The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States

Gregory C. Sisk*

Table of Contents

Introduction ............................................................. 602
I. Weaving the Tapestry of Waivers of Sovereign Immunity ........... 606
   A. The Origins of the Court of Federal Claims and the Tucker Act . 606
   B. A Primer on Tucker Act Jurisprudence ........................ 611
   C. The Administrative Procedure Act and Sovereign Immunity...... 615
II. The Tapestry is Unraveled: *Bowen v. Massachusetts* .............. 618
III. The Tear in the Fabric Grows Larger ............................. 627
   A. Contract Claims and the Bar on Specific Performance .......... 627
   B. Civilian Employment Claims .................................. 636
   C. Military Employment Claims .................................. 648
   D. Indian Money Claims ......................................... 656
   E. Government Spending Program Claims ........................ 666
IV. Mending the Tear: Restitching the Court of Federal Claims into the Tapestry ......................................................... 675
   A. The Judiciary as Seamstress ................................... 675
      1. Reconsideration by the Supreme Court .................... 675
      2. Stabilization by the Court of Appeals for the Federal Circuit ........................ 681
   B. Congress as Tailor ............................................ 687
      1. Exclusion of Monetary Relief from the Administrative Procedure Act ............................................. 688
      2. The Adequacy of Monetary Relief Under the Tucker Act Precludes Administrative Procedure Act Review .......... 695
Conclusion .............................................................. 706

Introduction

The concept of “sovereign immunity”—the immunity of the United States from suit without its express permission—underlies and permeates the question of federal governmental liability in court.¹ For any suit against the United States or its agencies to survive a motion to dismiss, a claimant must find a specific statute that waives the sovereign immunity of the government for that type of claim and then must follow the rules set down in that statute for pursuing recovery. Over the past century and a half, Congress has gradually lowered the shield of sovereign immunity, making the United States

* Professor, University of St. Thomas School of Law (Minneapolis) (gcиск@ stthomas.edu). The author has written widely on the subject of civil litigation against the federal government, including the recent publication of a casebook, *Litigation with the Federal Government*. He gratefully acknowledges Dean C. Peter Goplerud and the Board of Governors of the Drake University Law School Endowment Trust for the award of a research stipend that supported the completion of this project.

amenable to suit in most areas of substantive law and covering most situations in which an injured party would desire relief.\textsuperscript{2} Congressional enactments thereby have woven a broad tapestry of authorized judicial actions against the federal government.

Although these statutory waivers of federal sovereign immunity have been enacted piecemeal by Congress over the course of 150 years, they nevertheless fit together into a reasonably well-integrated pattern of causes of action covering most subjects of dispute between the government and its citizens. Congress has contributed to this cohesion, intentionally or unintentionally, by limiting the sweep of one statute and thereby avoiding conflict with another. For example, the Tucker Act\textsuperscript{3} was enacted in 1887 to authorize money claims against the federal government for “cases not sounding in tort.”\textsuperscript{4} Thus, when the Federal Tort Claims Act (“FTCA”)\textsuperscript{5} was subsequently enacted in 1946, it filled an empty niche and operates independently from the Tucker Act in most circumstances. Similarly, by its terms, the Administrative Procedure Act (“APA”)\textsuperscript{6} excludes actions for “money damages,”\textsuperscript{7} thereby directing most money claimants to frame an action under other statutes designed for money judgments, such as the Tucker Act and the FTCA—although, as will be seen, this particular design has become somewhat disordered.

Unfortunately, the courts, while ordinarily striving to synthesize separate statutory provisions into a coherent whole, have not always been friends of harmony. Indeed, even when Congress has attempted to stitch the seams of the statutory fabric more tightly together, a particular judicial decision may appear to unravel the tapestry. As a notorious and remarkably far-reaching example, in \textit{Bowen v. Massachusetts},\textsuperscript{8} the Supreme Court confronted the problem of distinguishing between a proper claim under the APA for specific relief (routed to the federal District Courts) and a Tucker Act claim for money damages (falling within the exclusive jurisdiction of the United States Court of Federal Claims. Instead of drawing a bright line between money and nonmoney claims—and thus a clear jurisdictional border


\textsuperscript{4} Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (2000); see infra Part I.A–B.

\textsuperscript{5} Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680.


\textsuperscript{7} Administrative Procedure Act, 5 U.S.C. § 702 (2000); see infra Part I.C.

\textsuperscript{8} Bowen v. Massachusetts, 487 U.S. 879 (1988); see infra Part II.
between the United States District Court and the then-Claims Court (now the Court of Federal Claims)—the Supreme Court adopted an amorphous case-by-case approach, allowing plaintiffs to frame some claims for monetary relief as falling within the APA framework rather than under the purview of the Tucker Act. Section 702 of the APA explicitly excludes actions seeking “money damages.” The Court majority, however, interpreted that term very narrowly as referring only to claims that seek compensation for a loss. By contrast, the Court allowed, when money is “the very thing” to which a party is entitled, by statutory direction or otherwise, those funds may be claimed in an action for specific relief.

Contending that the majority opinion unsettled Tucker Act jurisprudence, unjustifiably expanded specific relief under the APA to include money, and encouraged forum shopping between the District Court and the Court of Federal Claims, Justice Scalia dissented from the Bowen v. Massachusetts decision. By blurring the lines of demarcation between equitable-type nonmonetary claims properly brought in District Court under the APA and monetary claims properly reserved to the Court of Federal Claims under the Tucker Act, Justice Scalia contended that the Court’s ruling sows jurisdictional chaos. Because virtually any complaint seeking monetary recovery could be framed as a request for an injunction against nonpayment of the funds or for specific relief requiring the government to pay money, Justice Scalia argued that the “Court cannot possibly mean what it says today.” He concluded that the Court’s reasoning “cannot possibly be followed where it leads, [but that] the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single [grant-in-aid program] type of suit before us.”

In fact, the lower courts are in disarray and, while some courts have resisted the temptation to take Bowen v. Massachusetts to its logical extremes, others have seized upon the open-ended language of that decision to assert authority to decide matters long thought to fall outside of their jurisdiction.

Some courts have accepted Justice Scalia’s invitation to read the Bowen v. Massachusetts decision narrowly and to skeptically regard claims for money framed as APA suits for equitable relief. For example, when nuclear utilities invoked District Court jurisdiction by seeking an injunction under the APA against enforcement of certain governmental assessments rather than by requesting a refund, one Court of Appeals characterized this as an intolerable “attempt to artfully recast its complaint to circumvent the Tucker

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9 Bowen, 487 U.S. at 891–901.
11 Bowen, 487 U.S. at 891–901.
12 Id. at 895, 900.
13 Id. at 913–30 (Scalia, J., dissenting).
14 Id. at 930.
15 Id. at 921.
16 Id. at 930.
17 See infra Part IV.
Act] jurisdiction of the Court of Federal Claims,” while a concurring judge noted that the case “confront[ed] the court with a choice between a seemingly illogical Supreme Court rule, calling for a less-than-sensible result, on the one hand, or underruling the Supreme Court decision, here Bowen v. Massachusetts, on the other.” Likewise, another Court of Appeals held that a plaintiff could not seek backpay for a wrongfully denied federal employment opportunity through an APA suit for specific relief, although the dissenting judges accused the majority of a “cavalier” dismissal of the Supreme Court’s Bowen v. Massachusetts decision.

Yet, despite the fact that federal employment disputes have always fallen squarely within the exclusive jurisdiction of the Court of Federal Claims, one Court of Appeals has held that, if his or her case is carefully pleaded, a military servicemember seeking a retroactive extension of enlistment to obtain military retirement benefits could proceed under the APA. Moreover, the Bowen decision has undermined one of the most enduring limitations on government liability—the rule barring specific performance in contract actions against the federal government and thereby limiting contract claimants to a damage remedy. One Court of Appeals, relying directly upon Bowen v. Massachusetts, held that the Tucker Act did not forbid the court from requiring the government to honor a contract, that is, specifically perform, under APA judicial review. As yet another example, the confusion about the jurisdictional divide between Tucker Act/Court of Federal Claims and APA/District Court suits has even extended to Indian claims against the government for breach of its trust responsibilities to America’s indigenous peoples—one of the oldest arenas for Tucker Act litigation.

These “signals of distress” from the lower courts justify renewed Supreme Court review of this problem and further suggest that the Bowen v. Massachusetts decision has proven to be impossible to apply in a predictable and sensible manner. Alternatively, either the Supreme Court or the United States Court of Appeals for the Federal Circuit, with its unique role as national appellate arbiter of federal money claims, could clarify the state of the law and stabilize jurisdictional lines by limiting Bowen v. Massachusetts

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19 Consol. Edison Co., 247 F.3d at 1386 (Plager, J., concurring) (citation omitted).
20 Hubbard v. Adm’r, EPA, 982 F.2d 531, 531-39 (D.C. Cir. 1992) (en banc); see infra Part III.B.
21 Hubbard, 982 F.2d at 540 (Edwards, J., dissenting).
22 James v. Caldera, 159 F.3d 573, 581–83 (Fed. Cir. 1998); see infra Part III.C.
23 Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1276–79 (10th Cir. 1991); see infra Part III.A.
26 See infra Part IV.A.
to its peculiar context of an ongoing funding program implicating sensitive issues of the federal-state relationship.\textsuperscript{27}Indeed, there are encouraging signs on the judicial front, as the Supreme Court has resisted any extension of \textit{Bowen v. Massachusetts} to new contexts,\textsuperscript{28} and the Federal Circuit has taken a considered step forward in restoring jurisdictional clarity and stability in assignment of claims between judicial institutions.\textsuperscript{29} If, however, these positive movements were reversed and the courts proved unwilling or unable to play the role of seamstress and tighten the stitches the judiciary has loosened, then Congress should take the opportunity to mend this growing tear in the statutory tapestry.\textsuperscript{30}

The experience of the past decade and a half confirms the detrimental consequences of a loosely-defined standard for treatment of money claims against the federal government in creating confusion and inconsistency and enhancing the opportunity for forum-shopping by litigants.\textsuperscript{31} To achieve clarity and simplicity in determining the preliminary requisite of proper jurisdiction, the Court should restore a bright line between retrospective monetary relief and prospective equitable relief.\textsuperscript{32} Even more important, the ability of the Court of Federal Claims to afford full relief in a single lawsuit implicating monetary relief should be recognized as adequate in most instances and should be augmented in appropriate categories of cases.\textsuperscript{33} In the interests of efficiency and respect for the institutional strengths of the alternative forums, the invaluable role of the District Court must be respected in nonmonetary cases as well as cases that present an exceptional need for specific relief, and the Court of Federal Claims should be confirmed as the proper and exclusive forum for those types of claims that traditionally have fallen within its judicial franchise.\textsuperscript{34} In this way, by preserving the fabric of District Court authority while also restitching the Court of Federal Claims into the cloth, the tapestry of statutory waivers of sovereign immunity may again be made whole.

\textbf{I. Weaving the Tapestry of Waivers of Sovereign Immunity}

\textbf{A. The Origins of the Court of Federal Claims and the Tucker Act}

The concept of “sovereign immunity”—that is, the immunity of the federal government from suit without its express permission and subject to limitations incorporated into the statutory waiver—underlies and permeates the subject of litigation against the federal government.\textsuperscript{35} What today is the Court of Federal Claims shared its birth with that of the first significant grant

\textsuperscript{27} See id.

\textsuperscript{28} See infra Part IV.A.1.

\textsuperscript{29} See infra Part IV.A.2.

\textsuperscript{30} See infra Part IV.B.

\textsuperscript{31} See infra Part III.

\textsuperscript{32} See infra Part IV.B.1.

\textsuperscript{33} See infra Part IV.B.2.

\textsuperscript{34} See id.

\textsuperscript{35} SISK, \textit{LITIGATION WITH THE FEDERAL GOVERNMENT}, supra note 1, at 104.

