2003

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35 Geo. Wash. Int'l L. Rev. 521-609 (2003).

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SUING THE FEDERAL GOVERNMENT: SOVEREIGNTY, IMMUNITY, AND JUDICIAL INDEPENDENCE

VICKI C. JACKSON*

Sovereign immunity has become a place of contest between important values of constitutionalism. On the one hand, constitutionalism entails a commitment that government should be limited by law and accountable under law for the protection of fundamental rights; if the "essence of civil liberty" is that the law provide remedies for violations of rights, immunizing government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights.[1] On the other hand, a commitment to democratic decisionmaking may underlie judicial hesitation about applying the ordinary law of remedies to afford access to the public fisc to satisfy private claims,[2] in the absence of clear legislative authorization. These competing and important

* Professor of Law, Georgetown University Law Center. For helpful comments and discussion, I thank Robert Taylor, Sue Bloch, Neal Katyal, Dan Meltzer, Jim Oldham, Jim Pfander, Judith Resnik, Joshua Schwartz, Mike Seidman, and Mark Tushnet. I am indebted to my Research Assistants, Alida Dagostino, Amber Dolman, and Rebecca Lee, for their cheerful and careful help, and to the editors of this journal for their helpful suggestions. Responsibility for any errors is mine alone. I want to thank the United States Court of Federal Claims and Judge Bohdan Futey for asking me to provide an overview of federal sovereign immunity law for the panel on international and comparative perspectives on sovereign immunity at the Symposium on "Suing the Sovereign," at the 15th Judicial Conference of the Court of Federal Claims in October, 2002. This essay grows out of the draft prepared for the conference and the presentation given at the panel.

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This tension has been widely noted. *See, e.g.*, Richard Fallon, *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 519 (1991) [hereinafter Fallon, *Claims Court*]; *cf.* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787-90 (1991) (suggesting that constitutional remedies function both to redress violations of individuals' rights and to constitute a system structurally sufficient to reinforce rule of law and uphold constitutional values).

2. *See, e.g.*, Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) (arguing that much of federal sovereign immunity doctrine is supported by "a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule"); *cf.* Charles F. Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 HARV. C.R.-C.L. L. REV. 322, 323, 362-63, 367 (1975) (suggesting that availability of monetary relief should turn on clarity of Congress' allocation of monies). Similar concerns may undergird reservations about allowing members of one government to create liabilities that bind future governments. *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 488-95 (1999).

values can and should be worked out without reliance on the abstract or dignitary notions of sovereignty implicit in the very phrase "sovereign immunity."

As I suggest below in Part I, federal sovereign immunity was a doctrine of limited effect in the early years of this republic and allowed for a number of remedies for governmental wrongdoing. Moreover, the constitutional provenance of federal "sovereign immunity" is obscure, and was a matter of genuine uncertainty in early years. Over time the doctrine developed, drawing support from some aspects of constitutional architecture as well as from unreasoning and mistaken extensions of other versions of "sovereign immunity." Among the strands of constitutional structure behind federal "sovereign immunity" are Congress' powers over appropriations and the jurisdiction of the federal courts, powers that do not necessarily require but may help explain the early attraction of sovereign immunity as a doctrine.

As described in Part II, the "sovereign immunity" doctrine has been dynamic, not static, as judges make choices about how broadly or narrowly to characterize its reach in response to legislation by Congress. In the inter-branch dynamic, both Congress and the Court have refrained at critical junctures from pressing constitutional limits, a restraint that has created an arguably beneficial ambiguity about the relationship of the judicial power to the legislative power in resolving claims against the government. Yet given the adverse effects of sovereign immunity on courts' capacities to provide individual justice, it is past time for that dynamic to move back towards more restrictive understandings of the doctrine's scope.

In Part III, I consider federal sovereign immunity's relation to aspects of the idea of judicial independence embodied in Article III of the United States Constitution. Doctrines that article III courts will not enter ineffective or advisory judgments, nor judgments subject to legislative or executive revision or direction, coalesce in cases involving claims against the government, in ways that suggest that sovereign immunity may have been thought to preserve an aura of judicial independence. In light of the competing constitutional norms at stake and the well-established independence of the federal courts today, I end by urging re-interpretation of federal sovereign immunity doctrines so as to close rather than widen remedial gaps in the law.

I. SOVEREIGN IMMUNITY, ITS MEANING, HISTORY AND SCOPE

Sovereign immunity's meaning is contested and contestable.[3] If we assume that it is a rule that the government cannot be sued without its consent, it is a rule that–unless consent is presumed from the Constitution–stands in tension with *Marbury v. Madison*[4]'s assertion that the "essence of civil liberty" is that the law provide a remedy for the violations of rights. Judicial remedies not only protect individual rights but can function as an important mechanism of government accountability. To the extent that sovereign immunity protects the government from being held to account through generally available judicial remedies, it is in considerable tension with these rule-of-law "essences." A doctrine of "sovereign immunity," then, particularly one that is not explicit in constitutional text, demands some explanation.

Although the "sovereign immunity" of the federal government is accepted today as "the law," it is nowhere explicitly set forth in the Constitution. At the time of the Constitution's adoption, the federal government's immunity from suit was a question–not a settled constitutional fact. Clear statements of sovereign immunity for the federal government did not emerge for some years.[5] Moreover,

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3. It is sometimes invoked as a doctrine protecting the sovereign government from liability for wrongdoing. *Cf.* Alden v. Maine, 527 U.S. 706 (1999) (concluding, with respect to states, that the Eleventh Amendment stands for both an immunity from federal jurisdiction and an immunity from suit in state courts for liability to private persons); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L. J. 1683 (1997) (discussing whether the Eleventh Amendment grants immunity from liability, or immunity from jurisdiction, or both). Alternatively sovereign immunity might be viewed as embodying a set of presumptions about what remedies are available for what kinds of wrongs. *See, e.g.*, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 72-104 (1988).

4. 5 U.S. (1 Cranch) 137, 163 (1803).

5. The first clear reference to the sovereign immunity of the United States in an opinion for the entire Court appears to be in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (dictum) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."). *See also* United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834). For an earlier but more ambiguous reference, see Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335-36 (1816) (distinguishing between Article III's language extending the judicial power to "all cases" arising under federal law but only to "Controversies" to which the United States was a party and explaining that the difference may reflect an effort to give Congress discretion whether to permit suits against the United States, noting that "[i]t might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrong"). Not until 1846 did the Supreme Court invoke the proposition that the United States was subject to suit only by its consent given in legislation as a basis to deny relief. *See* United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846) (denying affirmative relief against the United States but stating that, on the law side, the lower court had power to suspend execution of judgment

many judicial remedies for governmental wrongdoing were available; sovereign immunity rules have never barred all suits against government officers, or all forms of relief that operate against the government. The doctrine of sovereign immunity as it initially developed in this country had a much more constrained meaning.[6]

To illustrate, consider section 14 of the First Judiciary Act, providing that all federal courts could issue writs of habeas corpus.[7] These writs, directed against governmental custodians, have never been regarded as barred by sovereign immunity and play a major rule-of law role in checking unlawful deprivations of liberty.[8] In

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in favor of the United States until applicability of credits were clarified); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review*, 75 HARV. L. REV. 1479, 1484 (1962); *see also* Reeside v. Walker, 52 U.S. (11 How.) 272 (1850) (alternative ground); Hill v. United States, 50 U.S. (9 How.) 386 (1850).

6. Sovereign immunity's greatest impact was in preventing actions without specific legislative authority for money from the public treasury, where the money was not obtained through coercion or other unlawful means. *See* United States v. Testan, 424 U.S. 392, 402-03 (1976) (distinguishing cases where the government is sued "for money improperly exacted or retained" from others in which sovereign immunity protects United States from suit absent consent); Fallon, *Claims Court*, *supra* note 1, at 523. On the importance of how money or property came into government hands for purposes of immunity doctrine, see Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 527-28 (1838) (reporting counsel's argument urging a distinction between funds in the government's possession but not rightfully belonging to the government, which judicial orders could reach, and government funds); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) (upholding federal process to recover funds against officers of Ohio who had unlawfully seized money in branch of National Bank). In addition to claims for money in the public treasury (e.g., "treasury liability for tort"), or for specific performance of a government contract, Professor Jaffe notes cases involving property "which has come unsullied by tort into the bosom of the government" as among those in which government consent to suit was likely to be required, in the absence of which suits against an officer would be treated as barred by the immunity of the state. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 29 (1963); *cf.* Ann Woolhandler, *Old Property, New Property*, 75 NOTRE DAME L. REV. 919, 922 (2000) [hereinafter Woolhandler, *Old Property*] (noting availability of suits against officers for tort damages and also in assumpsit to collect monies exacted as taxes). For other helpful discussions, see David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 12-21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987) [hereinafter Woolhandler, *Patterns*]; Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction and Parties Defendant*, 68 MICH. L. REV. 387, 389-404 (1970);

7. The Judiciary Act of 1789 § 14, 1 Stat. 73 (1789).

8. For cases invoking habeas corpus practice to justify exercising jurisdiction over state or federal officers notwithstanding pleas of sovereign immunity, see, for example, *Ex parte* Young, 209 U.S. 123, 167-68 (1908); United States v. Lee, 106 U.S. 196, 218, 220 (1882). Although it might be argued that habeas corpus, being mentioned in the Constitution, see U.S. Const. art. I, § 9, is a "textual" exception to a broad, but unwritten, immunity principle, the Court's reliance on habeas practice in both *Young* and *Lee* better accords with the view that sovereign immunity was understood simply as no bar to a range of claims against government officers in connection with their official duties.

other challenges to federal action claimed to be in excess of lawful authority, the writ of mandamus and the injunction have been available in actions against individual government officials.[9] *Marbury v. Madison* itself approves mandamus as the proper remedy to issue against a Cabinet-level federal official to compel the performance of a clear duty,[10] notwithstanding his high government office. In 1838 *Kendall v. United States ex rel. Stokes*[11] upheld mandamus of a federal official, even where the consequence of the adjudication would be an award of credits leading to payment of the plaintiff's claim.

In tort cases, damages claims could be brought against individual government officers, though not against the government itself.[12] In 1804 in *Little v. Barreme*,[13] an award of damages in an action against a U.S. naval officer for interdicting a vessel coming *from* a French port (when the statute only authorized seizure of vessels going *to* such ports) was upheld, on the theory that the officer had no defense to damages if his actions were in violation of the law, even if they were pursuant to a presidential order.[14]

Contracts and takings claims for "just compensation" were a different matter.[15] Contracts claims were generally subject to the rule

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9. For cases involving requests for injunctive relief against federal officers, see, for example, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). For mandamus, see Kendall, 37 U.S. 524 (1838); *see also* Miguel v. McCarl, 291 U.S. 442, 451-55 (1934) (treating request for mandatory injunction as meeting standard for mandamus with respect to one of the federal defendants).

10. Marbury, 5 U.S. at 169-71; *see also* Jaffe, *supra* note 6, at 2 (noting availability of common law writs and objecting to then-recent Court decisions that "impair the long-established accountability of government to suit for alleged illegal activity" by expanding the circumstances in which suits against officers would be deemed barred by the government's immunity); Cramton, *supra* note 6, at 406 (criticizing recent decision holding that wrongful official conduct may not be enjoined if within the officer's general sphere of authority).

11. 37 U.S. (12 Pet.) 524 (1838). Mandamus was available only under limited circumstances. *See infra* note 127.

12. Such liability was consistent with the defense of the Constitution in the Federalist Papers. *See* THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (discussing executive power and asserting that "in a republic . . . every magistrate [i.e. executive officer] ought to be personally responsible for his behavior in office"). For further discussion of the common law background of government responsibility in tort and the role of officer suits, see Engdahl, *supra* note 6, at 14-21; *see also* Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Edwin M. Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 1 (1926).

13. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); *see also* Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851) (affirming monetary judgment against U.S. military officer for wrongfully confiscating plaintiff's goods and rejecting military necessity defense).

14. *Little*, 6 U.S. at 177-79.

15. *See* Jaffe, *supra* note 6, at 21.

that an agent who signed for a disclosed principal had no liability to perform the contract.[16] Satisfaction of breach of contract claims thus depended on Congress–in the early years there was no statute conferring jurisdiction either over claims against the United States nor, generally, over claims "arising under" federal law.[17] No court exercised standing jurisdiction over claims against the U.S. government, whether for contract, tort or even the payment of "just compensation" due on a taking of property under the Fifth Amendment.[18] The remedy many used was by petition to Congress for private bills–a remedy that was conceivably effective in the early days of the union but which rapidly became ineffective.[19] Thousands of claims were filed most of which were not addressed at all; others were addressed with a lack of consistency, uniformity, and fairness.[20] Experiments with claims commissions and with

16. *See* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1017 (4th ed. 1996) [hereinafter HART & WECHSLER]. *But cf.* Woolhandler, *Patterns*, *supra* note 6, at 414-15, 428, 427-29, 444-45 (suggesting that the line between official liability and non-liability was more complex than captured by the tort/contract distinction because courts would sometimes give relief against officers for breach of a legal duty not sounding in tort; noting availability of assumpsit against tax collectors).

17. The first Court of Claims was not created until 1855, see HART & WECHSLER, *supra* note 16, at 1028, and, except for a very brief period in 1801-02, the lower federal courts did not have jurisdiction over cases "arising under" federal law. *Id.* at 34. *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 24-29 (1927).

18. *See* U.S. CONST. amend. V (providing that just compensation must be paid when property is taken for public purposes); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794-95 n.69 (1995) (discussing absence of judicial remedy for most federal takings until enactment of the Tucker Act in 1887). Professor Brauneis has argued that the nineteenth century witnessed a transformation in understandings of the Fifth Amendment from a prohibition on certain kinds of takings to a right of compensation, with an accompanying commitment to judicial remedies in both the federal and state governments. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 109-15 (1999); *see also* Floyd Shimomura, *The History of Claims Against the United States: Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV 625, 687-98 (1985).

19. *See* Shimomura, *supra* note 18 at 644 (explaining that, until 1804, the House Committee of Claims "appears to have functioned tolerably well given the relatively low volume of petitions filed"); William Wiecek, *The Origin of the United States Court of Claims*, 45 ADMIN. L. REV. 387, 392-94 (1968).

20. According to Professor Wiecek, less than 6,000 of the 14,602 claims presented between 1831 and 1837 were the subject of any congressional consideration. Wiecek, *supra* note 19, at 392. Moreover, of the 17,573 claims presented between 1838 and 1847, 8,948 claims were never considered and only 910 appear to have been acted on by both houses. Brown v. United States, 6 Ct. Cl. 171, 191 (1870) (citing HON. J.N. ROCKWELL, HOUSE COMM. OF CLAIMS, H.R. REP. NO. 30-498, vol. 3 (1st Sess. 1848)). Furthermore, in the legislative arena, no process was regularized for fact finding, and some members were even accused of accepting bribes to speed action on pending petitions. *Brown*, 6 Ct. Cl. at 191. *See also* WILLIAM A. RICHARDSON, HISTORY, JURISDICTION AND PRACTICE OF THE COURT OF

executive claims determination were also not entirely satisfactory.[21] These failures led to establishment of the federal Court of Claims–initially in 1855, and then with modifications in the 1860s–as the first federal court established exclusively to deal with claims against the federal government.[22]

In a number of cases involving government taking or occupation of land, however, common law actions in ejectment against the government officials holding the property were upheld. In 1815 in *Meigs v. McClung's Lessee*[23]–an action brought against a federal military officer–the Court upheld the private plaintiff's land claim, rejecting the government's argument that it held title under an Indian treaty. And in 1882, in *United States v. Lee*,[24] the Court specifically rejected a sovereign immunity defense in an action brought by Robert E. Lee's son against two army officers holding the land that is now Arlington Cemetery on behalf of the United States.

The basic point is that "sovereign immunity" has never been a complete immunity from litigation for the government; it has never barred all remedies for governmental wrongs, even some remedies that could affect the treasury or government property. Indeed, today, federal sovereign immunity functions largely as a clear statement rule for the interpretation of jurisdictional statutes and remedial provisions.[25] At the same time, however, "sovereign immunity" has been,[26] and still is invoked to bar courts entirely from hearing some individual claims of legal wrongs.[27] It is thus important to try to understand where federal sovereign immunity comes from and why it endures.

CLAIMS OF THE UNITED STATES 1-2 (1882) (describing defects in congressional claims procedures); Shimomura, *supra* note 18, at 648-51 (describing dissatisfactions with congressional claims process between 1838 and 1855).

21. *See* Wiecek, *supra* note 19, at 390-91 (describing, *inter alia*, President Madison's suspension of the functions of a Commissioner, established by Act of Congress, to resolve property claims arising during the War of 1812). *See also infra* text at notes 207-10 for discussion of *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

22. For a description of the history and current status of this court, see *infra* notes 203-06, 265. In noting the "firstness" of the Court of Claims, I am not including the commissioners appointed to settle war-related claims or the claims settlement tribunals established to resolve claims under particular international agreements. *See, e.g.*, United States v. Ferreira, 54 U.S. 40 (1851); *see also* Wiecek, *supra* note 19, at 390-91 (describing commissioner set up to hear War of 1812 claims and Mexican War Commission of 1849).

23. 13 U.S. (9 Cranch) 11, 12 (1815).

24. 106 U.S. 196 (1882).

25. *See infra* text at notes 184-86.

26. For critical discussions of past decisions, see, for example, Cramton, *supra* note 6, at 404-16; Engdahl, *supra* note 6, at 21-41; Jaffe, *supra* note 6, at 29-39; Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1644-62 (1997).

27. *See infra* text at notes 98, 184-90.

A. *Conceptual Challenges and Constitutional Confusions*

Article III of the United States Constitution provides that the "judicial Power shall extend to . . . Controversies to which the United States shall be a Party . . . ."[28] To the extent that "sovereign immunity" were understood to require consent to suit by the government, one might have thought that this constitutional text amounted to the requisite consent.[29] Nevertheless, as early as 1793 two members of the Supreme Court (who were prepared to *uphold* the Court's jurisdiction over contract claims against a *state)* expressed reservations about whether federal courts could adjudicate comparable claims against the United States.[30] Why these reservations, in the face of the text of Article III?

The nature of the sovereignty created under the 1789 Constitution was something new and uncertain—it took the people and the institutions time to work out their relationships.[31] The people were moving from subjects to citizens, rejecting notions of sovereignty tied to the monarchy or to the British Parliament. Was there a "sovereign" in this new republic? If so, where did that sov-

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28. U.S. CONST. art. III, § 2.

29. *See* Note, *The Constitutional Status of the Court of Claims*, 68 HARV. L. REV. 527, 529 (1955). For a powerful but quite different textual argument, see James Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) (arguing that the "petition" clause of the First Amendment was intended to guarantee access to courts for redress of governmental wrongdoing and is inconsistent with sovereign immunity as a constitutional doctrine). For a critique, see Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739 (1999) (right to petition courts is not inconsistent with sovereign immunity requiring courts to deny jurisdiction). For a reply, see James Pfander, *Restoring the Right to Petition*, 94 NW. U. L. REV. 219 (1999). *But cf.* Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 HARV. L. REV 1559, 1585-99 (2002) (arguing that an Article III "case" or "controversy" was understood to require personal jurisdiction of the defendant that could not be obtained, even under state-as-party heads of jurisdiction, without the consent of the state being sued).

30. *See infra* text at notes 34-40 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)).

31. *See, e.g.*, STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 92 (1997) (noting John Jay's public statement in 1790 that how to implement the Constitution's separation of powers was a matter of "'a great Diversity of opinions, and on which we have all as yet much to learn'") (quoting from Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 26-27 (Maeva Marcus et al. eds., 1989)); *cf.* Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 18 J. SUP. CT. HIST. 73 (1993) (noting ambiguous responses of states in first two cases filed against them and diversity of opinions on questions of states' amenability to suit). For a thoughtful excavation of the fluidity of constitutional understandings of governance and of the evolution and impact of legislative claims resolution in the early eighteenth century, see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

ereignty reside under a system of separated powers? What were the roles of the national legislature, the executive, and the federal courts? Questions of the form of government and of the nature of the sovereignties created under the new federal Constitution of 1789 have been at the root of many major constitutional questions in the United States. These questions were quickly brought to the fore with respect to the liability or immunity of governments in federal court proceedings.[32]

Several conceptual difficulties confronted jurists in the early years: what law applies in actions against the government and its officials; whether "sovereign immunity" is part of the "law"; and how the rule of law and sovereign immunity apply in a system of constitutionally divided power.[33] The first Supreme Court case in which issues of sovereign immunity received extensive discussion is *Chisholm v. Georgia*,[34] where the question was whether a citizen of South Carolina could sue the State of Georgia on a contractual debt in the Supreme Court. Although the case was within the literal language of Article III of the Constitution, which described the "judicial Power" as extending to "Controversies . . . between a State and Citizens of another State,"[35] Georgia refused to appear,[36] and the question of jurisdiction was discussed by the Justices in several opinions. All but one of the Justices concluded that the Court had and constitutionally could exercise jurisdiction over the case.[37]

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32. *See* Engdahl, *supra* note 6, at 6 (suggesting that "had the question been put" U.S. lawyers at the time of the Constitution's adoption would have disagreed whether sovereign immunity had any application in a republican polity). For a view that it did not, see Edmund Randolph, *Report of the Attorney General to the House of Representatives* (Dec. 27, 1790), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 142, 148, 163 (Maeva Marcus ed., 1992) (proposing that circuit courts have jurisdiction over *all* controversies to which the United States shall be a party; that district courts not have jurisdiction where the United States are a defendant; and explaining that "the dignity of the United States, and of a particular state, ought to exempt them from the cognizance of a single judge") (emphasis added). *Cf.* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87, 347-89, 430-67, 524-32, 559-64 (1969) (describing changing understandings of the nature of sovereignty at the time leading up to the Constitution's drafting and ratification).

33. It would be a mistake to assume that the drafters or ratifiers had a single coherent theory about these fundamental questions. *See, e.g.*, Wiecek, *supra* note 19 at 388 (describing history from 1789 to the Civil War, about how to handle claims against the government, as involving "constitutional and administrative developments by experimental approaches"). *See also supra* notes 31-32.

34. 2 U.S. (2 Dall.) 419 (1793).

35. U.S. CONST. art. III, § 2.

36. *Chisholm*, 2 U.S. at 419 (noting Georgia's failure to appear).

37. *Id.* at 451 (Blair, J.); *id.* at 458 (Wilson, J.); *id.* at 466 (Cushing, J.); *id.* at 472 (Jay, C.J.); *id.* at 430-34 (Iredell, J., dissenting) (arguing that under the Judiciary Act of 1789 the Court lacked jurisdiction). Justice Wilson wrote with particular power for the proposition

In response to the Court's decision in *Chisholm*, the Eleventh Amendment was enacted to provide that the judicial power should *not* "be construed to extend to any suit in law or equity, commenced or prosecuted against one" state "by Citizens of another State, or by Citizens or Subjects of any Foreign State."[38]

The immunity of the states and of the federal government were treated by two of the four justices in the *Chisholm* majority as raising distinct issues (although no claim against the United States was at issue). Each treated the question of jurisdiction over a suit against the United States as difficult, while at the same time concluding that the Court had jurisdiction over the contract claim against Georgia. Chief Justice John Jay, who argued that the doctrine of sovereign immunity was "feudal," and inapplicable to the jurisdiction conferred by Article III over claims between states and private citizens, confessed to having some doubts whether Article III's jurisdiction over cases involving the United States should be construed to permit claims *against* the United States in light of the difficulty of enforcing judgments against the government.[39] Justice Cushing likewise expressed concern whether the United States could be sued, while upholding jurisdiction over the State of Georgia.[40] The ensuing amendment to the Constitution was written in

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that "the people of the United States intended to bind those States by the Judicial power vested by the national Constitution," *id.* at 464, and specifically rejected other nations' immunity practices as irrelevant under the Constitution, *id.* at 453-54, while Justice Blair insisted that "if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty." *Id.* at 452; *see infra* note 92.

38. U.S. CONST. amend. XI.

39. *Chisholm*, 2 U.S. at 472, 478 (Jay, C.J.) ("[I]f the word party comprehends both Plaintiff and Defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but . . . [let me] suggest an important difference between the two cases. . . . [I]n all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view."). Chief Justice Jay went on to express the "wish" that "the State of society was so far improved . . . as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens." *Id.* But, he said, "[w]hether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question." *Id.*

40. *Id.* at 469 (Cushing, J.) ("One other objection has been suggested, that if a State may be sued by a citizen of another State, then the United States may be sued . . . by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected with other reasons. . . . As to

precise and narrow language, confined to excluding certain suits against *states* from the judicial power.

Lurking behind the jurisdictional question in *Chisholm* was a more general question about the relationship of the government to the governed: If the United States was to have a government of laws, not men, did "law" in the form of the ordinary remedies for wrongs apply in actions against the government? *Marbury v. Madison*[41] illustrates both the power and the difficulty of this question.[42] Although *Marbury* is most often studied for its conclusion that the Court had the power to find unconstitutional a statute enacted by Congress,[43] *Marbury* is also an important foundation for judicial remedies against the government. The Court there concluded that mandamus could issue against a high federal executive officer, reasoning that the importance of the office was no barrier to relief where the head of a department "commits any illegal act, under colour of his office, by which an individual sustains an injury"; in such cases, "it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding. . . ."[44] Although the relief sought might have led to claims on the public treasury,[45] the Court raised no objection to whether the

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reasons for citizens suing a different State, which do not hold equally good for suing the United States; one may be, that as controversies between a State and citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief. . . . But I do not think it necessary to enter fully into the question, whether the United States are liable to be sued by an individual citizen? In order to decide the point before us.").

41. 5 U.S. (1 Cranch) 137 (1803).

42. As is well known, William Marbury had been nominated by President Adams and confirmed by the Senate as a justice of the peace for the District of Columbia, but before his judicial commission could be delivered President Jefferson took office and his administration withheld delivery. Marbury filed an original action in the Supreme Court to mandamus James Madison, then Secretary of State under President Jefferson, to deliver to him the commission for his office. *See generally* Susan Low Bloch, *The Marbury Mystery: Why Did Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607 (2001).

43. The Court held that insofar as Section 13 of the Judiciary Act authorized original actions in the Supreme Court for mandamus of federal officials, the statute was unconstitutional because the Court's original jurisdiction could be no broader than that defined in the Constitution. *Marbury*, 5 U.S. at 174-80.

44. *Id.* at 170. For a helpful perspective on Marshall's discussion of mandamus as a way of "laying the foundation" for mandamus relief from the lower federal courts, see James E. Pfander, Marbury, *Original Jurisdiction and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1586 (2001).

45. Had mandamus been awarded to Marbury, it may well have had the effect of giving relief that would create a claim on the public fisc, as a judicial officer might have had a claim for his salary if he were permitted to take office. *See* Marbury, 5 U.S. at 161 (noting that "the salary of the officer commences from his appointment").

litigation was "really" against the government and barred by immunity. Rather, Chief Justice Marshall wrote:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. . . .The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[46]

The Court's reference in the above-quoted language to "the king himself" being sued and judgments against him complied with might be taken to suggest that *a fortiori*, relief would be available against the highest organs of government in the new republic.

Yet although Chief Justice Marshall addressed the question whether the high nature of the office in question was a bar to relief, concluding that mandamus was a proper remedy and within the judicial power of the United States, the Court issued no such order because it concluded that it lacked jurisdiction to grant such an order in an original proceeding.[47] *Marbury* endorses the formal appearance of adherence to the rule of law but without actually requiring the result to which the Court found the claimant legally entitled. It nonetheless stands importantly for the proposition that the law will generally provide a remedy for breach of certain rights even if the breach is caused by the acts of the government.

If *Marbury* decided that the ordinary law of remedies was available to hold government officials accountable for their wrongful acts, a related question was whether government "itself" is liable to suit. As *Chisholm* illustrates, this question originally was seen as more difficult with respect to the national than the state governments. What informs the hesitation of Justices Jay and Cushing in *Chisholm* about whether the United States could be sued? In *Chisholm*, Justice Wilson argued that the absence of monarch, the

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46. *Id.* at 163.

47. A number of scholars have speculated that uncertainty over whether a mandamus judgment would have been enforced in that case—a concern similar to that expressed by Chief Justice Jay in *Chisholm*—may have led the Court in *Marbury* to find itself lacking jurisdiction to issue an order that the Jefferson administration might disobey. For a discussion, see, for example, Richard Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 18 (2003) (characterizing the Court's avoiding issuance of an order that might be defied as an act of "prudent retreat, display[ing] more guile to emerge in glory from the specter of defeat"); Bloch, *supra* note 42, at 622 n.54 (noting defiance concern and collecting other authorities); *see also* ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960).

role of a written constitution and the process of judicial review suggested that English approaches to sovereign immunity were inapposite to the suability of governments under the United States Constitution.[48] Others, however, were less sure whether or how to translate fictional remedial concepts relating to a hereditary monarch to a fundamentally different form of government in which sovereignty lay and remained with the people.

Almost ninety years later, in *United States v. Lee*,[49] the Court stated that the doctrine of sovereign immunity "has never been discussed or the reasons for it given, but it has always been treated as an established doctrine".[50] In England, the Court asserted, the "petition of right" afforded a judicial remedy in all cases where title to property was disputed between the crown and the subject.[51] Moreover, the reasons for sovereign immunity in England were inapplicable because of the

> vast difference in the essential character of the two governments as regards the source and the depositaries of power . . . Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch . . . When [the citizen here], in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.[52]

While accepting the immunity of the sovereign as a given,[53] the battle in *Lee* was over whether the doctrine was satisfied by the for-

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48. *Chisholm*, 2 U.S. (2 Dall.) at 453-66.

49. 106 U.S. 196 (1882).

50. *Id.* at 207. *Lee* asserts that "[t]he first recognition of the general doctrine [of federal sovereign immunity] by this Court," is in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *Lee*, 106 U.S. at 207. While "acced[ing] to the general proposition that in no court can the United States be sued directly by original process as a defendant," *Lee* noted that the doctrine "is not permitted to interfere with the judicial enforcement of the established rights of the plaintiffs when the United States is not a defendant or a necessary party to the suit." *Id.* at 207-08.

