the costs of that which is the legal ground of complaint,-in all other respects he is a stranger."[98] Cockburn stated that he

> entirely concur[s] in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, *whereby some wrong or grievance has been sustained*, yet that is not ex debito justitiae . . . as distinguished from the case of a *party* aggrieved, who is entitled to relief ex debito justitiae if he suffers from the usurpation of jurisdiction by another Court.[99]

Cockburn then rejected the co-respondent's application for a writ of prohibition because "all that the applicant can allege is

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[94] 122 Eng. Rep. 430 (1863).
[95] *Id.* at 433.
[96] THIO, *supra* note 57, at 82.
[97] *Forster*, 122 Eng. Rep. at 434.
[98] *Id.* at 435.
[99] *Id.* (emphasis added).

that he has been wrongfully ordered to pay these costs."[100] In other words, not only was the co-respondent deemed a "stranger" in spite of the fact that he was clearly "aggrieved" by the proceedings in the court below, but the degree of injury was not sufficient for the court to intervene on his behalf.

Cockburn's most illuminating statement was made in response to one of the attorneys' admonitions that "a prohibition may be granted upon the request of a stranger, as well as of the defendant himself."[101] Cockburn said that "the applicant would only have a right to get that part of it prohibited in which he is interested."[102]

The opinions of the other judges in *Forster* also demonstrate that as late as 1863, a "stranger" needed some significant personal interest in order to obtain a writ of prohibition. Justice Wightman said that he agreed with Chief Justice Cockburn on "the insufficiency of the interest of the applicant in the subject matter to entitle him to make this application [for a writ of prohibition]."[103] Justice Crompton stated that he agreed "in deciding the case on the narrower ground" that "[t]he applicant having had costs awarded against him . . . and being an adulterer, has no *locus standi* to complain of the dissolution of the marriage; the only suggestion is, that he is aggrieved because he is ordered to pay costs. But they are independent of the dissolution of the marriage."[104] Again, the co-respondent was considered a "stranger," even though aggrieved, and did not have a sufficient interest to obtain a writ of prohibition.

Justice Blackburn stated that he "agree[d] with the Lord Chief Justice and my brothers Wightman and Cromptom in thinking this rule should be discharged."[105] According to Blackburn, "[p]rohibition is granted for two reasons."[106] The first is "contempt of the Crown," and the second "a damage to the party."[107] Where there has been contempt of the crown,

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[100] *Id.*
[101] *Id.* at 434.
[102] *Forster*, 122 Eng. Rep. at 434.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 436.
[106] *Id.*
[107] *Forster*, 122 Eng. Rep. at 436.

"that is a case in which we ought to interfere."[108] But, according to Blackburn, "[a] stranger has in general no right to require our interference; *but if he shews that he is aggrieved and has sustained damage*, then, ex debito justitiae, as in any other suit, he has a right to our opinion upon the question."[109] The application by this stranger was rejected because the co-respondent was not "in any sense a party aggrieved by an excess of jurisdiction . . . . He has no interest in the question whether the marriage is to stand or not."[110] The effect of this case, according to Thio, is "to limit the term 'aggrieved party' to either the plaintiff or defendant in a suit, and to designate a non-party applicant for prohibition a 'stranger.' "[111]

Thio also found support for this view of "stranger" standing in Chief Justice Cockburn's opinion in *Rex v. Twiss*,[112] a case decided a year before *Worthington*. *Twiss*, according to Thio, arose "out of an application by the guardians of the poor of a parish for a license to apply consecrated grounds for secular purposes."[113] A writ of prohibition was sought by "[a] non-resident of the parish . . . to prevent the licensing authority from proceeding with the application made by the guardians of the poor."[114] Chief Justice Cockburn stated that the prohibition in this case would not be granted based on

> the distinction which was much relied on by my Brother Blackburn as well as myself in *Forster v. Forster*, viz., that in the exercise of this jurisdiction by prohibition, the Court will not interfere on the application of a person who is a stranger, and not in any way interested in the subject matter of the suit sought to be prohibited, nor aggrieved by the alleged excess of jurisdiction."[115]

Because the applicant had not shown " 'any interest in the preservation of the churchyard, he must be taken, therefore to have come here to try the abstract question whether a churchyard once consecrated can be applied to secular purposes.' "[116]

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[108] *Id.*
[109] *Id.* (emphasis added).
[110] *Id.*
[111] THIO, *supra* note 57, at 82.
[112] (1869) L.R. 4 Q.B. 407.
[113] THIO, *supra* note 57, at 84.
[114] THIO, *supra* note 57, at 84.
[115] *Twiss*, [1869] L.R. 4 Q.B. at 413.
[116] *Id.* at 413-14.

Indeed, Professor Thio was unable to find a single case from the eighteenth century wherein a disinterested stranger obtained a writ of prohibition, and only one 1875 case, *Worthington v. Jeffries*, wherein such an applicant was successful. Cases decided within a decade of *Worthington*, however, continued to require a significant personal interest. Moreover, Professors Jaffe and Berger failed to cite a single case from that period for such a proposition. As the court stated in *Worthington*, "[t]he absence of any instance of the exercise of the suggested right is the strongest evidence against its existence."[117]

On the other hand, authoritative statements from Wood, Bacon, Blackstone, and others demonstrate that "the business of the . . . courts of Westminster when the Constitution was framed"[118] did not include issuing writs of prohibition on behalf of strangers lacking any personal interest in stopping the proceedings in the inferior court. Indeed, it appears that those seeking to rely on the eighteenth century understanding of the writ of prohibition to disprove Justice Scalia's assertion that standing has "deep roots in the common law understanding . . . of what makes a matter appropriate for judicial disposition"[119] would do well to take a second look at the writings of that period.

II. THE WRIT OF CERTIORARI

Berger and Jaffe also cited certiorari as a writ which could be obtained by a mere "stranger" in the English courts of the eighteenth century. Berger first cited two cases, one from 1870 and the other from 1924, which discuss the similarities between the writs of prohibition and certiorari,[120] and another case from 1702 wherein Chief Justice Holt stated that certiorari would issue to review the " 'proceedings of all jurisdictions erected by Act of Parliament . . . to the end that this court may

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[117] Worthington v. Jeffries, [1875] L.R. 10 C.P. at 385.

[118] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (Frankfurter, J., concurring).

[119] Honig v. Doe, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting).

[120] Berger, *supra* note 17, at 820 (quoting The Queen v. Justices of Surrey, [1870] L.R. 5 Q.B. 466, 472-73; and The King v. Electricity Commissioners, [1924] 1 K.B. 171, 204-05).

see that they keep themselves within their jurisdiction; and if they exceed it, to restrain them.' "[121]

However, Berger cited only two English cases for the proposition that a "stranger" could seek a writ of certiorari.[122] The first case, *Regina v. Thames Magistrates Court*, ex parte *Greenbaum*, tells us nothing about the English practice in certiorari during the eighteenth century, as it was not decided until 1957. The second case, *The Queen v. The Justices of Surrey*, suffers from the same flaw, having been decided in 1870, although it is a bit more relevant than the first. *Surrey*, however, is afflicted with problems independent of its age. The court in *Surrey* relied on *Forster v. Forster and Berridge*[123] for the proposition that a "stranger" seeking a writ of prohibition was one "having no particular interest in the matter."[124] However, as was demonstrated by the opinions of the justices in *Forster*[125] and by Professor Thio,[126] *Forster* does not stand for the proposition that one with no interest could seek a writ of prohibition. Indeed, the court in *Forster* referred to the applicant as a "stranger," although he was clearly "aggrieved," and proceeded to deny him a writ of prohibition due to the insufficiency of his interest,[127] suggesting that not only was one required to have some interest, but that the interest had to be significant.