The United States Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts.\footnote{Act of February 24, 1855, ch. 122, 10 Stat. 612.} Prior to 1855, individuals with contract or other monetary claims against the federal government were barred by sovereign immunity from seeking redress in court and thus were left to petition Congress to enact legislation—in the form of “private bills”—appropriating funds to pay those claims.\footnote{Seamon, \textit{supra} note 36, at 175.} As originally conceived, the Court of Claims had authority only to make recommendations to Congress to pay claims, thereby serving as an advisor to Congress regarding the merits of such claims.\footnote{Id. at 176; Michael F. Noone, Jr. & Urban A. Lester, \textit{Defining Tucker Act Jurisdiction After Bowen v. Massachusetts}, 40 \textsc{Cath. U. L. Rev.} 571, 575 (1991); William M. Wiecek, \textit{The Origin of the United States Court of Claims}, 20 \textsc{Admin. L. Rev.} 387, 397 (1968).} President Lincoln urged Congress to give the “power of making judgments final” to the Court of Claims, arguing that “[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals.”\footnote{CONG. GLOBE, 37th Cong., 2d Sess., app. 2 (1862).} As President Lincoln requested, and “under the deluge of Civil War claims,”\footnote{C. Stanley Dees, \textit{The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?}, 28 \textsc{Pub. Cont. L.J.} 545, 546 (1999).} Congress acted in 1863 to grant the Court of Claims power to make binding and final judgments with appellate review by the Supreme Court.\footnote{Act of March 3, 1863, ch. 92, 12 Stat. 766; \textit{see also} Dees, \textit{supra} note 41, at 546; Seamon, \textit{supra} note 36, at 176.}

From an historical and a practice perspective, it is not at all surprising that the very first congressional waiver of the United States’ immunity from legal action and liability was focused primarily upon disputes involving government contractors. Professor Harold J. Krent explains that “[t]he [pre–Civil War waiver of immunity from contract suit] was viewed as indispensable to the efficient operation of government, for without it, qualified private contractors might not undertake government projects and the government could not obtain the goods and services it needed at affordable prices.”\footnote{Harold J. Krent, \textit{Reconceptualizing Sovereign Immunity}, 45 \textsc{Vand. L.J.} 1529, 1565 (1992).} Professor Gillian Hadfield writes that the waiver of sovereign immunity in contract cases served not only practical ends but promoted democratic theory:

\begin{quote}
The ability of the sovereign to bind itself in contract has been an important step in the evolution of the modern democratic state. Through the use of contracts, government has been able to perform its functions more effectively by drawing on private resources to deliver governmental goods and services. Politically, by honoring its
\end{quote}

In 1886, Representative John Randolph Tucker introduced a bill in Congress to revise the jurisdiction and procedures of the Court of Claims and to replace the earlier 1855 and 1863 statutes.\footnote{H.R. 6974, 59th Cong. (1886). \textit{See generally} United States v. Mitchell, 463 U.S. 206, 213 (1983) (describing the history of the Tucker Act and the Court of Claims).} The Tucker Act,\footnote{Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.). As discussed below, see infra Part I.B, the substance of the Tucker Act is found primarily in 28 U.S.C. § 1346(a)(2) (the “Little Tucker Act”) and § 1941 (the “Big Tucker Act”).} enacted in 1887, remains the “foundation stone” in the adjudication of money claims against the United States.\footnote{Dees, supra note 41, at 546.} This statute confirmed the powers and nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and also expanded that court’s authority to hear suits based upon the Constitution.\footnote{Seamon, supra note 36, at 176–77.} Moreover, the Tucker Act granted the then–circuit courts (today the District Courts) concurrent jurisdiction with the Court of Claims over monetary claims not exceeding $10,000 in amount.\footnote{Noone & Lester, supra note 39, at 575. The concurrent jurisdiction of the District Courts over the Little Tucker Act claims is codified today at 28 U.S.C. § 1346(a)(2).} In 1972, Congress enacted the Remand Act\footnote{Remand Act of 1972, Pub. L. No. 92-415, § 12, 86 Stat. 652 (codified at 28 U.S.C. § 1941(a)(2) (2000)).} as an amendment to the Tucker Act, which permits the court to grant certain types of equitable relief “incident of and collateral to” a money judgment, such as reinstatement of an employee to a position or correction of records.\footnote{Id.} In 1996, the Tucker Act was amended to grant the Court of Federal Claims jurisdiction, including the power to issue declaratory and injunctive relief as well as money damages, over protests arising from solicitations of bids for government contracts, a field of litigation that has become a sizable part of the court’s docket.\footnote{Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874–76 (1996) (codified at 28 U.S.C. § 1941(b) (2000)).} With these and other minor exceptions, the substance of the Tucker Act has been remarkably stable during the past century.\footnote{Seamon, supra note 36, at 178 n.111.}

During the past quarter century, however, the Tucker Act has been revised in two important structural ways,\footnote{On these two important structural changes to the handling of claims under the Tucker Act, see generally Seamon, supra note 36, at 178 n.111.} and the former Court of Claims has been reconstituted once and renamed twice. First, prior to 1978, contract disputes with the government generally fell under the provision of the Tucker Act covering claims founded on contract.\footnote{SISK, \textit{Litigation with the Federal Government}, supra note 1, at 518.} Since 1978, the now–Court of Federal Claims has original court jurisdiction, shared only with the agency boards of contract appeals, over all contract claims covered by the Contract
Disputes Act of 1978 ("CDA"). The CDA governs all contracts entered into by the government for the procurement of property, other than real property; the procurement of services; the procurement of construction, alteration, repair or maintenance of real property; or the disposal of personal property. The vast majority of contracts with federal government departments and agencies fall within the coverage of the CDA. Pursuant to the CDA, a government contractor has two alternatives avenues for review of an adverse decision by a government agency contracting officer: (1) a "direct access" suit in the Court of Federal Claims under the Tucker Act as amended by the CDA, or (2) review by the Board of Contract Appeals for the agency. Whether the case is heard by the Court of Federal Claims or the Board of Contract Appeals, either the contractor or the government may seek appellate review in the United States Court of Appeals for the Federal Circuit.

Second, the Federal Courts Improvement Act of 1982 ("FCIA") bifurcated the original Court of Claims into two separate but related judicial entities. The Court of Claims was an Article III court, with its judges being appointed for life tenure as with judges on other federal courts. As part of the FCIA, Congress established the slightly renamed Claims Court as the trial court for Tucker Act and CDA claims and, then, created the Federal Court of Claims as an Article II court.

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58 Sisk, Litigation with the Federal Government, supra note 1, at 543. There are exceptions, however, to the coverage of the CDA. First, contracts in which the government supplies a service are not covered by the CDA. Second, agreements by the government arising out of its regulatory activities are not created under the CDA process. Third, although the CDA purports to apply to "any express or implied contract," 41 U.S.C. § 602(a), it actually does not apply to most implied-in-fact contracts "which by their nature do not have a contracting officer to make the decision that initiates proceedings under the Act," Urban A. Lester & Michael F. Noone, Jr., Litigation with the Federal Government § 9.109 (3d ed. 1994). Finally, some government agencies or entities, such as those not funded by congressional appropriations, are not covered by the CDA for their contracting activities. On the scope of the CDA and for examples of the exceptions to its coverage, see generally Sisk, Litigation with the Federal Government, supra note 1, at 543–44 & n.**.
59 For a discussion of the alternative avenues for review in CDA cases, see generally Sisk, Litigation with the Federal Government, supra note 1, at 530–46; Dees, supra note 41, at 547–48.
60 Tucker Act, 28 U.S.C. § 1491(a)(2) (2000); Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(3). See generally Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990) (describing "direct access" suits in the then–Claims Court under the CDA). With the CDA, the Little Tucker Act was amended to remove jurisdiction from the District Courts over contract claims subject to the CDA, even if the claim does not exceed the $10,000 amount-in-controversy that sets the ceiling for other Little Tucker Act claims in District Court. 28 U.S.C. § 1346(a)(2).
61 41 U.S.C. § 606. See generally Seaboard Lumber, 903 F.2d at 1562 (describing review by the appropriate Board of Contract Appeals under the CDA).
64 Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962) (declaring that the Court of Claims was an Article III court).

Circuit to hear appeals involving these and other claims.65 Congress designated the Claims Court as an “Article I court,”66—that is, a court created by Congress pursuant to its legislative powers under Article I of the Constitution and whose judges do not have the life-tenure protection guaranteed to members of the regular federal judiciary by Article III of the Constitution.67 The creation of the Federal Circuit, however, preserved appellate review by an Article III court.68

In 1992, the Claims Court was renamed the “United States Court of Federal Claims,”69 the denomination that it retains today. By statute, the court consists of sixteen judges, appointed for fifteen-year terms by the President, with the advice and consent of the Senate.70 Congress, however, has provided that judges who are not reappointed following expiration of their terms may, under certain circumstances, become “senior judges,” perform judicial


68 In many respects, the division of trial and appellate authority between the now–Court of Federal Claims and the Federal Circuit is merely a continuation of existing adjudication practice in the former Court of Claims. Before enactment of the FCIA in 1982, Congress had authorized trials to be conducted before non–Article III trial commissioners, with appellate review by the Article III judges on the Court of Claims. 28 U.S.C. § 2503 (1976). See generally Sea–board Lumber Co. v. United States, 903 F.2d 1560, 1565 (Fed. Cir. 1990) (stating that “the split of trial and review functions under both systems is substantially similar”); Dees, supra note 41, at 546–47; Thurmond, supra note 67, at 513 (stating that, through the FCIA, “Congress reorganized the trial and appellate divisions of the United States Court of Claims to streamline the two-tier court” and that the then-new Claims Court “today represents the trial division of the former Court of Claims” and “the appellate section of the Court of Claims was combined with the Customs and Patent Appeals Court to become the new United States Court of Appeals for the Federal Circuit”).


duties as requested by the chief judge, and continue to receive an annuity equal to the salary payable to active judges.  

B. A Primer on Tucker Act Jurisprudence

The Tucker Act is a jurisdictional statute that also waives the federal government’s sovereign immunity for monetary claims “founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidified damages in cases not sounding in tort.”

(By its terms, the Tucker Act excludes cases “sounding in tort;” instead, the Federal Tort Claims Act subsequently enacted in 1946 waived sovereign immunity for suits in District Court seeking money damages for tortious wrongs by the federal government.)

Trial court jurisdiction over “Big” Tucker Act claims against the United States is assigned by § 1491(a)(2) of title 28 of the United States Code to the Court of Federal Claims. District Courts retain concurrent jurisdiction over Tucker Act claims for $10,000 or less under § 1346 of title 28, which is commonly known as the “Little” Tucker Act. The Big Tucker Act and the Little Tucker Act differ only in terms of the designated forum. The substance of the statutory waiver of sovereign immunity and the limitations on relief are the same whether a Tucker Act claim is heard in the District Court or in the Court of Federal Claims.

Although the Big Tucker Act makes no specific reference to money or to amount in controversy, the Tucker Act from its inception in 1887 has been understood as authorizing only the award of monetary relief against the United States. In 1969, in United States v. King, the Supreme Court held that neither the Tucker Act nor other statutes could be read to expand the authority of the then-Court of Claims to render declaratory or injunctive remedies: “cases seeking relief other than money damages from the Court of Claims have never been ‘within its jurisdiction.’” As a narrow exception to this general rule, Congress enacted the Remand Act of 1972 as an amendment to the Tucker Act and, thereby, authorized what is now the Court of Federal Claims to grant limited equitable relief, such as ordering an agency to restore an employee to a position or correcting personnel records. The court’s limited equitable authority, however, is incidental and collateral to a

71 Id. § 178(b)-(e).
72 Id. §§ 1346(a)(2), 1491(a)(1).
73 Id.
75 Id. § 1491(a)(1).
76 Id. § 1346(a)(2).
77 United States v. Jones, 131 U.S. 1, 9, 14–18 (1889) (holding that the enactment of the Tucker Act did not expand the powers of the Court of Claims beyond the award of judgments for money to the granting of equitable relief).
79 Id. at 4.
81 Id.
Tucker Act claim for a money judgment.\textsuperscript{82} Thus, for example, a federal employee may not bring an independent suit that seeks purely equitable relief from the Court of Federal Claims, but rather must request this additional relief in conjunction with a valid underlying claim for monetary relief under the Tucker Act.\textsuperscript{83} Since 1996, the Court of Federal Claims also has had the power to grant declaratory and injunctive relief, and money damages, in bid-protest suits by disappointed competitors for government contracts.\textsuperscript{84}

In 1983, in \textit{United States v. Mitchell},\textsuperscript{85} the Supreme Court clarified that the Tucker Act speaks both to subject matter jurisdiction in the federal courts and to the amenability of the United States to suit. The Court explained that the Tucker Act itself accomplishes the waiver of sovereign immunity, in addition to directing claims to the appropriate forum through its jurisdictional directives.\textsuperscript{86} Thus, while a party must find a substantive source of law or cause-of-action outside of the Tucker Act, the party need not find a separate waiver of sovereign immunity elsewhere nor is the interpretation of that source of substantive law subject to the strict construction rule that otherwise controls the threshold determination of whether the government has waived immunity.\textsuperscript{87} The Tucker Act is the necessary waiver; the constitutional provision, statute, regulation, contract, or trust relationship (or treaty for Indian Tucker Act claims)\textsuperscript{88} need only set forth a substantive right to monetary relief.