51. *Id.* at 208. For a more dramatic claim of particular note for readers of this symposium, see Brown v. United States, 6 Ct. Cl. 171, 192 (1870) (stating that "the legal redress given to a citizen of the United States is less than he can have against almost any other government in Christendom [sic]").

52. *Lee*, 106 U.S. at 208-09 (commenting that "the monarch [in England] is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons . . . .")

53. *See Lee*, 106 U.S. at 207; *see also* The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868) ("It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts without his consent. . . . This doctrine of the common law is equally applicable to

mality of not naming the United States as a defendant or whether it should be more broadly construed to forbid the award of relief against the government officers. The majority held that "the doctrine [of sovereign immunity], if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit;"[54] it upheld the Court's jurisdiction over an action to eject federal army officers from land held under authority of the Secretary of War in use as a military station and cemetery.[55] The *Lee* dissenters, however, argued that absent specific consent of the Congress, the court had no authority to try the question of the title to land held under authority of the United States.[56] Sovereign immunity was, in their view, an "axiom of public law," in a republic no less than any other form of government, and necessary to protect the ongoing performance of vital federal functions.[57] In 1882, then, nearly a century after adoption of the Constitution, the Court was split five to four on the reasons for and scope of the doctrine of federal sovereign immunity.

A third conceptual problem confronting early generations was the difficulty of translating the ideas of "rule of law" and sovereign immunity into a system of separated powers: how would legislative, executive and judicial branches share responsibility for assuring

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the supreme authority of the nation . . . ."; holding, however, that the doctrine did not prevent assertions of claims for money in the court's registry arising from sale by U.S. of captured vessel); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869) ("Every government has an inherent right to protect itself against suits . . . . It would be impossible for [the government] to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person"; relying also on fact that Congress had established a statutory system for the challenge of taxes which required a protest that the plaintiff had failed to make).

54. *Lee*, 106 U.S. at 207-08.

55. The action was brought by the heir of the former owner of the land, General Robert E. Lee's wife, whose land was deemed forfeited to the federal government because of a failure to pay a federal tax; the tax was proffered but the proffer was rejected (because not made in person by its owner) and the land deemed forfeited, a procedure ultimately found to have been unlawful. *Id.* at 198-99, 218.

56. *Id.* at 223-26 (Gray, J. dissenting).

57. *Id.* at 226 (Gray, J., dissenting). Because the sovereign can hold property only through agents, to allow an action against the sovereign's agents is in effect to allow it against the sovereign. *Id.* Sovereign immunity in such actions, the dissent argued, is necessary to preserve the capacity of the sovereign to perform sovereign functions, such as defense, free from the possibility of having property levied on or interfered with for the vindication of private claims. *Id.*

that "the laws furnish [a] remedy" for the violation of legal rights,[58] including adjudication of claims for relief against the public fisc? The judicial power of Article III extends both to "all cases . . . arising under" federal law and also "to Controversies to which the United States" are a party—and the judicial power ordinarily encompasses the power to provide effective relief and enforcement of judgments.[59] As noted above, as a purely textual matter Article III standing alone might be read to authorize suits against the United States.[60]

But Article I, Section 8 provides that "The Congress shall have Power to . . . pay the Debts . . . of the United States,"[61] and Article I, Section 9 specifies that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,"[62] thus suggesting that Congress may have primary authority over whether Treasury moneys are put to any particular use, including satisfying judgments.[63] Moreover, Articles I and III contemplate that Con-

58. *Marbury*, 5 U.S. at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

59. *See infra* notes 100, 200 and text at notes 252-94.

60. *But cf.* Williams v. United States, 289 U.S. 553, 571 (1933) (suggesting that Article III's grant of jurisdiction over "[c]ontroversies to which the United States shall be a party" applies only where the United States is a party plaintiff or petitioner). This decision has been sharply criticized. *See* HART & WECHSLER, *supra* note 16, at 420-21 n.9 (referring to *Williams* as an "intellectual disaster" and noting its inconsistency, *inter alia*, with the Court's earlier reasoning upholding original jurisdiction over suits by states against the United States in *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902) (stating that "the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition")). *Williams*' holding—that the judges of the then-Court of Claims were not Article III judges and accordingly that their salaries could be reduced—was rejected by Congress in 1953, and by the course of the Court's decisions thereafter. *See, e.g.*, Glidden v. Zdanok, 370 U.S. 530, 531-32 (1962) (Harlan, J., announcing the Court's judgment) ("The Congress has since pronounced its disagreement [with *Williams*] by providing . . . that 'such court is hereby declared to be a court established under Article III of the Constitution of the United States.'" (citing, *inter alia*, Act of July 28, 1953, § 1, 67 Stat. 226). *See infra* notes 204, 265.

61. U.S. CONST. art. I, § 8.

62. U.S. CONST. art. I, § 9.

63. *See Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929) (describing Court of Claims as a "legislative court" to "examine and determine claims . . . against the United States," a "function which belongs primarily to Congress as an incident of its power to pay the debts of the United States"); *see also* Buchanan v. Alexander, 45 U.S. (4 How.) 20, 20-21 (1846) (holding that state court process may not attach to moneys in the hands of a disbursing officer of the United States; permitting "diver[sion] of public money from its legitimate and appropriate object . . . would be found embarrassing, and under some circumstances . . . fatal to the public service"). For disagreement on the meaning of the appropriation clause, compare Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988) (arguing that appropriations clause contemplates congressional control of federal spend-

gress will have some control over the numbers and jurisdiction of "inferior" federal courts and has power to make exceptions to the appellate jurisdiction of the Supreme Court,[64] thereby laying the foundation for the conventional view that Congress does not have to create inferior federal courts at all and thus can exclude from federal adjudication all cases, with the exception of the small category of original jurisdiction cases.[65] The President, finally, has the power and responsibility to "take Care that the Laws be faithfully executed . . . " —a text that begs the question of what it is that "the Laws" require when it comes to providing remedies for wrongdoing by the government against a citizen.[66]

B. Chisholm's *Trauma? Constitutional Parity Misplaced*

These genuine conceptual difficulties were compounded by the additional challenge of coming to terms with the federalism that was created under the Constitution. Many sovereign immunity cases fail to distinguish between the state and the federal governments in the sources of or reasons for immunity.[67] Yet as Chief

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ing through legislation meeting certain procedural requirements), with J. Gregory Sidak, *The President's Power of the Purse,* 1989 DUKE L.J. 1162, 1168-71, 1183-1194 (1989) (suggesting that President has implied power to spend public moneys "to the extent minimally necessary to perform his duties and exercise his prerogatives under article II" and that the words "made by Law" in Appropriations Clause need not refer only to legislation). *See also* Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power,* 81 IOWA L. REV. 79 (1995); L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials,* 26 J. LEGIS. 221 (2000); *cf.* Gerald E. Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715, 739-41 (1978) (arguing that only legislatures have the institutional competence to make decisions concerning raising and allocating government money).

64. U.S. CONST. art. I, § 8, cl. 9 (enumerating Congress' power to "constitute Tribunals inferior to the supreme Court"); U.S. CONST. art. III, § 1 (stating *inter alia* that judicial power shall vest in "such inferior Courts as the Congress may from time to time ordain and establish"); U.S. CONST. art. III, § 2 (stating that, other than for original jurisdiction cases, the Supreme Court "shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make").

65. The Court has held that cases brought by the United States against a state are within the original jurisdiction of the Court, because that jurisdiction applies to *all cases* where a "State" is a party. United States v. Texas, 143 U.S. 621, 644 (1892). It has also held that the original jurisdiction extends to cases brought by states against the United States with its consent, but has suggested that the United States may not condition its consent to being sued by a state on trial in the lower federal courts in derogation of the scope of the original jurisdiction. California v. Arizona, 440 U.S. 59, 65 (1979).

66. U.S. CONST. art. II, § 3. The text would appear at a minimum to require the executive to implement otherwise constitutional laws enacted by Congress for paying the debts of the United States.

67. *See, e.g.,* United States v. Lee, 106 U.S. at 206-07; Minnesota v. Hitchcock, 185 U.S. at 386; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 107-14 (1984); *see also* Cramton, *supra* note 6, at 396 (asserting that it "was natural to assume that the federal

Justice Jay's and Justice Cushing's hesitations in *Chisholm* suggest, there may have been *greater* justification under the 1789 Constitution for treating the United States as enjoying immunity from suit (absent statutory waiver) than for treating states as constitutionally immune from suit in federal court.[68] Enactment of the Eleventh Amendment after *Chisholm* clearly meant that some claims against states formerly within (or formerly understood as within) the judicial power, were no longer within the federal judicial power. No similar text spoke to the immunity of the United States from the judicial power. But perhaps the trauma of being overruled by constitutional amendment chilled the Court's inclination carefully to reason about the amendment's implications (vel non) for federal sovereign immunity or indeed about the sources of that immunity.[69]

This is not the only area in which the Court has assumed that the Constitution's treatment of the states was similar to the Constitution's treatment of the United States government.[70] Yet with respect to the basis for sovereign immunity, there are factors that

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government was entitled by judicial implication to the same protection accorded the states by constitutional amendment"). For an example of this assumption that also shows some recognition that the sources of immunity differ, see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. at 708 (Frankfurter, J., dissenting) (referring to immunity of states and the United States: "[t]he sources of the immunity are formally different, but they present the same issues"). For a recent assertion that the immunities of the state and federal governments may differ, see Lapides v. Bd of Regents, 535 U.S. 613, 623 (2002).

68. *Cf.* Nevada v. Hall, 440 U.S. 410, 414 (1979) ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."). Under these concepts (assuming they survived the Constitution), suits against the states in federal courts would stand on a different footing from suits against the United States in its own courts. *Cf. id.* at 416 (asserting that historically, suits against the sovereign in its own court were barred without sovereign's consent but suits against another sovereign were determined according to forum state's law).

69. Interestingly, *Cohens v. Virginia* invokes the language of the Eleventh Amendment, in describing the general view that no suit could be "commenced or prosecuted against" the United States, before going on to refer to a possible statutory basis for this belief. 19 U.S. at 411-12 ("the judiciary act does not authorize such suits").

70. See, for example, Bolling v. Sharpe, 347 U.S. 497 (1954), where the Court assumed that if the Fourteenth Amendment forbids the states from requiring segregation by race in public education, the Fifth Amendment—despite its different language and provenance—could do no less. For discussion, see Akhil Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 52-53 (2000); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1275-84 (1992); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1279-81 (2001). But the Court is not consistent in its assumption of constitutional parity between the two levels of government. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 571-77 (1964) (rejecting the argument that, because the federal government includes the Senate, the states may keep one of their legislative houses proportioned unequally to population).

point in different directions for the two levels of government.[71] Some rationales for governmental immunity plainly have different application to the federal and state governments in suits arising under federal law.[72] Although there are very substantial arguments that the principle of sovereign immunity should have no application to the United States,[73] there are competing arguments that some aspects of sovereign immunity doctrine—notably, those relating to judicially compelled payments from Treasury funds—are either required by, or consistent with, the U.S. Constitution at the federal level.[74] This is not because of the dignity of the sovereign,[75]

71. I recognize that there is some evidence that sovereign immunity might have been thought to apply to both levels of government on the basis of public policy or what is "inherent in the nature of sovereignty." *See* THE FEDERALIST No. 81, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1999); Randolph, *supra* note 32, at 163 (suggesting, with respect to whether the Constitution be regarded (as he would) as itself an act of consent to judicial jurisdiction, that the two levels of government "should be on the same footing"). A key question, neatly elided in Federalist No. 81, is what attributes of state sovereignty were "surrender[ed]" in the new constitution. Given the Constitution's structure (Randolph's views notwithstanding), it is at least arguable that the states surrendered an immunity to certain suits under the Constitution that the federal government enjoyed. Such a view may underlie the distinctions in the Court's doctrine between suits by a state against the United States, permissible only with statutory consent, and suits by the United States against a state. *See* notes 81, 84, *infra.*

72. One rationale for sovereign immunity, suggested by Justices Holmes, was that "there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). This rationale on its own terms is irrelevant where a state is sued under a federal law, yet would apply when the federal government is sued under the same federal statute—though not when the federal government is sued under the Constitution, which "the people" made. *See infra* note 73.

73. Structural reasoning from commitments to government constrained by law and to the enforcement of those limits and the protection of *constitutional* rights by the judiciary strongly disfavor recognition of any constitutional form of immunity from ordinary judicial process (particularly in the absence of any constitutional text analogous to the Eleventh Amendment limiting the judicial power in actions against the United States). For important arguments along these lines, see Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-27, 1466-92 (1987) (arguing that neither federal nor state governments "can enjoy plenary 'sovereign' immunity from a suit alleging a violation of constitutional right" and that the Constitution embodies a "remedial imperative"); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 292 (1995) (arguing that *Bivens* "stands for the principle that enforcement of the Constitution is not dependent on the assent of the political branches or of the states . . . [and that] the Constitution must be enforceable by individuals even when the political branches do not choose it to be"); id. at 344 (noting that, in the federal context, "[t]here is not even a constitutional amendment to misinterpret," in contrast to questions of state immunity and the Eleventh Amendment). *See also* Pfander, *supra* note 29, at 899-906, 946-86 (arguing that the "petition" clause of the First Amendment should be understood to reject sovereign immunity in favor of judicial resolution of claims against the government).

74. *See* Jackson, *supra* note 3, at 79 n.319, 94-97.

75. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (ascribing enactment of Eleventh Amendment "to some other cause than the dignity of a State" since States can still be sued by the United States or other states); *cf.* Evan H. Caminker, *Judicial Solicitude for*

or a view that the sovereign is above the law,[76] but because the law of the Constitution commits appropriations to the Congress and specifically prohibits payments out without an appropriation.[77] That a court cannot compel payments from the Treasury absent statutory authority does not necessarily mean that the court cannot enter a judgment satisfiable only from public funds; but, in the absence of some form of legislative commitment in advance to satisfy those judgments, entry of such a judgment may prove inefficacious,[78] in light of Congress' power over appropriations of public funds.

This arguable basis for some aspects of the doctrine of federal sovereign immunity—the constitutional commitment of appropriations to Congress[79] —does not exist, or, more precisely, does not exist in as strong a form for the state governments.[80] A related

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State Dignity, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (Mar. 2001) (providing thoughtful but ultimately skeptical discussion of "dignity" rationale); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1946-54 (2003) (rejecting state dignity as basis for non-accountability). Other recent treatments of "dignity" as a basis for state sovereign immunity include: Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245 (2000); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1135-36 (2000); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1096-97 (2002); Susanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

76. *See* United States v. Lee, 106 U.S. at 208-09 ("[T]he *people*, who are [in England] called *subjects*, are the sovereign. . . . [T]here is no reason why deference to any person, natural or artificial, not even the United States, should prevent [the citizen here] from using the means which the law gives him for the protection and enforcement [of rights].").

77. *See* notes 61-63 *supra*.

78. For discussion of federal courts' concerns not to enter inefficacious judgments or merely "advisory" opinions, see *infra* text accompanying notes 207-26, 252-91; Jackson, *supra* note 3, at 95 n.379.

79. *See infra* text accompanying notes 94-101. The conventional wisdom is that federal separation of powers doctrine does not apply to the state governments. *See* Elrod v. Burns, 427 U.S. 347, 351 (1976); *cf.* Baker v. Carr, 369 U.S. 186, 222 n.48 (1962) (discussing non-justiciability of Guarantee Clause claims concerning meaning of "republican form of government" clause). I have elsewhere argued that the federal Constitution does require that states maintain legislative, executive and judicial branches, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998), and that remedial traditions might favor presumptions against abrogation of state sovereign immunity absent specification from Congress, see Jackson, *supra* note 3, at 88-114. But it does not follow from the constitutionally required existence of legislative and judicial branches at the state level that states must enjoy sovereign immunity in the form it exists at the federal level. *See infra* note 80.

80. It might be argued that, if states are required by the Constitution to maintain legislatures, *see supra* note 79, and if appropriation of funds is a core legislative function, then if the federal government is entitled to sovereign immunity absent legislative consent so, too, are the states. There are a number of problems with this argument, however, even assuming that Congress' power over appropriations supports some aspects of federal sover-

prudential basis for federal sovereign immunity – that courts are reluctant to issue judgments that are not going to be enforced, and thus are particularly reluctant to issue judgments against other parts of their government without some indicia that they will be effective—also applies with less force in litigation to which the states are parties.[81] Indeed, in litigation between two or more states the Court has "asserted a power to render judgment and a concomitant power to enforce the judgment, even if it were for accrued monetary relief."[82]

The early influence of *Chisholm* and its overruling by the Eleventh Amendment may explain the failure to develop a more reasoned account of the source of federal sovereign immunity in the several nineteenth century cases that refer to it in passing.Notwithstanding differences between the two levels of government, the idea that no sovereign government can be sued without its consent has been invoked to support both federal and state sovereign immunity.[83] Little distinction has been drawn between the

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eign immunity. First, although legislatures are likely to have control over appropriations under state constitutions, state legislative control over appropriations need not precisely mirror the federal constitution's plan. *See* State *ex rel.* Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 96, 69 N.W. 373, 375 (1896) (describing English history on legislative control of appropriations and commenting that "our own state constitution . . . is somewhat more strict, and more in accordance with the English practice, than either the federal constitution or the constitution of most of the other states"). Second, legislative control over appropriations does not necessarily require recognition of a doctrine of sovereign immunity. *See infra* text at notes 307-08; *see also* Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457 (1961) (judicially abolishing state governmental immunity from tort liability). *See generally* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to their Citizens Under Federal Statutory Law*, 78 IND. L. J. (forthcoming 2003) (describing "transformation" as many states judicially, as well as legislatively, abandoned sovereign immunity doctrine). For both these reasons, states' separation of powers may differ from that at the federal level. *Cf.* Todd D. Peterson, *Controlling the Federal Courts Through Appropriations Process*, 1998 WIS. L. REV. 993, 1033-41 (contrasting understanding that federal judges lack authority to appropriate money for the judiciary with state courts upholding their inherent powers to compel appropriations). Finally, the "in pari materia" separation of powers argument for state sovereign immunity seems to apply with far more force to claims under state law than to matters within Congress' (rather than the state legislature's) competence.

81. In this regard, note that the United States itself may bring actions against states for monetary relief, without the specific consent of the state legislature. *See* Alden v. Maine, 527 U.S. 706, 756 (1999); *see also* Jonathan R. Siegel, *Congress' Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44 (1999) (arguing that given conceded power of the United States to sue states, Congress could authorize suits by individuals using "qui-tam" approaches).

82. Jackson, *supra* note 3, at 80 n.325 (citing Virginia v. West Virginia, 246 U.S. 565 (1918)).

83. *See, e.g.*, United States v. Lee, 106 U.S. at 226 (Gray, J., dissenting) (referring to "axioms of public law"); Hans v. Louisiana, 134 U.S. 1, 12-14, 16-17 (1890) (quoting Hamilton to the effect that it is "inherent in the nature of sovereignty not to be amenable to the

immunities afforded to the two levels of government and the caselaw has borrowed one from the other—to the detriment of clear explication of the source or nature of this immunity.[84]

C. *The Sources of Federal Sovereign Immunity Law*

As we have seen, federal sovereign immunity stands in marked tension with the "rule of law" vision of *Marbury*, at least where suits against officers are not effective in providing a remedy. It is also arguably inconsistent with important limitations on government action found in the Bill of Rights which might imply the availability of judicial redress for their violation.[85] Professor Pfander's work suggests as well that it is inconsistent with the First Amendment's right to petition, which in his view extends not only to petitions to legislative and executive bodies, but also to petitions against the federal government in court.[86] Yet such accounts, persuasive as

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suit of an individual without its consent" and quoting Justice Taney's views that such was the practice of "civilized nations"); *supra* note 67.

84. The casual assumption that the immunities are the same is all the more surprising because of some significant differences in how they operate. The United States may sue a state (consent being deemed given in the Constitution) but states may not sue the United States without the consent of Congress. Kansas v. United States, 204 U.S. 331, 341-42 (1907). States can be sued as defendants in federal courts, but I am aware of no case upholding the jurisdiction of a state court over an affirmative claim against the United States without its consent. The federal government can waive its own immunity from suit under federal statutes but is currently held to lack capacity to abrogate state government immunities when it legislates under Article I of the Constitution, Seminole Tribe v. Florida, 517 U.S. 44 (1996), a result that, while formally "symmetric" in permitting each sovereign to control whether it is subject to suit, is entirely anomalous in light of the Supremacy Clause of Article VI and the current doctrine that the United States does have legislative power to subject those state governments to regulation under those Article I statutes. *See also* Lapides v. Bd. of Regents, 535 U.S. 613, 623 (2002) (state invocation of federal court jurisdiction treated as waiver of immunity even though federal government may invoke such jurisdiction without as substantial a waiver). Some differences may also exist with respect to the power to award or enhance attorneys fees. *Compare* Missouri v. Jenkins, 491 U.S. 274, 278-84 (1989) (upholding enhancement of attorneys' fees against state where there was delay in payment), *with* Library of Congress v. Shaw, 478 U.S. 310, 323 (1986) (holding that enhancement of statutorily authorized award against federal government was not allowed as compensation for delay), noted in HART & WECHSLER, *supra* note 16, at 1075 n.4.

85. *See* Bandes, *supra* note 73, at 319-20; Amar, note 73, at 1488-92.

86. *See generally* Pfander, *supra* note 29, at 953-62. Although I have much sympathy for Professor Pfander's argument, its revisionist account is in some tension with the practice of congressional or non-Article III claims resolution for the first sixty years of the nation's history. *See generally* Shimomura, *supra* note 18, at 633-51 (describing, *inter alia*, claims review by the Comptroller in the Treasury Department, by the Secretary of War, and "congressional adjudication" of claims through private bills). Professor Pfander takes issue with Shimomura's reading of early state cases in Pennsylvania, see Pfander, *supra* note 29, at 938 n.141, but not with his description of the absence of a federal Article III court vested by Congress with jurisdiction over claims against the United States. Professor Pfander's

they may be on how the Constitution should have been interpreted, are faced with the remarkable staying power of the idea of federal sovereign immunity. Notwithstanding repeated scholarly critique, the idea of federal sovereign immunity has been so vigorously insisted upon in so many settings that, despite all that has been written on the subject, it seems worth trying to understand the sources for the idea of sovereign immunity and for its endurance. Apart from assumptions about parity with the states' immunity, what are its possible sources?

First, English law at the time recognized some form of sovereign immunity.[87] As many scholars have concluded, however, the common law doctrine of sovereign immunity was more about the mode for obtaining redress than a ban on redress of injury caused by the sovereign and his agents.[88] Professor Pfander has recently argued with great power that sovereign immunity in England was simply misunderstood here and in fact provided remedies, including monetary remedies, as of right against the Crown.[89] The English

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account may well be the most plausible understanding of the Petition Clause, but one which did not take root perhaps because of the operation of Congress' power to control the jurisdiction of the federal courts and its failure to vest them with jurisdiction over such claims for the pre-Civil War period. *See* text at notes 102-14 *infra.*

87. *See, e.g.*, Engdahl, *supra* note 6, at 3 (describing feudal origin of king's "immunity against unconsented suit in his own court"). Early on the Court also recognized an immunity from judicial process for foreign sovereign military vessels peacefully entering ports, reflected in the common practices of nations and derived from the implied consent of the national government. *See* Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 137-46 (1812). Note that sovereign immunity could embrace a number of ideas, including: (1) incapacity to commit a legal wrong (or immunity from any form of substantive legal rule); (2) immunity from process; (3) immunity from suit in the sovereign's courts; (4) immunity from suit in other sovereigns' courts; (5) immunity from liability for certain remedies; (6) immunity from execution of judgment; and (7) immunity from some ordinary courts or remedies, provided adequate others are afforded. On the distinction between immunity from liability and immunity from jurisdiction for states, see Vázquez, *supra* note 3, at 1700-03; *see also* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 581-88 (1994) (distinguishing immunity in sovereign's courts from immunity in other sovereigns' courts).

88. *See* Engdahl, *supra* note 6, at 2-15 (noting development of effective remedies outside the regular court process to redress wrongs by the king and vindicate the rule of law); Jaffe, *supra* note 6, at 1-19 (arguing that effects of sovereign immunity in England were mostly "procedural" and that only real deficiency was "nonliability of government for torts of its servants").

89. *See, e.g.*, Pfander, *supra* note 29, at 914 (noting that by the late 18th century in England, sovereign consent was simply presumed in most forms of action, as British law saw an "evolution away from any requirement of genuine consent"); *see also* Jaffe, *supra* note 6, at 19 (concluding that with independence, "the citizens of the new Republic lost half of the rights against government which as Englishmen they had previously enjoyed," including the petition of right, and other writs that had been available through Exchequer and Chancery); *cf.* Brown v. United States, 6 Ct. Cl. 171, 192-94 (1870) (disparaging American

common law tradition was capable, however, of being (mis)read so as to support some limited version of a sovereign immunity doctrine,[90] and international practices also lent support to the recognition of judicial immunity for sovereigns on a basis of comity.[91] Yet even if these might be regarded as sources, the question remains how they were "constitutionalized" especially in the face of Article III's text.[92] Moreover, as the Court noted in *Lee*, doctrines reflecting British subjects' concerns about removing the Queen of England from her garden did not fit well with U.S. constitutional conceptions of citizens having rights in a government under the rule of law.[93]

Second, the Constitution allocates to Congress control of appropriations and the power to pay the debts of the United States.[94] As

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system of remedies against the federal government and describing assertedly superior systems in England, Prussia, and Bavaria).

90. *See, e.g., Chisholm*, 2 U.S. at 460 (Wilson, J.) (accepting that at the time in England the King could not be sued without his consent, though noting that it was not always so and that "even now, the difference is only in the form, not in the thing"); *see also* Briggs v. Light-Boat, 93 Mass. (11 Allen) 157, 162 (1865) (reviewing English law and concluding it supported immunity of property of the United States from judicial process without its consent). For a compelling description of the extensive remedies in fact available under English law, see Pfander, *supra* note 29, at 906-29.

91. *See, e.g., Schooner Exchange*, 11 U.S. (7 Cranch) at 137-46; Lee, *supra* note 75.

92. *See, e.g., Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 851 (1824) (declining to analyze English decisions on whether a state should be considered a party when it is not so named in the record, because "it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the Courts of any other country."); *Chisholm*, 2 U.S. (2 Dall.) at 453-54 (Wilson, J.) (asserting that rules of international law on sovereign immunity not relevant to United States as a nation, noting absence of term "sovereign" from the U.S. constitution, and generally distinguishing "other states and Kingdoms" from the United States under the Constitution); *id.* at 450 (Blair, J.) (rejecting relevance of "European" practices in construing U.S. Constitution); *cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (rejecting implied common law jurisdiction over crimes in federal courts). Recent studies note the contentiousness of the question of state sovereign immunity at and around the time of ratification. *See* Marcus & Wexler, *supra* note 31, at 84-86; Nelson, *supra* note 29, at 1574-1608.

93. *Lee*, 106 U.S. at 208 (contrasting views of "subjects" in "the king-loving nation [who] would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener" with citizens' rights in the United States); *see also* Amar, *supra* note 73, at 1433-36, 1466 (contending that the Court's sovereign immunity doctrines as applied to constitutional violations have "misinterpreted the . . . Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth," including the idea that the Constitution, like a corporate charter, bound public officials).

94. This constitutional allocation of control can also be read in light of a history of legislative adjudication of claims both in the colonies and for the fledgling national government under the Articles of Confederation. *See* ARTICLES OF CONFEDERATION, art. 8 (1781) (expenses incurred for common defense and war, that are "allowed by the United States in Congress assembled," to be "defrayed out of a common treasury"); Shimomura,

Professor Kate Stith has argued, the Constitution places special emphasis on Congress' role over taxing and spending.[95] Article I authorizes Congress to "pay the Debts" of the federal government and forbids money to be "drawn from the Treasury" without "Appropriations made by Law."[96] As early as the 1850s, the Court

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supra note 18, at 631-37 (discussing both colonial and national claims practices in the eighteenth century); Wiecek, *supra* note 19, at 389 (noting impact under the Articles of lack of administrative apparatus, lack of national courts, and Congress' distrust of Robert Morris, the superintendent of finance, that led to creation of a treasury board that reported to Congress, a practice that then influenced claims resolution practice after the Constitution); *see also* Desan, *supra* note 31, at 1501 (describing importance of early eighteenth century shift from executive to legislative adjudication of claims against the government and suggesting that "popular support for a legislative role balancing claims of private right and the uses of public revenue . . . fueled the movement to adopt the Eleventh Amendment"); *cf.* United States v. Lovett, 328 U.S. 303, 322 (1946) (Frankfurter, J., concurring) (noting that "the Constitution was framed in an era when dispensing justice was a well-established function of the legislature"). *But cf.* Pfander, *supra* note 29, at 928-29, 937-45 (suggesting that there was a parallel and developing practice after the Revolutionary War in many states of judicial claims determination); Nelson, *supra* note 29, at 1606 n.227 (noting that in some states that permitted judicial resolution of claims against the government the state legislatures specifically retained discretion whether to pay the judgments). Well into the 19th century, some members of Congress took the position that Congress could not delegate its authority to pay the debts of the United States to any tribunal outside of Congress. *See also infra* note 252.

95. *See* Stith, *supra* note 63 and other sources cited in that note.