Furthermore, the *Surrey* court relied on *Arthur v. Commissioner of Sewers*[128] for the distinction between an "application by a party aggrieved and by one who comes merely as a stranger to inform the Court."[129] Berger also cited *Arthur* as a case from which the proposition that "certiorari was available to a stranger may be inferred,"[130] because the court

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[121] *Id.* (quoting Rex v. Inhabitants in Glamorganshire, 91 Eng. Rep. 1287, 1288 (1702)).

[122] *Id.* at 821 (citing Regina v. Thames Magistrates Court, ex parte *Greenbaum* [1957] Local Gov't Rep. 129, 132, 135-36; and Regina v. Justices of Surrey, [1870] L.R. 5 Q.B. 466, 472-73).

[123] 122 Eng. Rep. 430 (1863).

[124] *Surrey*, 5 Q.B. at 473. *See also* THIO, *supra* note 57, at 92.

[125] *See* discussion *supra* notes 94-110 and accompanying text.

[126] THIO, *supra* note 57, at 82, 92.

[127] *See Forster*, 122 Eng. Rep. at 435.

[128] 88 Eng. Rep. 237 (1725).

[129] *Surrey*, 5 Q.B. at 473. *See also* THIO, *supra* note 57, at 92.

[130] Berger, *supra* note 17, at 820 (citing Arthur v. Commissioner of Sewers, 88 Eng. Rep. 237 (1725)).

"drew a distinction between a party aggrieved and 'one who comes merely as a stranger,' for purposes of deciding whether issuance of the writ was discretionary or a matter of right."[131] The opinion of the court in *Arthur*, however, does not even contain the word "stranger."

In *Arthur*, the plaintiff had been chosen as clerk at a meeting of the commissioners, and at the next meeting they fired him.[132] The clerk moved for a writ of certiorari, which was opposed by the commissioners "who offered to read affidavits that the plaintiff was surreptitiously chosen without due notice given to the majority of the commissioners."[133] The plaintiff responded that the court should "not inquire into the merits of his election until a *certiorari* was granted and returned."[134] The court apparently agreed, as the reporter wrote that "for this reason the Court would not permit the affidavits to be read, but would grant a *certiorari*, which was a *writ of right*."[135] The reporter then noted that "this was denied by one of the Judges, who said that a *certiorari* was not a *writ of right*, for if it was it could never be denied to grant it; but it has often been denied by this Court . . . so that it is not always a writ of right."[136] That same judge went on to say that

> [i]t is true, where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiae*, because he has no other remedy, being bound by the judgment of the inferior judicature.[137]

Conspicuously missing from *Arthur* is the standing of a "stranger" as opposed to the standing of an "aggrieved party."[138] Apparently one judge thought that a person who had been summarily deprived of an "office or place" was entitled to a writ of *certiorari ex debito justitiae*. But that says little, if

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[131] *Id.* at 821.
[132] *Arthur*, 88 Eng. Rep. at 237.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Arthur*, 88 Eng. Rep. at 237.
[138] *Cf.* THIO, *supra* note 57, at 92 ("[I]t is noteworthy that the court made no reference to the capacity of a person who is not aggrieved to apply for certiorari.").

anything, about the ability of one with no personal interest in the proceedings to obtain a writ of certiorari. It means at most that this particular judge thought that this particular aggrieved person, who had been summarily deprived of his office, was entitled to the writ as a matter of right.

Another problem with *Surrey* is that the court (erroneously) relied on the case of *The Queen v. Newborough*[139] for the proposition that when a stranger or "one of the general public having no particular interest in the matter" seeks a writ of certiorari, "the Court has a discretion."[140] The standing of the parties seeking the certiorari in *Newborough* was never even mentioned by the court or the parties in that case.

In *Newborough*, special constables were appointed by the justices of the peace "in apprehension of expected disturbances at the parliamentary elections which were then about to take place."[141] Later, the justices "made an order for the payment of 95*l*. 1*s*. 3*d*. on account of allowances to, and expenses incurred in respect of, special constables."[142] The payment was allowed and "two ratepayers then objected to such allowance and requested the Court to disallow the same."[143] The court's opinion contains no discussion of certiorari or the ability of disinterested members of the public to seek the writ. The *Surrey* court relied on this single sentence from the *Newborough* opinion: "It is in the discretion of the Court to grant or to refuse a certiorari, and it is not a matter of right."[144] However, as Professor Thio states, the *Newborough* court "might well have regarded the ratepayers aggrieved persons as did subsequent courts in certiorari applications."[145]

Professor Jaffe cited the work of Professor de Smith for the proposition that the "English tradition of *locus standi* in . . . certiorari is that a 'stranger' has standing, but relief in suits by strangers is discretionary."[146] Professor de Smith was, however, much more tentative with his conclusions than either

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[139] [1869] L.R. 4 Q.B. 585.
[140] *Surrey*, 5 Q.B. at 473. *See also* THIO, *supra* note 57, at 93.
[141] *Newborough*, at 585.
[142] *Id.* at 586.
[143] *Id.*
[144] *Id.* at 589.
[145] THIO, *supra* note 57, at 93.
[146] Jaffe, *supra* note 12, at 1274 (citing DE SMITH, *supra* note 56, at 303).

Jaffe or Berger.[147] Professor de Smith stated that "[t]here are numerous dicta to the effect that a 'stranger' may be awarded a certiorari,"[148] but "there is no reason for doubting the soundness of Lord Denning's observation that the court " 'would not listen, of course, to a mere busybody who was interfering in things which did not concern him.' "[149] However, the most interesting conclusion reached by Professor de Smith is that "in no reported English case has an application brought by such a person been successful."[150] It is also noteworthy that the earliest case found by de Smith which actually states the proposition that an unaggrieved "stranger" could obtain a writ of certiorari is the 1870 case of *The Queen v. The Justices of Surrey*,[151] one of the two cases cited by Professor Berger for this same proposition.

In summary, neither Professor Berger nor Professor Jaffe cited any persuasive evidence that the certiorari practice in the courts of Westminster at the time the Constitution was framed included granting the writ to disinterested strangers. Aside from the "inference" Berger drew from the 1725 decision in *Arthur v. Commissioner of Sewers*, which inference we have seen was unwarranted, Berger's argument is based entirely on a very questionable decision from 1870, and a decision from 1957, neither of which reveals anything about the contemporary understanding of the judicial power in 1789. Professor Jaffe relied solely on the research of Professor de Smith, who was himself quite tentative in his conclusions about the English tradition in certiorari. Indeed, Professor de Smith himself did not cite a single eighteenth century source for the proposition that a disinterested stranger could obtain a writ of certiorari, and the earliest court decision he did cite is the same 1870 decision cited by Professor Berger, *The Queen v. The Justices of Surrey*.

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[147] "[M]ost of the decisions have failed to provide a full exposition of the relevant legal principles and many of the dicta are ambiguous." DE SMITH, *supra* note 56, at 368.

[148] DE SMITH, *supra* note 55, at 369.

[149] DE SMITH, *supra* note 55, at 369 (quoting R. v. Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd. [1966] 1 Q.B. 380, 401).

[150] DE SMITH, *supra* note 55, at 369.

[151] *Surrey*, 5 Q.B. at 466.

The legal writings of eighteenth century England, on the other hand, reveal that at the time the Constitution was framed the writ of certiorari was available only to parties aggrieved by the action of the court below. Bacon described certiorari as

> an original Writ issuing out of Chancery, or the King's Bench, directed in the King's Name, to the Judges or Officers of (a) Inferior Courts, commanding them to return the Records of a Cause depending before them; to the End the Party may have the more sure and speedy Justice before him[152]

As the King's Bench had "a Superintendency over all Courts of an Inferior Criminal Jurisdiction," according to Bacon, it could have "any Indictment removed and brought before it self."[153] Moreover, when the writ was sought by the king it was granted as a matter of right, since "he has a Prerogative of Suing in what Court he pleases."[154] However, the court had "a Discretionary Power in granting or refusing it at the Suit of the Defendant."[155] Bacon never suggested that anyone but the prosecutor or the defendant could remove a criminal indictment by writ of certiorari, nor did he mention the word "stranger."