Beyond establishing jurisdiction and waiving sovereign immunity, the Tucker Act does not create substantive law or define the substance of a claim in and of itself. By its terms, the Tucker Act permits claims founded upon the Constitution, a federal statute or regulation, or a contract. Not every violation or nonfulfillment of a constitutional or statutory mandate, however, gives rise to a Tucker Act claim.\textsuperscript{89} Thus, for example, a military base might

\textsuperscript{82} Id. (authorizing Court of Federal Claims to issue certain equitable order “incident of and collateral to” any money judgment under the Tucker Act).

\textsuperscript{83} SISK, \textsc{Litigation with the Federal Government}, supra note 1, at 469; see also \textit{United States v. Testan}, 424 U.S. 392, 404 (1976) (explaining that the Remand Act, with its authorization of limited equitable relief, “applies only to cases already within the court’s [Tucker Act] jurisdiction”).


\textsuperscript{86} Id. at 212, 215–16. The \textit{Mitchell} Court thereby corrected the Court’s erroneous suggestion in \textit{United States v. Testan}, 424 U.S. 392, 398 (1976), that the Tucker Act “is itself only a jurisdictional statute” and did not waive the sovereign immunity of the United States. \textit{Mitchell}, 463 U.S. at 216 (saying that, while adhering to the result in \textit{Testan}, this “isolated language regarding waiver of immunity” should be disregarded”).

\textsuperscript{87} \textit{Mitchell}, 463 U.S. at 218–19.

\textsuperscript{88} See infra Part III.D (discussing Indian Tucker Act claims).

\textsuperscript{89} \textit{Mitchell}, 463 U.S. at 216 (“Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act.”); David M. Cohen, \textit{Claims for Money in the Claims Court}, 40 \textsc{Cath. U. L. Rev.} 533, 535 (1991) (“[T]he nature of the statute upon which the
be closed in violation of a statutory procedure or a directive by Congress mandating that facilities of a certain nature not be closed. But that statutory violation by itself would not support a Tucker Act claim by businesses in the community surrounding the base for damages in the form of lost business profits. Similarly, if the Federal Communications Commission unlawfully denied a radio license, that statutory violation likely would not permit a Tucker Act claim by the radio station for lost economic opportunities. Either case might give rise to a claim under the APA asking the court for specific relief in the form of an order that the base be reopened or the radio license be given. But presumably, no claim for money damages under the Tucker Act would be allowed.\(^9^0\)

The central question for Tucker Act purposes then is to determine whether a particular constitutional or statutory provision establishes an entitlement to a money remedy to a claimant, as opposed to stating a governmental duty to the public. In its classic and oft-cited 1967 opinion in *Eastport Steamship Co. v. United States*,\(^9^1\) the Court of Claims held that the Tucker Act claimant had to demonstrate that the source of substantive law he or she relied upon “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.”\(^9^2\) In 1976, in *United States v. Testan*,\(^9^3\) the Supreme Court adopted this same formulation, giving full credit to the Court of Claims for the concept.\(^9^4\) In sum, a claim is cognizable under the Tucker Act if it is founded upon a “money-mandating” statute or constitutional provision, that is, one that contemplates compensation in money for violation of the government’s duty.\(^9^5\)

The plaintiff relies is significant because the United States clearly is not required to respond with the payment of money in every case in which the government violates a statute.”).

\(^9^0\) SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, *supra* note 1, at 461–62.

\(^9^1\) *Eastport Steamship Co. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967).

\(^9^2\) *Id.* at 1009.


\(^9^4\) *Id.* at 400; *see also* *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (same).

\(^9^5\) On the “money-mandating” requirement, see generally Cohen, *supra* note 89, at 540–44. The “money-mandating” requirement applies not only to statute-based Tucker Act claims, as in *Eastport Steamship, Testan,* and *Mitchell,* but also to constitution-based Tucker Act claims. By virtue of its clear command for just compensation, takings claims under the Fifth Amendment have been one of the classic categories of Tucker Act cases. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, *supra* note 1, at 509–89, 592; *see also* *United States v. Causby*, 328 U.S. 256, 267 (1946) (“If there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”). In addition, the Federal Circuit has found that the “Compensation Clause” of Article III—which guarantees that the compensation of federal judges “shall not be diminished during their Continuance in Office,” U.S. CONST. art. III, § 1—also is money-mandating and thus permits federal judges to challenge deduction of social security taxes from salary in the Court of Federal Claims under the Tucker Act. *Hatter v. United States*, 953 F.2d 626, 627–29 (Fed. Cir. 1992), *aff’d by lack of quorum*, 519 U.S. 801 (1996). (Subsequently the Supreme Court heard the *Hatter* case on the merits, and while mentioning the earlier jurisdictional ruling in the Federal Circuit, did not question the availability of Tucker Act jurisdiction over the matter. *United States v. Hatter*, 532 U.S. 557, 564 (2001).) By contrast, the Federal Circuit and the Court of Federal Claims have rejected Tucker Act claims founded upon the First Amendment free speech clause, the Fourth Amendment search and seizure clause, the Fifth Amendment due process clause, the assistance of counsel requirement of the Sixth Amendment, and the involuntary servitude prohibition of the Thirteenth Amendment, reasoning that these provisions are not money-mandating in nature. See;
As with constitutional or statutory-grounded claims, the Tucker Act and the subsequently-enacted CDA do not identify the substantive law that governs a contract-based claim. When a Tucker Act claim is founded upon a money-mandating statute or constitutional provision, the particular statute or constitutional provision giving rise to the claim provides the governing substantive law. But when a Tucker Act claim is founded upon contract, the source of substantive law is a federal common law of contracts. As the then-Claims Court explained:

[T]he law to be applied in cases related to federal contracts is federal and not state law. The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private contract law for analogies and concepts. However, it is a separate and distinct body of law.

Whether a claim is brought under the Big Tucker Act in the Court of Federal Claims or in the District Court under the Little Tucker Act, all Tucker Act case appeals fall within the exclusive appellate jurisdiction of the Federal Circuit. Through the FCIA, Congress intended that the Federal Circuit exercise exclusive appellate jurisdiction over nontax Tucker Act claims in order “to provide reasonably quick and definitive answers to legal


99 See supra notes 63–68 and accompanying text.
questions of nationwide significance.”  

Specifically, § 1295(a)(3) of title 28 of the United States Code grants, to the court, jurisdiction over all appeals from the Court of Federal Claims. Additionally, § 1295(a)(2) confers appellate jurisdiction over District Court decisions “if the jurisdiction of that court was based, in whole or in part, on section 1346[(a)(2)] of this title.”

In 1987, in United States v. Hohri, the Supreme Court held that the Federal Circuit, rather than the regional Court of Appeals, has exclusive jurisdiction over an appeal of a District Court’s decision of a “mixed” case raising both a claim under the Little Tucker Act and a claim under the FTCA. Thus, for purposes of locating appellate jurisdiction, the Court gave priority to the presence of a Tucker Act claim, notwithstanding the joiner of other claims in the case. In making this determination, the Supreme Court examined the comprehensive framework of the FCIA and noted the strong congressional expressions of the need for uniformity in the area of Tucker Act jurisprudence.

In 1988, in the interests of resolving jurisdictional questions at the outset of litigation, Congress enacted legislation permitting an immediate appeal by both plaintiffs and the government from adverse District Court rulings on motions to transfer actions to the then–Claims Court. To ensure continued uniform adjudication of Tucker Act issues in a single forum, that interlocutory appeal is within the exclusive jurisdiction of the Federal Circuit. Thus, when a plaintiff or the government requests, the Federal Circuit may determine whether a case involves a “disguised” Big Tucker Act claim, a claim for more than $10,000 wrongly filed in the District Court, and the Federal Circuit can decide the jurisdictional dispute before the District Court hears the case on the merits.

C. The Administrative Procedure Act and Sovereign Immunity

While the Tucker Act provided a jurisdictional basis and a statutory waiver of sovereign immunity for money-based claims against the United States, the then–Court of Claims, as explained above, was greatly limited in its authority to grant equitable relief. Accordingly, if a party alleging a wrongful action by the federal government had not suffered a monetary injury, the Tucker Act and the Court of Claims did not afford a remedy.

Before 1976, a lawsuit asserting unlawful action by a federal agency generally had to be framed as a suit against the individual government official responsible for the action, because the United States had not waived its sov-

102 Id. § 1295(a)(2).
104 See id. at 75–76.
105 Id. at 71–73.
108 Sisk, Tucker Act Appeals, supra note 98, at 45.
ereign immunity to be sued directly.\textsuperscript{109} Thus, parties aggrieved by agency action had to fit a lawsuit within the rule of \textit{Larson v. Domestic & Foreign Commerce Corp.}\textsuperscript{110}

In \textit{Larson}, the Supreme Court held that a suit for specific relief against a federal officer in an individual capacity could go forward only if the officer’s action was “not within the officer’s statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, were constitutionally void.”\textsuperscript{111} In other words, the suit would be treated as against the government itself and, thus, barred by sovereign immunity unless: (1) the official had acted outside of his statutorily delegated authority, or (2) the official had acted contrary to constitutional command.\textsuperscript{112} In the first instance, the lawsuit was regarded as one directed against the government official individually because he or she was considered to have abdicated his or her role as a government agent by acting in an unauthorized manner.\textsuperscript{113} The \textit{Larson} Court described the second instance variously as another example of a government agent acting \textit{ultra vires} by violating the command of the Constitution\textsuperscript{114} or as a constitutional exception to the doctrine of sovereign immunity.\textsuperscript{115}

If, however, a government official instead was acting within the scope of his or her general authority and the claim was that he or she abused discretion, reached an arbitrary and capricious decision, or made a procedural error—but did not act unconstitutionally—the \textit{Larson} rule treated any suit as one challenging the actions of the government itself and thus as barred by sovereign immunity.\textsuperscript{116}

In 1976, Congress amended the Administrative Procedure Act to bypass the \textit{Larson} limitations and expressly waive the sovereign immunity of the government, thereby allowing suits seeking judicial review of an agency’s action to be brought directly against the government itself in federal District Court.\textsuperscript{117} Section 702 of the APA now reads in pertinent part:

\begin{itemize}
\item 109 \textit{See generally Sisk, Litigation with the Federal Government, supra} note 1, at 104–35.
\item 110 \textit{Larson v. Domestic & Foreign Commerce Corp.}, 337 U.S. 682 (1949).
\item 111 \textit{Id.} at 702; \textit{see also} Malone v. Bowdoin, 369 U.S. 643, 646–48 (1962) (affirming \textit{Larson} and holding that suit against a federal officer would fall outside the bar of sovereign immunity only if the officer acted outside of the authority conferred upon his office or his conduct offended a provision of the Constitution).
\item 112 \textit{Larson}, 337 U.S. at 686–91; \textit{see also Sisk, Litigation with the Federal Government, supra} note 1, at 608.
\item 113 \textit{See Larson}, 337 U.S. at 689–90.
\item 114 \textit{See id.} at 690.
\item 115 \textit{See id.} at 696.
\item 117 Pub. L. No. 94-574, 90 Stat. 2721 (1976). The APA was originally enacted in 1946 to
An action in a court of the United States . . . stating a claim that an agency 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 United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.\textsuperscript{118}

Although the waiver of sovereign immunity found in the APA does not provide an independent grant of subject matter jurisdiction in the federal courts,\textsuperscript{119} the general federal-question jurisdictional statute, \textsection\textsection 1331 of title 28 of the United States Code,\textsuperscript{120} confers authority upon the District Courts to review federal agency action, unless some other statute mandates exclusive jurisdiction in another forum.\textsuperscript{121}

While the 1976 amendment to the APA lifted the bar of sovereign immunity, the permission granted for judicial review in District Courts was not without condition. Among the limitations on the waiver in the APA, and those most pertinent to the present discussion, are: (1) claims for relief in the nature of “money damages” are excluded from the APA under \textsection \textsection 702;\textsuperscript{122} (2) final agency action is reviewable in court under the APA only when there is “no other adequate remedy” in a court;\textsuperscript{123} and (3) relief is precluded under the APA “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”\textsuperscript{124}

This Article focuses on the meaning and scope of these statutory limitations regarding “money damages” and the adequacy or exclusiveness of remedies or relief in another court. While this may seem at first encounter to be an “arcane and narrow legal issue,” one judge has aptly observed, and the discussion below should confirm, that the respective contours of the APA and the Tucker Act “presents an extremely important issue that may dictate the allocation of judicial resources nationwide” and that touches directly upon the institutional integrity of the Court of Federal Claims.\textsuperscript{125}

provide for judicial review of agency action. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Nonetheless, the APA was not regarded as having waived sovereign immunity for suits directly against the United States government, and indeed, the Court’s Larson decision further restricted the “officer suit fiction” after enactment of the APA. Seamon, \textit{supra} note 36, at 179. Accordingly, the 1976 amendment to the APA was an essential step in making the government amenable to citizen suits challenging unlawful agency action.