96. U.S. CONST. art I, §§ 8, 9. Professor Sidak has argued for an executive branch power to spend monies without an appropriation statute in order to carry out the President's constitutional duties and prerogatives. *See* Sidak, *supra* note 63, at 1185. *But see* Raven-Hansen & Banks, *supra* note 63, at 130-33 (1995) (disagreeing with Sidak on history, intent, and practicability). The argument for implied presidential power of the purse is one that could be extended to the article III courts (or to the Supreme Court, as the only constitutionally required article III court, on conventional understandings). The idea that a federal court could determine that the Constitution required an appropriation and thus the court could incur expenses (or direct the withdrawal of money) without legislative authorization by Congress, *cf.* Bandes, *supra* note 73, at 344 n.263 (suggesting that appropriations clause would not bar judicial awards of damages against the government without legislative authorization "because a *Bivens* award is an appropriation made under the Constitution"), is both intriguing and concerning. While it would allow more room for the courts to fulfill their role in enforcing constitutional rights, it also could accrue enormous power in the courts to decide on the expenditure of public funds. In light of the close attention the Constitution's structural articles give to the composition of the body that is most clearly empowered to both tax and authorize spending, allowing the federal courts to so define the word "law" in the Appropriations Clause must give one real pause. *See* Richard S. Arnold, *Money or the Relations of the Judicial Branch with the Other Two Branches*, 40 ST. LOUIS U. L.J. 19, 20 (1996) (courts cannot compel appropriations); *cf.* Frug, *supra* note 63, at 788-89 (arguing that courts in institutional reform cases must allow for legislative discretion to allocate monies). Yet there may well be a power in courts otherwise vested with jurisdiction to invalidate as unconstitutional particular restrictions on the use of "Appropriations made by law." *Cf.* Todd Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 997 (1998) (discussing constitutional constraints on use of the appropriation power to hobble Article III courts' internal functions and suggesting Congress could not use power over judicial budget "in a manner that vio-

identified the appropriations power as the basis for requiring a specific statute authorizing awards of monetary relief against the treasury before judicial relief could be granted.[97] In *Office of Personnel Management v. Richmond*,[98] the Court rejected an equitable estoppel claim by a civil servant against the government on the ground that the Appropriations Clause required specific statutory authority to entertain a money claim against the government. The necessity for an appropriation to expend public monies is deeply entrenched as a constitutional norm, and lends force to the argument that money judgments against the United States cannot be *paid* without an appropriation from Congress.[99] But whether that is sufficient to

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lates constitutionally guaranteed rights or the essential independence of the judicial branch"). Whether emergency or urgent necessity might ever warrant some amount of unauthorized expenditure to permit federal courts to function constitutionally is a different question that I do not address here.

97. *See* Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850) (referring to the Appropriations Clause as a reason why an officer could not be subject to mandamus to pay a debt in the absence of an appropriation from Congress authorizing its payment); *see also* Buchanan v. Alexander, 45 U.S. (4 How.) 20, 21 (1846) (state process cannot attach to appropriated public funds in hands of disbursing agent for the United States).

98. 496 U.S. 414, 424 (1990) ("For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute."). *See also id.* at 423 (noting substantiality of government's argument that sovereign immunity precludes any action based on estoppel, but resting on the Appropriations Clause as a more narrow ground).

99. *See Reeside*, 52 U.S. (11 How.) 272. *Reeside* grew out of an action originally brought by the United States against a postal contractor for monies due; Reeside in effect counterclaimed for a larger amount he claimed was due him from the United States. The jury found for Reeside. *Id.* at 273. His executrix then sought to mandamus the Secretary of the Treasury (Walker) to enter the amount as a credit on the books of the United States and to pay that amount to her. After concluding that the relief was not warranted because the jury verdict on the set off had not been properly reduced to an independent judgment against the United States, the Court went on to address other objections. *See id.* at 289. The Court stated that mandamus would not lie unless a law required the officer to do that which is sought, and asserted that there was no statute requiring the Secretary to enter this kind of claim on its books to pay, nor had appropriation been made. Invoking (but not explaining) sovereign immunity, the Court placed "peculiar importance" on the prospect of a court "entering a judgment against a party which it could not enforce by execution, and which none of its officers had been authorized to discharge." *Id.* at 291. The Court wrote:

> [n]o officer, however high, not even the President . . . is empowered to pay debts of the United States generally, when presented to them. If . . . the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the Treasury . . . the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now. The difficulty . . . is the want of any appropriation by Congress to pay this claim. It is a well known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.

Id. Thus, it concluded, the widow should present her claim to Congress. *See also infra* note 261.

support a doctrine of sovereign immunity from *adjudication* is a different matter altogether,[100] one that has been left in a state of some ambiguity by decisions of the Court (and derives from concerns that which could be addressed through a much more limited doctrine).[101]

Third, Congress' control over the jurisdiction of the federal courts gives it considerable powers simply to refuse to authorize suits against the government.[102] Notably in the First Judiciary Act,

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100. Since courts enter judgments against private parties that sometimes cannot be enforced, the fact that a money judgment against the United States may not be enforceable without a subsequent appropriation is by itself an insufficient explanation for why a court otherwise seized of jurisdiction should not proceed to judgment. *Cf.* Republic National Bank v. United States, 506 U.S. 80, 98 (1992) (White, J., concurring) ("Perhaps . . . [a] judgment creditor will have collection problems, but that does not render his judgment a meaningless event."). For further discussion, see *infra* text at notes 253-57. Indeed, for much of its first several decades the U.S. Court of Claims (for most of this period regarded as an Article III court) entered judgments that were paid through later appropriations. *See infra* note 264; *see also* Note, *The Constitutional Status of the Court of Claims*, 68 HARV. L. REV. 527, 530-31 (1955) (Claims Court practice permits court to enter judgments that cannot be executed so long as the judgment is regarded as final in what it decides). For a suggestion that the Appropriations Clause does *not* limit the jurisdiction of courts, see Major Collins' Case, 15 Ct. Cl. 22 (1879) (asserting that the Appropriations Clause "is exclusively a direction to the officers of the Treasury . . . and not to the courts of law; the courts and their officers can make no payment"); *cf.* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (describing Appropriations Clause as limit on executive disbursing officers). To this day, the federal government distinguishes between waivers of sovereign immunity and the ability to obtain payment of a judgment, which requires an appropriation. *See* GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATION LAW, Doc. No. GAO/OGC-94-33, v. III, ch. 14, at 14-5 (2d ed. 1994) [hereinafter GAO REDBOOK]; *infra* note 287. Finally, it bears noting, judgments against sovereign governments in some limited circumstances can be enforced against their property. *Cf.* 28 U.S.C. §§ 1609-11 (2000) (concerning execution of judgments against and attachment of property of foreign governments).

101. *See* discussion *infra* text accompanying notes 261-62, 267-96. It is important to note that even if the appropriations power were thought to justify some limits on federal courts' power to enter judgments against the federal government, it would be difficult to account for much of federal sovereign immunity law on this basis, since many forms of relief that do not involve claims against the treasury have been found barred by the government's immunity from suit. *See, e.g.*, Hawaii v. Gordon, 373 U.S. 57 (1963) (suit to compel executive branch decision with respect to disposition of certain federal properties); Dugan v. Rank, 372 U.S. 609 (1963) (suit to enjoin impoundment of water).

102. Justice Story noted a relationship between Congress' control of federal jurisdiction and claims against the government. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 334 (1816) (suggesting that omission of the word "all" before the phrase "controversies which the United States shall be a party" in Article III might be explained by a desire not "to imply a right to take cognizance of original suits brought against the United States as defendants in their own courts" absent their consent). Justice Harlan suggested that Congress' control over whether Article III courts, or other processes, would decide on claims against the United States was not different in kind than the control Congress generally has over the existence and jurisdiction of the inferior federal courts. *See* Glidden v. Zdanok, 370 U.S. at 551 (Harlan, J., delivering the judgment of the Court) ("[P]ossession of the choice [whether to allow article III court jurisdiction over claims against the

Congress gave the federal circuit courts jurisdiction of "suits of a civil nature at common law or in equity" where the "United States are plaintiffs, or petitioners."[103] And it was early on established that a grant of jurisdiction by implication excluded jurisdiction in areas not specified.[104] Reading these specific grants of jurisdiction in light of this interpretive practice, one might conclude that these statutes by implication excluded suits against the United States.[105] To the extent, then, that Congress may control the jurisdiction of the lower federal courts,[106] it had at least arguably and by implication prohibited suits against the United States through statutory

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U.S.] . . . subjects those courts [including the Court of Claims] to the continuous possibility that their entire jurisdiction may be withdrawn. . . . But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, section 1, authorized but did not obligate Congress to create inferior federal courts."). On a link between Congress' control of jurisdiction with respect to claims against the United States and Congress' control of appropriations, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1302 (1998) (noting above suggestion in *Martin v. Hunter's Lessee* and linking change in Article III text on U.S. as party cases to Convention's commitment to Congress of power to pay public debt); Pfander, *supra* note 29 at 952-53 (linking Convention's rejection of mandatory language requiring Congress to pay public debt with rejection of mandatory federal jurisdiction in all U.S.-party cases).

103. The Judiciary Act of 1789, 1 Stat. 73, limited the grant of jurisdiction in cases to which the U.S. was a party in the circuit courts to suits where "the United States are plaintiffs, or petitioners," *id.* § 11, and, likewise, in the district courts, to cases "where the United States sue." *Id.* § 9. Professor Pfander called my attention to an early and unsuccessful legislative proposal to authorize the filing in the Supreme Court of petitions against the United States resulting in a decree that would be "binding on the United States the faith of which is hereby pledged to stand to and perform the same." Harper Judiciary Bill of 1800, reported Mar. 11, 1800, § 5, *reprinted in* MARCUS, *supra* note 32, at 311-12. *See also supra* note 32 (describing Edmund Randolph's proposal of 1790).

104. *See, e.g.*, Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449-50 (1850). In light of such interpretive rules, sovereign immunity might be seen not as constitutional law, but rather (or at least largely) as a canon for interpreting jurisdictional acts based on the First Judiciary Act's limiting jurisdiction over actions involving the United States to those where it was plaintiff or petitioner. *Cf.* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (explaining the "domestic relations" exception to diversity jurisdiction as statutory and arising by recodifications that did not change extant doctrine).

105. In what may be the earliest reference to the sovereign immunity of the United States in an opinion of the Court, congressional legislation is invoked. "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; *that the judiciary act does not authorize such suits.*" Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (emphasis added). The Court's reference to the Judiciary Act, rather than to the Constitution, is noteworthy.

106. Two situations warrant further discussion, as ones in which congressional control of federal court jurisdiction may not suffice fully to explain the government's immunity. First, a waiver of immunity by the United States to a suit by a state brought in the Supreme Court's original jurisdiction might need to be understood as distinct from Congress' power to control the jurisdiction of the federal courts, given conventional understandings that

law. Moreover, the mere existence of congressional power over federal jurisdiction may have caused sustained inquiry into the bases for a sovereign immunity doctrine to seem superfluous.[107]

The debate over Congress' power to control the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court is too vast fully to rehearse here. Some have argued that the Constitution guarantees a judicial remedy only in

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Congress cannot add to or subtract from the Court's original jurisdiction. For discussion, *see infra* note 112.

Second, the immunity of the United States to *state court* process appears to have been well established by the mid-nineteenth century. *See, e.g.*, Briggs v. Light-Boat, 93 Mass. (11 Allen) 157, 162 (1865); *cf.* Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1846) (holding that funds in hands of a Navy purser, due as wages to a sailor who owed money to the plaintiff, were not amenable to attachment in the state court). Jurisdictional statutes excluding certain suits against federal officers from federal courts may have been understood to imply the need to preclude state court jurisdiction as well. *Compare* McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813) (holding that Section 11 of the First Judiciary Act did not authorize a federal circuit court to issue mandamus to a federal official), *with* McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 603-05 (1821) (concluding that in light of Congress' not having authorized most federal courts to issue mandamus to federal officials, the state courts should not have power to issue that extraordinary writ). Other remedies against federal officers were available in state courts. *See* Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 9-12 (1817) (upholding state court jurisdiction in action to replevy seized goods because Congress had not "expressly, nor by implication," forbidden it); *see also McClung*, 19 U.S. (6 Wheat.) at 603-05 (noting availability of "ordinary mode" of redress against officers in actions for damages or return of property while rejecting state court authority to issue mandamus against such officers). *But cf.* Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) (denying state court authority to grant habeas relief to a federal soldier). The immunity of federal property, or officers, from suit in state court might be attributed not only to generalized (and arguably mistaken) notions of sovereign immunity, such as those referred to in *Briggs*, but perhaps also to federalism principles for protecting federal instrumentalities from state interference, such as those articulated in *McCulloch v. Maryland*. 17 U.S. (4 Wheat.) 316, 426-37 (1819). Whether congressional waivers of the immunity to claims in state court, *see, e.g.*, 28 U.S.C. § 2410 (2000) (waiving immunity in actions concerning real property), should be seen as distinct from Congress' power over federal jurisdiction is unclear: because state court decisions resting on federal grounds are reviewable in the Supreme Court, a waiver of immunity could be seen (albeit indirectly) as an exercise of power to allocate cases to the appellate jurisdiction of the Supreme Court rather than to lower federal courts. Without trying to resolve this point, I note only that there may be grounds for finding the United States immune from state court jurisdiction that do not require resort to generalized notions of sovereign immunity from judicial redress more generally.

107. *See supra* note 102. In addition to Congress' power to control federal jurisdiction, it is possible that the Petition Clause of the First Amendment—under the weight of legislative and executive claims resolution and the failure to confer jurisdiction on a court generally to hear claims against the United States—may have reinforced judicial commitment to the sovereign immunity doctrine, *cf.* Reeside, 52 U.S. at 291-92 (referring to "resort to Congress" as an "ordinary mode of redress" supporting the unavailability of mandamus of the Secretary of the Treasury in a case where no existing statute clearly authorized payment of the claim), and notwithstanding Professor Pfander's recent excavation of a very different meaning of the Petition Clause. *See* Pfander, *supra* note 29.

very limited circumstances.[108] Others argue that federal courts must be able to carry out their essential roles,[109] roles that would include power to enforce constitutional prohibitions or maintain the supremacy or consistency of federal law. Still others find in the language of Article III a mandate that some, or all, of the heads of jurisdiction identified in Article III must be brought within either the original or appellate jurisdiction.[110] Under the Court's decisions, however, and as many scholars argue, Congress has substantial discretion over the jurisdiction of the courts,[111] a discretion

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108. *See, e.g.*, John Harrison, *Jurisdiction, Congressional Power and Constitutional Remedies*, 86 GEO. L.J. 2513, 2518, 2522-24 (1998) (suggesting that the only remedy required by Section 1 of the Fourteenth Amendment may be nullification of unconstitutional government action, but noting difficulties in requiring citizens to violate law in order to be able to test legality of government action and obtain that remedy); *cf.* Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (suggesting that Congress has more latitude to withhold jurisdiction from courts altogether than to confer it subject to unconstitutional limitations).

109. *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict the Lower Federal Courts Jurisdiction*, 83 YALE L.J. 498 (1974); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Lawrence Sager, *Foreword, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

110. *See, e.g.*, Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Amar, *The Two Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). Professor Amar's theory—that there must be a federal court with appellate or original jurisdiction over those heads of jurisdiction preceded by the word "all" in the first paragraph of Article III, Section 2, while Congress has discretion whether to confer jurisdiction over the remaining "Controversies"— has been particularly influential. On possible application of this theory to claims against the United States, compare Amar, *The Two Tiered Structure of the Judiciary Act of 1789, supra*, at 1508 (suggesting that most cases involving the U.S. as party head would also have involved federal law and been within the "arising under" mandatory jurisdiction), with Daniel J. Meltzer, *Article III and the Judiciary Act of 1789: The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1583 n.49 (1990) (arguing that at time most cases involving the United States as party would have been understood as governed by "local law"). *See also* Amar, *supra* note 73, at 1468 n.179 (noting that First Judiciary Act did not authorize suits against the United States). As I understand Professor Amar's view of federal question jurisdiction, constitutional claims against the United States would have to be within the jurisdiction of some Article III court.

111. *See* Meltzer, *supra* note 110, at 1628 ("Supreme Court decisions almost uniformly suggest (also often in dictum) that Congress' power to restrict federal court jurisdiction is unlimited."). For a forceful argument in favor of the traditional view of Congress' broad authority to regulate and make exceptions to the federal courts' jurisdiction, see Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845-47 (1975). *See also* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 748-70, 775 (1998) (arguing that "[t]he Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts"); *cf.* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 901-03, 906-15 (1982) (doubting "internal"

that in the earliest Judiciary Act was exercised to authorize suits in which the United States was a party plaintiff—by relatively clear implication excluding those suits in which it was a party defendant.[112]

The co-existence of Congress' powers over federal court jurisdiction and over the public monies of the United States may have obscured, or minimized incentives to clarify, mistaken assumptions about the application of common law notions of sovereign immunity.[113] These several possible sources for the development of some form of federal immunity from suit (at least on money claims), we must recall, stand against the explicit text of Article III as well as the rule-of- law commitments of *Marbury*—which include not only that the law provides a remedy for violations of rights but also that the government is a government of laws, not "men." The tensions within the constitutional scheme on the question of sovereign immunity were thus considerable. Indeed, to the extent sovereign immunity has been justified as avoiding interference with executive

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constraints from Article III on Congress' power to restrict Court's appellate jurisdiction but arguing that Equal Protection Clause in some cases may prohibit limitations). *See generally* Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908-10 (1984); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965). For a different view, see Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 28-48 (1990) (challenging view that Congress has primary responsibility for defining federal jurisdiction).

112. That the First Judiciary Act did not extend the jurisdiction of the lower federal courts to suits against the United States, *see supra* note 103, is, of course, not dispositive of the relationship between federal sovereign immunity and Congress' power to control the jurisdiction of the federal courts. The Supreme Court's original jurisdiction is now conventionally understood to be that prescribed by the Constitution, and further it is the conventional understanding that Congress can neither add to nor subtract from the Court's original jurisdiction, and yet the United States has been held to be immune from the suit of a state within the original jurisdiction of the Supreme Court absent congressional consent. *See, e.g.*, Kansas v. United States, 204 U.S. 331, 341-42 (1907); Oregon v. Hitchcock, 202 U.S. 60 (1906). To the extent that the conventional understanding that Congress cannot control the Court's original jurisdiction is correct, *but see* Amar, *Two Tiered Structure*, *supra* note 110, at 1523 n.74, federal sovereign immunity cannot be entirely explained as a subset of Congress' powers to control the jurisdiction of the federal courts. Nor do the jurisdictional statutes fully correspond to normative arguments that the Constitution itself requires certain remedies against the United States. *See supra* note 73 and accompanying text. Yet, Congress' substantial control of federal jurisdiction may help explain the degree of relatively unreasoned acceptance of "sovereign immunity" as part of U.S. law.

113. *See, e.g.*, Cary v. Custis, 44 U.S. (3 How.) 236, 245 (1845) (in explaining why Congress had power to eliminate one remedy for unlawful tax collection, the Court refers in succeeding sentences to the immunity of the United States from unconsented suit and to Congress' power to control the jurisdiction of the inferior federal courts); *see also supra* note 102.

or legislative functions, it serves these goals only indirectly and, as many have urged, those goals could in all likelihood better be served through other doctrines.[114]

Yet while sovereign immunity may never have been well justified within the U.S. constitutional structure, solutions to some of the conceptual problems identified above emerged. The rule of law came to mean something somewhat different in dealing with claims against the government than claims as between private parties,[115] but the degree of divergence was capable of being at least partially mitigated through suits against officers, as well as through the explicit establishment of jurisdictional authority to hear claims against the government itself, first in the Court of Claims and then in the district courts.[116] Notwithstanding the confusion and ambiguity surrounding its origins, claims for monetary relief from the government have come to be conventionally regarded as "public rights,"[117] which Congress can authorize (or withhold authority

114. Such other doctrines might including equitable restraint, *see* Pfander, *supra* note 29, at 987, or development of a federal common law of remedies, *see* Jackson, *The Supreme Court*, *supra* note 74, at 88-104. *But cf.* Krent, *supra* note 2, at 1533-34 (arguing that sovereign immunity may be justified on separation of powers grounds insofar as it allows Congress to "protect majoritarian policy" from politically unaccountable judges and from undue constraints resulting from past decisions of no longer accountable government officials, but also recognizing that some aspects of the current structure of immunity are not consistent with this rationale).

115. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1855) (asserting an "important distinction" between redress for private wrongs and for public wrongs).

116. *See infra* text accompanying notes 136-37, 154, 161.

117. The "public rights" doctrine obscures more than it clarifies about the possible sources of sovereign immunity for the federal government in the U.S. constitutional tradition. The origin of this doctrine is *Murray's Lessee*, 59 U.S. (18 How.) 272, a case involving a dispute between private parties that turned on the constitutionality of a summary process of selling property belonging to a government employee who was believed to owe the government money. *Id.* at 275-76. The constitutional attack was formulated not so much as an affirmative claim against the government, but as an effort to resist summary government process against a government employee. In elaborating the idea of the government's right to proceed summarily to protect its accounts from "public wrong" without submitting the matter to an Article III court, the Court does discuss the government's exemption from suit, *see* 59 U.S. at 283-85, but it is not the first time the Court does so, *see supra* notes 5, 50 and accompanying text. *Murray's Lessee*'s greater importance for this subject is its insistence that there are some kinds of matters that are capable of being determined either within the Article III courts or not, as Congress decides. *See* Richard Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 915, 919 (1988) (describing public rights doctrine as holding "that some disputes about the proper application of law to fact—mostly, though not invariably, associated with the doctrine of sovereign immunity—do not require judicial resolution, even though they are capable of it[ ]"). According to Fallon, the public rights doctrine has various roots: sovereign immunity itself; a broader understanding of the realm of executive discretion, supported by the view of certain government benefits as privileges rather than rights; and the fact that the large number of decisions

from) the Article III courts to hear and decide,[118] as Congress frequently has done since the Civil War.

II. Sovereign Immunity's Changing Scope and Congressional Control of Jurisdiction

The federal government today is amenable to suit on a wide range of claims in a number of adjudicatory fora.[119] The current posture has resulted in part from common law remedial traditions but more importantly from legislation, reflecting Congress' key role in determining remedies for governmental wrongdoing. Congress' control over the courts' jurisdiction and over remedies for government wrongs has significantly influenced the Court's articulation of a purportedly constitutional regime of "sovereign immunity." The caselaw has allowed for much change in the role played by officer suits as compared to suits directly against the government in constraining and remediating governmental wrongs. In the dynamic interactions between judge-made sovereign immunity law and legislatively-authorized remedies, the jurisdiction of the Court of Federal Claims has played a central role,[120] supporting a shift—from individual officer to government liability—in several areas of law. History suggests that the Court's determination of what remedies are prohibited by "sovereign immunity" is strongly influenced by what remedies Congress has permitted, as illustrated below.

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that the executive branch must make that could not reasonably be made initially by courts and through litigation. *Id.* at 952-53; *see also* Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. Col. L. Rev. 581, 593 (1985) (suggesting that the assumption of the older "public rights" cases was the view that "the citizens possessed no 'rights' cognizable in court" and hence the only basis for judicial resolution of disputes between citizen and government was through waiver of immunity); *cf.* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 Buff. L. Rev. 765, 793-94 (1987) (describing *Murray's Lessee*'s progeny as resting on a distinction between privileges and vested rights).

118. *See* Fallon, *supra* note 117, at 937 (suggesting that sovereign immunity doctrines rest on the idea that "government should be able to weigh for itself whether submission to a traditional lawsuit would harm or promote the public interest," and that mass benefit programs provide legitimate reason to avoid lawsuits in order to avoid drain on resources going to would be beneficiaries). But note that Fallon also recognizes the Article III value that "wielders of governmental power must be subject to the limits of law." *Id.* at 938.

119. *See, e.g., infra* notes 154 (Tucker Act), 161 (Federal Tort Claims Act), 179 (Administrative Procedure Act), and accompanying text.

120. *See infra* notes 140-58 and accompanying text.

A. *"Nonstatutory" Remedies Against Government Officers*

As noted above, the disruptive potential of the conceptual tensions surrounding the idea of sovereign immunity was mitigated in the early years by its coexistence with traditions of specific relief against individual officers, of both state and federal governments (as in *Marbury*).[121] Thus, for example, in *United States v. Peters*,[122] the Court held that an admiralty proceeding could go forward against executrixes of the treasurer of Pennsylvania, who had had possession of the proceeds of a condemned vessel. Likewise in *Osborn v. Bank of United States*[123] the Court upheld jurisdiction and specifically rejected sovereign immunity barriers to an action against officers of Ohio who had seized money from the Bank of the United States in satisfaction of a state tax.[124] In *Kendall v. United States ex rel. Stokes*,[125] the Court upheld the availability of mandamus in an officer suit involving disputed payments due from the U.S. government. Mandamus of federal officials continued to be available into the twentieth century, even in cases essentially involving

121. *See also* Engdahl, *supra* note 6, at 14-21 (describing remedies available against officers under pre-Civil War sovereign immunity and related doctrines); Cramton, *supra* note 6, at 392 (referring to actions against individual officers as the "mainstay" of judicial review of government action); *cf.* Bandes, *supra* note 73, at 332 (referring to injunctive relief against government officers under *Ex parte Young*, 209 U.S. 123 (1908), as "a crucial means of avoiding the bar of sovereign immunity").

122. 9 U.S. (5 Cranch) 115 (1809). *See id.* at 139-40 ("If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."). David Rittenhouse had taken possession of the proceeds as Treasurer but at the time of his death was evidently awaiting State release of his indemnity bond before paying the proceeds over to the State Treasury. *Id.* at 123-24.

123. 22 U.S. (9 Wheat.) 738 (1824). *But cf.* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 123-24 (1828) (dismissing in part because action against the Governor in his official capacity was in effect against the state).

124. *Osborn*, 22 U.S. at 850-58 (jurisdictional bar of Eleventh Amendment immunity applies only where the state is party of record).

125. 37 U.S. (12 Pet.) 524 (1838) (upholding mandamus of a treasury official to enter a credit due the claimant). For an interesting discussion of early understandings of the judicial power of the Supreme Court to issue mandamus to federal officers, see Pfander, *supra* note 44, at 1523-31.

claims on the treasury,[126] albeit with many limitations.[127] For tortious or otherwise wrongful action by a government official, in violation of or not authorized by law, then, officer suits—for mandamus, for ejectment, or other common law remedies —could serve as moderately effective vehicles for contesting claims of right as between governments and private individuals.[128] The 1882 deci-

126. *See, e.g.*, Miguel v. McCarl, 291 U.S. 442 (1934) (ordering relief in the nature of mandamus against a federal financial officer who had refused to pay veteran's benefits to a Philippine veteran); Roberts v. United States ex rel. Valentine, 176 U.S. 221, 230-31 (1900) (affirming issuance of writ of mandamus against the Treasurer of the United States to pay monies due as additional interest on bonds under a special act of Congress because Treasurer's duty to do so was "ministerial"); *see also* Mellon v. Orinoco Iron Co., 266 U.S. 121, 125-27 (1924) (affirming order compelling payment to one with equitable interest in award of trust funds in Treasury). In *Miguel v. McCarl*, the Court specifically rejected the defense that the United States was a necessary party and that the suit should be dismissed as one against the United States without its consent. 291 U.S. at 455.

127. Mandamus was only available for breach of a clear ministerial duty, *see, e.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516-17 (1840), and its scope was contracted at various times through findings that statutes committed decisions to executive discretion. *See, e.g.*, Work v. United States ex rel Rives, 267 U.S. 175, 177-84 (1925); HART & WECHSLER, *supra* note 16, at 997; *see also* Byse, *supra* note 5, at 1484-1502 (noting various inadequacies in reliance on mandamus to provide relief); Woolhandler, *Patterns*, *supra* note 6, at 422-29 (discussing "discretion" and "legality" models of review and noting the shift from presumptions of remedy in the "legality" model under the Marshall Court to presumptions in favor of government discretion in the Taney Court). Until 1962, moreover, the only lower federal court authorized to issue mandamus against federal officials was the U.S. Court of Appeals for the D.C. Circuit, *see* Smith v. Bourbon Co., 127 U.S. 105, 112 (1888), not because of sovereign immunity but because of the interpretation of jurisdictional statutes which were modified only in 1962. *See* The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (2000) (providing all federal district courts with jurisdiction over actions "in the nature of mandamus" to compel federal officers to perform their duty). And, for the most part, the lower federal courts did not have "federal question" jurisdiction until 1875, *see supra* note 17, though relief against government officers for violation of the Constitution was sometimes available in cases in which jurisdiction was founded on diversity of citizenship. *See* Woolhandler, *Old Property*, *supra* note 6, at 923; Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80-83, 134-37 (1997). In 1976, Congress removed the minimum jurisdictional amount for suits under the general federal question statute against federal officers arising out of their official capacities. Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976). In 1980, the jurisdictional amount was removed from all federal question cases under 28 U.S.C. § 1331. Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

128. In addition, assumpsit was available against tax or customs collectors for the collection of assertedly illegal taxes, duties, and levies. *See* Woolhandler, *Old Property*, *supra* note 6, at 922; Woolhandler, *Patterns*, *supra* note 6 at 414-15. The Court early on asserted, moreover, that other "modes of redress" involving actions against individual tax officials were available. Cary v. Curtis, 44 U.S. (3 How.) 236, 250 (1845) (upholding a statutory withdrawal of an action against the customs collector to recover unlawfully collected customs duties in light of the availability of other "modes of redress," including "an action of detinue, or perhaps an action of trover, upon his tendering the amount of duties admitted by him to be legally due. . . ."); *see also id.* at 252-57 (Story, J., dissenting) (arguing that Congress could not constitutionally abolish the traditional remedy against the tax collector); *Glidden*, 370 U.S. at 549 n.21 (noting that *Cary* used "care . . . [to] specifically

sion of the Court in *Lee* was thus in accord with other decisions applying "party of record" or "necessary party" rules to facilitate the assertion of claims against officers of the government, both federal and state, notwithstanding sovereign immunity.[129] The majority in *Lee* explained that the Fifth Amendment's protection against uncompensated takings and deprivations of life, liberty or property without due process of law, enforceable in the case of deprivations of liberty through a writ of habeas corpus issued to the jailer, likewise contemplated remedies against those agents of the government who held property under governmental authority but in violation of the Constitution's commands of due process and just compensation for the taking of private property for public use.[130] Thus, a doctrinally constrained concept of sovereign immunity was supported by an understanding of the implications of the Constitution for the availability of remedies against government officers. The Constitution's rule-of-law implications for government action itself were yoked to common law remedial traditions to support use of officer suits as a tool to do justice as between citizens and their government.[131]

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declin[e] to rule whether all right of action might be taken away . . . even going so far as to suggest several judicial remedies that might have been available"); *cf.* Poindexter v. Greenhow, 114 U.S. 270 (1885) (upholding various forms of relief against individual state officials involved in seizure of plaintiffs' property for nonpayment of taxes whose payment had been adequately tendered). However, in some cases the Court expanded the concept of lawful discretion to make it more difficult to obtain relief against government officers for violations of legal rights. *See* Woolhandler, *Patterns, supra* note 6, at 422-24 (discussing Decatur v. Paulding, 39 U.S. (14 Pet.) 494 (1840)); *cf.* Fallon & Meltzer, *supra* note 1, at 1781 (noting that "cases always have existed in which no effective redress could be obtained for rights violations committed by the government and its officers . . . ."); Young, *supra* note 118, at 795-801 (describing a link between idea of judicial deference to executive discretion manifest in such cases as *Decatur* and the "public rights" doctrine).