Statements by other commentators of the eighteenth century also suggest that only the prosecutor or a defendant could obtain a writ of certiorari. Cowell described the writ of certiorari as "a Writ . . . to an inferior Court, to call up the Records of a Cause therein depending, that conscionable Justice may be therein administered, *upon Complaint made by Bill, that the Party which seeketh the said Writ, had receiv'd hard dealing in the said Courts.*"[156] Any party who had "receiv'd hard dealing"

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[152] 1 BACON'S ABRIDGMENT, *supra* note 61, at 349 (emphasis added).

[153] 1 BACON'S ABRIDGMENT, *supra* note 61, at 349-50.

[154] 1 BACON'S ABRIDGMENT, *supra* note 61, at 350.

[155] 1 BACON'S ABRIDGMENT, *supra* note 61, at 350.

[156] COWELL'S DICTIONARY, *supra* note 88, at *CE*. *See also* BLOUNT'S DICTIONARY, *supra* note 88, at *CE* (Certiorari is a writ issuing "to an inferior Court, to call up the Records of a Cause there depending, that Justice may be done therein, *upon complaint made by Bill, that the Party who seeks the said Writ, hath received hard dealing in the said Court*") (emphasis added). A "bill" in this context was "a Declaration in Writing, expressing either the Wrong the Complainant hath suffered by the Party complained of, or else some Fault committed against some Law or Statute of the Realm . . . . It contains the fact complained of, *the Damage thereby sustained*, and Petition of Process against the Defendant for redress." JACOB'S DICTIONARY, *supra* note 78, at *BI* (emphasis added).

in the court below can hardly be thought of as a disinterested stranger.

Similarly, Jacob described certiorari as a writ issuing out of the King's Bench or Chancery "to an inferior Court, to call up the Records of a Cause there depending, that Justice may be done therein, *upon Complaint that the Party who seeks the said Writ hath received hard Usage, or is not like to have an indifferent Trial in the said Court.*"[157] Furthermore, Jacob said that when the writ was "at the Suit of the King, the Court is bound to award it . . . . But it is at the Discretion of the Court to grant it or not, at the Prayer of the Defendant."[158] Jacob did not mention a disinterested "stranger" obtaining a writ of certiorari.[159]

William Hawkins wrote in his treatise that the King's Bench or Chancery court could "award a *Certiorari* . . . to remove the Proceedings before" the other "Courts of Criminal Jurisdiction, whether they be of ancient or newly created Jurisdiction."[160] The court was "bound of Right to award it at the Instance of the King . . . . But it seems to be agreed, That it is left to the Discretion of the Court either to grant or deny it at the prayer of the Defendant."[161] Again, nothing was said of the ability of a "stranger" to obtain the writ.

Similarly, William Rastal described the writ of certiorari as "a Writ that lies where a Man is impleaded in a base Court, that is of Record, *and he supposes that he may not have equal Justice there.*"[162] The writ would also lie "in many other Cases, to remove Records for the King, as Indictments and others."[163] And, "upon Writs of Error of Judgment in the Common Pleas, *each Party may have this Writ* to bring any of the

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[157] JACOB'S DICTIONARY, *supra* note 78, at *CE*.

[158] *Id. See also* The King v. Eaton, 100 Eng. Rep. 49 (1787) ("The language of the Court has always been, that the King has a right to remove proceedings by certiorari of course; but that where a defendant makes an application of this sort, he must always lay a ground for it before the Court.").

[159] *Cf.* CUNNINGHAM'S DICTIONARY, *supra* note 65, at *CER* ("But though the court is to grant it at the suit of the King, yet it has a discretionary power in granting or refusing it at the suit of the defendant.").

[160] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 286 (1721).

[161] *Id.* at 287.

[162] WILLIAM RASTAL, LES TERMES DE LA LEY 106 (1721).

[163] *Id.* at 106-07.

proceedings into the King's Bench."[164] Burns described the writ as "issuing out of the court of chancery or of the king's bench . . . commanding them to *certify* or return the records of a cause depending before them, to the end the party may have the more sure and speedy justice."[165]

Blackstone's writings also demonstrate that the writ of certiorari was available only to the parties in the proceedings below. Blackstone stated that the King's Bench was

> divided into a crown side, and a plea side. And on the crown side, or crown office, it takes cognizance of all criminal causes . . . . Into this court also indictments from all inferior courts may be removed by writ of certiorari, and tried either at bar, or at nisi prius, by a jury of the county out of which the indictment is brought.[166]

The writ of *certiorari facias* was, according to Blackstone, "had at any time before trial, to certify and remove the indictment; with all the proceedings thereon, from any inferior court of criminal jurisdiction."[167] Certiorari was "granted *at the instance of either the prosecutor or the defendant*: the former as a matter of right, the latter as a matter of discretion."[168] According to Blackstone, this was done "frequently" for one of four purposes:

> 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him.[169]

Once the writ was issued and delivered to the inferior court "for removing any record or other proceeding, as well as upon indictment as otherwise, [it] supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein

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[164] *Id.* at 107.
[165] BURN'S DICTIONARY, *supra* note 76, at 149.
[166] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 262 (emphasis in original).
[167] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 315.
[168] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 316 (emphasis added).
[169] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 315.

entirely erroneous and illegal."[170] Blackstone's description of the writ clearly suggests that it was available only at the suit of the prosecutor or the defendant. Nowhere is there any language to suggest that a disinterested stranger could obtain such a writ.

Matthew Hale described the writ of certiorari as one which issued "unto inferior justices to remove indictments or appeals" to the king's bench, as it was "the sovereign ordinary court of justice in causes criminal."[171] The writ issued:

> to consider and determine the validity of indictments, . . . to have the prisoner or offender tried either at the bar, or by *nisi prius* before the king's justices of the courts of *Westminster* . . . to examine, and affirm or reverse the proceedings and judgments given by inferior judges, . . . to plead the king's pardon . . . [or] to issue process of outlawry against the offender in those counties and places where the process of inferior justices cannot reach them.[172]

Hale never used the word "stranger," nor did he suggest that a disinterested person could obtain the writ of certiorari.

In fact, a thorough review of the writings of a host of legal scholars of the period uncovered only one statement in Hawkins' treatise which suggests that the writ of certiorari was available to a "stranger," although a closer look at the reference reveals that the "stranger" was, like the stranger who could obtain a writ of prohibition, one with some interest in the relief sought. The statement is found in the section of Hawkins' treatise entitled "Of Appeals," where he was discussing the abatement of an appeal "upon the Exception or Plea of the Party for the Multiplicity of Action."[173]

An "appeal" in this context was "an Accusation of One against another to Attaint Him of Felony by Words Ordain'd for it."[174] It was "always at the Suit of the Subject. It is the Party's Private Action, prosecuting also for the Crown in respect of the Felony."[175] The "Appellant" was the plaintiff and the "Appellee" was the defendant.[176] Hawkins wrote that

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[170] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 316.
[171] 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 210 (1788).
[172] *Id.*
[173] 2 HAWKINS, *supra* note 160, at 190.
[174] 4 WOOD'S INSTITUTE, *supra* note 60, at 627.
[175] 4 WOOD'S INSTITUTE, *supra* note 60, at 627.
[176] 4 WOOD'S INSTITUTE, supra note 60, at 627.