\textsuperscript{118} Administrative Procedure Act, 5 U.S.C. \textsection 702 (2000).


\textsuperscript{120} 28 U.S.C. \textsection 1331.

\textsuperscript{121} RICHARD J. PIERCE, JR., SIDNEY A. SHAFFO & PAUL R. VERKUIJL, ADMINISTRATIVE LAW AND PROCESS, \textsection 5.6, at 177 (3d ed. 1999); III KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, \textsection 18.1, at 163, \textsection 18.2, at 165–66 (3d ed. 1994).

\textsuperscript{122} 5 U.S.C. \textsection 702.

\textsuperscript{123} \textit{Id.} \textsection 704.

\textsuperscript{124} \textit{Id.} \textsection 702.

\textsuperscript{125} Katz v. Cisneros, 16 F.3d 1204, 1210 (Fed. Cir. 1994) (Rader, J., dissenting).
II. The Tapestry Is Unraveled: Bowen v. Massachusetts

When Congress was considering amendments to the Administrative Procedure Act in 1976, proponents of a waiver of sovereign immunity for judicial review of agency action also desired to pull together the “patchwork” of various statutory waivers of immunity in the hopes of regularizing this area of law and reducing confusion. In other words, Congress wished to ensure that a remedy existed for wrongs that are appropriately addressed in a court but also to avoid confusing intersecting jurisdiction between different statutes. Thus, before 1988, the APA and the Tucker Act were appreciated as complementary but separate provisions addressing different types of judicial review, not as overlapping and conflicting statutes. Lawsuits challenging administrative actions that sought relief other than monetary relief could properly be brought in District Court under the APA. But by its terms, the APA excludes actions for “money damages,” thereby directing money claimants to frame an action under other statutes designed for money judgments, such as the Tucker Act or the FTCA. If the plaintiff sought relief, other than in tort, in the form of a money judgment, or the practical equivalent of a money judgment, his or her action could be maintained only under the Tucker Act, in the absence of a specific jurisdictional statute encompassing a claim for monetary relief under a particular statutory scheme, such as Title VII of the Civil Rights of 1964.

126 Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 782–83 & n.3 (1st Cir. 1987) (discussing legislative history to 1976 amendments and referring to purpose to regularize “patchwork” of sovereign immunity waivers); see also New Mexico v. Regan, 745 F.2d 1318, 1321–22 (10th Cir. 1984) (saying that the APA must be “read in conjunction” with other jurisdictional statutes including the Tucker Act); H.R. REP. No. 94-1656, at 11 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6131 (the “explicit exclusion of monetary relief [from the amendment to the APA leaves] limitations on the recovery of money damages contained in . . . the Tucker Act . . . unaffected”); Richard H. Fallon, Jr., Claims Court at the Crossroads, 40 CATH. U. L. REV. 517, 527 (1991) (“Congress clearly seems to have contemplated that there can be no suit in federal district court if the suit can instead be brought in the Claims Court under the Tucker Act.”).

127 At that time, the Courts of Appeals almost uniformly recognized that cases seeking monetary relief from the United States were cognizable actions, if at all, only under the Tucker Act. See, e.g., Chula Vista City Sch. Dist. v. Bennett, 824 F.2d 1573, 1579 (Fed. Cir. 1987); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361–68 (5th Cir. 1987); Wronke v. Marsh, 767 F.2d 354, 355 (7th Cir. 1985); Chula Vista City Sch. Dist. v. Bell, 762 F.2d 762, 764–65 (9th Cir. 1985); vacated on other grounds, 474 U.S. 1098 (1986); Van Drasek v. Lehman, 762 F.2d 1065, 1071–72 (D.C. Cir. 1985); United States v. Kansas City, 761 F.2d 605, 607–09 (10th Cir. 1985); Hahn v. United States, 757 F.2d 581, 586–88 (3d Cir. 1985); Maier v. Orr, 754 F.2d 973, 980–82 (Fed. Cir. 1985); Portsmouth Redevelopment & Hous. Auth. v. Pierce, 706 F.2d 471, 473–75 (4th Cir. 1983); Bakersfield City Sch. Dist. Of Kern County v. Boyer, 610 F.2d 621, 627–28 (9th Cir. 1979); Hoopa Valley Tribe v. United States, 596 F.2d 435, 436 (Ct. Cl. 1979). But see Md. Dep’t of Human Res. v. Dep’t of Health & Human Servs., 763 F.2d 1441 (D.C. Cir. 1985) (holding that claim for specific relief in money is cognizable under the APA).


That ordered understanding became unsettled with the Supreme Court's decision in *Bowen v. Massachusetts* in 1988. In *Bowen v. Massachusetts*, the Supreme Court held that certain types of monetary claims, which it characterized as seeking specific relief in the form of money rather than money "damages," could be pursued under the APA rather than through the Tucker Act. Instead of drawing a bright-line between money and nonmoney claims—and thus a clearly-defined jurisdictional border between the United States District Court and the Court of Federal Claims—the Court adopted an amorphous case-by-case approach, allowing plaintiffs to frame some claims for monetary relief as falling within the APA framework rather than under the purview of the Tucker Act. In so doing, the Court "blurred the lines dividing relief" available in alternative forums and introduced chaos into the jurisdictional determination.

The underlying federal program at issue in *Bowen v. Massachusetts* was governed by the Medicaid statute, which establishes a federal financial participation program—a common method of federal assistance to states in providing various forms of welfare assistance. Some federal statutes, such as the Social Security Act disability and supplemental security income programs, pay benefits directly to individual beneficiaries. Under Medicaid and similar programs, such as Aid to Families with Dependent Children ("AFDC"), the individual states administer the program and pay benefits for individuals. The federal government then reimburses the states for a set percentage of the expenditures, as a matching payment.

With respect to financial participation programs, disputes arise between the federal government and the states in two basic ways. First, the general state plan for running the program might be challenged as contrary to federal statutes and regulations. If the Secretary of Health and Human Services ("HHS") concludes that a state plan is in "substantial noncompliance" with federal law, the Secretary may terminate the program. By express provi-
sion in the Medicaid statute, such a noncompliance decision by HHS is re-
viewable in the regional federal Court of Appeals.142

Second, the Secretary may find an individual expenditure by a state to
be inappropriate.143 Thus, the Secretary’s challenge is not to the overall op-
eration plan but to a particular category of benefits provided by the state.144
In such a case, the Secretary “disallows” the specific expenditure and refuses
to provide reimbursement for it.145 The Medicaid statute contains no provi-
sion for court review of a disallowance, thus leaving the state to find another
statutory basis for a judicial challenge to the disallowance.146

In Bowen v. Massachusetts, the State of Massachusetts provided state
Medicaid benefits for services to mentally retarded individuals involving
training by state department of education employees.147 The Secretary deter-
mined that the expenditures fell within the federal program only if these ser-
vices had been performed solely by state mental health employees148 and,
accordingly, disallowed the expenditures.149

Massachusetts responded to the disallowance by filing a complaint in the
United States District Court for the District of Massachusetts seeking relief
under § 702 of the APA.150 The complaint sought injunctive relief requiring
the Secretary to provide reimbursement for these expenditures.151 The Dis-
trict Court ruled in favor of Massachusetts on the merits of the case.152

On appeal, the Secretary raised the jurisdictional objection for the first
time by arguing that the case should have been heard in the then-Claims
Court under the Tucker Act.153 The United States Court of Appeals for the
First Circuit ruled that the District Court could hear the claim insofar as it
sought prospective injunctive relief, but not if it sought money past due.154
The court then ruled in favor of Massachusetts on the merits.155 The govern-
ment petitioned for Supreme Court review, arguing that the entire case, in-
cluding both claims for prospective and retrospective relief, should have gone
to the Claims Court. Massachusetts filed a cross-petition contending that the
District Court had proper jurisdiction to grant complete relief, including on
the claim for monetary reimbursement.156

142 42 U.S.C. § 1316(a)(3) (providing that a final agency order in a compliance proceeding
is reviewable in the “United States court of appeals for the circuit in which such State is loc-
cated”); see also Bowen, 487 U.S. at 885.
143 Bowen, 487 U.S. at 885.
144 Id.
145 42 U.S.C. § 1316(d); see Bowen, 487 U.S. at 885.
146 Bowen, 487 U.S. at 885.
147 Id. at 885–86.
148 Id. at 886.
149 Id. at 886–87.
150 Id. at 887.
151 Id.
152 Id. at 888.
153 Id. at 888–89. Before the District Court, the Secretary initially raised but then withdrew
the jurisdictional objection. Id. at 888 & nn.11–12.
154 Id. at 889.
155 Id. at 890.
156 Id. at 890–91.
In the majority opinion written by Justice Stevens, the Supreme Court began by examining whether Massachusetts’s claim for retrospective monetary relief was outside the scope of APA relief available in the District Court.\textsuperscript{157} Section 702 of the APA authorizes “[a]n action in a court of the United States seeking relief other than money damages.”\textsuperscript{158} The majority of the Supreme Court, however, interpreted the exclusionary term, “money damages,” very narrowly as referring only to claims that seek compensation for a loss.\textsuperscript{159} By contrast, the Court held, when money is “the very thing” to which a party is entitled, by statutory direction or otherwise, that money may be claimed in an action for specific relief.\textsuperscript{160}

Justice Stevens said that the reversal of a disallowance decision by HHS under the Medicaid program would not properly be characterized as an award of damages, but rather that such would constitute merely “an adjustment—and, indeed, usually a relatively minor one—in the size of the federal grant to the State that is payable in huge quarterly installments.”\textsuperscript{161} Because reimbursement of money is the very thing to which Massachusetts claimed entitlement, the Court concluded that an injunction to pay that money would be “specific relief,” not money damages:

\textsuperscript{157} Id. at 891–901. The majority opinion also stated, in a line unsupported by authority, that “insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages.” Id. at 893; see also id. at 909–10 (stating that the District Court’s reversal of the disallowance was not a “money judgment” as it did not directly require payment of money but rather assumed “that the Government will abide by this declaration and reimburse Massachusetts the requested sum”). With apparent reference to this passage, Justice White concurred with the Court’s construction of the District Court’s disallowance authority as not involving a judgment for money damages, but declined to agree that the District Court could have “entertain[ed] and expressly grant[ed] a prayer for a money judgment against the United States.” Id. at 912 (White, J., concurring in the judgment). The import of the passage in the majority opinion is unclear. To the extent that the majority was suggesting that artful pleading of a claim for a past-due money judgment as a request for specific relief should control the Court’s analysis, Justice Scalia pointedly responded that he could not agree and did not think the majority really believed that the jurisdictional line could be drawn on the “mere form” of a pleading rather than “on the basis of the substance of the claim.” Id. at 915 (Scalia, J., dissenting); see also Fallon, supra note 126, at 525 (“At one point, the Court suggests that the framing of the prayer for relief is crucial . . . . This, however, seems too broad a basis to provide persuasive support for the Court’s holding. Every claim for damages could be styled as a request for an injunction ordering the defendant to pay money.”). As discussed further below, see infra Part IV.A.1, the Supreme Court subsequently clarified that, whatever \textit{Bowen v. Massachusetts} may mean, it cannot be read to permit a plaintiff to frame a complaint seeking forms of specific relief, such as a request for an equitable lien upon monies held by the government, that “are merely a means to the end of satisfying a claim for the recovery of money.” Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999). In any event, the disputed passage in \textit{Bowen v. Massachusetts} also may be read merely to confirm that “insofar as the complaints sought declaratory and injunctive relief,” as contrasted with “the monetary aspects of the relief” also sought by Massachusetts, those claims were not excluded from the APA. See \textit{Bowen}, 487 U.S. at 893. In other words, for purposes of § 702’s exclusion of money damages, those equitable claims with prospective effect for the continued operation of the Medicaid program plainly were encompassed within the APA, notwithstanding the retrospective monetary aspect of other claims.