129. *See, e.g.*, Davis v. Gray, 83 U.S. (16 Wall.) 203, 220-21 (1873); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 850-58 (1824); *see also* United States v. Peters, 9 U.S. (5 Cranch) 115, 139-40 (1809); *cf.* Meigs v. McLung's Lessee, 13 U.S. (9 Cranch) 11 (1815) (exercising jurisdiction to decide on disputed title to land held by federal officials). Despite the strength of the tradition of officer suits and the party of record rule, suing an officer would not always avoid an immunity bar, *see* Governor of Georgia v. Madrazzo, 26 U.S. (1 Pet.) 110, 123-24 (1828); *see also* David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 150-54 (1984). Nor would mandamus always issue, even to correct an error of law, if the executive decisionmaker was vested with "judgment and discretion" initially to interpret the law. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

130. United States v Lee, 106 U.S. 196, 218 (1882).

131. *But cf.* Woolhandler, *Patterns, supra* note 6, at 422-29 (arguing that officer suits became more constrained in the mid-nineteenth century as the Court moved from an approach in which relief against unlawful acts was generally available, to an approach focused more on protecting governmental decision processes). For recent arguments that officer suits could still be sufficient to avoid the need for government liability, see Carlos

Suits against government officers were available not only for specific relief against government funds or property but also for damages against the officer personally. In *Little v. Barreme*,[132] the Court upheld damages awarded against a naval officer for carrying out an order that was based on a misinterpretation of a federal statute, notwithstanding that the President had issued the order and the importance of military obedience to civilian authority, which the Court recognized.[133] Professor Woolhandler's research suggests that *Little v. Barreme* is no anomaly. In the early nineteenth century, she concludes, officers could be held liable for compensatory relief "if an arrest or seizure were made without probable cause . . . [or] where actions were taken beyond the scope of the statute, as determined by the Court."[134]

As most scholars have concluded, obtaining relief against government officers on a government contract was more difficult than where tortious conduct was involved, perhaps because of a back-

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Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 873-86 (2000) (suggesting that officer suits could be adequate substitute for government liability in vindicating federal law); Vázquez, *supra* note 3, at 1790-1804 (arguing that due process can be satisfied by damages remedies against state officers).

132. 6 U.S. (2 Cranch) 170 (1804).

133. *Id.* at 179. In a noteworthy passage, Chief Justice Marshall wrote:

> I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, . . . and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and . . . I acquiesce in [the opinion] of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.

Id. at 179. Was the Chief Justice trying to suggest the direction in which he thought the law should move, yet preserve the budding tradition of unanimity on the Court?

134. Woolhandler, *Patterns*, *supra* note 6, at 416 n.93 (noting, *inter alia*, Otis v. Bacon, 11 U.S. (7 Cranch) 589, 595 (1813); Sands v. Knox, 7 U.S. (3 Cranch) 499, 501-02 (1806); and Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806)); *see also* Engdahl, *supra* note 6, at 14-15, 17, 16-21 (describing "the insistence of nineteenth century courts upon this strict rule of personal official liability" under which public officials were "personally liable for any positive wrong which was not actually authorized by the state" or which "had been authorized by the state . . .[but] not authorized in contemplation of law"). Engdahl argued that the stringency of this rule was what "made it more than merely a means of redressing strictly personal wrongs . . . [but also] an instrument for enforcing certain legal rights and particularly constitutional limitations against the state." *Id.* at 19.

ground rule that an agent is not liable for the principal's breach.[135] The remedial system was thus by no means free of gaps: Thousands of request for private bills to satisfy claims against the government overwhelmed Congress' relatively primitive capacities for legislative adjudication early on. Congress' response was, eventually, creation of the Court of Claims.[136] By 1866, the jurisdiction of the Court of Claims (also referred to as the "Claims Court") permitted entry of final judgments, reviewable by the Supreme Court, in cases against the United States based on a statute of Congress, a regulation of an executive department, and on any contract with the U.S. government, express or implied.[137] Unlike the range of relief possible in officer suits, the remedy available in the Claims Court was limited (until fairly recently) exclusively to money damages.[138] This jurisdictional limitation on relief was long held to preclude claims in the Court of Claims that sought as a remedy the specific performance of government contracts.[139]

B. *The Impact of the Court of Claims' Jurisdiction on the Expansion of Federal Sovereign Immunity To Bar Relief Against Officers*

Although in important respects the Court of Claims increased the accountability of the government to do justice to those with whom it had dealings, its existence has also been invoked by the Court as a basis for expanding the scope of "sovereign immunity" in cases against federal officers. In *Larson v. Domestic & Foreign Commerce Corp.*,[140] the plaintiff sought specific relief to enforce a contract to purchase surplus coal from the government, seeking to avoid the asserted bar of sovereign immunity by arguing that under

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135. *See supra* note 16.

136. Act of Feb. 24, 1855, ch.122, 10 Stat. 612; Act of Mar. 3, 1863, ch. 92, § 1, 12 Stat. 765. For discussion of the problems posed by these early statutes, see *infra* text at notes 215-21.

137. Act of Mar. 17, 1866, 14 Stat. 9.

138. *See, e.g.*, United States v. King, 395 U.S. 1 (1969) (holding that the Court of Claims lacked jurisdiction to give declaratory relief). *See generally* URBAN LESTER & MICHAEL F. NOONE, LITIGATION WITH THE FEDERAL GOVERNMENT § 6.113 (3d ed. 1994) (noting that until 1972, Court of Claims' jurisdiction was limited to monetary relief). Even now, its jurisdiction over other forms of relief is quite limited and generally ancillary to its jurisdiction to grant monetary relief. *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 469 (2000) (describing the Remand Act of 1972, now codified at 28 U.S.C. § 1491(a)(2), authorizing Claims Court to provide limited equitable relief to employees as an incident to action for monetary relief).

139. *See* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155 (1998); Sisk, note 138, at 518.

140. 337 U.S. 682 (1949).

the contract title to the coal had passed to the plaintiff. A closely divided Court upheld the plea of sovereign immunity, in very broad reasoning:

> It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is 'illegal' . . . But . . . [s]ince the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement . . . ."[141]

Distinguishing action "in excess of authority or under an authority not validly conferred" from a contract or property claim arising out of authorized action, the Court indicated that even if the Administrator's interpretation of the contract was wrong, his action was within his authority and thus his action had to be regarded as that of the United States.[142] Recognizing a line of contrary authority,[143] the Court indicated it was making a choice to construe sovereign immunity to bar this action.

This rationale was very broad—that action of the sovereign would not be enjoined and that "authorized" but wrongful action of an officer would be deemed that of the sovereign.[144] So, too, was the Court's assertion that "[t]here are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who

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141. *Id.* at 693. Chief Justice Vinson wrote the opinion for the Court, which Justice Douglas joined on what appears to be a more narrow principle. *See id.* at 705 (Douglas, J., concurring). *See also id.* at 705 (Rutledge, J., concurring in the result); *id.* (Jackson, J., dissenting without opinion); *id.* at 705-32 (Frankfurter, J., joined by Burton, J., dissenting).

142. *Id.* at 691. Thus the Court holds "that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency . . . the action itself cannot be enjoined or directed since it is also the action of the sovereign." *Id.* at 695.

143. *Id.* at 699 (citing Goltra v. Weeks, 271 U.S. 536 (1926)).

144. Professor Bandes criticizes the reasoning for "los[ing] the original reason for the fiction" that acts outside of an official's authority were not those of the official, that is, to be able "to reach the sovereign." Bandes, *supra* note 73, at 333-34. Professor Sisk suggests that the Court here offers divergent conceptions of sovereign immunity in actions against officers, one that turns on the officer acting *ultra vires* his office (and thus conceives of the officer as "not the state") and one that is trumped by constitutional necessity (i.e., that conceives of the officer as the state acting unconstitutionally). *See* Sisk, *supra* note 138, at 134. *See also infra* note 190. For present purposes, my point here is that *Larson* represents a broadening of the scope of sovereign immunity in actions nominally against an officer, a broadening to which the Court of Claims remedy contributed.

presents a disputed question of property or contract right . . . ."[145] Of course, in *United States v Lee*, specific relief was held available to try the title to land as between a private claimant and army officers holding it for military use. The *Larson* Court dismissed *Lee* as involving the potential for an unconstitutional taking of property without just compensation, apparently because there was no Court of Claims remedy at the time.[146]

The significance of the Court of Claims remedy in *Larson* was twofold. After relying on that remedy to distinguish *Lee* (on the grounds that its absence in 1882 rendered the officers' holding of the property potentially an unconstitutional taking without just compensation), the Court returned to the Court of Claims remedy near the end of its opinion to emphasize the limitations Congress imposed on its jurisdiction. It emphasized that Congress "has permitted suits for damages, but, significantly, not for specific relief in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine."[147] Notwithstanding its reference to sovereign immunity, however, the Court's sense of Congress' remedial preferences would seemingly be sufficient on its own to support the conclusion that officer suits are barred.[148] On this view,

145. *Larson*, 337 U.S. at 704 (citing Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840)). Interestingly, though, *Decatur* did not turn on sovereign immunity but on the unavailability of mandamus for acts within the discretion of the government officer. *See* Sisk *supra* note 138, at 517.

146. *See* Sisk, *supra* note 138, at 696-97 (asserting that *Lee* represents "a specific application of the constitutional exception to the doctrine of sovereign immunity"); *see id.* at 697 n.17 (noting that when *Lee* was decided in 1882—prior to the 1887 Tucker Act—there was no remedy for obtaining compensation for taking of land); *accord*, Malone v. Bowdoin, 369 U.S. 643, 649 n.8 (1962).

147. *Larson*, 337 U.S. at 705. This approach is a reversal of the "remedial hierarchy" between "retroactive" damages and prospective relief applied under the rubric of "sovereign immunity" in suits against state officers. *See* Edelman v. Jordan, 415 U.S. 651 (1984); Jackson, *supra* note 3, at 73; *see also* Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 Geo L.J. 1, 15-19 (1998) (discussing distinction in 11th amendment caselaw between suits against state officers seeking prospective relief and suits seeking monetary relief from state treasuries and critiquing recent expansions of the scope of immunity in actions for specific relief).

148. *See, e.g.*, Block v. North Dakota, 461 U.S. 273, 285-86 (1983) (treating statutory waiver of immunity to quiet title actions as precluding officer suit that would evade procedural limitations of the statute on grounds that a "precisely drawn detailed statute preempts more general remedies"); Dugan v. Rank, 372 U.S. 609, 611 (1962) (dismissing suit against a government officer and implying that plaintiff's action should have been brought against the United States under the Tucker Act); *see also* Schweiker v. Chilicky, 487

Larson can be read not as a case about constitutional immunity but as a statutory case, based on the Court's effort to implement Congress' preferred remedy: to provide damages after the fact in the Court of Claims for breach of contract rather than to "stop the government in its tracks". The Court of Claims remedy, in other words, becomes the key to understanding the Court's retrenchment on the availability of specific relief against a government officer who is alleged to have acted wrongly (but not in violation of statutory or constitutional limits on his authority).[149]

The importance of this statutory basis for the Court's decision in *Larson* is only emphasized by considering both more recent changes in federal jurisdiction to grant specific relief to competitors in bid disputes (even if such relief may "stop the government in its tracks" of awarding a contract[150]), as well as the increasing emphasis in litigation involving the sovereign immunity of the states of the so-called "Ex parte Young" injunction, whose availability to provide specific relief on both federal statutory claims as well as constitutional claims was recently reaffirmed.[151] Contrary to *Larson*'s implication, there is simply no general remedial rule against enjoining government action.[152] The *Larson* Court's implication

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U.S. 412 (1988) (refusing to find implied constitutional cause of action available against government officers in light of administrative remedies for denials of benefits); *cf.* Middlesex Co. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) (finding that a section 1983 remedy against local government was impliedly precluded by two federal environmental statutes with comprehensive and distinct enforcement mechanisms).

149. *See also* Pfander, *supra* note 29, at 974-77 (suggesting that *Larson* reflects a use of "sovereign immunity" "not as a threshold barrier to litigation that applies irrespective of the availability of other remedies," but as "a tool of equitable discretion").

150. *See* 28 U.S.C. § 1491(b) (2000) (authorizing the Court of Federal Claims and the district courts "to render judgment on an action by an interested party objecting to . . . a proposed award . . . of a contract" and to award "any relief that the court considers proper, including declaratory and injunctive relief" provided the court "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action"). For a recent example, see Ramcor Services v. United States, 185 F.3d 1286 (Fed. Cir. 1999) (upholding Court of Federal Claims jurisdiction to have issued preliminary injunction against award of contract to a competitor of plaintiff). *See generally* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 638-40 (2001) (explaining the differences between sovereign immunity waivers in protests and in contract disputes).

151. *See* Verizon Md., Inc. v. Pub. Serv. Comm'n, 122 S. Ct. 1753, 1761 (2002); Ex parte Young, 209 U.S. 123 (1908). For a discussion of the significance of the prospective injunction against state officials to vindicate federal law, see, for example, Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997).

152. *See* Jackson, *supra* note 3, at 73 (discussing shifts in supposed remedial hierarchy being enforced through judicially developed sovereign immunity doctrine). *Larson* has been widely criticized for years. *See, e.g.*, Byse *supra* note 5, at 1488 (noting "incongruous" result that, to the extent that normal rules of agency would impose liability on a private

that generally, damages are to be preferred to specific relief, is an inaccurate description of the Court's more general sovereign immunity jurisprudence and can only be understood in the particular statutory context—that is, Congress' definition of the jurisdiction, and limitations on the jurisdiction of the Court of Claims.

With respect to claims relating to government takings of property, the expansion of the Claims Court's jurisdiction to include constitutional claims for just compensation had a similar effect on the availability of specific relief against officers. In 1871 the Supreme Court held that the Claims Court lacked jurisdiction over an action against the United States where the government took and held plaintiff's land on a contested claim to title[153] —the very kind of fact setting in which Lee successfully brought an action in ejectment against officers of the United States to try title to land. The transformation from a legislative to a judicial system for money claims against the government for takings of property did not occur until the Tucker Act of 1887. It expanded the jurisdiction of the Court of Claims to include "[a]ll claims founded upon the Constitution of the United States," and most claims "for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."[154]

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employer for wrongs of employee, *Larson* expands protection of government and its officials from responsibility); Cramton, *supra* note 6, at 404-10 (noting *inter alia* that under *Larson* the existence of statutory authority "need not depend upon a careful construction of the statute in question" because the case must be dismissed on sovereign immunity grounds if defendant is within his or her "general sphere of authority even though the particular action would be statutorily prohibited if the statute were properly interpreted"); *see also* Jaffe, *supra* note 6, at 29-37 (criticizing use of "sovereign immunity" to protect against suits interfering with the exercise of official discretion as unnecessary in light of existing doctrine; "[a]way with fruitless and unhistorical attempts to determine whether a suit is 'really' against the state."). The Court's recent Eleventh Amendment cases place increasing weight on injunctive remedies to enforce federal statutory schemes, by excluding damages remedies from the arsenal available to enforce statutes enacted under Article I powers. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 712 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

153. United States v. Langford, 101 U.S. 341 (1879). Three years later, however, the Court rejected jurisdictional attacks on the authority of the lower federal courts to try an action in ejectment against federal officers holding property on a disputed claim to title. United States v. Lee, 106 U.S. 196, 222-23.

154. Act of March 3, 1887, 24 Stat. 505. Since enactment of the Tucker Act, the Court has repeatedly asserted that the Constitution itself requires a compensatory remedy for the taking of property. *See, e.g.*, First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 315-16 & n.9 (1987) (stating that the Constitution itself authorizes monetary award for takings, notwithstanding sovereign immunity); Jacobs v. United States, 290 U.S. 13, 17 (1933) (asserting that the right to just compensation cannot be taken away by statute

Eventually, however, the authorization of a judicial remedy for the taking of property in the Court of Claims had an effect on the scope of sovereign immunity similar to that which its jurisdiction over contract claims had in the *Larson* case. In *Malone v. Bowdoin*,[155] the Court held that an action in ejectment against Forest Service officers to try title to land held by the United States but claimed by a private property owner was barred by the doctrine of immunity. The private claimant had a remedy in the Court of Claims if his land had been taken, and that was (evidently) all that the law entitled him to. Relying on *Larson*, the Court explained that *Lee* represented a "Fifth Amendment" exception to the doctrine of sovereign immunity.[156] Yet *Lee* rested, not so much on the Fifth Amendment, as on the need for "judicial enforcement of . . . established rights."[157] What motivates the decision in *Malone* expanding the scope of federal sovereign immunity doctrine in actions against officers to try title to property is, as I suggested above, the effect of the alternative remedy in the Court of Claims

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or qualified by statutory failure to provide for interest where interest was required to make compensation adequate). *But cf.* Lynch v. United States, 292 U.S. 571, 582 (1934) (after concluding that rights against the United States arising from a contract may be Fifth Amendment property rights that cannot be taken without just compensation, the Court states that "[w]hen the United States creates rights in individuals against itself it is under no obligation to provide a remedy in court" and may withdraw its consent to suit). Yet the historical record may leave open an argument that the legislative "mode of redress" would also comply with the constitutional requirement. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794-95 n.69 (1995) (discussing absence of judicial remedy for most federal takings until enactment of Tucker Act); Philip Trimble, *Foreign Policy Frustrated: Dames & Moore, Claims Court Jurisdiction, and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 381 n.291 (1984) (asserting that cases leave unclear whether a judicial tribunal is required to determine just compensation); *cf. Fla. Prepaid v. College Sav. Bank*, 527 U.S. 627, 644 n.9 (1999) (in explaining why available state remedies may be sufficient to meet due process standards in the event of a state infringement of patent, the Court's opinion notes both judicial remedy and the availability of a legislative claim process); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999) (plurality opinion) (treating relationship of sovereign immunity to just compensation obligation as possibly uncertain); Vicki C. Jackson, *Principle & Compromise in Constitutional Adjudication*, 75 NOTRE DAME L. REV. 953, 960-61 (2000) (noting the *Fla. Prepaid* footnote as a signal of uncertainty as to whether the Court will treat legislative claims as a sufficient remedy for due process purposes); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1070 (2001) (suggesting that obligation to provide compensation for takings does not necessarily require a judicial remedy). *But cf. id.* (arguing that the Due Process Clause that would require a judicial remedy if other remedies provided by the state are inadequate and further arguing that "Congress could not repeal the existing Tucker Act remedy for governmental takings unless an adequate alternative remedy were available").

155. 369 U.S. 643 (1962).

156. *Id.* at 647-48.

157. *Lee*, 106 U.S. at 207-08.

on the Court's judgment, in light of congressional action, of the requirements of the overall remedial structure.[158]

C. *The FTCA and Tort Liability*

As noted above, in the early nineteenth century a ship captain in obedience to presidential order stopped a vessel, but was found personally liable—without defense—in an action in which it was decided that the president's order exceeded the scope of the statutory authorization.[159] By the mid-twentieth century, immunity doctrines had been developed to shield government officials and employees from personal liability in tort for carrying out governmental duties.[160] Although private employers could be held liable for the wrongs of their employees through doctrines of respondeat superior, this doctrine was unavailable through common law adjudication against the federal government under prevailing interpretations of sovereign immunity. In the early nineteenth century, common law tort liability against the government itself was almost unheard of, though a system of remedies against government employees existed, perhaps broader than is found today.

In 1946, legislation was enacted waiving sovereign immunity and establishing jurisdiction for a number of tort claims against the federal government. The Federal Tort Claims Act (FTCA)[161] was a major step forward, establishing the principle that the government would, under some conditions, be liable in tort just as would a private entity. But the statute has a number of significant limita-

158. For a statutory response to the Court's decision in *Malone*, see The Quiet Title Act of 1972, 28 U.S.C. § 2409a (2000); *see also* Block v. North Dakota, 461 U.S. 273 (1983) (discussing the Quiet Title Act of 1972). *Block* itself makes clear the interaction between statutory remedies against the government and the Court's treatment of officer suits, though the opinion has the benefit of not relying on sovereign immunity as a reason to bar the officer suit, *see id.* at 185-86 (not reaching whether prior to The Quiet Title Act the suit against the officer would have been permitted); rather the Court relies on the pre-emptive effect of a detailed statute on more generally available remedies. *See Block*, 461 U.S. at 282-86.

159. *See* text at notes 132-33, *supra*. The story is more complicated with respect to claims for the return of property that a private citizen asserts came into government hands improperly. *Compare* Land v. Dollar, 330 U.S. 731 (1947), *with* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704-05 (1949); *see also id.* at 726-29 (Frankfurter, J., dissenting).

160. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Barr v. Mateo, 360 U.S. 564, 570-76 (1959); Gregoire v. Biddle, 177 F.2d 570 (2d Cir 1949); *see also* Spalding v. Vilas, 161 U.S. 483, 498-99 (1896); Kendall v. Stokes, 44 U.S. 87, 98-99 (1845).

161. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified and amended at 28 U.S.C. § 2671 *et seq.* (2002)).

tions.[162] Of these, the most important is the "discretionary function" exemption.[163] This provision excludes from the waiver of immunity and jurisdiction any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[164] In the first case considering the discretionary function exemption, *Dalehite v. United States*,[165] the Supreme Court gave it an expansive reading, one that imposes significant limitations on the FTCA as a basis for tort liability of the government in circumstances where private parties would be liable. Although *Dalehite* has excluded tort liability in a number of instances, more recent decisions have clarified that negligence within a federal regulatory program but not involving questions of "public policy" could be actionable under the FTCA.[166]

The key point for present purposes, though, is this: As Congress has expanded the arena of government liability for tort (as in contracts and takings), so have Congress *and* the Court narrowed the availability of actions against federal government employees. They have done so, moreover, without resort to the rubric of "sovereign immunity" in ways that suggest that the expansion of sovereign immunity in *Larson* should be understood as having much more to do with shifts in the statutory structure of remedies than with any-

162. *See* 28 U.S.C. § 1346(b) (2000) (providing jurisdiction); *see also* 28 U.S.C. § 2680 (2000) (explaining exceptions).

163. *See* 28 U.S.C § 2680(a) (2000). Other notable exceptions bar jurisdiction based on the acts of an employee who was "exercising due care, in the execution of a statute or regulation, whether or not . . . valid," and exclude liability for certain intentional torts (for example, assault, libel, or slander). *See* 28 U.S.C.§ 2680(a), (h) (2000). In addition, the Court has interpreted the FTCA as inapplicable to claims by members of the Armed Services when those claims "arise out of or are in the course of activity incident to service." Feres v. United States, 340 U.S. 135, 146 (1950). Also excepted are claims "based on strict liability for ultrahazardous activity." Laird v. Nelms, 406 U.S. 797, 803 (1972) (rejecting suit for property damage resulting from sonic boom of military aircraft).

164. *See* 28 U.S.C. § 2680(a) (2000).

165. 346 U.S. 15 (1953) (holding that suit by those killed or injured when ammonium nitrate exploded as it was being loaded onto ships in Texas was barred). *See id.* at 36 ("Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."). The dissent argued that whether or not they were matters of policy, nonregulatory "housekeeping" decisions, such as the bagging temperature for explosive fertilizer, involve the same kind of balancing that "citizens do at their peril" and argued that the suit should go forward. *See id.* at 59-60 (Jackson, J., dissenting).

166. *See* Berkovitz v. United States, 486 U.S. 531 (1988) (distinguishing policy-making from particular instances of negligence in issuing a license, or authorizing distribution of vaccine, where government officials allegedly had no discretion to proceed as they did).

thing required by the Constitution itself. Two lines of development will be considered: the Court's development and expansion of immunities for individual defendants and the substitution of the government as the sole defendant under the FTCA.

The Court has actively developed official immunity doctrines to protect government employees from damages liability when sued either in common law torts,[167] or in constitutional tort actions founded directly on the Constitution for violating the constitutional rights of individuals under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[168] After *Bivens* and its progeny recognized a federal cause of action for damages against federal government employees under several constitutional provisions (thus permitting suit to be filed in federal court rather than in state court where most common law tort suits began),[169] the Court constructed an increasingly difficult-to-satisfy set of standards that plaintiffs had to meet to overcome the "official immunity" of federal executive branch officials when sued for violations of federal law.[170] Under current standards, executive branch officers have a "qualified" immunity, according to which the officer may be held

167. *See, e.g.*, Doe v. McMillan, 412 U.S. 306, 320 (1973); Howard v. Lyons, 360 U.S. 593 (1959) Barr v. Mateo 360 U.S. 564 (1959). The cases frankly acknowledge that the scope of official immunity was being formulated by the courts absent congressional definition. *See Doe*, 412 U.S. at 320-23; *Howard*, 360 U.S. 597; *Barr*, 360 U.S. at 569. Although the lower courts were in conflict for a period on whether the immunity attached to all acts within the outer perimeter of office or only those that were discretionary in character, the Court held that only discretionary acts were thereby protected. *See* Westfall v. Erwin, 484 U.S. 292, 297-300 (1988) (denying absolute immunity to federal employees sued for nondiscretionary acts and holding that immunity attaches only where challenged conduct is "within the outer perimeter of an official's duties and is discretionary in nature"); *see also Doe*, 412 U.S. at 320-25 (rejecting rule that "official immunity automatically attaches to any conduct expressly or impliedly authorized by law" in action against Public Printer and Superintendent of Documents). The ruling in *Westfall* was, however, legislatively overturned. *See infra* text at note 174.

168. 403 U.S. 388 (1971) (finding implied cause of action under the Constitution for damages to remedy violations of the Fourth Amendment).

169. *See* Carlson v. Green, 446 U.S. 14 (1980) (finding implied cause of action under the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (implying constitutional cause of action for damages to vindicate equal protection principles of due process clause). More recent decisions have been reluctant to extend the logic of *Bivens*, rejecting its application to due process claims, *see, e.g.*, Schweiker v. Chilicky, 487 U.S. 412 (1988), claims against federal agencies, *see* FDIC v. Meyer, 510 U.S. 471 (1994), or government contractors, *see* Correctional Services Corp. v. Malesko, 122 S. Ct. 515 (2001).

170. *See, e.g.*, Saucier v. Katz, 533 U.S. 194 (2001); Anderson v. Creighton, 483 U.S. 635 (1987); Davis v. Scherer, 468 U.S. 183, 190-97 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *But cf.* Hope v. Pelzer, 122 S. Ct. 2508, 2517 (2002) (rejecting argument that the "clearly established" standard can be met only if facts on which the damage claim is based are "materially similar" to prior decided cases, it being sufficient if the unlawfulness was "apparent" in light of clear established law). Judicial and legislative officers enjoy more

liable in damages only if he or she is found to have violated the "clearly established" constitutional rights of the plaintiff.[171] Thus, to overcome the qualified immunity defense, a plaintiff must show not only that the defendant's actions violated the law but also that the law was clearly established at the time of the action. Plaintiffs rarely succeed in doing so.[172] Moreover, the Court has indicated its unwillingness to extend the logic of *Bivens* to constitutional causes of action in other settings.[173]

Now to the second line of development: In 1988 Congress enacted the Westfall Act to provide in essence that the FTCA, with the United States as a defendant, would be the exclusive remedy for common law torts by federal employees acting within the scope of their employment.[174] Although this exclusivity provision does not apply to actions against government employees on constitutional tort theories,[175] it represents the culmination of a significant reversal in the nature of the remedies available for government wrongdoing in a number of areas spanning common law tort

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absolute immunities for claims arising out of their judicial or prosecutorial functions. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976).

171. *Harlow v. Fitzgerald*, 457 U.S. at 818 ("government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

172. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 nn.5-6 (1998) (suggesting that *Bivens* cause of action has not in fact provided compensation to most injured victims of constitutional violations and may overdeter law enforcement personnel).

173. *See* Correctional Services Corp. v. Malesko, 122 S. Ct. 515, 523 (2001) (emphasizing need for "caution toward extending *Bivens* remedies into any new context"); *see also supra* note 169. This new skepticism about judicially implied remedies for damages against government officers, the expanded statutory immunity conferred on federal officers under the FTCA (*see infra* text accompanying notes 174-76), and the limitations on the damages remedy that result from qualified immunity, together appear to work a significant retrenchment on the availability of damages suits based on federal law against government officers as a means of individual remediation and structural accountability.

174. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4563, codified at 28 U.S.C. § 2679 (2000). Responding to the decision in Westfall v. Ervin, 484 U.S. 292 (1988), *see supra* note 167, the Act's purpose is described in a leading treatise as providing "government employees with absolute immunity from common law torts committed within the scope of employment"—and even where the FTCA remedy is not available because of a statutory exclusion. LESTER & NOONE, *supra* note 138, at § 13.112; *see* United States v. Smith, 499 U.S. 160, 165-75 (1991); *cf.* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 426-27 (1995) (upholding judicial review of certification that acts were within scope of employment for purposes of invoking FTCA remedy and noting that effect of such certification may be to leave plaintiff with no remedy if matter falls within FTCA exception).