> after an Appellant hath appeared on a Writ of Appeal, or even on a Bill of Appeal removed into the Court of King's-Bench from before the Sheriff and Coroners by *Certiorari*, if he commences a new Appeal for the same Matter, the Appellee may plead in Abatement that such prior Appeal is still depending, &c.[177]

However, it was "no Plea in Abatement of a Writ of Appeal, that the Appellant hath brought a Bill of Appeal for the same Matter before the Sheriff and Coroners, because such Bill is not of so high a Nature as a Writ of Appeal . . . till it be removed into the King's Bench."[178] Once the bill was removed into the King's Bench, however, "if the Plaintiff bring a Writ of Appeal for the same Matter . . . the Appellee may plead in Abatement that such Bill of Appeal is depending, because after it is removed into the King's-Bench, it is of as high a Nature as a Writ of Appeal."[179]

Hawkins then made the following statement:

> Yet Sir *Matthew Hale* seems to be of the Opinion that such Bill so removed is not pleadable in Abatement 'till the Plaintiff hath appeared thereon; perhaps for this Reason, that before the Plaintiff hath appeared it doth not appear of Record that he hath prosecuted the Suit in the King's Court, because the *Certiorari* might have been taken out by a Stranger. Upon which Ground it seems to have been resolved that it is no good Plea in Abatement of an Appeal, that the Plaintiff hath purchased another Writ of Appeal . . . because it might be for what appears upon the Record, That the first Appeal was so far prosecuted by a Stranger, but in the same Case it is admitted that such prior Appeal depending will abate the second, where it appears on Record that the same Plaintiff hath appeared and sued it, as in praying of Process, &c.[180]

Although this quote clearly suggests that a "stranger" might have prosecuted the appeal and obtained a writ of certiorari in the King's Bench, the context of the reference makes it clear that Hawkins was not referring to one with no interest in the appeal, because Hawkins had just spent several pages demonstrating exactly who had a *sufficient legal interest* to appeal certain felonies. For example, according to Hawkins, a wife

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[177] HAWKINS, *supra* note 160, at 190.

[178] HAWKINS, *supra* note 160, at 190. A statute provided that all of the appeals filed before the Sheriff and Coroner in the County Court could be "[r]emoved by *Certiorari* into the King's Bench." 4 WOOD'S INSTITUTE, *supra* note 60, at 628.

[179] HAWKINS, *supra* note 160, at 190.

[180] HAWKINS, *supra* note 160, at 190.

could appeal the death of her husband, but only if she proved "that she was wholly innocent herself of the Death complained of," and that "she was the Lawful Wife of the Deceased, at the time of his Death."[181] Furthermore, "if the Wife herself had a share in the Guilt, the Heir may have an Appeal against her."[182] However, the heir had to be an heir "general to the deceased, by the Course of the Common Law."[183] If the "Heir general had himself a share in the Guilt . . . the next Heir shall have an Appeal against him."[184] However, a father could not "have an Appeal of the Death of his Son, because he cannot be his Heir."[185]

To appeal a larceny, Hawkins wrote, it was not absolutely necessary "that the Appellant have the absolute Property of the Goods stoln [sic]; for it seems agreed that a Carrier or even a Servant . . . may have an Appeal of Larceny against any one who shall steal them."[186] However, one could not "maintain such an Appeal who has the bare Charge of Goods without a Possession."[187] In short, it is unclear exactly what Hawkins was referring to when he used the term "stranger" in this context, but these passages reveal that he was not referring to one with no interest in prosecuting the appeal.

The portion of Hale's treatise cited by Hawkins does not mention the writ of certiorari, but is nevertheless revealing. Hale was discussing when a man should "be put to answer in criminal and capital offenses without indictment at the king's suit."[188] One such instance was where an appeal was "brought at the suit of the party, and the plaintiff is nonsuit upon that appeal."[189] In that situation, Hale wrote, "the offender shall be arraigned at the king's suit upon such appeal."[190] But there were two limitations on this type of action by the king. First, such an appeal by the king could only occur "where the plaintiff in appeal hath either declared upon his

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[181] HAWKINS, *supra* note 160, at 163.
[182] HAWKINS, *supra* note 160, at 165.
[183] HAWKINS, *supra* note 160, at 165.
[184] HAWKINS, *supra* note 160, at 165.
[185] HAWKINS, *supra* note 160, at 165.
[186] HAWKINS, *supra* note 160, at 167.
[187] HAWKINS, *supra* note 160, at 167.
[188] 2 HALE, *supra* note 171, at 155 (italics omitted).
[189] 2 HALE, *supra* note 171, at 156.
[190] 2 HALE, *supra* note 171, at 156.

appeal by writ, or formed his appeal by bill, for the bare issuing of a writ [of appeal] without a declaration is not such an appeal as, the party being nonsuit, the defendant shall be thereupon arraigned."[191] This requirement was based in part on the fact that the writ of appeal might have been "brought in his name by a stranger without his privity."[192] Thus the "stranger" Hawkins was referring to was, according to Hale, one attempting to bring the appeal in the name of the injured party. This could be interpreted to mean that the term "stranger" was being used as it was in the context of the writ of prohibition, to refer to one who is not a named party to the suit.

The second limitation on this type of appeal by the king is also revealing. Hale said that for the king to proceed on the appeal it must have been "an appeal . . . well begun, and by a party enabled to prosecute it."[193] Thus if the appeal abated "because a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only of the death of her husband,) . . . there the appeal shall not be arraigned at the king's suit, because the appeal was never good."[194]

The most significant problem, however, with the notion that a disinterested "stranger" could obtain the writ of certiorari in the English Courts of the eighteenth century is that such a proposition is not to be found in any authoritative legal sources from that period. Although there are many authoritative assertions that a "stranger" could obtain the writ of prohibition, none have been found in discussions of the writ of certiorari. And although Hawkins and Hale, while discussing the abatement of appeals, at least implied that a "stranger" might have sought a writ of certiorari, the references are at best ambiguous. Moreover, in his discussion of the writ of certiorari, Hawkins never mentioned the word stranger, and never suggested that anyone other than the prosecutor or defendant (or one in privity to the prosecutor or defendant) could obtain such a writ.[195]

Furthermore, even if we assume arguendo that a "stranger" could obtain the writ of certiorari in the English courts of

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[191] 2 HALE, *supra* note 171, at 156.
[192] 2 HALE, *supra* note 171, at 156.
[193] 2 HALE, *supra* note 171, at 149.
[194] 2 HALE, *supra* note 171, at 149.
[195] *See* HAWKINS, *supra* note 160, at 286.

the eighteenth century, it has already been demonstrated that the term "stranger" was a term of art used to refer to one who was not a plaintiff or defendant (or one privy to the plaintiff or defendant) in the relevant proceedings, but who nevertheless had some personal interest in the relief sought.[196] There is simply no authority before the 1870 decision in *The Queen v. The Justices of Surrey*[197] for the notion that the disinterested "stranger" could obtain the writ of prohibition.

In sum, the English practice in certiorari during the eighteenth century did not, as was suggested by Berger and Jaffe, allow "one without a 'personal stake,' a mere stranger to the action complained of, . . . to initiate and maintain an 'adversary' proceeding in the public interest to challenge a jurisdictional usurpation."[198] Those who rely on the eighteenth century practice in certiorari to accuse Justice Scalia and others of "ignoring history," and creating "new traditions" would do well to take a second look at that history and tradition themselves. Indeed it appears that the eighteenth century English practice is consistent with Justice Scalia's assertion that the "personal stake" requirement of the standing doctrine is grounded "upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[199]

III. THE INFORMATION IN THE NATURE OF QUO WARRANTO

Professor Berger also cited the "information in the nature of quo warranto" as an eighteenth century writ which was available to the disinterested "stranger."[200] Professor Berger wrote that the quo warranto information "antedates the statute of 9 Anne, which allowed anyone who so desired to make use of the name of the Clerk of the Crown, with leave of Court, for the purpose of prosecuting usurpers of franchises."[201] "The breadth of the statute envisaged suits by a stranger," according

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[196] *See* discussion *supra* notes 66-119.

[197] [1870] L.R. 5 Q.B. 466.

[198] Berger, *supra* note 17, at 827.

[199] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[200] Berger, *supra* note 17, at 823. Professor Jaffe did not refer to the information in the nature of quo warranto.