\textsuperscript{159} \textit{Bowen}, 487 U.S. at 895.

\textsuperscript{160} Id. at 895, 900.

\textsuperscript{161} Id. at 893.
The State’s suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary “shall pay” certain amounts for appropriate Medicaid services, is not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.162

In so ruling, the Court dismissed163 the legislative history behind § 702 which viewed the phrase “money damages” as synonymous with “monetary relief.”164 Moreover, in enacting the 1976 amendment to § 702, a Senate report described the changes as procedural and jurisdictional in nature and not requiring any additional appropriation of funds,165 suggesting Congress did not anticipate that the APA would become a regular avenue for pursuing monetary claims against the federal government. The Court also ignored the underlying intent of Congress in enacting § 702 of establishing the APA and the Tucker Act, not as overlapping and conflicting statutes, but as separate provisions addressing different types of judicial review.166 In sum, the Court overlooked the purpose behind § 702 of regularizing the “patchwork” of doctrines in the sovereign immunity area.167

Justice Scalia, joined by two other members of the Court, dissented on the meaning and application of the “money damages” exclusion in § 702.168 He argued that damages means the payment of money to compensate for a loss, whereas specific relief prevents or undoes the loss by ordering restoration of property that was wrongfully taken or enjoining future acts.169 In

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162 Id. at 900.
163 Id. at 897–900.
164 H.R. Rep. No. 94-1656, at 11 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6131 (“The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished [under § 702] only in actions for specific relief, (injunction, declaratory judgment, mandatory relief, etc.).”); S. Rep. No. 94-996, at 10 (1976) (same); Sovereign Immunity: Hearings on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong. 58 (1970) (Mr. Byrd, representing the Administrative Law Section of the American Bar Association, explained that the proposal was intended to except “not only suits for . . . money but also substitutes for money” including “specific relief in lieu of monetary relief”); id. at 118, 139 (Prof. Cramton, on behalf of the Administrative Conference, explained that “[a]ll forms of monetary relief . . . are excluded” from the proposed waiver of sovereign immunity in the APA, and stated that “the language of our proposal, which is applicable in terms only to actions ‘seeking relief other than money damages,’ indicates that sovereign immunity remains as a defense to actions seeking monetary relief”); id. at 221–22 (Prof. Davis described the proposed statute as intended “to allow the plaintiff in any suit for relief other than money to name the United States as defendant,” and stated that the proposed language “other than money damages” was intended as a “[l]imitation of [the] proposal to relief other than money.”).
165 S. Rep. No. 94-996, at 19 (1976) (“The committee does not believe that enactment of [the proposed amendments to the APA] which [are] procedural in nature and clarif[y] the jurisdiction of the Federal courts while marginally expanding it, will require additional appropriation of funds to either the judiciary or the agencies.”).
166 See supra notes 126–30 and accompanying text.
167 See Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 782-83 & n.3 (1st Cir. 1987).
168 Bowen, 487 U.S. at 913–21 (Scalia, J., dissenting).
169 Id. at 913–14.
essence, Justice Scalia viewed a claim for specific relief to pay money as something of an oxymoron (unless the claimant seeks restitution of a specific specie of money, such as a possessory interest in particular currency).170 Moreover, he concluded, the money sought here in fact was “compensation for the monetary loss (damage) [Massachusetts] sustained by expending resources to provide services to the mentally retarded in reliance on the Government’s statutory duty to reimburse.”171 In sum, Justice Scalia relied upon a clear distinction in the common law between money (which is damages) and a nonmonetary remedy (which is “specific relief”).172

As a congressional report later stated, by this narrow interpretation of § 702 of the APA, Bowen created “an uncertain exception to the general principle that monetary claims against the United States must proceed under the Tucker Act.”173 As addressed in detail below,174 this exception has proven entirely unworkable in practice. The purported distinction drawn by the Court between “money damages” and “monetary relief” simply sows confusion. In litigation involving statutory claims for past-due benefits or monetary claims for relief from alleged unconstitutional governmental activities, for example, it is often extremely difficult to distinguish between a compensatory claim for “damages” and a purported equitable claim for specific relief in the form of money. These semantic differences, however, now have the important effect of determining the forum for resolution of the dispute.

Bowen itself exemplifies the artificial nature of the distinction between “monetary relief” and “money damages.” Massachusetts sought judicial review of a final order by HHS refusing to reimburse the state for expenditures. As described above, the Supreme Court viewed this action as a claim for specific relief or for an injunction against HHS to provide the reimbursement and, thus, held the action could properly be maintained under the APA rather than the Tucker Act. The case, however, could just as easily have been characterized as a traditional contract action in which the state was asserting that HHS had breached its duty under the written grant-in-aid program plan to provide reimbursement.175 As a contract action, the monetary relief would clearly be denominated as “damages,” even in a technical sense, for the contract breach.176

Likewise, when an individual beneficiary or grant recipient under a federal social welfare or other spending program is terminated for some reason, a claim for retroactive restoration of the benefit or grant payments can be framed either as one seeking specific relief ordering payment of past-due funds wrongly withheld—to “undo the [government’s] refusal” to make the

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170 See id. at 917–19 & n.3.
171 Id. at 917.
172 Id. at 913–14; see also infra notes 627–32 and accompanying text (discussing common law treatment of claims for monetary relief).
174 See infra Part III.
175 Bowen, 487 U.S. at 923 (Scalia, J., dissenting) (analogizing the Medicaid program to a contract between the federal and state governments).
176 Id. at 917 (Scalia, J., dissenting).
payments—or instead as one seeking damages for breach of the purported statutory duty to make the payments. The claimant thus may elect between the APA and the Tucker Act and, consequently, between the District Court and the Court of Federal Claims, even if the amount in controversy exceeds $10,000.

The potential for forum-shopping under the Supreme Court’s decision is thus plain. The vague distinction between money “damages” and specific monetary relief encourages artful pleading of monetary claims in a manner that will ensure the plaintiff the forum that he or she desires. Thus, if the Court’s reasoning is broadly applied, a party that can frame its request for monetary relief as seeking something other than “damages” in the technical sense may avoid the Court of Federal Claims and litigate in the District Court under the APA. Virtually any complaint seeking the recovery of money may be framed as a request for an injunction against nonpayment of that money or specific relief requiring a federal official to pay money. But the proper trial forum should not be made to depend upon clever legal drafting of a complaint.

Justice Stevens, writing for the majority, also rejected the government’s argument that § 704 of the APA barred judicial review because an alternative adequate remedy in the form of monetary relief was available against the United States in the Claims Court under the Tucker Act. By its terms, § 704 authorizes judicial review under the APA only when “there is no other adequate remedy in a court.” Nonetheless, the Court held that the District Court had jurisdiction to review the government’s refusal to reimburse Massachusetts for its Medicaid expenditures despite the fact that monetary relief might have been obtained in the Claims Court under the Tucker Act.

Even assuming its availability, the majority found that a Tucker Act remedy would be inadequate because the Claims Court would be limited to issuing a money judgment and would be unable to grant prospective injunctive relief. Justice Stevens wrote that the Court was “not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in light of the rather complex ongoing relationship between the parties.”

The majority opinion closed its § 704 analysis by highlighting the special nature of the financial participation dispute between the federal government and the State of Massachusetts:

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177 See id. at 910.
178 Id. at 901-08.
180 Bowen, 487 U.S. at 904–07. Although acknowledging that the Tucker Act in some instances provides special and adequate review procedures sufficient to oust APA review by force of § 704, id. at 905 n.42, the Court also said that the primary purpose of the § 704 reference to “other adequate remedy in a court” was to “codify the exhaustion requirement” to ensure that District Court jurisdiction did not duplicate existing administrative procedures set forth in other statutes, id. at 902-03.
181 Id. at 905–07.
182 Id. at 905.
The nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context because neither the Claims Court nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims. More specifically, it is anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit.183

In dissent, Justice Scalia responded that, under the common law, “even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an ‘adequate remedy’ in all but the most extraordinary cases.”184 He agreed that a damages remedy in the Claims Court might not be adequate in every case, but noted that the majority failed to explain why a judgment for money would not have been adequate to remedy Massachusetts’s claim for financial reimbursement in this particular case.185 Nor did Justice Scalia accept the majority’s argument that a complex and ongoing federal-state relationship merited special consideration, saying that the area of law involved in Medicaid was not more complex than those subjects routinely handled in the Claims Court, that the federal government’s relationship with the states was not peculiarly intricate, and that the dispute was one of federal law that did not implicate state-law questions.186

Unfortunately, despite having suggested earlier in the majority opinion that Massachusetts’s claim could have been pursued in the Claims Court,187 Justice Stevens appended a later footnote suggesting in dictum that the state’s claim for reimbursement in that case might not be cognizable under the Tucker Act.188 By suggesting that even if the state had chosen to seek its remedy in the Claims Court through an action for damages, the Tucker Act might have afforded no remedy, the majority unnecessarily and mistakenly created doubt about the authority of that court. Although the footnote dictum is less than clear, Justice Stevens appeared to be under the impression that an action for money may be made under the Tucker Act only if the

183 Id. at 907–08 (internal citations omitted).
184 Id. at 925 (Scalia, J., dissenting); see also infra notes 656–58 and accompanying text.
185 Bowen, 487 U.S. at 927–28 (Scalia, J., dissenting).
186 Id. at 928–29.
187 Id. at 900 n.31.
188 Id. at 905 n.42.
statute providing the substantive relief—in that case, the Medicaid statute—
could be read as including an implied private right of action.\textsuperscript{189} This state-
ment reflects a fundamental misunderstanding of the nature of the Tucker
Act and a break with past precedent.