175. *See* 28 U.S.C. § 2679 (b)(2) (2000) (also excluding from exclusivity of suit against U.S. provisions federal statutory claims against government officials when "such action against an individual is otherwise authorized").

actions. Whereas in the early nineteenth century remedies against individual officers were a predominant mode of judicial redress and accountability (and remain so for state officers), today remedies against individual federal officers are often precluded, and the only remedy is that against the government.[176]

Thus, enactment of the Westfall Act—together with the FTCA itself and the judicial expansion of individual officer immunities in litigation against them for damages in constitutional torts—has had an effect on remedies for torts (common law and constitutional) similar to that we saw in the area of contracts and takings claims previously subject to some forms of judicial redress through actions against individual officers. As the Court of Claims remedy against the United States obviated the need for remedies to be permitted against individual officers in contracts and takings cases, in the Court's view, thereby resulting in important changes in sovereign immunity doctrine to preclude suits against the officers, the FTCA and the Westfall Act represent legislative moves in the same direction—to immunize government employees from liabilities assumed by the government, though often under more restrictive jurisdictional and remedial terms.[177]

D. *Sovereign Immunity, Remedial Gaps and Congressional Control of Jurisdiction*

It is important to note that today a large array of judicial remedies may be invoked against the federal government and its officers. In addition to mandamus, other forms of prospective relief against federal officials have been and are available.[178] The question of whether sovereign immunity barred certain forms of prospective relief against federal officials remained much in issue until 1976, when federal law was amended to waive sovereign immunity on claims against the government for relief "other than money damages."[179] Because the Administrative Procedure Act

176. It is worth remarking that there are a number of specific statutory abrogations of sovereign immunity, for example, in the litigation of patent and copyright claims. *See* 28 U.S.C. § 1498 (2000).

177. *See supra* notes 163-64 (noting discretionary function and intentional tort exemptions). In addition, FTCA claims are not tried to a jury and no punitive damages are allowed. See 28 U.S.C. §§ 2402, 2674 (2000). *See generally* Lehman v. Nakshian, 453 U.S. 156 (1981) (discussing absence of constitutional jury trial right in actions against the federal government).

178. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

179. *See* Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976) (amending section 10(b) of the Administrative Procedure Act, 5 U.S.C.§ 702, to provide that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency

(APA) generally provides for judicial review of agency action claimed to violate the law or to be otherwise arbitrary, it authorizes relief in a wide swath of cases.[180] Mandamus may still come into play, however, where non-statutory review of an officer's action is sought, and courts continue to invoke the distinction between discretionary and nondiscretionary acts to determine when relief is available.[181] Many statutes, in addition to the APA, specifically provide for judicial review of the decisions and orders of government agencies.[182]

Thus prospective or declaratory relief against federal officials plays an important role in securing government accountability

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or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.") The statute further provides that "[t]he United States may be named as a defendant in any such action . . . ." 5 U.S.C. § 702. With the removal of the minimum amount in federal question cases against federal officers at the same time, this waiver of sovereign immunity has resulted in "a substantial enlargement of the opportunities to bring suit against government officers to control their official action." LESTER & NOONE, *supra* note 138, § 16.08. For helpful discussions of prior law, see Byse, *supra* note 5, at 1484-1502; Cramton, *supra* note 6, at 404-24.

180. *See* 5 U.S.C. §§ 701-706 (2000). The scope of the APA's authorization of review is broad. Notably in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court upheld jurisdiction over a dispute between the state of Massachusetts and the federal Department of Health and Human Services over reimbursements under the Medicaid program. It upheld a lower court order reversing the department's disallowance of certain requests for reimbursement for past services—an order that, while not requiring any particular payment, might have the effect of increasing the stream of payments that would be made to the state. *See* 487 U.S. at 886-88. The United States had argued that such a claim was barred as one for "money damages" and as one over which the Claims Court would have had jurisdiction under the Tucker Act (and thus barred from APA review by a proviso that such review was not available if there was another adequate remedy in another court). The Supreme Court rejected both these arguments. *Id.* at 891-908. Yet most ordinary contract disputes over money will be reviewed outside the APA. *See, e.g.*, Upstate Fed. Credit Union v. Walker, 198 F.3d 372 (2d Cir. 1999) (upholding dismissal of APA claim because claim should have been brought under Contract Disputes Act). In addition to the proviso that APA review is available only where no other court could grant adequate relief, 5 U.S.C. § 704 (2000), the statute also specifies that review is not available where another "statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702 (2000).

181. *See, e.g.*, Estate of Michael v. Lullo, 173 F.3d 503 (4th Cir. 1999) (upholding mandamus jurisdiction over action against IRS official to allow foreign tax credit); Vishnevsky v. United States, 581 F.2d 1249, 1255-56 (7th Cir. 1978) (upholding jurisdiction to mandamus IRS officials to credit taxpayer with excess payment and specifically rejecting government's sovereign immunity defense) (noted in HART & WECHSLER, *supra* note 16 at 1017). *But cf.* Heckler v. Ringer, 466 U.S. 602, 616 (1984) (noting but questioning possibility of mandamus); Pittston Coal Group v. Sebben, 488 U.S. 105, 121-23 (1988) (rejecting availability of mandamus to reopen administrative denial of black lung benefits). *See also* HART & WECHSLER, *supra* note 16, at 999 (noting increasing importance of statutory forms of review).

182. *See, e.g.*, 29 U.S.C. § 160(e) (2000) (NLRB orders reviewable in court of appeals).

under law. Though most such remedies were originally "nonstatutory" in character, they could be brought only in connection with a jurisdictional statute. From the earliest days, the availability of relief against federal officials resulted from a mixture of judge-made remedies and legislatively organized judicial jurisdiction,[183] but with development of the Court of Claims, enactment of the FTCA, and the development of many specific forms of statutory review, the balance has shifted—an understandable development. What is perhaps harder to understand is the Court's vigorous invocations of the idea of "sovereign immunity" in the face of an overall remedial move towards government liability.

For despite a relatively broad scheme of remedies for alleged wrongdoing by the government and its officials, sovereign immunity is no mere relic. First, sovereign immunity functions in a wide range of areas as a "clear statement" rule for interpretation of statutes claimed to subject the United States to monetary liabilities, such that, for example, provisions generally authorizing awards of attorneys fees,[184] or general rules concerning interest on judgments,[185] or provisions authorizing damages, fines or penalties for violations of statutes (that otherwise apply to the United States as a substantive matter),[186] will not apply in the absence of unusually

183. The story of nonstatutory review of government action through mandamus and other prospective remedies is far more complex than my brief summary allows. As noted, there are important variations in the nineteenth century between courts willing to grant relief based on breach of legal duties and courts more concerned with protecting the discretion of the government actors. *See* Woolhandler, *Patterns, supra* note 6, at 422-29 (suggesting that the Taney Court denied relief in certain officer suits by expanding the concept of discretion to include legal errors that, under Marshall Court precedents, might have been redressable); *supra* note 131. It may be accurate to say that in the post-Civil War era, remedies against officers— remedies that had compensated for the assumption of federal sovereign immunity—began to be retrenched, to be followed by statutory responses that redressed some though not all of these remedial inadequacies by waiving sovereign immunity. *See also* Engdahl, *supra* note 6, at 20-22, 41.

184. *See* United States v. Bodcaw Co., 440 U.S. 202, 203-04 n.3 (1979) (per curiam) (holding that litigation costs cannot be assessed against the U.S. without specific statutory authorization).

185. *See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310, 314 (1986).

186. *See, e.g.*, Lane v. Pena, 518 U.S. 187 (1996) (finding no waiver for damages under one section of the Rehabilitation Act); United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res., 508 U.S. 1, 3 (1993) (finding that a statute waiving immunity from suit did not waive immunity from paying filing fees); Department of Energy v. Ohio, 503 U.S. 607 (1992) (holding that statute's waiver of immunity to civil penalties did not extend to waiver for punitive fines). *Cf.* United States v. Dalm, 494 U.S. 596, 621 (1990) (Stevens, J., dissenting) (disagreeing with Court's conclusion that lower court lacked jurisdiction, in part because of sovereign immunity, over taxpayer's claim for equitable recoupment, and commenting: "[t]he majority's affection for plain language seems to end where its devotion to sovereign immunity begins.").

clear statement. Second, there remain some claims against the United States that are outside the jurisdiction of any court. These would include common law tort claims, for example, that fall within the rather large area of discretionary judgments,[187] and which, under the Westfall Act, can be brought only against the United States—but which are subject to dismissal under the "discretionary function" exemption. They would also include claims based on government misrepresentations, in which government employees in good faith relied to their detriment on advice received from government offices.[188] And there are various remedies, including specific performance of contract, that may be available in litigation between private parties that are not available in litigation against the government.[189]

Sorting out the independent effect of "sovereign immunity" apart from the question of congressional control of the federal courts' jurisdiction is difficult. What we call the "sovereign immunity" of the United States in many respects could be described instead as a particularized elaboration of Congress' control over the lower court's jurisdiction. It is true that the Court has sometimes expressed its conclusions in language that suggests an a priori preference for one kind of remedy over another in the judicial construction of sovereign immunity law. *Larson*, for example, has broad language about how the government, "as representative of the community as a whole, can not be stopped in its tracks" by affording specific relief against an official. This language clearly does not explain or predict the caselaw, as the *Youngstown Steel* case just a few years later demonstrates.[190] *Larson* can instead best be

187. *See, e.g., Dalehite*, 346 U.S. 15; United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). *Cf.* 3 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.3, at 227 (3d ed. 1994), *cited in* SISK, *supra* note 138, at 696 (criticizing the Westfall Act as "seriously incomplete because federal employees remain potentially liable for constitutional torts, and victims of some intentional torts continue to have no remedy against the government" presumably because of the FTCA's exclusion of intentional torts other than by law enforcement employees).

188. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 429-30 (1990). *Cf. Dalm*, 494 U.S. at 610 (relying on sovereign immunity, in part, to hold that taxpayer was not entitled to seek equitable recoupment of taxes).

189. *See supra* note 139 and accompanying text. In addition, as many scholars have noted, as official immunities have expanded, remedial gaps are exacerbated by sovereign immunity bars. *See, e.g.*, Amar, *supra* note 73, at 1487; Engdahl, *supra* note 6, at 41-56.

190. The Court in *Larson* itself acknowledged that the prohibition on prospective relief would not apply in the same way to constitutional claims. See 337 U.S. at 704; *see also id.* at 690-91 & n.10 (also distinguishing claims of "ultra vires" official action from "error" in the exercise of granted power); *but cf. id.* at 691 n.11 (sovereign immunity may bar suit against officer even on constitutional claims if affirmative relief beyond cessation of conduct is required). The Court has relied on its decision in *Larson* to expand the immunities

understood as an illustration of the impact that Congress' exercise of its powers over the inferior federal courts—there, the creation and expansion of Court of Claims jurisdiction—has had on how the Supreme Court articulates the scope of the sovereign immunity doctrine.

Federal sovereign immunity law is almost entirely statutory in its operation, in that Congress determines what claims against the United States can be heard in federal and state courts.[191] Although Congress is in important respects "in charge" of how it uses the federal courts, it acts within limits that the courts themselves articulate. Federal courts are limited both formally and informally by congressional powers—but in a dynamic process in which the courts also impose limits on Congress. Within this dynamic, the ultimate limits on both Congress' power to withdraw judicial remedies for governmental wrongs and on the courts' powers to provide remedies to vindicate constitutional rights against Congress's legislative commands remain, for the most part, untested,[192] creating ambiguities that have allowed for much change in the role played by officer suits as compared to suits directly against the government in constraining and remediating governmental wrongs.

While the scope of sovereign immunity has changed, so too have the remedies available against individual officers; while some remedial gaps have been closed, others have opened.[193] The availability of judicial relief for claims against the United States itself has markedly expanded and regularized over time; yet new questions have arisen and some old questions remain unresolved. The essential dynamism of the systems in place for responding to such claims emphasize that claims against the government are inevitably a locus for tension and confrontation between the political and the

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of states and state officials when sued as defendants in federal courts. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding the Eleventh Amendment generally prohibits award of prospective relief against state officials under state law).

191. *See* Glidden v. Zdanok, 370 U.S. 530 (1962) (holding that Article III courts can exercise jurisdiction over claims against the United States under jurisdiction conferred by Congress); *cf.* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 102, 67-70 & n.23 (1982) (Brennan, J., announcing the judgment of the Court) (treating suits against the government as "public rights" cases that can be brought within Article III jurisdiction).

192. *See infra* text accompanying notes 283-98.

193. *See generally* Fallon and Meltzer, *supra* note 1, at 1778-81 (arguing that the "law of remedies is inherently a jurisprudence of deficiency" and asserting that the number of cases in which there is no effective judicial redress for wrongs by the government and its officers "has expanded under doctrines that are now well entrenched").

judicial branches.[194] The structure of the doctrine has been a matter of changing remedial *choices* made by courts as they reshape the scope of the doctrine in response to what Congress has done. Although some ambiguity in the boundaries of legislative and judicial power may be relatively benign, or, in any event, inevitable, as I will suggest below there are good reasons to re-consider what have become reflexive invocations of sovereign immunity to defeat judicial remedies.

III. Sovereign Immunity and Judicial Independence

Understanding sovereign immunity as a judge-made doctrine, one not clearly compelled by the Constitution and one interpreted with varying degrees of stringency, opens up possibilities for interpretive choices. In this section I consider how early concerns for judicial independence may cast light on the attraction the sovereign immunity doctrine held for the Court. At the same time, however, I suggest that sovereign immunity's possible early appeal in sustaining perceptions of judicial independence can not justify its expansive invocation to defeat claims against the government.[195]

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194. My claim here is largely a descriptive, rather than a normative, one about the continued existence of ambiguities on fundamental questions of separation of powers. For discussion of a somewhat more normative claim about the "dialogue" between courts and Congress over jurisdiction, see Akhil Amar, *Taking Article III Seriously: A Reply to Professor Friedman,* 85 Nw. U. L. Rev. 442 (1990); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction,* 85 Nw. U. L. Rev. 1 (1990); Barry Friedman, *Federal Jurisdiction and Legal Scholarship: A (Dialogic) Reply,* 85 Nw. U. L. Rev. 478 (1990); Mark Tushnet, *The Law, Politics and Theory of Federal Courts: A Comment,* 85 Nw. U. L. Rev. 454 (1991); Michael Wells, *Congress's Paramount Role In Setting the Scope of Federal Jurisdiction,* 85 Nw. U. L. Rev. 465 (1990).

195. For arguments that sovereign immunity or related doctrines limiting remedies against governments are justified, have beneficial effects, or do not have significant adverse effects, see for example, Krent, *supra* note 2, at 1531-34 (justifying many sovereign immunity doctrines on grounds of democracy); John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983,* 84 Va. L. Rev. 47, 68-82 (1998) (treating officer suits and claims against states as part of an integrated remedial system and arguing that on the whole the remedial system for government wrongdoing strikes appropriate balance based on "fault" of government action); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law,* 109 Yale L.J. 87, 99-106 (1999) (arguing as well that limitations on remedies allows for appropriate and beneficial evolution of constitutional law); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs,* 67 U. Chi. L. Rev. 345, 347-48 (2000) (arguing that government liability on the same terms as private firms would not produce appropriate deterrence); *see also* Alfred Hill, *In Defense of Our Law of Sovereign Immunity,* 42 B.C. L. Rev. 485 (2001) (writing "in defense of our law of sovereign immunity" which, due to officer suits and waivers of immunity on government contracts, he argues, rarely defeats relief). To fully address these arguments is beyond the scope of this essay. I note here only that, to the extent that remedial rules prohibiting certain kinds of relief serve important functions, they could be reasoned about far more directly, e.g.,

How claims against the government are treated can serve as useful measures of judicial independence as well as of more general commitments to the rule of law. Indeed, one of the principle arguments in favor of an independent judiciary is that it will be able to hold government accountable under law, as well as to render impartial justice between the government and the people. The idea of "sovereign immunity" is thus in many ways wholly antithetical to an independent judiciary holding government accountable to law. Yet early cases suggest that, in making remedial choices under the rubric of "sovereign immunity," the Court may have been influenced by concerns over the finality and enforceability of judgments linked in article III doctrine with judicial independence.

The independence of a court can be understood across many axes.[196] Why, though, would sovereign immunity—a doctrine that *limits* judicial power against the government—have anything to do with judicial independence, which consists, in part, of courts' willingness to reach decisions on the law even if the political branches disagree? A partial answer may lie in the caselaw prohibiting executive or legislative revision of judgments, the development of which has featured cases from the United States Court of Federal Claims and its predecessors.

A court whose judgments are revised by other branches may not be seen as independent, and may not understand itself as independent.[197] It may take less care in reaching conclusions,[198] or may

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through doctrines of remedial restraint, than through unreasoned invocation of sovereign immunity. *See supra* note 114.

196. For two helpful recent collections of essays, see JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter Burbank & Friedman] and JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O'Brien eds., 2001) [hereinafter Russell & O'Brien]. As these collections suggests, judicial independence embraces many different ideas, including decisional independence; institutional independence; the independence of the court as whole and the independence of individual judges; and psychological and professional orientations to independence.

197. Issues of status—of the courts, of the judges who sit on them, and of the law they generally interpret and apply—may also be bound up in questions of perceived independence.

198. Additionally, if judicial judgments can be overridden by executive or legislative authorities, is there a possibility that those courts would eventually attract less able people to sit as judges? Alternatively, would such a tribunal be less able to command the attention of lawyers and litigants if the court's "judgments" simply have to be re-litigated in a legislative arena? This effect seems somewhat doubtful, to the extent that winning a judgment is understood as the first stage of a necessary process to recover. *Cf.* Shimomura, *supra* note 18 at 626, 653 n.238 (explaining that between 1855-1863, claimants faced a "no win" situation: if the claimant was successful in the Court of Claims, Congress gave little weight to the

seek to curry favor with the political revisory authority to avoid being reversed or ignored.[199] A court that cannot enforce its own judgments may need to be mindful of the avenues for enforcement outside the judiciary and the wishes of other branches of the government in deciding what relief to afford.[200] A court that cannot grant effective relief may be perceived by citizens as impotent,[201] and, without some degree of popular support for the judiciary, courts may have difficulty functioning independently of other branches of government.[202]

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decision and reheard the matter, but if the claimant lost in the Court of Claims, Congress "tended to treat the claim as dead"). Law does not constrain the political branches' decisions to the same extent that, on conventional understandings, law constrains appellate courts. Thus it might be that if appeal from a court judgment lies to a legislative or other political body, constraints on reversal or modification of judgment are likely to be weaker and hence also the incentives to "do it right" the first time.

199. This possibility might be subject to empirical testing, for example, by trying to measure whether the Court of Claims has been more deferential to the government in its congressional reference duties than in issuing final judgments. Since its creation the Court has heard some cases on "reference" from Congress, where in form and fact its opinion was considered merely "advisory." *See, e.g.*, 28 U.S.C. §§ 1492, 2509 (2000). In at least some of these congressional reference cases the claims court has not shied away from finding liability or recommending substantial damage awards. *See, e.g.*, Gray v. United States, 21 Ct. Cl. 340, 344, 392-407 (1886) (finding that certain claims by U.S. citizens that the United States had surrendered in negotiations with France, were valid, and that the U.S. had thereby taken the claimants' property without just compensation and should provide for payments to the claimants). Despite the possibility for currying favor with revisory authorities noted above, it is also possible that the habits of mind of judges who generally make "real" judgments might carry over to the smaller reference jurisdiction. The link between finality and judicial independence may be at its most clear when the influence of other branches seeks to work against the interests of individual claimants. *Cf. Sioux Nations*, 448 U.S. 371 (allowing for mid-course changes in law benefiting claimants against the government rather than the government itself); HART & WECHSLER, *supra* note 16, at 114.

200. *See* infra text at notes 259-62. Although judicial judgments are rarely entirely self-executing, judgments that require both legislative and executive action may be understood as bearing a higher risk of non-enforcement. *See* Jackson, *supra* note 74 at 97-98. Both congressional appropriation and executive disbursement are ordinarily needed to pay off a claim against the United States.

201. *Cf.* Shimon Shetreet, *The Critical Challenge of Judicial Independence in Israel, in* Russell & O'Brien, *supra* note 196, at 244-46 (arguing the need for constitutional protection for the proper execution of a legal decision).

202. A number of comparative studies suggest the importance, in establishing the legitimacy and independence of constitutional courts, of their being open to direct complaints by individual citizens. *See, e.g.*, DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 14 (1997) (describing how Germany came to regard the citizens' constitutional complaint to the Constitutional Court as an important prerogative of citizenship); *cf.* Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997) (arguing that both the European Court of Justice and the European Court of Human Rights have "compiled a more successful compliance record in cases involving private parties litigating directly against state governments or against each other" that in state-to-state disputes).

As the first federal court created for the purpose of adjudicating claims against the government,[203] the Claims Court (now, the United States Court of Federal Claims [COFC]) illuminates evolving concepts of judicial independence.[204] Its history suggests that sovereign immunity has functioned as a separation of powers doctrine, not only recognizing Congress' authority over the expenditure of public monies but also protecting courts from losing in

203. The most recent major change in the status of the Claims Court occurred in the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 105, 127, 96 Stat. 25, 27-28, 37-39 (codified as amended in scattered sections of 28 U.S.C.) (establishing United States Claims Court as Article I to replace the trial commissioners of the former Court of Claims and establishing a new Article III Court of Appeals for the Federal Circuit, which took over the functions of the Article III judges review panels of the former Court of Claims). The name of the United States Claims Court was changed in 1992 to the Court of Federal Claims ("COFC") by Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516 (codified as amended at 28 U.S.C. §§ 1491-1509). For additional discussion of the history of the Claims Court, see *infra* notes 204, 206, 212-21.

204. The Court of Claims has for much of its existence been regarded as an Article III court itself. Several cases suggest that it acquired Article III status in 1866. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1871) (although the Court of Claims originally did not exercise judicial power, after 1866 amendment the court was "thus constituted one of those inferior courts which Congress authorizes"); *see also* Miles v. Graham, 268 U.S. 501 (1925) (assuming that Court of Claims judges were protected by the Constitution against diminution in their salaries); United States v. Union Pac. R.R., 98 U.S. 569, 603 (1878) (assuming that the Court of Claims was created by Congress to exercise the judicial power of Article III). In 1910 the Claims Court's advisory jurisdiction was expanded, and by 1929 the Supreme Court concluded in dicta that the it was a legislative court, *see* Ex parte Bakelite, 279 U.S. 438, 451-55 (1929). In 1933 it so held. *See* Williams v. United States, 289 U.S. 553 (1933). However, several opinions in *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591-93, 600 & n.24 (1949) (Jackson, J., announcing judgment of the Court); *id.* at 609-11 (Rutledge, J., concurring in the judgment); *id.* at 541 nn.20-21 (Vinson, C.J., dissenting), cast doubt on whether a majority of the Court still agreed with the reasoning in *Williams*. In 1953 Congress declared its view that the Claims Court was an article III court. *See* Act of July 28, 1953, Pub. L. No. 83-158, § 1, 67 Stat. 226. In 1962, the Court so held. *See* Glidden v. Zdanok, 370 U.S. 530 (1962). In 1982, with the statutory shift in appellate functions to the Article III judges of the Federal Circuit, the Court of Claims was reconstituted as an Article I court, *see* Federal Courts Improvement Act § 105, 28 U.S.C. § 171 (2000) whose adjudicatory decisions are reviewable by the U.S. Court of Appeals for the Federal Circuit, *see* 28 U.S.C. § 1295(a) (3) (2000). *See generally* Shimomura, *supra* note 18, at 659-98 (describing shifting perceptions of the Claims Court's status). *But cf.* HART & WECHSLER, *supra* note 16, at 113 (asserting that the Supreme Court generally regarded the Claims Court as an Article I court). Since article III courts review the COFC's decisions I assume that Article III requirements of finality would need to extend to the Claims Court's judgments. *See* United States v. Jones, 119 U.S. 477, 480 (1886) (upholding jurisdiction to review judgment of Court of Claims because "it is conclusive as to everything it embraces"); *see also* Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 699 (1927) (holding that Court lacked jurisdiction to review decision of court below in an "administrative" trademark proceeding because the court did not issue a "judgment binding parties in a case" for Article III purposes); *cf.* In re Sanborn, 148 U.S. 222 (1893) (dismissing for lack of jurisdiction a petition for review of an advisory decisions of Court of Claims on a reference case); United States v. Ferreira, 54 U.S. 40, 47-52 (1852) (finding no jurisdiction to review recommended awards pursuant to treaty by district judges acting as commissioners)).

confrontations with the political branches by focusing on specific indicia of likely legislative compliance.[205] History also suggests that the degree to which such independence has been achieved may owe as much to the self-restraint of both the political and the judicial branches as it does to more explicit doctrinal rules. I will develop these points below by focusing on the caselaw concerning the finality and enforceability of Article III judgments as aspects of the constitutional law of judicial independence, connected with the concerns of "sovereign immunity."

A. *Judicial Independence and Finality of Judgment*

The independence of Article III courts from having their judgments formally subject to revision did not come without contest. Perhaps in part out of concern that the appropriations power requires final decision by Congress of what the debts of the United States were,[206] Congress repeatedly sought to use federal judges to manage claims against the government without according those judgments finality, giving rise to decisions thought to reflect fundamentally on the nature of the Article III "judicial power." Thus, in *Hayburn's Case*,[207] most members of the United States Supreme

205. In contrast to Professor Krent, who has argued that much of sovereign immunity doctrine is normatively justifiable as a "structural protection for democratic rule," *see* Krent, *supra* note 2, at 1531, my claim here is a descriptive one that emphasizes sovereign immunity's function in protecting (the courts' perception of) judicial independence.

206. *See* WILLIAM COWEN, PHILIP NICHOLS, JR., & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS, A HISTORY PART II: ORIGIN, DEVELOPMENT, JURISDICTION, 1855-1978, at 5 (1978) [hereinafter COWEN ET AL.] (noting that early Congress was unwilling to permit judicial determination of claims against government both because of prior history of legislative or administrative resolution under the Articles of Confederation and "more important" because of Article I, § 9 which "Congress saw . . . as a directive to retain control over public expenditures"); Shimomura, *supra* note 18, at 651-52 & n.218 (noting that many in Congress in 1850s shared the "view that delegation of final jurisdiction over claims to the courts was inconsistent with Congress' appropriation power"); Weicek, *supra* note 19, at 393 (noting as an important favor explaining continuation of Congress' legislative claims practice prior to 1838 "the prevalence of widespread doubt, both inside Congress and out, concerning the constitutionality of alternative modes of claims disposition" and the impossibility, in light of Article I § 9, of courts requiring Congress to make an appropriation).

207. 2 U.S. (2 Dall.) 408 (1792). For helpful discussions of *Hayburn's Case*, see STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 106-11 (1997); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 590-618 (1989); Neal Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1730-37 (1998); Maeva Marcus & Robert Tier, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 (1988). These works suggest that to the extent that the objection was to federal courts giving nonbinding advice, there were competing traditions that might have supported a different rule. For purposes of this essay, I focus, not on the sources for or correctness of the rule against advisory opinions, but rather on its relationship to the concerns underlying federal sovereign immunity.

Court in 1793 declined to exercise jurisdiction as Article III judges to determine amounts owed to veterans, due in important measure to the presence of a revisory authority in the Secretary of War over the amounts found due.[208] Part of the constitutional independence of the judges, it was claimed, involved their being able to issue judgments that are final as to what they decide. Some justices objected to the exercise of judicial jurisdiction given the possibility of both executive and legislative revision (presumably through decisions whether to pay the amount certified by the Secretary of War),[209] while others focused on the objection that the Secretary of War (or the Congress) would be functioning as appellate courts

208. The Invalid Pension Act of 1792, Act of March 23, 1792, ch. 11, 1 Stat. 243, directed the circuit courts to examine claims of military pensioners, and, if it found a pensioner qualified, to submit the name and a recommended amount to be paid to the Secretary of War. *See* HART & WECHSLER, *supra* note 16, at 99. At the time Supreme Court justices regularly were required to sit on the circuit courts. The statute required the Secretary to include any pensioner so certified by the circuit court on the list for a pension except that, "in cases of suspected 'imposition or mistake,' the Secretary was to withhold the suspected pensioner's name and so report it to Congress." *Id.* On a petition to mandamus the circuit court for Pennsylvania to act on a pension application, the Court held the decision over, never acting on the petition, *see* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792), before the issue was mooted by the amendment of the 1792 Act in the Act of Feb. 28, 1793, ch. 17, 1 Stat. 324, which required judges only to receive and transmit evidence to the Secretary of War for his determination of the pension claims. *See* COWEN ET AL., *supra* note 206, at 5-6 n.10.

209. *See* Opinion for the Circuit Court for New York (Chief Justice Jay and Justice Cushing of the Supreme Court and District Judge Duane), *reprinted at* Hayburn's Case, 2 U.S. 409, 410 (stating that "the duties assigned" to the circuit courts under the Act were not "properly judicial," because they were "subject[ ] first to the consideration and suspension of the secretary of war and then to the revision of the legislature . . . ."). For similar views, see Letter of April 18, 1792 of the Circuit Court for Pennsylvania (consisting of Justices Wilson and Blair and District Judge Peters), *reprinted at* 2 U.S. (2 Dall.) 409, 411-12 ("because the business directed by this act is not of a judicial nature [i]t forms no part of the power vested by the constitution in the courts of the United States," because if the court had proceeded, "its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States."). Some of the judges suggested their willingness to act as commissioners, rather than Article III judges, in reviewing the pension claims as Congress had contemplated, *see Opinion for the Circuit Court for New York*, an arrangement ultimately abandoned (though not before at least one veteran apparently had his prior success before judges, sitting as commissioners, reversed by the Supreme Court). *See* Note by the Chief Justice, Inserted By Order of the Court, *in* United States v. Ferreira, 54 U.S. 40, 52-53 (1851) (describing Yale Todd case, decided in 1794, as holding that the 1792 act was unconstitutional insofar as it sought to confer on the circuit courts matters outside the judicial power; that the 1792 Act did not authorize judges to act individually as a commissioners; and accordingly that moneys paid out on their findings were due back to the United States). For further discussion, see Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 309-10 (1986).

without being appointed in the manner and having the tenure security required for the exercise of Article III judicial power.[210]

A similar congressional effort to use judicial officers to help resolve claims but without the court's judgments having final authority arose in the formation of the first Court of Claims—and the Supreme Court invoked similar principles in response. In 1855 an act to create a " Court for the Investigation of Claims Against the United States," was the first effort to establish a standing court of claims.[211] The court, whose judges had life tenure during good behavior,[212] could hear cases directly filed by private claimants based on a contract, express or implied, with the United States, or based on a federal statute or regulation.[213] It could also hear matters on congressional reference. The court's decisions, however, were not treated as final but as subject to revision by Congress, whose Committee on Claims often rejected decisions in favor of claimants in deciding whether to recommend appropriations for their payment.[214]

In 1863 (under the pressure of many claims arising from the Civil War and the urging of President Lincoln for the government "to render prompt justice against itself, in favor of citizens"), Con-

210. *See, e.g.*, Letter of June 8, 1792, of the Circuit Court for the District of North Carolina (Supreme Court Justice Iredell and Judge Sitgreaves), *reprinted at* Hayburn's Case, 2 U.S. (2 Dall.) 409, 412-13 (concluding that "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary of war, if he shall have cause to suspect imposition or mistakes; this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution; for though congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the constitution requires and holding their offices by no other tenure than that of their good behavior, by which tenure the office of secretary of war is not held . . . . [And] no decision of any court of the United States can, under any circumstances in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments . . . .").