[201] Berger, *supra* note 17, at 823.

to Berger, "and at least one case in 1789 held that the writ was available to a stranger, as had earlier been held with respect to other prerogative writs."[202]

There are two immediate problems with Professor Berger's analysis of the information in the nature of quo warranto. The first is his assertion that the "breadth of the statute envisaged suits by a stranger." The relevant starting point, it seems, for determining what the statute "envisaged" is the statute itself, which does not contain the word "stranger."[203] Second, the case Berger cited as holding that "the writ was available to a stranger" does not mention the availability of the writ to "strangers."[204] Apart from these two problems with Berger's analysis, there is another more fundamental flaw in his reliance on the information in the nature of quo warranto to support the proposition that "disinterested strangers" could obtain prerogative writs in the English courts of the eighteenth century. Authoritative legal writings from that period suggest that quo warranto informations, which were a variety of the general criminal information, were not generally understood to be available to "disinterested strangers" asserting no interest in the relief sought. Rather, such informations, which were brought by a relator in the name of the king, were understood to be the king's suit. Thus, the extent to which a relator was interested in the relief sought is, for our purposes, irrelevant.

A. *The Criminal Information Generally*

The information in the nature of quo warranto was a type of criminal information, and the criminal information was, according to Blackstone, "the only species of proceeding *at the suit of the king*, without a previous indictment or presentment by a grand jury."[205] Blackstone described two variations of the criminal information.[206] The first, which is not particularly relevant here, was the information "partly at the suit of the

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[202] Berger, *supra* note 17, at 823.

[203] *See* 9 Anne c. 20 (1710).

[204] *See Rex v. Smith*, 100 Eng. Rep. 740 (1790). *See also* discussion, *infra* note 235 and accompanying text.

[205] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303 (emphasis added).

[206] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303. *See also* 4 WOOD'S INSTITUTE, *supra* note 60, at 630.

king, and partly at that of a subject."[207] These informations were, according to Blackstone, "usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer."[208] According to Blackstone, these informations were "a sort of *qui tam* action . . . only carried on by a criminal instead of a civil process."[209] According to Bacon, *qui tam* actions were "such as are given by Acts of Parliament, which give a Penalty, and create a Forfeiture for the Neglect of some Duty or Commission of some Crime, to be recovered by Action or Information, at the Suit of him who prosecutes as well in the King's Name as in his own."[210]

The second type of criminal information described by Blackstone was the information which was "only in the name of the king,"[211] and there were two variations of this type of information. First, there were those informations which were "truly and properly his own fruits, and filed *ex officio* by his own immediate officer, the attorney general."[212] Bacon wrote that these informations could "be filed without any Application or Leave of the Court, and the Party shall be obliged to answer the same."[213] These *ex officio* informations were, according to Blackstone, brought for those crimes which were "such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions."[214] Bacon described these offenses as those which were "principally and more immediately against the King."[215]

The second type of information brought "only in the name of the king" was the information "in which, though the king is

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[207] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303.

[208] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303.

[209] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303. (emphasis in original). A *qui tam* was "when an Information is exhibited against any Person on a *Penal Statute*, at the Suit of the King and the Party who is Informer, where the Penalty for Breach of the Statute is to be divided between them." JACOB'S DICTIONARY, *supra* note 78, at *QI*.

[210] 1 BACON'S ABRIDGMENT, *supra* note 61, at 37.

[211] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 303.

[212] 4 BLACKSTONE'S COMMENTARIES, supra note 69, at 304.

[213] 3 BACON'S ABRIDGMENT, *supra* note 61, at 165.

[214] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 304.

[215] 3 BACON'S ABRIDGMENT, *supra* note 61, at 165.

the nominal prosecutor, yet it is at the relation of some private person or common informer."[216] These informations were, according to Blackstone, "filed by the king's coroner and attorney in the court of the king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public,"[217] and were used to prosecute "gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government."[218] The procedure in such actions was "for the party grieved to move the court of queen's bench for a rule to show cause why a criminal information should not be filed."[219] This type of information will be referred to as the "relator action," and the information in the nature of quo warranto was "one species of such information."[220] Thus, the quo warranto information, as a "relator action," was generally understood to be an action "at the suit of the king." A closer look at the quo warranto information and its development will be helpful.

B. *The Quo Warranto Information*

The information in the nature of quo warranto was described by Blackstone as "a remedy *given to the crown* against such as had usurped or intruded into any office or franchise."[221] The information "tend[ed] to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises."[222] This "ancient writ," according to Blackstone, was the "writ of quo warranto," which was "in the nature of a writ of right for the King against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right."[223] Where judgment was for the defendant, he would

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[216] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 304.

[217] 4 BLACKSTONE'S COMMENTARIES, supra note 69, at 304. *See also* 3 BACON'S ABRIDGMENT, *supra* note 61, at 165.

[218] 4 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 304-05.

[219] 4 HENRY JOHN STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 379 n.(t) (1845).

[220] *Id.*

[221] *Id.*

[222] *Id.* at 308.

[223] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 262. A "franchise" was

"have allowance of his franchise."[224] But where the judgment was for the king, the franchise was "either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hand of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it."[225]

The writ of quo warranto, Blackstone wrote, eventually fell into disuse and was replaced by the information in the nature of quo warranto.[226] This information was "filed in the court of king's bench by the attorney general, in the nature of a writ of *quo warranto*; wherein the process is speedier."[227] In other words, the quo warranto information was initially an *ex officio* information, and was, according to Blackstone, "properly a criminal method of prosecution, as well as to punish the usurper by a fine . . . as to oust him, or to seize it for the crown."[228] But it was long used as well for "the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor," the fine being nominal only.[229]

The quo warranto information eventually became used for "the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Ann. c. 20."[230] This statute allowed "an information in the nature of quo warranto to be brought with leave of the court, at the relation of any person desiring to prosecute the

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defined as

> a Royal Privilege in the Hands of a Subject; and may be vested in Bodies Politick or Corporations, either aggregate or sole, or in many Persons that are not Corporations, (as in Borough Towns, &c.) or in a single Person. . . . All Franchises and Liberties are derived from the Crown, and some are held by Charter; but some lie in Prescription and Usage, without the Help of any Charter.
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> JACOB'S DICTIONARY, *supra* note 78, at *FR*. A "liberty" was "a Privilege held by Grant o[r] Prescription, whereby Men enjoy some Benefit or Favor beyond the ordinary Subject."

BLOUNT'S DICTIONARY, *supra* note 88, at *LI*.

[224] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263.

[225] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263 (emphasis in original).

[226] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263.

[227] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263.

[228] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263.

[229] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 263.

[230] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 264.

same," which person was then called the "relator."[231] The information would lie against "any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate,"[232] and the relator was required "to pay or receive costs according to the event of the suit."[233]

The purpose of the statute of 9 Anne c. 20 thus appears to have been to allow the information in the nature of quo warranto, previously an *ex officio* information available only to the attorney general, to be pursued as other "relator actions," filed in the king's name by the king's attorney in the King's Bench, the master of the crown office.[234] The fatal flaw in Professor Berger's reliance upon the quo warranto information is, therefore, readily apparent: at the time the United States Constitution was framed, the information in the nature of quo warranto, as a relator action, was understood to be the suit of the king, brought in the name of the king by the master of the crown office. Whether the relator in such actions had an interest in the proceedings sufficient to give him "standing" to sue,

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[231] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 264.

[232] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 264.

[233] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 264.