The Tucker Act, of course, is merely a waiver of sovereign immunity and
establishes no substantive right to relief.\textsuperscript{190} A substantive right must be
found in the Constitution, a statute, a regulation, or a contract. The claimant
must establish that this source of substantive law “can fairly be interpreted as
mandating compensation,” that is, can fairly be understood (assuming the
claimant is correct on the merits) as requiring the government to make the
monetary payment requested. But it is not necessary that the source of the
substantive right be read to imply a private right of action. The Tucker Act
itself provides an \textit{express} private right of action for damages.\textsuperscript{191} If a substan-
tive statute, such as the Medicaid statute, can “fairly be interpreted” as com-
manding the payment of money, it is sufficient to invoke the Tucker Act.\textsuperscript{192}
Under the Court’s Tucker Act precedent, whether the statute truly does man-
date payment under the circumstances of the particular case is an issue on the
merits to be resolved after jurisdiction is established.\textsuperscript{193}

Fortunately, the majority’s confusion about the nature of the Tucker Act
was stated only in dictum, as the issue before the Court concerned whether
the District Court had authority over the claim and not whether the
then–Claims Court also would have had proper jurisdiction. The Supreme
Court has developed a rather strict approach to the question of implied pri-
ivate rights of action.\textsuperscript{194} If the Tucker Act could only be invoked when a
statute could be read to permit a private right of action, then much of the
Tucker Act docket of the Court of Federal Claims would disappear. Indeed,
if another statute can be interpreted to include its own implied private right
of action, then a lawsuit could be maintained against the federal government
directly under that statute without any need for reliance upon the Tucker
Act. The Tucker Act would become superfluous. Here, as with much of the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{189} See \textit{id.} (citing cases regarding the implication of private rights of action in statutes that
do not provide expressly for a judicial remedy).
  \item \textsuperscript{190} See \textit{supra} notes 89–90 and accompanying text.
  \item \textsuperscript{191} See \textit{United States v. White Mountain Apache Tribe}, 123 S. Ct. 1126, 1134 (2003) (“To
the extent that the Government would demand an explicit provision for money damages to sup-
port every claim that might be brought under the Tucker Act, it would substitute a plain and
explicit statement standard for the less demanding requirement of fair inference that the law was
meant to provide a damage remedy for breach of a duty.”).
  \item \textsuperscript{192} See \textit{United States v. Mitchell}, 463 U.S. 206, 216–17 (1983). See \textit{generally supra} notes
91–94 and accompanying text.
  \item \textsuperscript{193} See \textit{Mitchell}, 463 U.S. at 228 (concluding that, because “the statutes and regulations at
issue here can fairly be interpreted as mandating compensation by the Federal Government,”
the Court of Claims had “jurisdiction” over the claims and remanding the case to the court for a
decision on the merits).
  \item \textsuperscript{194} See \textit{generally III DAVIS & PIERCE, supra} note 119, § 18.5, at 187–94 (discussing the
increasingly stringent, although not always consistently applied, standards for judicial implica-
tion of a private right of action in a statute that does expressly provide for a right to seek judicial
relief).
\end{itemize}
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reasoning in *Bowen v. Massachusetts*, Justice Scalia’s criticism rings true—"[t]he Court cannot possibly mean what it says today."195

Unfortunately, the lower courts are obliged to impose meaning upon *Bowen v. Massachusetts* as Supreme Court precedent and must attempt to apply it in a reasoned and rational manner to the multifarious disputes with the federal government in which monetary relief is either the acknowledged destination of the litigation expedition or lies just below the surface. As we see next, the results have not been pretty.

### III. The Tear in the Fabric Grows Larger

In his dissenting opinion in *Bowen v. Massachusetts*, Justice Scalia concluded by saying that the Court’s reasoning “cannot possibly be followed where it leads, [but that] the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit [grant-in-aid program] before us.”196 In fact, as discussed next, the lower courts are in disarray and, while some courts have resisted the temptation to take *Bowen v. Massachusetts* to its logical extremes, other courts have seized upon the open-ended language of that decision to assert authority to decide matters long thought to fall outside of their jurisdiction. Even the authority of the Court of Federal Claims over such traditional subjects as suits for monetary relief by federal employees suffering an adverse employment decision and Indian monetary claims against the government for breach of its trust responsibilities, as well as such venerable rules as the bar on specific performance as a remedy in contract, have been questioned and become confused. The “signals of distress”197 from the lower courts justify renewed court review of or legislative attention to this problem and further demonstrate that the *Bowen v. Massachusetts* decision has proven to be impossible to apply in a predictable and sensible manner.198

#### A. Contract Claims and the Bar on Specific Performance

As discussed above,199 Congress waived the government’s immunity from claims arising in contract very early, in 1855, even before the enactment of the Tucker Act in 1887. However, in the field of contracts law as in other areas of the law of federal government litigation, sovereign immunity was not wholly abandoned, and the government retains certain special privileges and benefits from certain limitations on liability in contract disputes. One of the most venerable and enduring rules of government contract law specifically, and indeed of sovereign immunity doctrine in general, has been that the remedy of specific performance is not available to compel the government to accept or discharge the duties agreed to under a contract. The only remedy

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196 *Id.* at 930.
197 *Webster, Choice of Forum in Claims Litigation*, supra note 25, at 536.
198 *See infra* Part IV.A.1 (arguing that the unworkable nature of the *Bowen v. Massachusetts* decision justifies the overruling or limitation of that precedent).
199 *See supra* Part I.A.
available to a government contractor who asserts breach by the federal government is an action for damages.

The rule barring specific performance emerged in the nineteenth century.\textsuperscript{200} During this period before Congress had enacted many statutory waivers of sovereign immunity, the Supreme Court sometimes avoided the bar of governmental immunity through the fiction that a suit properly could lie against an individual federal officer—but the Court precluded judicial awards of specific performance in contract as constituting undue interference with the other branches of government and thus offending principles of separation of powers.\textsuperscript{201}

As Professor Richard H. Seamon explains, this restriction on specific performance "prevents judicial interference with the discretion of officials in the political branches. In particular, the rule gives officials flexibility to get out of contracts that, they determine, no longer serve the public interest."\textsuperscript{202} Professor Harold J. Krent likewise observes that "[s]pecific performance would afford private contractors a weapon to gain relief based upon their expectancy interest, and more important, to force the government to expend funds for work it no longer believes to be in the nation’s interests."\textsuperscript{203} Note that the bar on specific performance “does not immunize the government from liability for violations of contractual rules; it merely limits the remedy for such violations.”\textsuperscript{204}

In terms of statutory analysis, this “no-specific-performance” rule is grounded not only in the limited equitable powers of the Court of Federal Claims, which has jurisdiction over most contract disputes, but also in the inherent limitations of the Administrative Procedure Act when used as an alternative cause of action in the District Court for those aggrieved by government conduct.

In \textit{United States v. King},\textsuperscript{205} the Supreme Court stated the general rule that the Court of Claims—and its present-day successor, the Court of Federal Claims—is limited under the Tucker Act to awarding monetary relief and is precluded from entering declaratory or equitable relief, which would include specific performance of a contract.\textsuperscript{206} Since the date of the \textit{King} decision,

\textsuperscript{200} Seamon, \textit{supra} note 36, at 159–79.
\textsuperscript{202} Seamon, \textit{supra} note 36, at 199.
\textsuperscript{204} Seamon, \textit{supra} note 36, at 202.
\textsuperscript{206} \textit{Id.} at 3-5. \textit{See generally supra} notes 77–79 and accompanying text. The bar on specific performance as a remedy for government refusal to continue with a contract effectively has been preserved in the Federal Acquisition Regulation, 48 C.F.R. pt. 52 (2003). This regulation provides for standard contract clauses to be included (or regarded as included as a matter of law) in all procurement contracts, which account for the majority of government contracting activity. The CDA, 41 U.S.C. § 602(a), governs all contracts entered into by the government for the procurement of property, other than real property; the procurement of services; the procurement of construction, alteration, repair or maintenance of real property; or the disposal of personal property. Under the implementing Federal Acquisition Regulation, a clause must be
Congress has expanded the powers of the Court of Federal Claims in certain defined circumstances (such as the power to order an agency to restore a federal employee to an office or position), but that court still does not possess the general equitable powers available to the District Courts.

The District Courts also lack authority to order specific performance by negative implication from the Tucker Act. Pursuant to § 702, the APA’s waiver of sovereign immunity is withdrawn when another statute “impliedly forbids” the relief sought. As explained by then–Judge Scalia in the decision of the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) in Sharp v. Weinberger:

The sole remedy for an alleged breach of contract by the federal government is a claim for money damages, either in the United States Claims Court under the Tucker Act . . . , or, if damages of no more than $10,000 are sought, in district court under the Little Tucker Act . . . . The waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in contract cases, because that waiver is by its terms inapplicable if “any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,” 5 U.S.C. § 702, and the Tucker Act and Little Tucker Act impliedly forbid such relief.

The legislative history to the 1976 amendments to the APA confirms that the expansion of that waiver of sovereign immunity was not intended to overturn established limitations on relief against the federal government, with direct reference to the preclusion of specific performance in contract:

[T]he amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought.

included in every procurement contract allowing the government to terminate any contract for convenience. 48 C.F.R. §§ 49.502, 52.249. See generally Gillian Hadfield, Of Sovereignty and Contract: Damages for Breach of Contract by Government, 8 S. CAL. INTERDISC. L.J. 467, 492–95 (1999);Joshua I. Schwartz, Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law, 64 GEO. WASH. L. REV. 633, 651–52 n.103, 695 & n.359 (1996). When the government terminates a contract under such a clause, a determination is made of appropriate restitution to the contractor, which is generally measured as the cost of the work performed thus far together with a profit for that completed work, but not including anticipated but unearned profits. W. NOEL KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL 502–03 (1990).


208 See generally SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, supra note 1, at 451–53, 469; supra notes 80–83 and accompanying text.


211 Id. at 1523 (citations omitted); see also B.K. Instrument, Inc. v. United States, 715 F.2d 713, 727–28 (2d Cir. 1983) (“[A]n action seeking specific performance of a contract with the Government may not be brought in a district court.”); Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 432–33 (3d Cir. 1979) (holding that the District Court had no jurisdiction to order the government to perform contract with plaintiff).
Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the [Tucker Act], Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, i.e., the Tucker Act, “impliedly forbids” relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts.212

As an exception to the general unavailability of equitable relief in government-contract law, but which is not an exception to the preclusion of the remedy of specific performance, the courts have certain equitable powers in the context of bid protests. A bid protest occurs when an agency has solicited bids and one of the bidders alleges errors in the process or challenges the validity of the award of the contract to another.

Until recently, the Court of Federal Claims and the federal District Courts shared authority to hear bid protests.213 Under the APA, District Courts were held to have authority to hear challenges by disappointed bidders for alleged violations of procurement statutes and regulations or for lack of rationality in the selection of the winning bidder.214 The predecessor to the Court of Federal Claims heard bid protests under its Tucker Act jurisdiction, on the theory that the government made an implied contract with prospective bidders to fairly consider their bids.215 In the FCIA,216 Congress granted the then–Claims Court express authority to hear bid protests, including the power to award equitable relief with respect to “contract claim[s] brought before the contract is awarded.”217 With the enactment of the Administrative Dispute Resolution Act of 1996,218 Congress conferred concurrent jurisdiction upon the District Courts and the Court of Federal Claims over bid protests, whether raised before or after the contract is awarded, along with the power to grant declaratory and injunctive relief, or monetary

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relief that is limited to the cost of bid preparation. The Act impressed a sunset provision upon the bid-protest jurisdiction of the District Courts. This jurisdiction terminated on January 1, 2001, thereby making the Court of Federal Claims henceforth the exclusive forum for bid disputes.

In the typical bid-protest case, the unsuccessful bidder seeks cancellation of the award and resolicitation of bids for the government procurement contract. In an unusual case, where it is clear that, but for unlawful conduct by the government contracting officer, the particular contract would have gone to the unsuccessful bidder, the court also may grant specific relief by removing the contract from the successful bidder and giving it instead to the petitioning unsuccessful bidder. A judicial order awarding a contract to a petitioning party, however, is not the equivalent of an order of specific performance. Specific performance is a remedy for breach of a contract that enforces performance according to the contract’s terms. By contrast, a bid-protest award arises at the contract formation stage, before there are any contract terms to enforce, and addresses only to whom the contract will be given. Moreover, a successful bid protest does not immunize the contractor from the government’s subsequent termination of the contract, which again may not be redressed by an award of specific performance. Indeed, when the government has canceled a prior contract and solicited bids for a new contract, the courts agree that specific performance may not be granted to resurrect the defunct contract, even when the disappointed contractor on the terminated contract characterizes its claim as a bid protest regarding the solicitation of new bids.