211. *See* COWEN ET AL., *supra* note 206, at 14-20, on which I rely heavily for this paragraph. Interestingly, the legislation as initially introduced was to create a "Commission" to examine private claims, but the proposal was amended before enactment to create a "Court." *Id.* at 13-14.

212. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612; *see also* Shimomura, *supra* note 18, at 652 n.225 (noting congressional debate over whether judges should have fixed or life terms and citing CONG. GLOBE, 33d Cong., 2d Sess. 106-14 (1855)).

213. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

214. *See* COWEN ET AL, *supra* note 206, at 18; RICHARDSON, *supra* note 20, at 8-9; Shimomura, *supra* note 18 at 652-53 (describing Congress' decisions to rehear claims decided in favor of the claimant by the 1855-63 version of the Claims Court); Wiecek, *supra* note 19, at 397-98. For discussion of the possibility that even having waived sovereign immunity Congress might have power to refuse to appropriate funds to pay judgments, see infra at notes 253-55 and accompanying text.

gress amended the finality provisions of the existing scheme, authorizing appeal to the United States Supreme Court "from any final judgment or decree" of the court in excess of $3,000.[215] Yet the force of this apparent judicial finality was undermined by an added provision that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefore shall be estimated by the Secretary of the Treasury."[216]

In *Gordon v. United States*,[217] Supreme Court review was sought of a Court of Claims decision. But after hearing argument from the petitioner, the Supreme Court dismissed the appeal for want of jurisdiction. The subsequently published opinion of Chief Justice Chase indicated that "the authority given to the head of an executive department, by necessary implication, in the fourteenth section of the amended Court of Claims act, to revise all the decisions of this court requiring payment of money, denies to it the judicial power from the exercise of which appeals can be taken to this court."[218] Chief Justice Taney's draft opinion, however, more broadly argued that because of *Congress's* control over whether to pay the judgments estimated for by the Secretary of the Treasury, the decisions of the Court of Claims were outside the judicial

215. *See* COWEN ET AL., *supra* note 206, at 212 (quoting Lincoln's Annual Address to Congress, 1861, 62 CONG. GLOBE 37th Cong., 2d Sess., app. at 2 (1862)).

216. *See* Act of March 3, 1863, § 14, ch. 92, 12 Stat. 765 (1863).

217. 69 U.S. (2 Wall.) 561(1865). All that appears at this citation is a brief reporter's summary stating in relevant part that "[a] majority of the court [Justices Miller and Field dissenting] . . . finding itself constrained to the conclusion that, under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised by this court, and intimating that the reasons which necessitated this view might be announced hereafter—the term being now at its close—the cause was simply dismissed for want of jurisdiction." Subsequently, an opinion of Chief Justice Chase was issued and published in the Court of Claims reports. Gordon's Case, *reprinted in*, 7 Ct. Cl. 1 (1871). Many years later the Court published a draft opinion written by Chief Justice Taney, who evidently prepared the draft to aid the Court in resolving issues prior to argument. (The draft is reprinted at Gordon v. United States, 117 U.S. 697, app. (1886) (draft of opinion by Chief Justice Taney in case decided in 1864 term). Taney died, however, before the case was disposed of, and Chase was appointed Chief Justice. The note of those responsible for the Taney draft's later publication indicates that the then-sitting justices in *Gordon* were influenced by his views. *See* Gordon, 117 U.S. App. at 697 & n.*.

218. Gordon's Case, 7 Ct. Cl. 1, 2 (1871), *reprinting* Chief Justice Chase's opinion in Gordon's Case, 69 U.S. 561 (1865); *see supra* note 217. Chief Justice's Chase opinion indicates the problem was the revisory authority in the Secretary of the Treasury, *id.* at 2, and the Court itself has come to so characterize the reason for the *Gordon* decision. *See e.g.*, United States v. Jones, 119 U.S. 477, 478-79 (1886) (quoting Chief Justice Chase's statements from "the records of the court"). *See also infra* notes 219-20 (discussing draft memorandum of Chief Justice Taney expressing a broader range of concerns in explaining why the Supreme Court could not review the judgment).

power the Supreme Court could exercise—because the courts could not constitutionally use process to secure payment of monetary judgments against the United States.[219] This constitutional problem stood in contrast to what Taney saw as the necessities of judicial power: "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."[220] The statue was amended, in apparent response to Chase's narrower argument, to remove the revising power of the Secretary of Treasury.[221] The Taney draft's concern about the effect of Congress' power of appropriation over the capacity of an Article III court to issue a money judgment against the United States was not finally laid to rest until the 1970s, and then over dissent, as will be discussed below.

A formal revisory power in another branch has many potential costs, including that of disrespect for the judgments of courts, but it has at least the benefit of institutional accountability and transparency, in the sense that the court enters the judgment it believes is appropriate, and then another branch outside the court acts to

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219. *See* Gordon v. United States, 117 U.S. 697, app. at 702-03 (Taney, C.J., draft memorandum) ("[A]ll that the Court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates, and Congress sanctions it by an appropriation, it is then to be paid, but not otherwise . . . [and] whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department . . . .").

220. *Id.* at 702; *see also id.* at 702-4 (asserting that the Court "has no jurisdiction in any case where it cannot render judgment in the legal sense of the term, and when it depends upon the legislature to carry its opinion into effect or not at the pleasure of the Congress"; Congress cannot require the court to "express an opinion on a case where its judgment would not be final and conclusive upon the rights of the parties, *and* process of execution awarded to carry it into effect") (emphasis added). *Gordon* was not the only case in which Taney was skeptical about money claims in effect against the United States. *See* Kendall v. United States ex rel Stokes, 37 U.S. (12 Pet.) 524, 627 (1838) (Taney, C.J., dissenting) (objecting to issuance of mandamus to compel the Postmaster to credit certain accounts).

221. The Court itself has construed the course of events as relating to the revisory power in the Secretary of the Treasury. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 144-45 (1871) (describing how the Claims Court was originally "authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of opinion [in *Gordon*] that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal. The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court. . . ."); United States v. Jones, 119 U.S. 477, 478-79 (1886) (describing *Gordon* as resting on the presence of executive authority "to revise all the decisions of that court" and noting that Congress deleted the objectionable section 14, and "from that time until the presentation of this motion it has never been doubted that appeals would lie").

agree or disagree. A related but arguably more severe problem arises when the political branches direct a court to enter judgment inconsistent with the court's own view of the facts and apparently controlling law.[222] The most significant case, *United States v. Klein*,[223] arose in the Court of Claims.

In the events leading up to *Klein*, Congress had enacted legislation to compel both the Supreme Court and the Court of Claims to rule adversely to certain claimants who had received pardons.[224] In an apparent effort to defeat a judgment (under a statute authorizing payment of certain claims of loyal southerners) in favor of a claimant who had received a presidential pardon, Congress passed legislation requiring the Claims Court, and the Supreme Court on review, to "dismiss" the cause where proof of loyalty was established

222. This problem can be described in different ways. For Professor Young, the cases suggest an "anti-puppeteering" principle that would prohibit the political branches from using the courts to achieve unconstitutional ends. *See* Gordon G. Young, *A Critical Reassessment of the Caselaw Bearing on Congress' Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 156-58 (1995) (arguing that *Klein* problem involves Congress' use of a specific limitation to dictate substantively unconstitutional results). For Professor Sager, *Klein* stands for the principle that courts may not be required to go through a charade, suggesting that they are exercising their own judgment when they are not. *See* Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2528-29 (1998) (suggesting, in light of expressive functions of adjudication, that *Klein* stands for principle that "[t]he judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence . . .). For Professors Liebman and Ryan, the essential problem was that the courts were first given jurisdiction but then told they could not make an independent judgment of what the Constitution meant. Liebman & Ryan, *supra* note 111, at 815-25. For Kim Lane Scheppele, writing in another context, the political branches must leave "interpretive discretion" to the courts in order to promote legitimacy of the rule of law. *See* Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressures*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 227, 268-70 (Stephen B. Burbank & Barry Friedman eds., 2002) (suggesting that political control of the law is legitimate when made through proper process, in a publicly transparent way, and in a way that leaves room for interpretive discretion to the court).

223. 80 U.S. (13 Wall.) 128, 146 (1871).

224. Under legislation permitting persons who were loyal to the Union to recover property or payment therefor if it were taken by the Union Army, suit was brought in the Court of Claims to recover for the Union Army's seizure and sale of cotton belonging to Victor Wilson, represented after his death by administrator Klein. The Court of Claims initially found Wilson to have been loyal and entitled to recover, but, on reopening the case, found possible evidence of disloyalty but also concluded that his estate was nonetheless entitled to recover because Wilson had been pardoned. *See Klein*, 80 U.S. at 132-33 (reporter's statement of the case); Klein's Case, 7 Ct. Cl. 240, 245-49 (1873) (lower court decision in compiled set of reports); *id.*, 7 Ct. Cl,. app. at vii-viii; *see also* United States v. Padelford, 76 U.S. (9 Wall.) 531, 541-43 (1870) (interpreting the legislation to extend benefits to persons who were pardoned). *See generally* Gordon G. Young, *Congressional Regulation of Federal Courts Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WISC. L. REV. 1189, 1197-99.

through reliance on a pardon.[225] In *Klein*, the Court rejected the effort to use the constitutional power over federal court jurisdiction to effectuate legislative revision of existing judgments.[226]

To the extent it holds that the Act "impair[s] the effect of a pardon, . . . thus infringing the constitutional power of the Executive,"[227] *Klein* stands importantly for the principle that Congress cannot use its power over the courts' jurisdiction to force the courts to give effect to a substantively unconstitutional rule. The *Klein* Court, however, seemed to believe it was acting on a broader principle relating to the role and independence of the courts,[228] that Congress lacks power to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[229] But it was well-established that changes in substantive law may be applied to pending cases (as *Klein* recognized),[230] and thus it is unclear what kind of prohibition *Klein* stands for where the "rule of decision" is not independently unconstitutional. The Court's opinion suggests three inquiries.

First, is the legislation an exercise of congressional power to make exceptions to appellate jurisdiction for a whole class of cases?

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225. *See* Act of July 12, 1870, 6 Stat. 230, ch. 251 at 235 (providing that "in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided [i.e., excluding pardons] . . . .the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction").

226. *See Klein*, 80 U.S.(13 Wall.), at 143-47. Another provision of the same 1870 legislation required the Court of Claims to dismiss cases in which evidence of a pardon was relied on to establish loyalty. *See* Act of July 12, 1870, 16 Stat. 235 (providing that, with respect to the Court of Claims "on proof of . . . pardon and acceptance [without explicit disclaimer of having participated in the rebellion] the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant"); Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1871), *discussed in* Young, *Critical Reassessment*, *supra* note 222, at 158-165. Professor Young distinguishes *Klein* (where the Supreme Court had been given jurisdiction, but only to reverse a judgment based on a pardon) from *Armstrong*, which Young treats as involving pure jurisdiction stripping because it simply excluded claims of those pardoned for disloyalty from the jurisdiction of the lower federal courts. For present purposes, the two cases differ insofar as the provision at issue in *Klein* was directed at interfering with a judgment that had already been entered, thus posing more sharply the problems of legislative revision that concerned the Court in *Gordon*. However, both legislative revision and efforts to control jurisdiction based on the merits of the case against the government are intimately linked to the "sovereign immunity" question of the role of courts in deciding monetary claims against the federal government.

227. *Klein*, 80 U.S. (13 Wall.) at 147; *see also id.* at 145 ("[The Act's] great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.").

228. *See* Sager, *supra* note 222, at 2525-26; *see also* Liebman & Ryan, *supra* note 110, at 818.

229. *Klein*, 80 U.S. at 146.

230. *Id.* at 146-47 (discussing *Wheeling Bridge* case).

If so, as in *Ex parte McCardle*[231], its action is presumptively valid. *Klein* suggests, however, that where the Court initially has jurisdiction but is then directed to dismiss upon a set of facts adverse to the claimant, such a directive does not go to jurisdiction but to the merits and cannot be sustained as an exercise of the exceptions power.[232] What the Court seems to be reaching for is a line between Congress' power over jurisdiction and the Court's adjudicatory independence in exercising jurisdiction, and thus a line between jurisdiction and the outcome on the merits.[233]

Second, the Court sought to distinguish Congress' exercise of its power to change the governing substantive law from its impermissibly prescribing rules of decision for this pending case,[234] on the ground that "no new circumstances have been created by legislation [b]ut the court is forbidden to give effect to evidence which,

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231. 74 U.S. (7 Wall.) 506 (1869).

232. *Klein*, 80 U.S. (13 Wall.) at 146 ("The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. . . . this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."). Since courts have jurisdiction to determine jurisdiction, and since jurisdiction can turn on facts (who is a diverse party, for example), this formulation does not easily distinguish valid uses of the power to define jurisdiction from something more problematic.

233. This view is captured by a recent reference to *Klein*. *See* Loving v. United States, 517 U.S. 748, 757 (1996) (citing *Klein* for the proposition that "Congress may not deprive court of jurisdiction based on the outcome of a case . . ."). Given the appropriations power, this distinction could perhaps be formally sustained if Congress legislates in a form that prohibits payment of a judgment rather than in a form directing the courts what judgment to enter. *See infra* note 242 (discussing *Eslin*). *See also* Ex parte Pocono Pines Assembly Hotels Co., 285 U.S. 526 (1932) (denying review to Claims Court decision upholding constitutionality of a "remand" statute which it construed as a congressional reference to find facts relating to whether a judgment previously entered by the Court of Claims should be paid); HART & WECHSLER, *supra* note 16, at 115 (discussing case); *infra* note 293 (same).

234. *Compare Klein*, 80 U.S. (13 Wall.) at 146 (Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it"), *with* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855) (upholding application of change in statutory law that had the effect of requiring dissolution of an injunction). In *Klein*, the Court described *Wheeling Bridge* as a case in which "No arbitrary rule of decision was prescribed . . . but the court was left to apply its ordinary rules to the new circumstances created by the act." Klein, 80 U.S. (13 Wall.) at 146-47. Whatever the precise scope of *Klein*, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *See* Miller v. French, 530 U.S. 327, 348-49 (2000); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992); *cf.* United States v. Sioux Nation of Indians, 448 U.S. 371, 391-407 (1980) (rejecting argument that *Klein* prohibited government from waiving res judicata defenses to allow re-adjudication of claim in Court of Claims; characterizing *Klein* as prohibiting Congress from "granting the Court of Claims jurisdiction to decide the merits of . . . [a] claim, while prescribing a rule for decision that left the court no adjudicatory function to perform").

in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."[235] The distinction here is elusive and perhaps only a matter of form—a difference between announcing a new substantive rule, on the one hand, and, on the other, telling the courts what that new rule means for the court's judgment.[236] Moreover, if Congress can craft a "new" rule so narrowly drawn as to reach only the desired pending cases, even the form might be a hollow barrier indeed.[237]

Finally, *Klein* implies that it is relevant if the change in rule is one designed to favor the government itself, in the course of a pending litigation.[238] This idea resonates with basic due process principles of impartial adjudicatory decisionmaking.[239] But how does one reconcile the idea that the government cannot change rules to protect itself financially in litigation with a baseline rule of sovereign immunity? In response to the government's explicit reliance on sovereign immunity because "the right to sue the government . . . is a matter of favor," the Court responded that "this seems not

235. *Klein*, 80 US at 147. In doing so, moreover, Congress has "passed the limit" between legislative and judicial power. *Id.*

236. *See* Sager, *supra* note 222, at 2526-27. Other interpretations of this part of the Court's discussion are possible. The Court could be referring to some rule of generality of legislation for new rules, but *Klein* itself arguably involved such a general rule and later cases clearly indicate that there is no generality requirement. *See Robertson*, 503 U.S. 429. Or the Court may be suggesting a difference between "new circumstances" relating to prospective relief and efforts to undermine rights to relief for past conduct that would in some sense have vested, or alternatively, to some implicit distinction between permissibly prescribing a rule for decision and dictating how the court should rule on factual issues whether those issues nominally relate to jurisdiction or to the merits.

237. *See Robertson*, 503 U.S. 429; *cf.* Liebman & Ryan, *supra* note 111, at 775 n.362 (describing *Robertson* as a case in which Congress "has even been permitted to command Article III judges to decide particular pending cases in particular ways").

238. *See* United States v. Sioux Nation of Indians, 448 U.S. at 404 (describing *Klein* as involving statute that "prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor"); Klein, 80 U.S. (13 Wall.) at 146 (expressing concern about "allowing one party to the controversy to decide it in its own favor").

239. *Cf.* Tumey v. Ohio, 273 U.S. 510 (1927) (holding that due process is violated when mayor acts as judge in cases where both he and his village will benefit financially if defendants are convicted). It is a different matter where Congress acts against the pecuniary interests of the United States in its capacity to recognize and provide for the payment of "debts" even when those debts are moral rather than legal obligations. For cases rejecting *Klein* challenges to federal statutes that authorize the Court of Claims to exercise jurisdiction and enter judgments against the United States notwithstanding possible legal defenses arising out of prior judgments in favor of the United States, *see, e.g.*, *Sioux Nation of Indians*, 448 U.S. at 404-05 (distinguishing *Klein* as involving an attempt to "prescribe a rule for the decision of the cause in a particular way," as compared to a change waiving a defense "so that a legal claim could be resolved on the merits"); Pope v. United States, 323 U.S. 1 (1944).

entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations."[240] If this language were read to suggest that Congress, once having given consent to adjudicate, cannot withdraw that consent in a pending case against the United States because it is unhappy with the results,[241] it would be a powerful constraint. But such a reading would be in some tension with other decisions, including *District of Columbia v. Eslin*,[242] in which

240. *Klein*, 80 U.S. (13 Wall.) at 144.

241. Professor Young argues that this aspect of *Klein* implies that the Congress could not withdraw consent to suit once given. Young, *supra* note 224, at 1226-27 (stating that above quoted language "strongly indicates that *suits* against the United States are not entirely dependent on congressional favor"); *see also id.* at 1213, 1215, 1224-33. Young argues that *Klein* can be read to reject sovereign immunity as a defense once a court has been given jurisdiction over claims against the government, or that for some types of claims Congress cannot withdraw consent once given, i.e., for Fifth Amendment claims, or where a limitation on a waiver of immunity is otherwise in violation of the Constitution. *See id.* at 1227-29. Ultimately Professor Young urges an even more narrow reading, that sovereign immunity cannot be invoked so as to discriminate against those who receive a pardon. *See id.* at 1230-32. A limitation on withdrawal of consent that arises from an independently unconstitutional distinction is far more limited than one derived from the premise that once a court is seized of an issue Congress could not invoke sovereign immunity (or its control of jurisdiction) to withdraw jurisdiction. Professors Liebman and Ryan read *Klein* as holding that Congress could not "rely on sovereign immunity to deny federal courts the power to remedy violations of supreme law that the Court's grant of jurisdiction and the judicial power otherwise forced the Court to notice." Liebman & Ryan, *supra* note 111, at 822-23, 842. On their view, sovereign immunity is like a jurisdictional bar and its invocation to bar jurisdiction altogether would not threaten the constitutionally protected "quality" of judicial decisionmaking.

242. 183 U.S. 62 (1901). The case arose out of federal legislation, enacted in 1880 and 1895, authorizing the Court of Claims to adjudicate claims against the District of Columbia; final judgments were to be paid by the United States. *See* 183 U.S. at 62-63. In *Eslin* the claimant against the government had won in the Court of Claims and the government had appealed. In an opinion for the Court, Justice Harlan noted that, while the appeal was pending, in 1897 Congress had repealed the law on which the proceeding was based and had specified that "'no judgment heretofore rendered in pursuance of said act shall be paid.'" *Id.* at 64. In contrast to *Klein*'s suggestion of a duty, he wrote:

> It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties.

Id. at 65. The Court quoted from Chief Justice Taney's draft memorandum in *Gordon* and concluded that because "no judgment now rendered by this court would have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, the present appeal must be dismissed for want of jurisdiction . . . ." *Id.* at 66.

This opinion seems to imply that no other court, without the consent of the government, could seek to enforce the previously entered judgment. *See also id.* at 64 (referring to

Congress' prohibition of payment of a Court of Claims judgment led the Supreme Court to dismiss a pending appeal for want of jurisdiction.

Perhaps the best understanding of *Klein*'s rule of judicial independence is that Congress cannot legislate so as to require courts to act unconstitutionally, or to force the courts to rule in favor of the government by depriving them of the authority that an independent court must have to express its own judgment on the facts and law.[243] But *Robertson v. Seattle Audobon Soc'y*[244] suggests that, although as a formal matter the doctrine does not permit Congress to "tell the courts how to decide a particular case," legislation can be drafted to target particular cases—even in litigation against the government—and change the substantive law governing only that case. Thus, Congress is able to go a long way to controlling judicial interpretation of the laws by eliminating "space" for interpretive decision.[245] As noted above, the difference between prescribing a new substantive rule and telling the court how to decide is in some

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a suggestion that the Court of Claims had basically suspended further proceedings in cases affected by the repealer). To the extent *Klein* preserves the possibility that Congress may not withdraw jurisdiction as a subterfuge for depriving party opponents of their judgments against the United States, *Eslin* suggests a different route for Congress to deprive claimants of the benefit of a judgment won in a lower federal court: perhaps Congress may achieve the effect it was seeking in *Klein, not* by directing entry of a particular judgment, but rather by eliminating the entire statute on which the claimants had proceeded (perhaps a "new circumstance" in *Klein*'s terminology) and by explicitly barring payment. *See* Glidden v. Zdanok, 370 U.S. 530, 567 (1962) (stating that Congress has "on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court," and citing *Eslin*).

243. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980); *see also* Martinez de Gutierrez v. Lamagno, 515 U.S. 417, 426 (1995) (resisting interpretation of a jurisdictional statute that "would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct"). Apparently relying on *Klein* as a rule of construction to avoid constitutional difficulties, the Court wrote, "We resist ascribing to Congress an intention to place courts in this untenable position." *Id.* at 430.

244. 503 U.S. 149 (1992).

245. *Cf.* Scheppele, *supra* note 222, at 227, 245, 268-70 (discussing role of "critical distance" in judging under law). The contortion upheld in *Robertson* allows Congress to essentially dictate the outcome of a particular case to a court so long as the issues involved are statutory and the case has not gone to final judgment (including exhaustion of appeals). For further discussion, see Sager, *supra* note 222, at 2527-28; *see also* Daniel J. Meltzer, *Congress, Courts and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549(1998) (treating *Klein* as standing for principle that Congress may not exercise power to regulate federal court jurisdiction "in a way that requires a federal court to act unconstitutionally"); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 719-21 (1995) (treating *Klein* as standing for proposition that "Congress may not adjudicate individual litigations").

measure a matter of form.[246] If *Robertson* is read for all it is worth, short of engaging in acts constitutionally prohibited by provisions other than the grant of Article III judicial power, it is unclear whether there is any limit on Congress' power to redefine what "the law is" in so narrow a category as to virtually dictate the result only in a specific pending litigation.[247]

In contrast to the rule against executive revision found in *Hayburn's Case* and *Gordon*,[248] it is more difficult to identify judicial

246. *See* Sager, *supra* note 222, at 2526. Sager suggests that *Klein*'s "first principle" should be understood as prohibiting Congress from "conscript[ing] the judiciary in a constitutional charade," a principle that could be threatened by legislation that did not "implicate the Constitution" but which nevertheless put the Court in the position of acting on articulated principles with which it was in critical disagreement and "which it could appropriately refuse to be made to seem to endorse . . . ." *Id.* at 2528, 2533. My own formulation of *Klein* is in some respects similar to Sager's, but I differ from his conclusion that *Robertson* did not offend *Klein's* broader effort to distinguish the law making from the adjudicatory function. On Sager's view, the Court construed the statute to change the substantive standard, so the Court was not forced to articulate a principle with which it was in disagreement about the meaning of the statute. *See* Sager, *supra* note 222, at 2534; *Robertson*, 502 U.S. at 434-35 (quoting language of amendment that Congress "'hereby determines and directs that management [of the forests] according to subsections (b)(3) and (b)(5) . . . is adequate consideration for the purposes of meeting the statutory requirements that are the basis for [the pending lawsuits]'"). On my view, *Robertson's* strained interpretation of the statute allowed Congress to effect a particular outcome in a particular case while at the same time nominally preserving the appearance of uniformity of law, a result inconsistent with political accountability principles, judicial and legislative candor, and with separation of powers values in preserving the courts' role in the interpretation of statutes. *Cf.* Jonathan Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246 (2002) (emphasizing that judicial check on statutory interpretation serves political accountability and deliberation values implicit in Constitution).

247. *Cf.* Redish, *supra* note 245, at 718-21 (arguing that Congress cannot enact legislation simply to resolve a particular dispute).

248. The Court has been notably successful in enforcing its view against executive revision of Article III judgments. Congress responded to the views of the justices in *Hayburn's Case* with an amended statute for executive decisionmaking rather than judicial, and to the *Gordon* decision with amendments to remove the revisory power. *See supra* note 208 and text accompanying note 221. In the 1950s, a similar issue arose when a proposal was made to enact a standing appropriation for payment of judgments of less than $100,000. According to the GAO, early versions of the proposal:

> contained language which some felt would authorize the Comptroller General to review the merits of a judgment prior to payment. The Judiciary especially expressed concern over this possibility, fearing that it could destroy the finality of judgments and lead to a situation in which the Comptroller General might deny a claim administratively, with the claimant then suing successfully and the Comptroller General refusing to pay the judgment for the same reasons he had originally denied the claim. The proposal was refined [to avoid this problem].

GAO REDBOOK, *supra* note 100, at 14-7. That Congress recognized the significance to Article III courts of the rule against revision of judgments is further indicated by contrasting the standing appropriation to pay final judgments of the Claims Court with the more limited authorization, enacted in 1961, for the payment of judgments of state, and foreign

decisions or statutes that are progeny of *Klein*.[249] Yet the centrality of its objection to legislative direction of adjudication,[250] the fact that its meaning is still an open question, may itself preserve both judicial independence and congressional prerogative. *Klein* is still widely read, studied, and debated.[251] *Klein*'s most important progeny may be the sense that there is some limit to legislative direction of decision in specific cases—even, or perhaps especially, in litigation against the government—and an abiding uncertainty over where that limit is.

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courts, *only* "upon the Attorney General's certification that it is in the interest of the United States to pay." *Id.* at 14-8.

249. *Klein* has, so far as I am aware, never figured as a basis for a Court decision invalidating legislation as interfering in judicial decisionmaking, though it has been invoked in support of particular interpretations and has also been distinguished as involving a principle not in issue. *See, e.g.*, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 426 (1995) (construing the Westfall Act not to require Court simply to dismiss case based, in part, on Attorney General's certification that acts were within scope of government officials employment and discussing *Klein*). Acknowledging that Congress might be able to adopt a compensation scheme that operates outside the courts, the *Lamagno* Court wrote, "that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at 430; *see id.* at 426 (rejecting interpretation that would make judges into "petty functionaries"); *see also* Miller v. French, 530 U.S. 327, 348-49 (2000) (distinguishing *Klein* and upholding provisions of the Prison Litigation Reform Act, including automatic stay, as simply imposing a new standard for prospective relief); Plaut v. Spendthrift Farm, 514 U.S. 211, 218 (1995) (describing but not relying on *Klein*, "where we refused to give effect to a statute that was said '[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it.'"); *cf. id.* at 226 (relying on *Hayburn's Case* and *Gordon* to support its conclusion that the challenged statute was invalid as "retroactive legislation [that] requires its own application in a case already finally adjudicated").

250. Thus, Professor Gunther, discussing *Klein*, has said, "virtually all the commentators agree that, even if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. That is a significant limitation." Gunther, *supra* note 111, at 910.

251. *See, e.g.*, Sager, *supra* note 222, at 2525 (noting that *Klein* "is 125 years old and still seems to command the active attention of the Supreme Court" and that the Court "apparently continues to pay wary obeisance" to *Klein*'s principle "limiting the ability of Congress to force the judiciary's hand"). *Eslin*, by contrast, is virtually unknown. As of September 1, 2002, according to a search by the author on LEXIS, the last Supreme Court case to cite it was *Glidden*, in 1962. Earlier citations to *Eslin* include, *e.g.*, Cummings v. Deutsche Bank und Disconto-Gesellsschaft, 300 U.S. 115, 119-20 (1937) (distinguishing *Eslin* on grounds that temporary postponement of government's willingness to turn over property is not tantamount to withdrawal of consent to suit, though asserting that consent of U.S. can be revoked at any time); Nashville & C.S. & L. Ry 288 U.S. 249, 263 (1933) (asserting that the ability to award process or execution to enforce a judgment is not always necessary to the exercise of the judicial power in light of jurisdiction exercised in suits between states and in the court of claims, with a compare cite to *Eslin*).