[234] *See Rex v. Trelawney*, 97 Eng. Rep. 1010 (1765) (The statute 9 Anne. c. 20 "lets in everybody who desires it, to make use of [the King's] name in prosecuting usurpers of franchises; *whereas, before no subject could have done so.*"). A closer look at the statute will be helpful. The introduction of the statute states that it was an "Act for rendering the proceedings upon Writs of Mandamus and Informations in the Nature of a Quo Warranto more speedy and effectual and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs." 9 Anne c. 20 (1710). The statute was enacted to assist divers Persons who had a Right to such Offices or to be Burgesses or Freemen of such Cities Towns Corporate Boroughs or Places [who] have either been illegally turned out of the same or have been refused to be admitted thereto having in many of the said Cases no other Remedy to procure themselves to be respectively admitted or restored to their Offices or Franchises of Being Burgesses or Freemen . . . And . . . in case any Person or Persons shall usurp intrude into or unlawfully hold and execute any of the said Offices or Franchises it shall and may be lawful to and for the proper Officer in each of the said respective Courts with leave of the said Courts respectively to exhibit One or more Information or Informations in the Nature of Quo Warranto at the Relation of any Person or Persons desiring to sue or prosecute the same and who shall be mentioned in such Information or Informations to be the Relator or Relators against such Person or Persons so usurping intruding into or unlawfully holding and executing any of the said Offices or Franchises and to proceed therein in such Manner as is usual in Cases of Informations in the Nature of a Quo Warranto. *Id.* ¶ 4.

as we understand that term, is irrelevant. The action was the king's, filed by the king's attorney at the relation of a citizen, and the king was clearly the most interested party in executing the criminal laws.

IV. THE INFORMER ACTION

Professor Berger also cited the "centuries-old 'informers' actions" as going "beyond making *available* procedures to control unlawful conduct, and offer[ing] financial *inducements* to strangers to prosecute such actions."[235] These informer actions, according to Professor Berger, were created by statutes which encouraged members of the general public to enforce acts of Parliament " 'by the promise of a share of the penalty imposed for disobedience.' "[236] And, Berger stated, "the pecuniary reward thus offered to strangers was little calculated to lead colonial lawyers to read cognate remedies narrowly."[237] Although it is unclear exactly what was meant by this last statement, a close look at the eighteenth century understanding of the "informer action" reveals that the common informer was not understood to be one lacking a "personal interest" in the proceedings.

As we have already seen, informer or *qui tam* actions were created "by Acts of Parliament, which give a Penalty, and create a Forfeiture for the Neglect of some Duty or Commission of some Crime, to be recovered by Action or Information, at the Suit of him who prosecutes as well in the King's Name as in his own."[238] Blackstone described the *qui tam* action as a

> species of property to which a man has not any claim of title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, bef ore judgment had, no man can say he has any absolute property, eit her in possession or in action.[239]

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[235] Berger, *supra* note 17, at 825-26 (emphasis in original).

[236] Berger, *supra* note 17, at 826 (quoting 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 356 (2d ed. 1937)).

[237] Berger, *supra* note 17, at 826.

[238] 1 BACON'S ABRIDGMENT, *supra* note 61, at 37.

[239] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 437.

Examples of this species of property included "penalties as are given by particular statutes on an action *popular* . . . . Such as the penalty of *500l*, which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths of government."[240] The penalty in such actions was "given to him or them that will sue for the same."[241] Blackstone described the rationale behind these actions in this matter:

> Now here it is clear that no particular person, A or B, has any right, claim, or demand in or upon this penal sum, till after action brought; for he that brings his action and can [bona fide] obtain judgment first, will undoubtedly secure a title to it, in exclusion to everybody else. He *obtains an inchoate imperfect degree of property, by commencing his suit*; but it is not consummated till judgment . . . . But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest.[242]

Thus, by bringing an action or information for a violation of a statute, the common informer was understood to acquire an inchoate property interest in the statutory penalty, which interest would prevent others (including the king) from bringing a subsequent suit for that same penalty. The informer then had the exclusive right to that penalty (except for the portion to which the king was entitled) should his action prove successful. The informer action was, therefore,

> one instance, where a suit and judgment at law are not only the means of recovering, but also of acquiring property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same.[243]

Interestingly, the second such "species of property" mentioned by Blackstone wherein no claim or title existed until the action was commenced and judgment obtained was "that of

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[240] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 437.
[241] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 437.
[242] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 437 (emphasis added).
[243] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 437-38.

damages given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass."[244] In such an action, "the plaintiff has no certain demand till after the verdict; but; when the jury has assessed his damages, and judgment is given thereupon . . . he instantly acquires, and the defendant loses at the same time, a right to that specific sum."[245] Blackstone recognized that "this is not an acquisition so perfectly original as in the former instance," since "the injured party has unquestionably a vague and indeterminate right to some damages" as soon as he was injured.[246] The jury verdict and judgment do not, then, "vest a *new* title in him," but rather they "fix and ascertain the *old* one."[247] Nevertheless, "as the legal proceedings are the only visible means of this acquisition of property," Blackstone wrote, "we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law."[248]

Thus, the informer or *qui tam* action, at the time the constitution was framed, stood on the same footing as the ordinary tort action, wherein a property right was acquired and recovered by the judgment itself. The legal right to bring the action or information was given by statute, and by commencing the action the informer obtained a vested property right in the penalty provided for in the statute. Should the plaintiff fail to assert that property interest, however, his suit would fail. For example, Jacob said that *qui tam* informations would "not lie on any Statute . . . unless the Whole or Part of such Penalty be expressly given to him who will sue for it."[249] This was "because otherwise it goes to the *King, and nothing can be demanded by the Party*."[250] This strongly suggests that a common informer was required to assert a "personal interest" in order to invoke the court's power in eighteenth century England.[251]

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[244] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[245] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[246] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[247] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438 (emphasis in original).
[248] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[249] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[250] 2 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 438.
[251] It is important to note that the eighteenth century understanding of the

V. THE RELATOR ACTION

Professor Berger also cited the relator action as an example of an eighteenth century English practice which "encouraged strangers to attack unauthorized action."[252] The relator action, according to Berger, "deriv[ed] from the Crown's duty 'to see that public bodies kept within their lawful powers,' "[253] and "flourished in England, where it was brought by the Attorney General 'at the relation . . . of some other person.' "[254]

As an example of such relator action, Professor Berger cited the quo warranto statute of 9 Anne c. 20. We have already seen, however, that informations in the nature of quo warranto, like other relator actions, were understood to be the king's actions. Thus, they provide no support for the notion that suits by "disinterested strangers" were commonplace in the English courts of the eighteenth century. Moreover, the quo warranto informations were filed by the king's attorney in the King's Bench, the master of the crown office, not the attorney general.

Furthermore, two of the three cases cited by Berger for the proposition that a "relator" needed to have no interest in the action were not quo warranto informations, but were *ex officio* proceedings filed in chancery court by the attorney general to insure the proper administration of charities. Blackstone described such proceedings in this manner:

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legal interest asserted by a common informer demonstrates only that such informers were not considered "disinterested strangers," but were indeed understood to be asserting a legal right in those proceedings. While this legal right might be sufficient to demonstrate that such informers were asserting a "personal stake" in the controversy, separation of powers principles in the United States Constitution limit Congress' ability to give the public at large penalties to prosecute others for breaches of law. Particularly, Congress may not "convert the undifferentiated public interest . . . into an 'individual right vindicable in the courts,' " as to do so would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." Lujan v. Defenders of Wildlife, 505 U.S. 555, 577 (1992). *See also* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1822 (1993) (Congress "cannot create individuated injury by assigning the right to sue on behalf of the public to the highest bidder or to the first bounty hunter on the scene.").

[252] Berger, *supra* note 17, at 827.

[253] Berger, *supra* note 17, at 826 (quoting H. WADE, ADMINISTRATIVE LAW 125-26 (2d ed. 1967)).

[254] Berger, *supra* note 17, at 826 (quoting WADE, *supra* note 253, at 113).

> The king, as *parens patriae*, has a general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is necessary, the attorney general, at the relation of some informant, (who is usually called the *relator*) files *ex officio* an information in the court of chancery to have the charity properly established.[255]

Since these proceedings were brought *ex officio* by the attorney general, the character of the relator in this type of action is irrelevant. The plaintiff in the proceedings was the king, represented by his attorney general, and the king was clearly the most interested party in these actions.