With that background in mind, does the longstanding bar on specific performance against the government survive the rearrangement of jurisdictional

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220 Administrative Dispute Resolution Act § 12(d).
221 See A & S Council Oil Co. v. Lader, 56 F.3d 234, 240 (D.C. Cir. 1995) (explaining that in bid-protest cases, “the relief sought is not money damages but cancellation of the award to the winner”).
222 See, e.g., Choctaw Mfg. Co. v. United States, 761 F.2d 609, 619–21 (11th Cir. 1985); B.K. Instrument, Inc. v. United States, 715 F.2d 713, 727–28 (2d Cir. 1983); Superior Oil Co. v. Udall, 409 F.2d 1115, 1121–22 (D.C. Cir. 1969); see also Veda, Inc. v. U.S. Dep’t of the Air Force, 111 F.3d 37, 38–41 (6th Cir. 1997) (upholding the District Court’s jurisdiction under the APA to hear a contractor’s challenge to the Air Force decision to set aside award to contractor and award it to competitor, in which contractor sought injunction against performance of contract with competitor, a declaration that award to competitor was unlawful, and a declaration that the award to the contractor was proper).
223 Choctaw Mfg., 761 F.2d at 621 n.19.
224 B.K. Instrument, 715 F.2d at 728 (holding that request by disappointed bidder for order awarding contract to it was not a request for specific performance of contract because disappointed bidder “has never entered into a contract with the Government, [and thus] there is no contract which the district court could order the Government to perform”); see also Steven L. Schooner, Fear of Oversight: The Fundamental Failure of Businesslike Government, 50 Am. U. L. Rev. 627, 638–39 (2001) (“Protests are challenges concerning the formation or award of government contracts . . . . [b]y contrast, contract disputes involve controversies or claims arising during performance of a contract.”) (footnotes omitted).
225 See, e.g., Mark Dunning Indus., Inc. v. Cheney, 934 F.2d 266, 269 (11th Cir. 1991); Ingersoll-Rand Co. v. United States, 780 F.2d 74, 76–80 (D.C. Cir. 1985); Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 433 (3d Cir. 1979).
lines in *Bowen v. Massachusetts*? The Supreme Court in *Bowen* offered an “equitable action[] for monetary relief under a contract” as one example of relief involving money that does not constitute “money damages” for compensation excluded from the APA.226 While the Court’s dictum reference here was to restitution claims for sums of money owed under a contract,227 and thus not to specific performance of contractual duties, the apparent endorsement of the authority of District Courts under the APA over claims for specific relief on contract that demand payment of money might seem to encompass other claims for specific relief on contract seeking nonmonetary relief.228

 Nonetheless, despite this arguably favorable dictum, the *Bowen v. Massachusetts* decision simply is not on point. The “no-specific-performance” rule is derived from Tucker Act contract-law jurisprudence and is preserved under the APA through the language in § 702 withdrawing authority from a District Court “if any other statute . . . impliedly forbids the relief which is sought.”229 The *Bowen* decision did not address this particular textual limitation on the statutory scope of the APA nor was the claim in that case based upon contract.230 Even if equitable relief under contract falls outside of the APA’s “money damages” exclusion as interpreted by the Supreme Court in *Bowen*, contract-based claims may still be barred under the APA by the separate impliedly-forbidden-relief limitation. In his dissent in *Bowen v. Massachusetts*, Justice Scalia argued that “[i]t is settled that sovereign immunity bars a suit against the United States for specific performance of a contract, and that this bar was not disturbed by the 1976 amendment to § 702.”231

 And, indeed, after *Bowen v. Massachusetts*, most federal courts have adhered firmly to the traditional understanding that the Tucker Act impliedly forbids specific performance in contract actions against the federal government whether brought in the Court of Federal Claims or in the District Court.232

 But the United States Court of Appeals for the Tenth Circuit, citing to *Bowen v. Massachusetts*, broke ranks with other courts and held that the


227 *Id.* at 893–95.

228 Seamon, *supra* note 36, at 188 n.184.


230 See N. Star Alaska v. United States, 14 F.3d 36, 38 (9th Cir. 1994) (observing that *Bowen v. Massachusetts* “did not involve a contract and it did not address the ‘impliedly forbids’ limitation on the APA’s waiver of sovereign immunity”); Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 613 (D.C. Cir. 1992) (same).

231 *Bowen*, 487 U.S. at 921 (Scalia, J., dissenting).

232 See, e.g., Presidential Gardens Ass’ns v. United States, 175 F.3d 132, 143 (2d Cir. 1999); Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 644–47 (9th Cir. 1998); *N. Star Alaska*, 14 F.3d at 38; *Transohio Sav. Bank*, 967 F.2d at 613; Coggshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989); Elec. Lightwave, Inc. v. Richardson, 106 F. Supp. 2d 1063, 1065 (D. Or. 1999); Americable Int’l, Inc. v. United States Dep’t of the Navy, 931 F. Supp. 1, 2 (D.D.C. 1996); Sec. Sav. Bank v. Dir., Office of Thrift Supervision, 798 F. Supp. 1067, 1077–79 (D. N.J. 1992); *see also* Up State Credit Union v. Walker, 198 F.3d 372, 377 (2d Cir. 1999) (holding that purported APA suit based upon a contract and which sought an order “analogous to a contractual remedy for specific performance because it would enforce an alleged agreement between the parties” was subject to the exclusive jurisdiction of the Court of Federal Claims).
Tucker Act did not forbid the court from requiring the government to honor a contract, that is, specifically perform a contractual obligation, under APA judicial review. In *Hamilton Stores, Inc. v. Hodel*, a company that held a qualified-exclusive concessions arrangement in Yellowstone National Park sued the Secretary of the Interior in District Court for infringing its contract rights of first refusal for new or additional concession services after the Park Service contracted with another concessioner to take over services previously provided by an unsatisfactory contractor. The plaintiff concession company ultimately lost on the merits of its claim that its preferential arrangement extended to this particular provision of services. The court found that, because the substitute concessionaire served as a successor supplying preexisting services, it was not providing new or additional concession services for which the plaintiff had a first right of refusal. Important for purposes of this discussion, however, the Court of Appeals upheld District Court jurisdiction and rejected the argument that the case fell within the exclusive jurisdiction of the then–Claims Court as a contract claim seeking relief in excess of $10,000 under the Tucker Act.237

Treating the concessionaire’s claimed right to exclusive provision of concession services as a statutory claim under the Concessions Policy Act of 1976 and, therefore within the ambit of the APA, the Tenth Circuit ruled that the concessionaire did not seek money damages within the APA exclusion. The court found that it, instead, sought to protect its preferential right to provide services. For this proposition—that seeking specific remedies to protect its preferential rights was not the equivalent of a claim for payment of compensatory damages within the exclusive authority of the then–Claims Court—the court repeatedly relied upon the *Bowen v. Massachusetts* decision.239

Furthermore, the court held that, while the concessionaire failed to establish its right on the merits, the District Court would have had the power to order the United States to honor a preferential concessions agreement with a contractor. Although the government apparently did not expressly argue that the Tucker Act impliedly forbade specific performance under contract within the meaning of § 702 of the APA, the Tenth Circuit implicitly rejected such an argument, by saying that “[e]ven if money damages for a given claim are only available in the Claims Court, the Tucker Act does not preclude the same claimant from seeking nonmonetary relief in a district court.”242

234 Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272 (10th Cir. 1991).
235 *Id.* at 1273–76.
236 *Id.* at 1280–82.
237 *Id.* at 1276–79.
238 *Id.* at 1279.
239 *Id.* at 1277–79 nn.11–12 & 14.
240 *Id.*
241 *See* id. at 1276–77.
242 *Id.* at 1278 n.11; *see also* Seamon, *supra* note 36, at 186 (arguing that the Hamilton court
Although the Hamilton dispute focused upon the propriety of the government’s award of a concessions contract, the asserted judicial authority appears to be more in the nature of an order of specific performance than the grant of a typical request for an equitable award of a contract in the context of a bid protest. To be sure, some of the points made by the complaining contractor in Hamilton—arguing that the park service solicited bids under the wrong set of regulatory procedures given the existence of a preferential rights agreement with the plaintiff company\textsuperscript{243}—are similar to those that would be made in a regular bid dispute lawsuit.

Moreover, while not characterizing the case as a bid protest, the Tenth Circuit cited to bid-protest decisions in a footnote.\textsuperscript{244} Because the District Court suit, however, was filed nearly six years after the government initially granted the competing concessionaire an interim contract and more than three years after the competitor and the park service entered into a long-term concession contract,\textsuperscript{245} it is difficult to regard this matter as a protest about solicitation of bids rather than an ongoing contractual dispute invol-

\textsuperscript{243} Hamilton, 925 F.2d at 1275.
\textsuperscript{244} Id. at 1279 n.14.
\textsuperscript{245} Id. at 1274–76. If treated as a bid-protest claim, at least under today’s timeliness standards, the Hamilton lawsuit likely would have been time-barred. While the most likely statute of limitations for a bid protest is the general provision of 28 U.S.C. \textsection 2501 allowing six years to file suit against the federal government, \textit{see, e.g.}, Rogers v. United States, 6 Cl. Ct. 829 (1984) (applying 28 U.S.C. \textsection 2501 to a bid protest); Shermco Industries, Inc. v. United States, 6 Cl. Ct. 588 (1984) (same), the common-law doctrine of laches is applicable in bid-protest litigation, \textit{see, e.g.}, Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843–45 (D.C. Cir. 1982) (evaluating timeliness of bid protest under laches doctrine); Saratoga Dev. Corp. v. United States, 777 F. Supp. 29, 34 (D.D.C. 1991) (same), aff'd, 21 F.3d 445 (D.C. Cir. 1994). In addition to a statutory limitations period, the equitable concept of “laches” traditionally has been applied when a plaintiff’s unreasonable delays in pursuing a claim cause prejudice to the defendant—usually when the request is for an equitable remedy. The doctrine of laches “is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.” \textit{Black’s Law Dictionary} 787 (5th ed. 1979). Moreover, the Government Accounting Office (“GAO”), the administrative agency charged with hearing bid protests, issued regulations implementing the bid-protest provisions of the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, \textsection 12, 110 Stat. 3870, 3874-76. Under those regulations, “[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to . . . receipt of initial proposals shall be filed prior to . . . the time set for receipt of initial proposals.” 4 C.F.R. \textsection 21.2(a)(1)(2000). While the courts have treated the GAO timeliness rules as only advisory, \textit{see, e.g.}, Balt. Gas & Elec. Co. v. United States, 133 F. Supp. 2d 721, 729 (D. Md. 2001); Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 358 (1994), aff'd, 39 F.3d 1198 (Fed. Cir. 1994) (unpublished table decision), the courts appear to agree that they should dismiss a bid protest as untimely if the complaining party failed to raise any objection in any forum prior to the closing date for bids, \textit{see, e.g.}, \textit{Balt. Gas & Elec. Co.}, 133 F. Supp. 2d at 729; CC Distribrs., Inc. v. United States, 38 Fed. Cl. 771, 782 (1997); \textit{Aerolease}, 31 Fed. Cl. at 358. In Hamilton, the complaining concessionaire argued that the initial solicitation of bids some six years earlier was pursued under the wrong regulations due to the plaintiff’s preferential right, an error that would have been apparent immediately. Yet this complaining concessionaire had failed to submit a bid for either the interim or permanent concession operation and, while contending that it had continually complained that the substituted concessionaire was expanding its operations in a manner that trespassed upon its scope of operations, it
ing a competing concessionaire. Indeed, the plaintiff concessions company complained generally that its preferential contract rights were being encroached upon by the expanding operations of the new concessionaire,246 complaints that sound more in breach of contract than protest of a bid award. In fact, the contractor earlier had pursued a claim under the CDA, but its filing was rejected for failure to comply with the certification requirements of the statute.247 Thus, the contractor’s APA suit in District Court for injunctive and declaratory relief was a rather brazen end-run around the traditional rules and procedures governing contract disputes.

Most important, the claimed right in the Hamilton case to be awarded the new concession services contract was based directly upon the terms of the previous contract creating a preferential rights concessions arrangement, and indeed, the complaint prayed for injunctive and declaratory relief requiring the government to “honor” the contract rights (and the parallel statutory provisions giving force to preferential rights in concessions contract arrangements).248 In sharp contrast with a bid protest focused solely upon supposed statutory or regulatory errors in the bidding process, the contractor in Hamilton forthrightly sought enforcement of government duties of performance under an existing contract—one of the terms of which happened to be the right of first refusal for other concessions contracts in that park.249 A bid-protest claim falling within the jurisdiction of the District Courts (before 2001) and outside the exclusive contract jurisdiction of the Tucker Act and the CDA is one that seeks “to vindicate the bidding process” and “rests solely on federal bidding statutes and regulations and, therefore, is completely independent of [any] contract.”250 By contrast, specific performance is defined as a court order compelling the promisor to perform actions promised in the contract,251 which is precisely what the plaintiff sought in Hamilton and what the Tenth Circuit agreed was available as a remedy if the underlying case was proven on the merits—enforcement of contract terms was the essential core of the case.252

The tear in the tapestry of sovereign immunity waivers caused by the Tenth Circuit’s decision admittedly is small and by itself might not be a noticeable flaw in the fabric. First, the Tenth Circuit stands alone and against the great weight of authority which holds that the specific performance bar

nonetheless waited nearly six years before complaining about the initial bid solicitation and award to that substitute contractor. Hamilton, 925 F.2d at 1275–76.