B. *Enforcement of Judgments and Judicial Independence*

The temptations for Congress to exercise or retain control over judicial decisions are likely to be particularly acute in cases that come before a court, like the federal Claims Court, that only hears cases against the government. Congress has exercised careful attention and control over the jurisdiction, makeup, and business of the Claims Court.[252] Formal revisory powers in legislative representatives or executive officials, like designation of matters as "advisory" references, clearly signal that courts are not being treated as final decisionmakers of the rights of the parties. However, even where as a formal matter the courts' judgments are final and appeals are exhausted, Congress may be able avoid payment of judgments once final by failing to appropriate funds to satisfy the judgment, or prohibiting the use of previously appropriated funds for such a purpose—as it did while appeals were pending in *Eslin*.[253] Congress has in the past (on rare occasions) reportedly singled out particular judgments of what was then the Court of Claims for nonpayment.[254]

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252. Since every case in the Claims Court is one to which the United States is a party, the centralization of such litigation in the single court facilitates not only uniformity and consistency of judicial decisionmaking but also congressional oversight. *See* Glidden v. Zdanok, 370 U.S. 530, 566 (1962) (Harlan, J., announcing the judgment of the court) (noting that "Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court"); *see also* Shimomura, *supra* note 18, at 654 n.245 (noting Rep. Fessenden's view favoring a single court for adjudication of claims against the government because Congress could abolish it if it did not like its judgments). *See generally* COWEN ET AL, *supra* note 206. By statute the Court of Claims must report to Congress as to every judgment entered against the United States, see 28 U.S.C. § 791(c) (2000).

253. *See* District of Columbia v. Eslin, 183 U.S. 62 (1901).

254. *See, e.g.*, 47 Stat. 28, § 3 (1932) ("For payment of the judgments rendered by the Court of Claims and reported . . . [in particular documents] . . . under the [War] department . . . except Number K 317 in favor of Albert C. Calton, $220, 018.34"); 33 Stat. 422 (1904) ("For the payment of the judgments, except the judgment in favor of Joseph Sudsburger . . . rendered by the Court of Claims and reported to Congress in [specific House documents]"); *see also* 33 Stat. 422 (1904) (separately providing for the payment of certain judgments "rendered by the United States courts on mandate of the Supreme court of the United States and by the circuit court of Fond du Lac County, Wisconsin . . .certified . . . by the Attorney General in [house document] except the two judgments in favor of the Coca Cola Company . . . ."). *See generally* Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677 (1933). This Note, cited and relied upon in *Glidden v. Zdanok*, is the last comprehensive description of decisions by the United States not to pay judgments that I have been able to locate. Professor Young has concluded that one of the cases that Note discusses did not involve refusal to pay a judgment already entered, but an anticipatory prohibition on payment of any possible future judgment to a previously unsuccessful claimant. *See* Young, *Congressional Regulation*, *supra* note 224, at 1257-60 (discussing the Chorpenning provision). It has proven very difficult to ascertain whether, since 1932, the United States has refused to pay other final judgments entered by the Court of Claims or

Even when the Claims Court's judgments are treated as final—in the sense of finally resolving the parties' legal entitlements—appropriations may not be available for their immediate satisfaction.[255] As noted above, an important element of the judicial power is the power to issue effective judgments; an effective judgment is generally, though not invariably, one that the court itself can issue process to enforce. Sovereign immunity is perhaps most intimately bound up with this Article III concern over the effectiveness and enforcement of judgments. To the extent that the original Constitution supports any part of the federal sovereign immunity doctrine, it most supports the idea that a court cannot order money to be withdrawn from the Treasury without an appropriation.[256] If the Constitution's commitment of appropriations to Congress implies that federal courts cannot issue process against treasury funds, judgments that can be satisfied only through such payments bear the risk of being ineffective,[257] absent legislative commitments to pay. Prudential concerns might thus support a remedial hesitation. Yet the sovereign immunity doctrine rhetorically, and actually, extends well beyond such cases.[258]

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by other federal courts. Before 1956, most judgments were paid through very specific congressional appropriations issued after judgments were entered. As a result of The Supplemental Appropriations Act, 1957, Pub. L. No. 84-814, 70 Stat. 694-95 (1956), judgments of under $100,000 would be automatically payable through an appropriation, and in 1977 the ceiling was removed so that judgments, awards and compromise settlements payable under Section 1304 are unlimited in amount. *See* Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96-97 (1977); 31 U.S.C. § 1304.

255. *See infra* notes 263, 264.

256. U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."). For discussion, see *supra* notes 63, 96.

257. *See supra* notes 100, 200. With private debtors, many forms of property can be attached and sold in satisfaction of unrelated debts. The Constitution, however, arguably commits to Congress the "Power to dispose of . . . Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. It is one thing for a court to adjudicate a claim, against the United States or its officers, that certain specific property belongs to the claimant, see, e.g., Land v. Dollar, 330 U.S. 731 (1947); United States v. Lee, 106 U.S. 196 (1882), but quite a different matter for a court to choose to seize a particular piece of property concededly belonging to the United States and authorize its sale in satisfaction of an unrelated claim. *See infra* note 278 (discussing attachment of property).

258. *See, e.g.*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703-05 (1949) (relying on sovereign immunity to foreclose consideration of specific relief on a contract even though it would not directly require disbursements from the Treasury); Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam) (same as to relief directing federal official to make a decision under a statute concerning release of certain lands); Malone v. Bowdoin, 369 U.S. 643, 645 (1962) (same as to specific relief relating to real property); *cf.* Dugan v. Rank, 372 U.S. 609, 619-21 (1963) (holding sovereign immunity foreclosed action against officers to enjoin impoundment of certain waters on grounds that relief would stop government "in its tracks" and that plaintiffs' proposed alternative (that government construct different additional dams) would incur treasury expenditures). Indeed,

Moreover, in narrow circumstances the Court has upheld mandamus of executive branch officials to afford money or credits to a claimant, where some specific evidence of a legislative commitment to pay is discernible. In *Kendall v. United States ex rel. Stokes*[259] the Court specifically relied on a congressional statute authorizing resolution of the particular claim and the subsequently expressed view of one house of Congress that the specific amount sought by the claimant should be credited.[260] By contrast, in *Reeside v. Walker*, although judgment against the federal government had been

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with respect to prudential concerns for noncompliance with court orders, sovereign immunity doctrines prohibits adjudication in some contexts in which the likelihood of resistance by the political branches would seem quite low, e.g., *Malone*, but permits coercive relief in cases of serious magnitude, *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

259. 37 U.S. (12 Pet.) 524 (1838) (upholding mandamus of a treasury official to enter a credit due to the claimant). In this case, after the Postmaster refused to pay all of an award determined by the Solicitor, under an Act directing satisfaction of this specific claim by the Postmaster in the amount to be determined by the Solicitor, the claimant sought help from the President; the President advised the claimants to seek help from Congress. *See id.* at 611-12. A congressional committee thereafter concluded that there was no need for further legislation but expressed the view that, consistent with the existing legislation, the entire award determined by the Solicitor should be paid. *See id.* at 612. Attorneys for the government argued that the suit was really one to recover money in the public treasury and thus barred by sovereign immunity. *See id.* at 587-88 (counsel's argument). Although the Court seemed to agree that the action was one in effect against the United States, it treated the law authorizing the Solicitor of the Treasury to determine the amount due as consent by the United States. *See id.* at 611 ("The real parties to the dispute were . . . the relators and the United States. The United States could not, of course, be sued, or the claims in any way enforced against the United States, without their consent obtained through an act of Congress: by which they consented to submit these claims to the solicitor of the treasury [to be determined,] [and directing] the postmaster general to credit . . . whatever sum . . . the Solicitor shall decide to be due them . . . ."). To the extent consent were needed for the judicial award of mandamus relief against the government officer, then, the statutory authorization to the solicitor and postmaster to resolve the dispute and credit the account was treated as sufficient, arguably melding the idea that executive disbursements from the Treasury must be pursuant to "appropriations made by law" with the idea of sovereign immunity from suit.

260. *See id.* at 611-12 (reporting Senate's adoption of its committee's conclusion that "'the postmaster general is fully warranted in paying and ought to pay . . . the full amount of the award of the solicitor of the treasury[,]'" and stating that "their right to the full amount of the credit . . . having been ascertained and fixed by law the enforcement of that right falls properly within judicial cognizance"). On the precise scope of the mandamus issued, *see infra* note 261. For a later case upholding relief in the nature of mandamus to a federal financial officer to pay veterans benefits, see Miguel v. McCarl, 291 U.S. 442, 454-55 (1934) (noting government argument that there was no existing appropriation but upholding power to issue mandamus where government's argument was based on erroneous view that the petitioner was not entitled to payment under existing statutes); *cf.* La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461-63 (1899) (upholding Claims Court jurisdiction to decide whether a fraudulent claim had been submitted in international negotiations, because its decision would be a "final, conclusive determination, as between the United States and the defendants, of . . . rights" and noting that if the Claims

reached on a set-off, mandamus was denied because "no mandamus or other remedy lies against any officer of the Treasury Department . . .where no appropriation to pay [the debt] has been made."[261] The contrast between *Reeside* and *Kendall* suggests that in

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Court had decided the claim was not fraudulent, the Secretary by statute had an "absolute legal duty" to pay it).

261. *See* Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850), discussed *supra* note 99. Although counsel in *Reeside* drew the Court's attention to a number of statutes from which a general duty of the Secretary of the Treasury to pay the debts of the United States was established, these "general statutes" lacked the specificity of the statute at issue in *Kendall*, and, in the Court's judgment, were insufficiently specific to support a mandamus to require entry of the petitioner's claim or its payment. *Id.* at 289-90; *see also* Decatur v. Paulding, 39 U.S. 497 (1840) (denying mandamus to Secretary of the Navy to pay additional sums to naval officer's widow where the duty of the Secretary under the resolution and statutes involved exercise of judgment under ambiguous statutory language).

Although in *Kendall* there was a statute requiring the Postmaster to "credit" to the relator's account the amount fund due by the Solicitor, Kendall, 37 U.S. at 609, it is not clear from the opinions themselves whether there was an appropriation to pay out funds. *Compare id.* at 612 (noting the resolution of the Senate in the case that "the postmaster general is fully warranted in *paying*, and ought to pay" the Solicitor's award) (emphasis added), *with id.* at 614 (opinion of the Court) ("The law upon its face shows the existence of accounts between the relators and the post office department. No money was required to be paid; and none could have been drawn out of the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators."). Whether the mandamus issued in *Kendall* was to "pay" or only to "credit" an account is also difficult to determine, though it seems likely that the mandamus issued in the lower court was one only to "credit" the amount awarded on the account. The lower court's decision on review in the Supreme Court, United States rel. Stokes v. Kendall, 5 D.C. (5 Cranch) 163 (1837), indicates that the petitioner included two prayers for relief, one for a credit and the other for payment, *see id.* at 533 (reporter's statement), and that a preliminary writ directed the respondent to "credit" the amounts, *see id.* at 164-65, 188, 190 (issuance of "mandamus nisi" on June 7, 1837); *see also id.* at 188 (approving mandamus nisi to require credit but expressing "doubts" whether mandamus should issue to require payment, "without previous appropriation by law"); *id. at* 235 (" 'The specific act, ordered to be done, in this case, is, to credit the relators with the full amount of the Solicitor's award.' ") (quoting counsel's argument). At the end of this phase of the litigation, however, it is hard to determine from that opinion whether a writ on the prayer to direct "payment" was granted in addition to the mandamus to credit the account. *See* 5 D.C. (5 Cranch), at 259 (quoting from counsel's argument that the parties seek a writ of mandamus "to credit *and pay* the balance of the Solicitor's award") (emphasis added); *id.* at 277 (opinion of the court) ("Let the peremptory mandamus be issued."). *See also id.* at 277-78 (describing counsels' arguments about whether an appeal bond was needed "to cover the whole debt claimed" given that the "money is safe in the Treasury of the United States" and thus perhaps suggesting that payments, in addition to credits, were at stake). The Supreme Court's opinion says that the "judgment of the court below is accordingly affirmed." *Kendall*, 37 U.S. at 626. On remand, the Circuit Court quotes a portion of the peremptory mandamus previously issued, to "credit" the account. *See* United States ex rel. Stockton v. Kendall, 26 F. Cas. 755, 757, 5 Cranch 385 (Cir. Ct. D.C. 1838) (quoting a portion of the peremptory mandamus). Under the circumstances (and notwithstanding the uncertainty about whether an appropriation had already been made), the credit may have been regarded as equivalent to payment; legal historians report that payment was made. *See* CARL B. SWISHER, 5 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-1864, at 164 (1974); *see also* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the*

order to avoid entering judgments uncertain to be paid, courts require some evidence that appropriations have been or will be made before entry of what is, in effect, process against an officer to enforce a money claim against the United States.[262]

Whether process could issue to compel payment of a judgment against the United States was at the crux of Chief Justice Taney's draft opinion in the *Gordon* case.[263] Although Court of Claims decisions were reviewed by the Supreme Court from 1866 on,[264]

200th Anniversary of the Federal Courts of the District of Columbia, 90 GEO. L.J. 549, 566-67 (2002); Woolhandler, *Patterns*, *supra* note 6, at 424 n.145 (treating *Kendall* as instance of "mandamus to compel payment of appropriated funds.").

262. *See Kendall*, 37 U.S. at 611. Note *Kendall*'s suggestion that, notwithstanding issuance of the mandamus to credit an amount, no payment would be made to the claimant unless an appropriation therefor were made, *id.* at 614, but its simultaneous references to the Senate's resolution that the amount be paid, *id.* at 612. *Kendall*, then, might be seen as an implicit precursor to Justice Harlan's more empirical view, in *Glidden*, of the relationship between judicial judgments and congressional appropriations to satisfy judgments. *See infra*, text at notes 271-79.

263. At the time the judgment in *Gordon* was entered by the Court of Claims no appropriation had yet been made for payment of the judgment, according to the Taney draft. *See id.* at 117 U.S. 697, app. at 699 ("In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards."). In April 1864 the *Gordon* appeal (originally submitted in December 1863) was put over for argument in the Supreme Court's next December term, and was not argued until January of 1865. *See* United States v. Jones, 119 U.S. 477, 478 (1886). In June of 1864 Congress provided a lump sum appropriation of $300,000 "for payment of judgments to be rendered by the court of claims." Shimomura, *supra* note 18, at 658 (quoting the Act of June 25, 1864, ch. 147, 13 Stat. 145, 148 (1864)). Whether Taney was aware of this appropriation at the time his opinion was drafted (which was some time before the argument was heard in January 1865) cannot be determined, though the draft makes no reference to the lump sum appropriation. I have been unable to determine the exact date of the Taney draft opinion; Taney died some time in late 1864. *See* Walter Ehrlich, *Taney, Roger Brooke*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 857 (Kermit L. Hall ed., 1992) (stating that Taney died December 12, 1864); United States v. Jones, 119 U.S. 477, 478 (1886) (suggesting that Taney died October 12, 1864).

Taney was not alone in suggesting that legislative control over appropriations was inconsistent with the exercise of a distinctly judicial power. *See* Railroad Co. v. Tennessee, 101 U.S. 337, 339-40 (1879) (holding that the state's withdrawal of consent to be sued did not impair its bond contract because the prior consent was only to "adjudication," with payment of any judgment dependent on legislative appropriation; thus the prior consent to suit was not a "judicial remedy" whose elimination violated the Contracts Clause; a judicial determination that could be satisfied only if the legislature decided to make an appropriation, "is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty").

264. In 1886, the Court asserted that, since the removal of the revisory power in 1866, it has "never been doubted" that jurisdiction to review the Court of Claims decisions lay in the Court, *Jones*, 119 U.S. at 478; *see id.* at 479 (citing De Groot v. United States, 72 U.S. 419 (1866)). According to Prof. Shimomura, Congress had ceased making lump sum appropriations in 1876 and did not resume lump sum appropriations until 1895. *See* Shimomura, *supra* note 18, at 661-62. Thus, when *Jones* was decided, Congress' practice was to appropriate funds for specific judgments—and it did so for "virtually every judgment of the Court

explicit resolution of whether the United States could be sued for monetary relief in an Article III Court and whether Congress' power over appropriations was inconsistent with an Article III court's power to issue and enforce effective judgments, did not occur until well into the twentieth century.[265] A central piece in this story is the establishment of the federal "judgment fund," a "permanent, indefinite appropriation" for the payment of most judgments against the United States, including those entered by the Court of Federal Claims.[266]

In *Glidden v. Zdanok*,[267] the Court again faced arguments that the Court of Claims was not an Article III court because judicial process could not issue to compel payment of its judgments. Justice Harlan announced the Court's judgment,[268] affirming the Court of

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of Claims." Shimomura, *supra* note 18, at 662. For an example of the delay in satisfaction of judgments that could result, see, e.g., Pam-to-Pee v. United States, 187 U.S. 371, 375 (1902) (noting earlier litigation in which the Claims Court entered a judgment, affirmed by the Supreme Court, whose mandate was filed in the Claims Court on April 20,1893 and reporting that more than a year later, on August 23, 1894, Congress passed an appropriations act to provide for payment of the judgment).

265. Although a number of cases between 1871 and 1925 appear to treat the Claims Court as an Article III court, *see supra* note 204, in *Ex parte Bakelite*, 279 U.S. 438 (1929), and *Williams v. United States*, 289 U.S. 553 (1933), the Court concluded that the judges of the Court of Claims were not Article III judges and that their salaries were subject to congressional reduction. *See supra* note 60. During this time period, the Supreme Court refused to prevent the Court of Claims from exercising review over a reference from Congress that essentially sought to revisit a previously final adjudicatory judgment the Claims Clourt had issued. *See* Ex parte Pocono Pines Assembly Hotels Co., 285 U.S. 526 (1932); HART & WECHSLER, *supra* note 16, at 115; Shimomura, *supra* note 18 at 678 n.436; *cf. Glidden*, 370 U.S. at 568 n.33 (treating Supreme Court's denial of petition for writ of mandamus or prohibition in *Pocono Pines* as without precedential effect). Not until *Glidden* did the Court squarely confront and reject the argument from the appropriations clause against the article III status of the Claims Court. *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149 n.35 (1974).

266. *See* 31 U.S.C. § 1304 (2000) (providing a "permanent, indefinite appropriation" for payment of certain judgments as certified by the Secretary of the Treasury); 28 U.S.C. § 2517(a) (final judgments of the COFC to be paid "on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court"). Under the permanent indefinite obligation, the judgment appropriation "cannot be overobligated nor can a payment be charged to the 'wrong' fiscal year," and thus, accounts need not be kept of judgments by agency or department, and obligations in pending litigation need not be recorded. GAO REDBOOK, *supra* note 100, at 14-13. As the Redbook states, "[a]t the present time, neither GAO nor anyone else in the federal government knows how much the United States pays out in judgments every year." *Id.* at 14-4.

267. 370 U.S. 530 (1962). The Zdanok Company challenged an adverse judgment rendered by a panel of the U.S. Court of Appeals for the Second Circuit on which a Court of Claims judge sat by designation. The question was whether the Court of Claims Judge was an Article III judge.

268. Justice Harlan was joined by Justices Brennan and Stewart. Justices Frankfurter and White did not participate. Justice Clark, joined by the Chief Justice, agreed that the Claims Court was then an Article III court but disagreed with Harlan's analysis of the signif-

Claims' character as an Article III court over a number of objections.[269] One of the most substantial of these objections, in Harlan's view, was the lack of power in the Court to enforce its judgments, a power that the Chief Justice Taney in *Gordon* thought rendered the judicial power incapable of acting.[270] Harlan, accepting the premise that the Claims Court could not provide execution on a money judgment against the United States, disagreed that the Claims Court could not therefore exercise Article III judicial power.

Harlan's analysis moves towards an empirical, rather than conceptual, account. First, he asserts that the scope of the problem has been reduced by the 1956 "judgment fund" legislation providing a standing appropriation for judgments under $100,000.[271] Harlan thus appears to assume that, notwithstanding the possibility of Congress enacting new legislation prohibiting the use of any amounts previously appropriated to a specific purpose,[272] the standing appropriation sufficiently assured the enforceability of

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icance of the congressional reference jurisdiction. *See* 370 U.S. at 585 (Clark, J., concurring in the result). Justices Douglas, joined by Justice Black, dissented. *Id.* at 589 (Douglas, J., dissenting).

269. Harlan dismissed the fact that on occasion Congress had withdrawn the jurisdiction of the Court of Claims to proceed in pending cases, because such a power with respect to the Supreme Court itself was upheld in *McCardle* and was thus not inconsistent with Article III status. *See* Glidden, 370 U.S. at 567-68 (Harlan, J., announcing the Court's judgment) (referring to *Eslin* and noting that *Klein* limited Congress' power in this regard). Harlan also rejected the rationale of *Williams v. United States*, 289 U.S. at 572-78, that suits against the United States were outside the judicial power by virtue of sovereign immunity, concluding that the older rule of *Murray's Lessee* was correct—that if sovereign immunity were waived, the Article III courts could exercise jurisdiction. *See* Glidden, 370 U.S. at 550-51, 562-66.

Of more concern was the congressional reference jurisdiction, in which the Claims Court is asked to give only advisory views to be considered by Congress. After expressing grave doubt as to the constitutionality of an Article III court entertaining such references, Harlan concluded that they were not so "substantial and integral" a part of the Claims Court's work as to detract from its Article III status. *See id.* at 582-83. His opinion suggests that the reference jurisdiction itself might "fail," rather than divest the Claims Court of its Article III status. *Id.* at 583. Justice Clark disagreed with Justice Harlan that *Williams* had been wrongly decided because, Clark said, before 1953 a larger proportion of the Claims Court's cases were congressional reference cases. Glidden, 370 U.S. at 585-87 (Clark, J., concurring in the result). On this view, Congress had substantial control over the Article III character of the Claims Court not so much by its own description of it, nor by its provisions for tenure and salary of judges, but through the proportion of reference cases it sent.

270. *Cf. supra* note 39 and accompanying text(describing Chief Justice Jay's hesitation in 1793 about whether sovereign immunity barred courts from hearing monetary claims against the United States).

271. *See Glidden*, 370 U.S. at 569.

272. *Cf.* Stith, *supra* note 63, at 1379 n.70 ("a 'permanent' appropriation is only as permanent as legislation can be – until Congress repeals or modifies it.").

those judgments. With respect to judgments in excess of $100,000, Harlan wrote, the statute at the time directed the Secretary of the Treasury "to certify [judgments] to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain of our problem, for Art. I, § 9, cl. 7, vests exclusive responsibility for appropriations in Congress."[273]

His response to this "problem" is essentially empirical—to note how rare it had been for Congress not to provide for payment of Court of Claims judgments.[274] He thus questioned whether "the capacity to enforce a judgment is always indispensable to the exercise of judicial power," in light of this "historical record, surely more favorable to prevailing parties than that obtaining in private litigation."[275] If the ability to issue process were truly indispensable, moreover, it would render problematic Congress' decision to vest the district courts with jurisdiction over money claims against the United States.[276] Finally, he suggested that the Court has in essence relied on the good faith of the state governments to comply with decrees issued in original jurisdiction cases,[277] and could likewise

273. *Glidden*, 370 U.S. at 569-70 (citing 28 U.S.C. § 2518).

274. *See id.* at 570 (citing Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 685-86 n.63 (1933) as finding only fifteen instances in which judgments of the Court of Claims had not been provided for). Even this number may be too high. *See* Young, *supra* note 224, at 1257-60 (reporting that one of the few instances of nonpayment of Court of Claims judgments described in the Harvard note involved a prohibition on payment of any judgment rendered in favor of Chorpenning, a claimant who had not received a judgment from the Court of Claims and indeed had no litigation pending at that time and suggesting that the provision was more in the nature of a withdrawal of consent to suit on his claim). Professor Judith Resnik has characterized the Court's approach in *Glidden* as a pragmatic one, in which the Court has "decoupled finality and Article III." Judith Resnik, *"Uncle Sam Modernizes his Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 625 n.46, 639 (2002).

275. *Glidden*, 370 U.S. at 570.

276. *Id.* (noting Congress' apparent judgment that indisputably article III federal district courts could enter money judgments against the United States, under the "Little Tucker" act and the Federal Tort Claims Act).

277. *Id.* at 571 (apparently assuming that the Court lacks power to issue process against states to compel the payment of money judgments and citing, *inter alia*, the West Virginia debt litigation). But the Court's decisions in the West Virginia litigation, though demonstrating much reluctance to press the issue, are ambiguous on whether and what process ultimately could issue, while clearly affirming the Court's power to obtain enforcement of its judgment. *See, e.g.*, Virginia v. West Virginia, 220 U.S. 1, 36 (1911) (identifying amount of debt and proportion attributable to West Virginia but declining to rule on interest or enter a judgment because "we think it best at this stage to go no farther, but to await the effect of a conference between the parties . . . . "); 222 U.S. 17, 20 (1911) (stating that it was permissible for West Virginia to await session of its legislature before settling a decree); 246 U.S. 565, 604 (1918) (describing how suit was commenced in 1906, and how judgment was rendered in 1915 but was still unsatisfied; concluding that the Court *does* have power to

rely on the good faith of the federal government itself.[278] This argument was later endorsed by the full Court in the *Regional Rail Reorganization Act Cases*.[279]

In resolving whether Congress' power over appropriations prevents the Article III judicial power from rendering judgment against the United States, the formal (or conceptual) and empirical approaches diverge. As a formal matter, one might say that given exclusive legislative control over appropriations and assuming that sovereign property is not subject to execution, and if the power to enter effective judgments is an essential prerequisite to Article III power, then unless an appropriation has been made, no

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enforce a monetary judgment against a state; but declining to decide whether to issue mandamus in the hopes that having affirmed "the right judicially to enforce" the judgment against the State, "we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution" by the state's compliance). It is interesting to compare the Court's reliance on the good faith of the government to pay judgments entered against it in *Glidden* and the *Rail Reorganization Act Cases*—where the assumption of good faith is advanced in support of the Court's exercise of jurisdiction—with the invocation of the presumed good faith of the State in *Alden v. Maine*, 527 U.S. 706, 755 (1999), as justification for *not* exercising jurisdiction over damages liabilities against states.

278. *Glidden*, 370 U.S. at 571. Justice Harlan does not suggest that the judgments could be satisfied by any form of process against the property of the United States. *See also supra* note 257. Apart from the protections to Treasury money arguably provided by the Appropriations Clause, there is a real question whether government property could be subject to execution (at least where title is not in dispute and the process is to secure payment of an unrelated debt). *See* The Siren, 74 U.S. 152, 154 (1868) (sovereign property has same exemption from judicial process as sovereign); Briggs v. Light-Boat, 93 Mass. 157, 163 (1865) (concluding that federal government property is immune from judicial process); *see also* 28 U.S.C. § 2409(a), (b), (c) (providing waiver of immunity for suit to try title to real property but specifying that even on an adverse judgment, the United States "shall not be disturbed in possession or control" of its property). Protection of government property from being levied on to secure payment of debts is widespread. Thus, the Foreign Sovereign Immunities Act prohibits execution on many forms of foreign sovereign property owned in the United States generally; provides for exceptions from this immunity from execution; and then excludes from the exceptions—that is, reasserts an immunity from attachment—for certain foreign property, for example, property intended for use in connection with military activity. *See* 28 U.S.C. §§ 1609-11 (2000).

279. 419 U.S. 102, 149 n.35 (1974) (quoting with approval Justice Harlan's reasoning that the Court could rely on the good faith of the United States to pay its judgments). This was in response to the dissent's argument that Congress might not appropriate money sufficient to satisfy a judgment that might in the future be entered in the Court of Claims on the railroads' claims that the compensation provided in the Act was not constitutionally adequate for their loss of property. *See id.* at 179-80 (Douglas, J., dissenting) (arguing that given size of the taking, Claims Court judgments could be for amounts in the billions of dollars, which Congress might not pay because "the Court of Claims is without power to enforce its judgments and "[w]hile those amounting to less than $ 100,000 are paid from a general appropriation, the payment of judgments exceeding this sum require special action by Congress").

judgment can issue.[280] An empirical approach focuses not on the formality of whether an appropriation has been made, but rather, on the likelihood of payment. Harlan's reasoning with respect to judgments under $100,000 relies on the formal legal fact of a standing appropriation (notwithstanding the (small) empirical possibilities of nonpayment). His reasoning about judgments over $100,000 depends on an empirical estimate based on past practice that even these larger, not yet provided for, judgments were likely to be paid.[281]

Glidden and the *Regional Rail Reorganization* cases have apparently settled that the ability to execute a judgment through judicial process is not essential for the exercise of article III power over claims against the United States, *if* there is sufficient empirical reason to believe the judgment will ultimately be paid. Yet their reasoning leaves open a number of questions. The Claims Court operated for decades before 1956 without a permanent appropriation to pay its judgments,[282] under statutes in which the government plainly had consented to being sued. Does this practice, together with the reasoning in these two cases, suggest that the judicial power does not require that the Court be able to use judicial process to enforce its judgments so long as Congress has waived its immunity from suit and judgment?[283] Even if no permanent appropriation for the payment of judgments exists? Although the *Rail Reorganization Act Cases* might be treated as dispositive,[284] a judgment fund did exist

280. Indeed, even if an appropriation were made, the formal possibility of Congress acting to prohibit use of the appropriation for payment of judgments after they are entered, see *supra* note 272, might be thought to bar the exercise of the judicial power; on the other hand, once an appropriation is made, the formal constitutional requirement of Article I, section 9, clause 7, for an appropriation, is satisfied. On the question whether a court could invalidate a later prohibition on use of appropriated funds to pay judgments, as an interference with Article III powers, see *infra* notes 290-91.

281. Note that on this empirical reasoning Congress could, if it refused to pay judgments often enough, render Article III courts powerless to issue judgments against the United States.

282. See GAO REDBOOK, *supra* note 100, at 14-5.

283. *Cf.* Paul Mishkin, *Federal Courts As State Reformers*, 35 WASH. & LEE L. REV. 949, 969-70 n.73 (1978) (noting that the Supreme Court had resolved the justiciability of claims against the United States "without declaring that the judicial orders could be enforced without congressional concurrence"). Note that retention of control over appropriations for the judgment fund need not involve "substantive" review of judicial decisions by the Congress, but rather might reflect budgetary constraints relating to the timing of when judgments are satisfied. *Cf.* Alden v. Maine, 527 U.S. 706, 750-51 (1999) (emphasizing government interest in determining what items on agenda rise to the top of budgetary priorities). Currently judgment creditors of the United States for the most part stand in a very secure position compared to those of most other defendants.