The two cases cited by Berger are, in any event, inconsistent as to whether one with no personal interest could be a relator in such an action. Berger first cited a 1741 decision, *Attorney General v. Bucknall*,[256] for the proposition that " '[i]t is not absolutely necessary' " that the " 'relators in an information for a charity should be the persons principally interested . . . . [A]ny persons, though the most remote in the contemplation of the charity, may be relators in these cases.' "[257] Professor Berger failed, however, to quote the very next sentence of the opinion: "But it seems necessary that there should be a relator, *who has some interest.*"[258]

The other case cited by Berger is an 1826 case, *Attorney-General v. Vivian*,[259] which he said "dispensed with 'the least particle of interest.' "[260] In fact, the court in *Vivian* quoted the language from *Bucknall* that the relators in an information for a charity need not be the persons "principally interested," but explicitly refused to follow that rule:

> Whatever opinions may have been formerly entertained on this point, I conceive it to be now settled, that it is not necessary for relators to have *any* interest in the subject of the suit. . . . I do not apprehend that it ever has been required of a relator to show that he has any interest in the relief sought.[261]

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[255] 3 BLACKSTONE'S COMMENTARIES, *supra* note 69, at 427.
[256] 26 Eng. Rep. 600 (Ch. 1741).
[257] Berger, *supra* note 17, at 826 (quoting *Bucknall*, 26 Eng. Rep. at 600).
[258] *Bucknall*, 26 Eng. Rep. at 600 (emphasis added).
[259] 38 Eng. Rep. 88 (1826).
[260] Berger, *supra* note 17, at 826 (quoting *Vivian*, 38 Eng. Rep. at 92).
[261] *Vivian*, 38 Eng. Rep. at 92.

In other words, the *Vivian* court simply refused to follow the rule announced in *Bucknall*. And a statement by the *Vivian* court reveals exactly why they failed to do so:

> The main object of having a relator is, to secure to the Defendants the costs of the information, in case it should turn out that the information was improperly filed; whatever be the relief prayed, *it is still the information of the Attorney-General*: and the Court must act upon it, if the due administration of the charity call for the Court's interference.[262]

The informations brought by the attorney general *ex officio* in chancery court for the control of charities were simply actions between the king and the charities which he had the authority to regulate. These were not, therefore, proceedings brought by a "disinterested stranger," regardless of the degree of interest needed by the relator in the due administration of the charity.

VI. THE WRIT OF MANDAMUS

Although Professor Berger wrote that the writ of mandamus is "not highly relevant" to show that the courts of eighteenth century England allowed "attacks by strangers upon jurisdictional usurpations,"[263] he believed and stated that the writ of mandamus had "an important complementary role to play in the enforcement of duties colored with a public interest, duties in which the 'personal interest' did not rise to the dignity of a 'cause of action.' "[264] It is not at all clear just what Professor Berger meant by this, but the cases he cited do not support the view that "disinterested strangers" could obtain the writ of mandamus.

Professor Berger first cited a case from 1652 wherein "mandamus was granted to the parishioners and officers of the parish of Clerkenwell 'to make the scavengers that are elected to that office serve the office.' "[265] However, nothing was said in that case of the interest of the plaintiffs. Berger also cited the *Case of the Borough of Bossiny*,[266] as an instance where

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[262] *Id.* (emphasis added).
[263] Berger, *supra* note 17, at 824.
[264] Berger, *supra* note 17, at 824.
[265] Berger, *supra* note 17, at 824 (quoting *Anonymous*, 94 Eng. Rep. 765 (1652).
[266] 93 Eng. Rep. 996 (1735).

"mandamus issued to hold an election for mayor."[267] Again, nothing was said in that case as to whether or not the plaintiffs were asserting a "personal interest" in this action.

In another case, a writ of mandamus "commanded in 1733 that an election be held to fill a vacancy on the corporation of Esham,"[268] and in another the writ was issued "to compel the justices of the peace 'to make rates for the relief of the poor.' "[269] There is no suggestion that those who obtained these writs were "disinterested strangers." Interestingly, though, Berger asserted that "[f]rom such cases a colonial lawyer might well have concluded that mandamus was capable of issuance at the suit of a stranger who sought to assert the public interest."[270] This statement is followed by a quote from Coke describing the scope of the authority of the King's Bench, and a quote from Lord Mansfield that mandamus " 'was introduced to prevent disorder from a failure of justice and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.' "[271] However, Berger provided no evidence that the writ of mandamus was available to disinterested strangers. Indeed, one wonders why "in justice and good government" a disinterested stranger would need the remedy of mandamus.

Professor Jaffe, on the other hand, wrote that "there is very little explicit evidence that the judges" of the eighteenth century believed "a private individual . . . had standing to bring a mandamus to vindicate the public order."[272] Indeed Jaffe stated that "[t]he reported cases were almost uniformly ones in which mandamus served the plaintiff as a 'remedy.' "[273] There was one case, however, which Jaffe said suggests "that the writ could be other than a 'remedy.' "[274] In

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[267] Berger, *supra* note 17, at 824.

[268] Berger, *supra* note 17, at 824 (citing *Anonymous*, 94 Eng. Rep. 471 (1733)).

[269] Berger, *supra* note 17, at 824 (quoting Lidleston v. Mayor of Exeter, 90 Eng. Rep. 567 (1697)).

[270] Berger, *supra* note 17, at 824-25.

[271] Berger, *supra* note 17, at 825 (quoting Rex v. Barker, 97 Eng. Rep. 823, 824-25 (1762)).

[272] Jaffe, *supra* note 12, at 1270.

[273] Jaffe, *supra* note 12, at 1270.

[274] Jaffe, *supra* note 12, at 1270.

The King and Queen v. St. John's College,[275] an action was brought against the Master of Cambridge to require him to remove certain "fellows who had refused or neglected to take the oath acknowledging the authority of the new establishment of William and Mary and disavowing the authority of any alien authorities."[276] Jaffe stated that "[i]t is not clear who the plaintiff was; it may have been the King not only in name but in fact,"[277] but the court issued the writ, and said that " 'it is the Duty of the Court of King's Bench, to see that the Law be executed.' "[278] Again, nothing was said in that case of the ability of a "disinterested stranger" to obtain a writ of mandamus.

Professor Jaffe also quoted Chief Justice Ellenborough for the proposition that " 'there ought in all cases to be a specific legal right . . . to found an application for a mandamus.' "[279] In the cited case, the court refused to issue the writ of mandamus ordering the Archbishop of Canterbury to admit one Dr. Highmore as an advocate in the Court of Arches.[280] "The court held," Jaffe wrote, "that since he had no 'right' to be admitted, he was not entitled to the order."[281] This case clearly demonstrates that one needed not only a "personal interest" to obtain a writ of mandamus, but that the personal interest had to rise to the level of a legal "right."

Authoritative legal writings of eighteenth century also demonstrate that mandamus was not available to "disinterested strangers." Bacon described mandamus as a writ "commanding the Execution of an Act, where otherwise Justice would be obstructed, or the King's Charter neglected."[282] The writ was used by the King's Bench to

> correct, not only Errors in Judicial Proceedings, but also extrajudicial Errors and Misdemeanors, tending to the Breach of the Peace, Oppression of the Subject, to the Raising of Faction, Controversy,

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[275] 87 Eng. Rep. 366 (1693).

[276] Jaffe, *supra* note 12, at 1271.

[277] Jaffe, *supra* note 12, at 1271.

[278] Jaffe, *supra* note 12, at 1271 (quoting The King and Queen v. St. John's College, 90 Eng. Rep. 245, 247 (1693)).

[279] Jaffe, *supra* note 12, at 1271 (quoting The King v. Archbishop of Canterbury, 103 Eng. Rep. 323, 326 (1807)).

[280] Jaffe, *supra* note 12, at 1271.

[281] Jaffe, *supra* note 12, at 1271.

[282] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 527.

> Debate, or any Manner of Misgovernment; *so that no Tort or Injury, whether Publick or Private, can be committed, but what may be reformed and punished according to the due Course of Law.*[283]

Mandamus was an "established Remedy, and every Day made use of, to oblige inferior Courts and Magistrates to do that Justice, which, without such Writ, they are in Duty, and by Virtue of their Offices, obliged to do."[284] The writ issued "regularly only in Cases relating to the Publick and the Government,"[285] and only where "such Matter . . . [is] laid before the Court, by *which it may appear, that the Party is intitled to it.*[286] Thus "where a Man is refused to be admitted, or wrongfully turned out of any Office or Franchise that concerns the Publick, or the Administration of Justice, he may be admitted or restored by *Mandamus.*"[287]

Furthermore, "a Member of a Corporation, being only suspended, and not . . . totally removed, may have a *Mandamus*; because were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all Remedy of Redress."[288] A single mandamus could not, however, be used to restore several persons to their office, "because *their Interests are several*, and they might have been removed for several different Causes."[289] These statements clearly suggest that one needed a "personal interest," indeed a legal "right," to obtain the writ of mandamus.

In other cases, Bacon wrote, "[t]he Court of King's Bench having a Superintendency over all inferior Courts and Magistrates," would issue the writ of mandamus to "oblige them to execute *that Justice which the Party is entitled to*, and which they are enjoined by Law to do."[290] For example, "where the Ordinary refuses to grant the Probate of a Will to an Executor, or to grant Administration to the next of kin, he may be compelled thereto by *Mandamus.*"[291] These statements are very

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[283] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 527 at 529-30 (emphasis added).
[284] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 528.
[285] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 527.
[286] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 528 (emphasis added).
[287] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 529.
[288] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 534.
[289] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 529 (emphasis added).
[290] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 534 (emphasis added).
[291] 3 BACON'S ABRIDGEMENT, *supra* note 61, at 534.

persuasive evidence that the writ of mandamus was not available to "strangers" seeking to prevent unauthorized actions.

Other writings also support the view that mandamus was not available to disinterested strangers. Cunningham described the writ as one issued by the King's Bench "to oblige inferior courts and magistrates to do that justice, which, without such writ, they are in duty . . . obliged to do."[292] The writ was used "so that no tort or injury, whether publick or private, can be committed, but what may be reformed and punished according to the due course of the law."[293] Furthermore, the party seeking the writ was required to demonstrate that he was "intitled to it."[294]

Similarly, Jacob described mandamus

> as a Writ issuing out of the Court of King's Bench, sent by the King to the Head of some Corporation, commanding them to admit or restore a Person into his Place or Office, &c. . . . It lies to restore a Mayor, Alderman or Capital Burgess of a Corporation; a Recorder, Town-Clerk, Attorney turned out of an inferior Court, Steward of a Court, Constable, &c.[295]

The person seeking the mandamus "to be admitted to any Office or Privilege, ought to suggest whatever is necessary to entitle him to be admitted."[296] Indeed, the legal writings from the relevant period consistently support the view that mandamus was available only as a remedy for parties injured by the action (or inaction) of lower courts or government officials.

In sum, neither Professor Berger nor Professor Jaffe cited any authority for the proposition that mandamus was available during the eighteenth century to "disinterested strangers" seeking to attack "jurisdictional usurpations." Rather, the cases cited, and other legal writings of that period, demonstrate that mandamus was a writ available only to those who seeking a remedy for injuries to personal legal rights.

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[292] CUNNINGHAM'S DICTIONARY, *supra* note 65, at *MAN*. Cunningham seems to have relied on Bacon for much of his section on mandamus.

[293] CUNNINGHAM'S DICTIONARY, *supra* note 65, at *MAN*.

[294] CUNNINGHAM'S DICTIONARY, *supra* note 65, at *MAN*.

[295] JACOB'S DICTIONARY, *supra* note 78, at *MA*.

[296] JACOB'S DICTIONARY, *supra* note 78, at *MA*.

CONCLUSION

The notion that the English practice in prerogative writs at the time the United States Constitution was framed allowed (and even encouraged) "disinterested strangers" to attack "jurisdictional excesses" has little, if any, support in the historical legal writings of that period. For whatever reason, Professors Raoul Berger and Louis Jaffe, both well-respected legal historians, simply ignored (or overlooked) a tremendous amount of historical evidence tending to prove that the doctrine of standing, or at least the requirement of a "personal interest" in the remedy sought, is consistent with what Justice Frankfurter described as "the business of the Colonial courts and the courts of Westminster when the Constitution was framed."[297]

Contrary to the assertions of Berger and Jaffe, the English practice in prohibition, certiorari, quo warranto, mandamus, informer, and relator actions, did not permit "standingless" suits to protect the public interest. Perhaps Professor Jaffe was a bit hasty when he accused Justice Frankfurter of "exaggerat[ing] . . . the precision of the tradition,"[298] as was Professor Berger when he described Frankfurter's view as "historically unfounded."[299]

Moreover, the "public rights" theorists who blindly seized upon the conclusions of Berger and Jaffe to chastise Justice Scalia for his assertion that standing has "deep roots in the common-law understanding . . . of what makes a matter appropriate for judicial disposition,"[300] will find that their criticisms rest on a frail foundation. Surely Professor Nichol too hastily accused Justice Scalia of "ignor[ing] the scholarship of the history of Article III."[301] Also premature was Professor Lee's assertion that "Berger's and Jaffe's historical works thus disprove Justice Scalia's assertion that the common law understanding dispositively favors reading 'cases' and 'controversies' to impose a personal stake requirement."[302] So too, Professor

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[297] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. at 150 (Frankfurter, J., concurring).

[298] Jaffe, *supra* note 12, at 1308.

[299] Berger, *supra* note 17, at 840.

[300] Honig v. Doe, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting).

[301] Nichol, *supra* note 21, at 1151-52.

[302] Lee, *supra* note 21, at 639.

Sunstein should begin to look elsewhere for support for his assertion that, "[a]s a matter of history, we have seen that Scalia's claim is not sound; in fact, it is baseless," because "courts had 'traditionally entertained' a wide variety of suits instituted by strangers."[303] Indeed, these advocates of public rights adjudication have little (if any) support for their position in the eighteenth century English prerogative writs. The historical writings of that period consistently demonstrate that courts did not intervene on behalf of "disinterested strangers," but insisted upon the plaintiff's assertion of some "personal stake" apart from his interest as a citizen.

It will surprise few people today that legal scholars advocating a more active federal judiciary distort or ignore our legal history and traditions in their quest to transform the judiciary into a quasi-legislature.[304] Legal education and scholarship are dominated by academics whose ideas are clearly inconsistent with our Nation's common law history and traditions, and inconsistent with the ideas that prevail in the democratic process.[305] The courts are their last hope for success, and history is simply an obstacle which must be overcome in order to succeed. The ultimate result of this project, of course, is "[t]o derange a whole process, evolved from the experiences of millions of people over centuries of legal development, on the basis of the beliefs or feelings of a particular judge or set of judges."[306]

Strangely, these scholars take history much more seriously when it appears to be on their side. I am sure they will be disappointed that the eighteenth century prerogative writs do not support public rights adjudication. Indeed, Justice Marshall appears to have been in keeping with the historical English practice when he said that "[t]he province of the court is, solely, to decide on the rights of individuals."[307] But I am

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[303] Sunstein, *supra* note 21, at 214.

[304] It is important to note that Professors Berger and Jaffe are emphatically *not* in this group. While I disagree with the conclusions they reached regarding the prerogative writs, I have no doubts regarding their commitment to preserving our legal history and traditions. Indeed, their contributions in this area have been enormous.

[305] *See generally*, Robert H. Bork, Slouching Towards Gomorrah 34-55 (1996).

[306] THOMAS SOWELL, THE VISION OF THE ANOINTED 130 (1995).

[307] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)

equally sure that the disappointment will not be great, and the debate over public rights adjudication will continue. History can be (and usually is) easily ignored.