284. Recall that the *Regional Rail Reorganization Cases* upheld Court of Claims jurisdiction over a potentially enormous multi-million dollar claim at a time when the permanent

then that effectively assured payment of most judgments of the claims court; its presence as a permanent indefinite appropriation, as well as Congress' history of payments, offered a good prospect that Congress would honor judgments even in excess of the fund.

What counts as a sufficient empirical basis to think that judgments will be effective is, thus, somewhat unclear.[285] If, for example, there were no advance appropriation at all, would that bar the court from entering judgment against the United States?[286] Or would it depend on the prior course of payments? On Harlan's empirical theory, the question remains whether, *absent* a judgment fund and a course of consistent payment, a waiver of sovereign immunity and consent to jurisdiction would be sufficient as an earnest of Congress' intent to pay. The GAO still takes the position that a waiver of sovereign immunity alone is not enough, as a constitutional matter, to assure payment.[287] If there is no appropriation but there is a specific waiver of sovereign immunity,[288] can the court proceed to judgment even though, if the claimant wins, he or

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indefinite appropriation was limited to judgments of under $100,000. The decision was made, however, against a background of fairly consistent payment of the judgments of the Claims Court. *See supra* notes 264, 274.

285. Note that the Court was divided in *Glidden* on whether, for the period *prior* to 1953 (during which time there were occasional refusals to pay court of claims judgments), the Court of Claims was or was not an Article III court. *Compare Glidden*, 370 U.S. at 584 (Harlan, J., announcing the judgment of the Court) (suggesting that *Williams*, which had held the Court of Claims was not an Article III court, was no longer good law), *with id.* at 585 (Clark, J., concurring in the result) (disagreeing with Harlan on "overruling" of *Williams*). Accounting for Supreme Court review of its judgments if it lacked the power to issue binding judgments would be difficult, but a court may lack Article III status for other reasons, and Claims Court judgments (except on advisory references) during all periods since 1866 were treated as reviewable. *See supra* notes 204, 221, 264; *cf.* Note, *The Court of Claims*, *supra* note 254, at 686-87 (suggesting that the Court's appellate jurisdiction over Claims Court judgments might depend on Congress' restraint in not seeking "remands," as in Pocono Pines litigation, for purpose of determining facts to aid in decision whether to make appropriation to pay admittedly final judgment).

286. Recall that *Reeside* asserted that, without an appropriation the Court could not issue affirmative process against a government officer in effect to pay a debt because Congress needed to act to pay the debts of the United States. *See* Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850). Recall as well, however, that for many years monies were appropriated for Court of Claims judgments after they were entered. *See supra* notes 254, 264.

287. The GAO Redbook asserts that "[a] waiver of sovereign immunity may result in a judgment against the government but, without more, will not get it paid . . .because [of] the 'Appropriations Clause' of the United States Constitution . . . which prohibits the withdrawal of money from the United States Treasury except under an appropriation . . . ." GAO REDBOOK, *supra* note 100, at 14-5. *See also* Collins v. United States, 15 Ct. Cl. 22, 36 (1879) ("When this court gives judgment against the United States, the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded."), *quoted and cited at* GAO REDBOOK, *supra* note 100 at 14-5. *See also supra* note 100.

288. Much might depend on how specific the authorization to sue is; courts would have interpretive latitude in determine whether sovereign immunity was waived.

she might need to wait for an appropriation before it could be satisfied?[289] History suggests that the court can proceed to judgment, though the dispositive decisions are framed by the judgment fund's existence.

Moreover, if the judgment fund is in existence, what if Congress were to enact an appropriations rider prohibiting use of appropriated funds to pay a particular final judgment? Would the Supreme Court today, like the Court in *Eslin*, refuse to exercise jurisdiction because the judgment could not be paid?[290] Or would the Court fall back on unimpaired portions of its jurisdiction to grant relief on the theory that the prohibition on payment was itself unconstitutional, perhaps as a taking of property within the Court of Claims jurisdiction?[291] Would *Klein* be regarded as in any way a constraint

289. *See supra* notes 254, 264 (describing earlier practice by which Congress appropriated funds to pay Claims Court judgments after the fact). The Court has on occasion implied that an obligation by a government officer to pay a debt, even when the obligation is not contested and even if ordinarily enforceable by mandamus, might not be enforceable through such a writ if moneys are not available or are more needed for other public necessities. *See* United States ex rel. Redfield v. Windom, 137 U.S. 636, 644 (1891) ("In The King v. The Lord Commissioners of the Treasury, 4 Ad. & El. 286, 295, Lord Denman, Chief Justice, said: 'If, as has been suggested, it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature.'"); *see also Virginia v. West Virginia*, discussed *supra* note 277. *But see Alden*, 527 U.S. at 750-51 (implying that if states could be sued for damages they would lose control over their public fisc and the priority of which obligations to satisfy, possibly on the assumption that they would have to pay the judgment immediately).

290. The legislation at issue in *Eslin* repealed the statutory authority under which the litigation proceeded and also prohibited payment of judgments previously entered. *See* District of Columbia v. Eslin, 183 U.S. 62, 64 (1901). The case suggests that Congress has the power to prohibit payment of a judgment in pending litigation. *See id.* at 65 (concluding that "when Congress by [the repealer act] directed the Secretary not to pay any judgment based on [the earlier act], that officer could not be compelled by the process of any court to make such payment . . ."); *cf.* De Groot v. United States, 72 U.S. 419, 432 (1866) (suggesting that Congress "may at any time withdraw a particular case" from the "cognizance" of the Claims Court). In *Eslin*, a motion for new trial was pending at the time of the repealer legislation, *see id.* at 64. More recent caselaw suggests that Congress' powers to interfere with article III court's judgments that have become fully final are more limited than its powers to affect pending cases. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). Read together, *Eslin* and *Plaut* might suggest that a prohibition on the use of appropriated funds to pay a fully final judgment might be more subject to Article III challenge than a prohibition on payment of a judgment still pending review. *But cf.* Office of Personnel Management v. Richmond, 496 U.S. 414, 425 (1990) (emphasis added) ("*Any* exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."). The question raised is whether a "reservation" designed to forbid payment of a fully final judgment of an Article III court is "valid." *See infra* next note.

291. In *United States v. Lovett*, 328 U.S. 303 (1946), the Court affirmed Court of Claims judgments in favor of three government employees, notwithstanding an appropriations law

in the face of an explicit exercise, not of the power to control jurisdiction, but the power over expenditures of federal funds?

We do not have definitive answers, perhaps in part because of the relative restraint exercised by Congress and the Court in their dealings on related questions. For example, in *Klein* Congress paid the judgment that was affirmed in the case (which had held unconstitutional legislation designed to prevent that very payment); Congress did not force the issue by enacting additional legislation to prevent payment of the judgment.[292] The *Klein* Court itself had offered Congress a face-saving possibility, saying that "it is impossible to believe that this provision was not inserted in the appropriations bill through inadvertence," and that the Court would "best fulfill the deliberate will of the legislature" by ignoring the requirement that it dismiss the case.[293] In *Eslin* the Court refused to exer-

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provision forbidding any payment of compensation to those employees from appropriated funds. Rejecting the argument that Congress had power under the Appropriations Clause to prohibit the payments, *see id.* at 313, the Court invalidated the prohibitory condition as an unconstitutional bill of attainder. *See id.* at 315. *Lovett* leaves the door open to find specific bans on payment of judgments unconstitutional. *See id.* at 307 (not reaching question whether the law infringes on executive power or denies due process). *Cf. Richmond*, 496 U.S. at 435 (White, J., concurring) (noting with approval that the Court "does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution such as the Just Compensation Clause, Jacobs v. United States, 290 U.S. 13 (1933), or if they encroach on the powers reserved to another Branch of the Federal Government"); *id.* at 437-38 n.* (Marshall, J., dissenting) (making similar point about what is not decided). Is there, then, a distinction between the absence of any appropriation and the presence of an appropriation with an invalid condition? *Cf. id.* at 435 (White, J., concurring) ("Although *Knote v. United States*, 95 U.S. 149, 154 (1877) held that the President's pardon power did not extend to the appropriation of moneys in the treasury without authorization by law for the benefit of pardoned criminals, it did not hold that the Congress could impair the President's pardon power by denying him appropriations for pen and paper."). Would an exclusion prohibiting payment of a particular judgment be subject to invalidation so as to permit payment from funds otherwise appropriated? *Cf.* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1113, 1117-18 (1969) (suggesting that courts can fall back on "general remedial" jurisdiction to evaluate the constitutionality of restrictions on particular remedies for constitutional rights); United States v. Klein, 84 U.S. (13 Wall.) 128, 146-48 (1871) (invalidating purported restriction on jurisdiction as unconstitutional); *but cf. id.* at 145 ("Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions.").

292. *See* Young, *supra* note 224, at 1256 & n.326 (describing payment of Klein's claim after the Supreme Court decision in his favor); *cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370 (1953) (suggesting that the government's power of withholding consent to suit "isn't as nearly absolute as it seems").

293. *Klein*, 80 U.S. (13 Wall.) at 148. *Cf.* Shimomura, *supra* note 18, at 695-96 (noting more "legislative acquiescence" in paying Claims Court's judgments than "judicial assertion" of enforcement powers). For an unusual counter-example of judicial cooperation with Congress' occasional resistance to accepting its judgments as binding Congress to pay, see Pocono Pines Assembly Hotel Co. v. United States, 73 Ct. Cl. 447, 497-502 (1932),

cise jurisdiction to review a Court of Claims judgment in light of congressional legislation mandating that the judgment not be paid. The Court was careful to note, however, that in so ruling it was not deciding on the "rights of the parties."[294] Although large judgments have in the past been entered against the United States, and loom in the Winstar litigation,[295] the apparently steady course

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petition for mandamus or prohibition denied, 285 U.S. 526 (1932). The Court of Claims had entered judgment for the petitioner, 69 Ct. Cl. 91 (1930), from which judgment the government did not appeal. According to the court, on the suggestion of the Comptroller General, Congress "remanded" the case to the Court of Claims "to hear testimony as to the actual facts" and to report its findings to Congress. *See* Appropriations, Second Deficiency Act, Pub. L. No. 71-869, 46 Stat.1552, 1622 (1931). The Court of Claims asserted that this factual investigation was intended to "'aid Congress' in determining whether to pay an admittedly final judgment and did not 'in any manner effect [sic] the finality of the judgment itself.'" Note, *supra* note 254, at 677, 683 n.47 (quoting Court of Claims opinion). In *Glidden* Justice Harlan treated this case as without precedential weight. 370 U.S. at 568 n.33.

294. *Eslin*, 183 U.S. 62, 66 (1901). Since Congress had not repealed entirely the jurisdiction of the court of claims over takings, query whether the previously successful plaintiff would have had a "takings" claim against the United States government?

295. In Winstar Corp v. United States, 518 U.S. 839 (1996), multibillion dollar claims were made against the United States arising out of the enactment of legislation tightening the accounting standards for savings and loans. Banks that had relied on federal regulator's assurances of favorable accounting treatment in the event of acquisition of failing thrifts sued on a theory of breach of contract. The Court, rejecting the government's sovereignty arguments, upheld the contract claims and remanded to the Court of Federal Claims. Litigation is ongoing, involving more than 100 savings and loan associations as plaintiffs, with government estimates of its potential liability in the range of $30-35 billion. Scholars, jurists and lawyers disagree on the appropriate measure of damages. *See, e.g.*, Hadfield, *supra* note 2, at 469-70 (arguing for reliance as proper measure of damages, as way of reconciling democratic commitments to allowing government flexibility and concerns for private property rights); Glendale Federal Bank v. United States, 239 F.3d 1374 (Fed. Cir. 2001) (vacating $909 million damages award because restitution was wrong approach and remanding for calculation of reliance damages); California Federal Bank v. United States, 245 F.3d 1342 (Fed. Cir. 2001) (vacating a judgment of $23 million in reliance damages on a $1.5 billion claim and remanding for consideration of plaintiffs' claim for lost profits) *discussed in* Marcia Coyle, *U.S. Digs in Against S&L's*, NAT'L L.J., May 28, 2001, at A1. Notwithstanding the unusually large potential liabilities for the government in the *Winstar* cases, the ambiguous boundaries between the appropriations power and waivers of immunity for Article III adjudication have, so far as I am aware, not been challenged. Rather, after an opinion from the Office of Legal Counsel that judgments or settlements in Winstar-related cases would be payable, not out of the Judgment Fund, but rather out of the FSLIC Resolution Fund, legislation was enacted apparently appropriating additional monies to provide for payments of judgments or settlements in those cases. *See* Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Neal S. Wolin, Deputy General Counsel, Department of Treasury (July 22, 1998) (on file with the Department of Justice, *at* http://www.usdoj.gov/olc/winstarfinal.htm); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1535, 1501-A20 (1999) (enacted H.R. 3421, 106th Cong. §110) (reprinted as note to 12 U.S.C. § 1821a (2001) (evidently appropriating "for payments of judgments against the United States and compromise settlements of claims in suits against the United States arising from the Financial Institutions Reform, Recovery and Enforcement Act and its

of payment of judgments in the last forty-five years as a result of the permanent indefinite appropriations, together with an empirical approach to the legal question of what constitutes an effective judgment, has avoided the need to answer these difficult questions.[296]

The tensions in competing constitutional concepts of who is in charge have not been resolved, though debate is quiescent. If *Klein* left unclear what constrains Congress' ability to interfere with the courts' judgments on claims against the United States, *Glidden* left unclear the degree to which congressional practice in claims payment affected the Article III character of the courts that issued those judgments.[297] But we should note the degree to which the Court is in control of at least some of the answers.

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implementation, such sums as may be necessary, to remain available until expended. . . .). For a helpful discussion of an unsuccessful effort to move from reliance on the permanent indefinite fund to annual agency appropriation for the satisfaction of certain judgments, see Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. REG. 501 (1996).

296. For what is possibly an early effort by a state to avoid confrontation over payment of a judgment, see Marcus & Wexler, *supra* note 31 at 80 (suggesting that Georgia in the 1790s may have "wanted to avoid a Supreme Court judgment that the state would have to honor or ignore" and thus settled the claim at issue in *Chisholm* after the Court upheld jurisdiction but before damages were decided). It is interesting to note that legislation explicitly forbidding the use of appropriated funds to pay overtime to Department of Justice attorneys, enacted in response to ongoing litigation over DOJ's failure to do so, applies only to "work performed on or after the date of" enactment of the legislation. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, §1000(a)(1), 113 Stat. 1535, 1501A-21 (1999) (enacting H.R. 3421, 106th Cong., Title I, § 115); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act FY2001, Pub L. No. 106-553, §1(a)(1), 114 Stat. 2762, 2762A-68 (2000) (enacting H.R. 5548, 106th Cong., Title I § 111); *cf.* Battaglia v. General Motors Corp., 169 F. 2d 254, 257-262 (2d Cir 1948) (upholding constitutionality of legislation eliminating employer liability for certain overtime costs due under a prior interpretation of the law and finding no violation of the Fifth Amendment or Article III).

297. *See supra* note 281. Although the permanent indefinite appropriation allays judicial concern about the effectiveness of judgments, other constitutional questions may arise about the constitutionality of such a standing and indefinite appropriation. *See* Stith, *supra* note 63, 1379-86 (arguing that the constitutional commitment to Congress of the appropriations power and specific prohibition on withdrawals of public moneys without appropriation imply procedural norms for legislation that appropriates public moneys, including some specification of total spending authority and, with more open-ended "backdoor spending," limitations of time and periodic review). Thus, while the judgment fund supports Article III court involvement in adjudicating claims against the government (by offering apparently effective security for payment of judgments), it does so only to the extent that it arguably has diminished effective congressional control of disbursements of federal funds; as a formal matter, however, any appropriation, even for a permanent indefinite fund, arguably could be understood to satisfy the constitutional requirement. *But cf.* Stith, *supra* note 63, at 1378-84 (acknowledging possibility that legislative "permission" is all that is required but suggesting Constitution requires further limits).

In *Glidden*, Justice Harlan at one point suggested that the limitations on its jurisdiction to grant anticipatory relief in some respects afforded greater latitude to the Court of Claims to adjudicate cases against the government.[298] While this argument is somewhat circular,[299] Harlan's point suggests a more general one. Sovereign immunity, understood at the federal level as a form of judicially developed doctrine of self-restraint, may well have had self-protective elements. Although commonly spoken of as a doctrine designed to protect executive and legislative functions, perhaps we should understand it instead as resulting from courts protecting themselves from potentially dangerous confrontations with political branches and thereby protecting at least the appearance of judicial independence.[300]

Given the uncertainties about the nature of the sovereignty created under the Constitution, courts hesitant to give opinions that were subject to executive revision might well have been hesitant to enter judgments of money relief against the treasury in the face of common law traditions and congressional power over appropriations for fear they would be ignored—absent unusually specific evidence either that Congress intended the courts to resolve the claim and/or that the specific claim would be paid. Elaborating on a constitutional doctrine of sovereign immunity in a sense empowered courts to at least appear to be in control of the dividing line between relief that would and would not be available, to withhold relief in cases found barred by the doctrine and to grant relief in cases that judicial decisions excluded from the sovereign immunity ban. Asserting the constitutional provenance of the sovereign

298. *See* Glidden, 370 U.S. at 557 ("No question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation [that court of claims can only award damages] upon the remedial powers of a federal court. . . . But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action.") (citing *Malone*, 369 U.S. 643; *Larson*, 337 U.S. at 703-04).

299. The cases Harlan cites in support of this proposition, see *supra* note 298, restricted the availability of specific relief against government officers in part *because* of the availability of the Court of Claims remedy, not independent of it. If the Court and Congress had not together acted thus to limit anticipatory relief, it is hard to see why a regime in which *both* ex ante and post facto remedies are available would not leave the courts more freedom to review government action. Moreover, recent scholarship suggests, in tension with Harlan's argument, that prospective remedies (rather than damages) yield more room for beneficent judicial innovation in constitutional meaning, unconstrained by concern for the consequences on officers' or public treasuries of retroactive money relief. *See* Jeffries, *supra* note 195, at 96-114.

300. *Cf. Glidden*, 370 U.S. at 582 (explaining that framers intended "case or controversy" limitations to "safeguard the independence of the judicial from the other branches").

immunity doctrine in a sense empowered the Court more fully to control what remedies it would make available.[301]

IV. CONCLUSION

Focusing on the degree to which sovereign immunity was a doctrine of avoidance designed in part to protect the status of the courts may help explain why the *Glidden* Court was prepared to uphold Article III courts in entering money judgments against the United States given either a permanent indefinite appropriation or a history of payment, even in the face of the unresolved question whether Congress could prohibit use of the appropriated funds to pay a particular judgment. Waivers of immunity to adjudication are treated as measures of a diminished likelihood of confrontation and resistance down the line.[302] Congress once having waived immunity and authorized an Article III court to enter judgment makes it much less likely that Congress will decide not to pay.[303] Congress' habit of payment reinforces the confidence of Article III courts. And neither branch has for the most part insisted on a full-scale confrontation with the other.

Sovereign immunity has played an important rhetorical role in the Court's explanation of reasons to bar, or permit, various forms of relief in disputes between citizens and the government.[304] The

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301. *Cf.* Scheppele, *supra* note 222, at 244-46 (arguing that judicial independence is enhanced when judges have a constitution against which to evaluate other laws because it gives judges a principled space from which to critically evaluate actions of other branches).

302. This idea also helps reconcile some of the early mandamus cases that went in different directions. In *Kendall* there was more reason based on specific statutory language to think Congress intended the particular debt to be paid, than there was in either *Decatur* or *Reeside*. *See supra* notes 261, 262.

303. Consider, for example, Republic National Bank of Miami v. United States, 506 U.S. 80 (1992) This case was an in rem action concerning the proceeds from the sale of property on which the bank had a lien and in which, after prevailing in the lower court, the marshal, who had custody of the funds, turned them over to the Treasury. *Id.* at 81-82. The United States argued that the "*res* no longer can be reached, because, having been deposited in the United States Treasury, it may be released only by congressional appropriation. . . . [and thus] the case is moot, or. . . falls into the "useless judgment" exception noted above, to appellate in rem jurisdiction." 506 U.S. at 89 (Blackmun, J.). Justice Blackmun concluded that no appropriation was needed to recover funds located in the treasury that never rightfully belonged to the United States and thus could not be considered public money. *See id.* at 91-92. On this point, Chief Justice Rehnquist wrote for the Court, concluding that the Judgment Fund, together with 28 U.S.C. § 2465, constituted "a specific appropriation authorizing the payment of funds" so that a judgment would not be useless and the courts could reach the merits of the dispute. *Id.* at 95-96.

304. As already noted, sovereign immunity has been frequently invoked to support narrow interpretations of jurisdiction to hear claims against the United States. *See* supra notes 184-87; *see, e.g.*, Dalehite v. United States, 346 U.S. 15, 31 (1953) (noting that "our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to

doctrine has been deployed in part in response to the actions of the legislative branch, in an effort to fashion remedies that are least likely to be objected to and most likely to be complied with, an inquiry whose answer is changeable and highly contextualized.[305] Whether we should see this as a useful form of independence or not is a much harder question, for while it may enhance courts' abilities to avoid confrontations it limits their abilities to enforce other aspects of the law. In this way the sovereign immunity doctrine, like doctrines of nonjusticiability more generally,[306] can be viewed either as a source of legitimacy for the courts or as a form of unprincipled weakness.

To the extent that sovereign immunity functions to recognize Congress' primacy in authorizing moneys to be drawn from the treasury, this function remains important, although rhetorically the assertion of an immunity from judicial decision is in considerable tension with the rule of law and individual remediation strands

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give jurisdiction for tort actions"); Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260-61 (1999) (holding that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"). *But cf.* Bowen v. Massachusetts, 487 U.S. 879, 890-93 (1988) (upholding district court jurisdiction under APA waiver for relief "other than money damages" in dispute over disallowance of credits to state under Medicaid program). Sovereign immunity, moreover, is regularly invoked as a defense by the government in litigation. *See, e.g.*, Brief for the United States at 10-11, United States v. White Mt. Apache Tribe, 123 S. Ct. 1126 (2003) (No. 01-1067, 2001 LEXIS U.S. Briefs 1067) (arguing that the United States' immunity from suit absent "unequivocal consent" requires a narrow interpretation of a statute establishing a "trust" for the benefit of Indians, to exclude damages for breach of fiduciary duty); Brief for the United States at 21-22, United States v. Navajo Nation, 123 S. Ct. 1079 (2003) (No. 01-1375, 2001 LEXIS U.S. Briefs 1375) (arguing that sovereign immunity prohibits action for breach of fiduciary duty to tribe in connection with mineral leases). *See* United States v. White Mt. Apache Tribe, 123 S. Ct. 1126, 1131-32 (2003) (rejecting government's argument and concluding that the standard for determining whether a statute created a right to compensation was not as stringent as standard for waiver of sovereign immunity); United States v. Navajo Nation, 123 S. Ct. 1079, 1091-95 (2003) (finding that relevant statutes imposed no duty giving rise to right to compensation).

305. This claim about the remedial structure of sovereign immunity law may be related to more general remedial trends. *Cf.* Douglas Laycock, *The Death of Irreparable Injury*, 103 HARV. L. REV. 687 (1990) (arguing that, despite being invoked, the requirement of irreparable injury to issue an injunction does not account for the cases and that equitable remedies should be understood as no longer subordinate to remedies at law but made available based on functional analyses).

306. *See generally* Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 601-03, 606-25 (1976) (describing Professor Wechsler's view that courts could not refrain from deciding constitutional questions except where the Constitution so required and Professor Bickel's view that courts legitimately could refrain from decision on prudential grounds, and questioning whether the "political question" doctrine is necessary); Martin H. Redish, *Judicial Review and the 'Political Question'*, 79 NW. U. L. REV. 1031, 1053-55 (1984) (rejecting legitimacy of "political question" doctrine and specifically noting, but rejecting as justification, "Judicial Fear of Disregard by the Political Branches").

of the U.S. constitutional tradition.[307] But even waivers of sovereign immunity do not necessarily guarantee payment. Conversely, Congress' control of appropriations does not necessarily require a doctrine of sovereign immunity from judgment,[308] though it may require limits on judicial requisitioning of federal funds.

To the extent sovereign immunity can be understood as a form of early judicial efforts to protect and secure judicial independence, however, its scope should be reconsidered and narrowed (if the doctrine itself is not abolished).[309] When the Court in *Klein* demurred to the suggestion that the court of claims' jurisdiction was entirely a matter of "favor," because it is the "duty" of the government to do justice, it was asserting a pervasive constitutional norm, derivable from the Declaration of Independence and from the Preamble to the Constitution, as well as the due process clause. And comparative experience—and the experience of U.S. courts as well—both suggest that the legitimacy of courts can be reinforced by confronting the government and affording individual relief to

307. *See supra* text at note 1. As noted above, I have not in this essay sought to address other possible arguments in favor of sovereign immunity, e.g., those that may derive from the value of constraining remedies to permit evolution of the law, *see* Jeffries, *supra* note 195, or that would justify nonliability rules based on economic or public choice analyses of voting and market mechanisms, or of agency problems, *see, e.g.*, Levinson, *supra* note195; Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001). I have tried to develop a descriptive, legal account of the persistence of the doctrine at the federal level, based on what the Court itself has said over time, rather than a normative account or critique of other possible justifications for retention of the doctrine. I have also tried to show that sovereign immunity's provenance in this country is confused, and obscured, by other more legitimate elements of constitutional design and that to the extent sovereign immunity's flowering was fed by concerns for judicial independence, those concerns cannot today justify interpretive choices that foreclose adjudication of substantial claims of government wrongs.

308. *Cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1387-89 (1973) (urging that sovereign immunity doctrine be narrowed to bar only certain remedies and to allow courts to issue declaratory judgments on the legality of any government action regardless of whether public officials then ignore the declaration).

309. *Cf.* Amar, *supra* note 73, at 1486-87 (suggesting that "even if [it were] colorable" in the eighteenth and early nineteenth centuries that the protection of constitutional rights was compatible with a doctrine of sovereign immunity, in reliance on a regime of strict liability for government officers, it is not today and the doctrine of sovereign immunity should not bar relief in courts where necessary to protect constitutional rights). Note that even some defenders of the constitutional status of sovereign immunity argue that it should be given more narrow scope, for example, in construing the effect of federal statutory waivers on federal sovereign immunity. *See e.g.* Hill, *supra* note 195, at 537 ("The Court's resistance to a finding of consent (arguably excessive in any event) is inappropriate in the case of federal statutes. While sovereign immunity is an aspect of the constitutional scheme, so too is the plenary power of Congress to waive it for the United States.").

those with legitimate claims against the government.[310] Although there may be some beneficial ambiguity from the branches' exercise of restraint in pressing confrontations with each other, at the same time it is and should be the role of courts to seek within the limits of their jurisdiction to do justice. President Lincoln's words about the duty of a government to render prompt justice against itself in favor of citizens refers to a responsibility shared by all of the branches, not just Congress. To the extent that U.S. courts adopted the doctrine of sovereign immunity as part of an effort to help define a line between judicial and legislative power, the need for some such line will continue.[311] Indeed, sustaining judicial independence may depend on both the courts and the political branches refraining, most of the time, from pressing the constitutional limits of their powers.[312] But to the extent that sovereign immunity functioned as a self-protective mechanism for courts to avoid confrontations with other branches, the development of the

310. *See also* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 543-607 (1999) (describing "foundational cases" in which constitutional courts around the world appear to acquire legitimacy and status by striking down legislation or other acts of their governments); *supra* note 202. Thus, while I recognize the possibility that it is the rigidity of insistence of "sovereign immunity" and on clear waivers that has contributed to the pattern of non-confrontation over judgments once entered on this standard, experience elsewhere may suggest that more liberal availability of relief against the government would not be inconsistent with the proper functioning of courts in constitutional democracies. *See* James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L L. REV. 611 (2003) (discussing *Francovich* doctrine, European Court of Human Rights law, and "willingness of European institutions to set aside rules of sovereign immunity," albeit in limited contexts); *see also* James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 253-55 (2003). It may well be the case today that the independence of courts is better secured by popular perception of their ability and inclination to do justice to citizens than by their avoiding confrontations with other branches of government.

311. For decades scholars have urged the Court to abandon reliance on "sovereign immunity" and instead develop doctrine more candidly focused on the considerations relevant to what relief should be available. *See, e.g.*, Byse, *supra* note 5, at 1528-29; Pfander, *supra* note 29, at 981, 986-90; *cf.* Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 103-14 (2002) (noting other doctrines that can protect separation of powers without resort to sovereign immunity). Thus, in some cases currently barred by "sovereign immunity" other doctrines would support denial of relief. A classic example is *Larson*, in which long-established rules against specific performance of contracts with the government might have been sufficient to support the Court's result. *See* Seamon, *supra* note 139, at 180; *cf. Larson* at 337 U.S. 705 (Douglas, J., concurring) (arguing that Court's decision was correct as to rules governing sale of government property); Frug, *supra* note 63, at 756 (criticizing state sovereign immunity doctrine for failing to "distinguish permissible orders by the extent of" the financial burdens, or other intrusiveness, imposed).

312. *See, e.g.*, Pfander, *supra* note 29, at 987 (arguing that doctrines of equitable restraint should be relied on in appropriate cases); Jackson, *supra* note 74, at 88-98 (1988) (arguing that federal common law of remedies should be developed to respect roles of other branches).

Constitution and the increased role of courts in the administration of justice against the government ought to give both courage and comfort in knowing that the likelihood of defiance of judgments can be said to have diminished substantially over the years. So where there is room for interpretation on questions of jurisdiction and remedies, the abstract idea of sovereign immunity (an idea whose constitutional provenance its at best unclear) or the fear of confrontation and noncompliance (a concern perhaps more understandable in the early years of the constitutional system) should not restrain the courts from interpreting their jurisdiction so as to fulfill the promise of *Marbury* that the law provide remedies to address violations of legal rights.