246 Hamilton, 925 F.2d at 1275–76.
247 Id. at 1276.
248 Id. at 1278–79.
249 See Doe v. United States, 37 Fed. Cl. 74, 79 n.6 (1996) (holding that the bid-protest equitable authority of the Court of Federal Claims under the Tucker Act was “inapplicable to the plaintiff’s present suit because the plaintiff alleges that the Government breached an already-existing contract”).
250 Mark Dunning Indus., Inc. v. Cheney, 726 F. Supp. 810, 813 (M.D. Ala. 1989), vacated pursuant to settlement and aff’d on other grounds, 934 F.2d 266 (11th Cir. 1991).
251 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 1138, at 106 (1964).
252 See Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 647 (9th Cir. 1998) (holding that the purported statutory claims did not state an APA claim but rather constituted a contract claim for specific performance impliedly forbidden by the Tucker Act because the claims did not exist independent of the contract terms).
still endures.\textsuperscript{253} Second, the \textit{Hamilton} decision likely is limited to the context of contract formation or awards. While, as noted above, the \textit{Hamilton} decision cannot be defended as the proper exercise of statutorily-granted equitable powers in review of a bid protest, the case falls within the penumbra of bid-protest judicial authority.\textsuperscript{254} Third, it is not clear that the Tenth Circuit understood itself as paving new ground or issuing the equivalent of an order of specific performance.\textsuperscript{255} Still because other courts have seen the \textit{Bowen v. Massachusetts} dictum and general approach as offering “a strong case” for specific relief in contract,\textsuperscript{256} uncertainty persists in this crucial area. As Professor Richard H. Seamon concluded after his exhaustive review of the history, purpose, and current status of the traditional bar on specific performance, “[i]n light of the division in the lower federal courts and the Supreme Court’s role in causing that division, the Court should decide whether the rule barring specific performance is still valid.”\textsuperscript{257}

B. Civilian Employment Claims

In the private sector, employee claims for wrongful discharge ordinarily constitute a contractual claim. In the federal public sector, employment is regulated by statute.\textsuperscript{258} Accordingly, a federal employment dispute typically implicated that branch of the Tucker Act for claims founded upon a statute. Indeed, before 1978, the Tucker Act was the primary vehicle for resolution of federal employment disputes, both civilian and military. A suit alleging an illegal discharge or reduction in rank typically would be pursued under the Tucker Act, with the Back Pay Act\textsuperscript{259} providing the substantive right, that is, the money-mandating basis for the claim.\textsuperscript{260} In addition, the Remand Act\textsuperscript{261} authorized the then–Court of Claims not only to award a money judgment for backpay but also to order the agency to restore the individual to a position or employment status. Civilian and military pay claims were a staple of the Tucker Act docket of what was then the Court of Claims.\textsuperscript{262}

\textsuperscript{253} See supra note 232.

\textsuperscript{254} See A & S Council Oil Co. v. Lader, 56 F.3d 234 (D.C. Cir. 1995) (while declining to decide whether to follow the Tenth Circuit’s decision, the court noted that because the plaintiff in \textit{Hamilton} “was seeking access to a new contract opportunity, the analogy to a disappointed bidder litigation was much closer”).

\textsuperscript{255} Indeed, in an unpublished opinion that post-dates \textit{Hamilton}, the Tenth Circuit recited the no-specific-performance rule. Sommer v. Fed. Aviation Admin., No. 92-1287, 1994 WL 161345, at *3 (10th Cir. May 2, 1994) (“Consequently, ‘[f]ederal courts do not have the power to order specific performance by the United States of its alleged contractual obligations.’” (quoting Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989))).


\textsuperscript{257} Seamon, supra note 36, at 158.

\textsuperscript{258} See generally Sisk, \textit{Litigation with the Federal Government}, supra note 1, at 462–80; Lester & Noonie, supra note 58, §§ 8.113 to 8.117.


\textsuperscript{260} See generally Sisk, \textit{Litigation with the Federal Government}, supra note 1, at 478.

On the Back Pay Act, see also infra notes 332–49 and accompanying text.


\textsuperscript{262} Lester & Noonie, supra note 58, § 8.113.
In 1978, Congress enacted the Civil Service Reform Act ("CSRA"). In general the CSRA provides that individuals within most categories of federal civilian employment who have suffered an adverse employment action may seek administrative review before the Merit Systems Protection Board ("MSPB") and then judicial review in the Federal Circuit. In United States v. Fausto, the Supreme Court held that the statutory procedures provided by the CSRA are exclusive and that a federal employee suffering an adverse personnel decision may not alternatively seek relief through a claim for backpay under the Tucker Act in the then–Claims Court, even if the CSRA fails to provide any remedy for a particular class of employees. Viewing the CSRA as a comprehensive and integrated personnel scheme that was intended to replace the haphazard preexisting arrangements for administrative appeal and judicial review of personnel actions, the Court ruled that the omission of a judicial remedy for a particular class of employees under the CSRA constituted a deliberate denial of that remedy. Accordingly, the CSRA provides the sole avenue for judicial review of adverse personnel decisions for federal civilian employees, with certain exceptions such as employment discrimination claims that may be brought in District Court, certain employment-related disputes in a labor union–represented bargaining unit that may be heard in the regional Court of Appeals upon review of an order by the Federal Labor Relations Authority ("FLRA"), and certain claims for overtime compensation or calculation of pay unrelated to an adverse personnel action that may be heard in the Court of Federal Claims under the Tucker Act.

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266 Id. at 443–51, 455.
267 Id. at 444, 448–49, 455.
269 For federal employees in a labor union–represented bargaining unit, alternative procedures for employment disputes—negotiated grievance or unfair labor practice procedures—may be available, under the administrative purview of the FLRA. Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2000). See generally FEDERAL CIVIL SERVICE LAW AND PROCEDURES: A BASIC GUIDE chs. 2, 11 (Ellen M. Bussey ed., 2d ed. 1990). Grievance arbitration decisions by the FLRA ordinarily are not reviewable by the courts; unfair labor practice decisions by the FLRA may be appealed to the appropriate federal Court of Appeals. Id. at 338.
270 Because the MSPB does not have jurisdiction over cases involving calculation of pay for federal employees who have not suffered an underlying adverse personnel action, overtime com-
Despite the traditional primacy of the Court of Federal Claims over federal civilian employee lawsuits seeking backpay and the more recent exclusivity of the CSRA statutory scheme over civilian personnel disputes, a minority of courts have found that certain constitutional-based employment claims may be heard outside the CSRA if no remedy is otherwise available.\textsuperscript{271} By force of constitutional mandate, these courts have held that an employee (or potential employee) who suffers a constitutional deprivation may nonetheless be entitled to a judicial remedy in District Court through the APA despite the silence of the CSRA and the unavailability of the Tucker Act.\textsuperscript{272} While, however, upholding the judicial power to award the federal position to claimants, these courts have struggled with the question of whether a backpay remedy may be granted outside the Tucker Act in such cases. Even if these courts are correct in permitting judicial review for constitutional objections by federal employees or job candidates, can an APA remedy include such a quintessentially monetary element as backpay? May the \textit{Bowen v. Massachusetts} decision be read to extend the scope of the APA even to encompass such a classic part of traditional Tucker Act jurisdiction as a claim by an employee or a disappointed applicant for employment to obtain lost wages?

The leading case on this point is \textit{Hubbard v. Administrator, Environmental Protection Agency},\textsuperscript{273} decided by the D.C. Circuit sitting en banc in 1992. Michael Hubbard was denied a position as an investigator with the Environmental Protection Agency, based upon reports that, while employed as a police investigator, he improperly divulged information to the press about an investigation of trafficking by members of Congress and their aides.\textsuperscript{274} Hub-

\textsuperscript{271} See infra note 284.
\textsuperscript{272} Id.
\textsuperscript{273} Hubbard v. Admin’r, EPA, 982 F.2d 531 (D.C. Cir. 1992) (en banc).
\textsuperscript{274} Id. at 532.
barded brought suit in the District Court under the APA seeking both appointment to the federal position and backpay for lost wages.\textsuperscript{275} Both the District Court and Court of Appeals agreed, prior to the en banc appellate review on the backpay remedy, that his exclusion from the position constituted a violation of his First Amendment free speech rights and could be pursued under the APA.\textsuperscript{276}

Hubbard’s case fell into a gap between the CSRA and the Tucker Act, requiring him to frame his suit alternatively under the APA. As discussed above, the Supreme Court in \textit{United States v. Fausto}\textsuperscript{277} held that the CSRA is the exclusive mechanism for federal employees to challenge adverse personnel actions, while recognizing that certain categories of employees (such as probationary employees) are not permitted to obtain judicial review under that statute. Similarly, someone who is not an employee, such as an applicant for a position, cannot claim “the more elaborate administrative protections—including judicial review—that Congress reserved for incumbent employees aggrieved by major personnel actions.”\textsuperscript{278} Nor could Hubbard have pursued his claim in the Court of Federal Claims under the Tucker Act, despite that court’s traditional purview over civilian employment claims seeking monetary relief and its ability since 1972 to order an agency to restore a federal employee to an office or position.\textsuperscript{279} First, although the Tucker Act encompasses money claims based on constitutional provisions, a Tucker Act claim may not be founded upon the First Amendment because that constitutional provision is not money-mandating in nature.\textsuperscript{280} Second, the Back Pay Act, although constituting a money-mandating statute, is applicable by its terms only to those who are employees of the federal government, that is, persons who already hold a government position, and thus does not apply to a disappointed job applicant.\textsuperscript{281}

\textsuperscript{275} \textit{Id.}
\textsuperscript{276} Hubbard v. EPA, 949 F.2d 453, 456–61 (D.C. Cir. 1991); Hubbard v. U.S. EPA Adm’r, 809 F.2d 1, 11–12 (D.C. Cir. 1986), \textit{vacated in part and aff’d sub nom.} Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (en banc). Subsequent to the \textit{Hubbard} decision, Congress amended the CSRA to permit the MSPB to order “corrective action,” specifically including backpay, when an agency commits a prohibited personnel practice. Pub. L. No. 103-424, §§ 3(c)–(d), 8(a), 108 Stat. 4362, 4364 (codified at 5 U.S.C. § 1214(g) (2000)). Following the D.C. Circuit’s decision in \textit{Hubbard}, the Office of Special Counsel filed an action with the MSPB seeking monetary relief on Hubbard’s behalf; Hubbard intervened in that MSPB proceeding. Hubbard v. Merit Sys. Prot. Bd., 205 F.3d 1315, 1316 (Fed. Cir. 2000). The MSPB held, and the Federal Circuit agreed, that backpay remained unavailable to Hubbard because the Back Pay Act did not apply to applicants for employment and because the 1994 amendment to the CSRA authorizing an award of backpay did not apply retroactively to conduct that took place before enactment. \textit{Id.} at 1317.
\textsuperscript{277} United States v. Fausto, 484 U.S. 439 (1988).
\textsuperscript{278} Spagnola v. Mathis, 859 F.2d 223, 225 (D.C. Cir. 1988) (citing 5 U.S.C. §§ 7511–7514, 7701–7703); see also \textit{Hubbard}, 982 F.2d at 532 n.1 (observing that CSRA remedies are not available to Hubbard).
\textsuperscript{280} United States v. Connolly, 716 F.2d 882, 886–87 (Fed. Cir. 1983); see also \textit{Hubbard}, 982 F.2d at 542 n.3 (Edwards, J., dissenting) (explaining why the Tucker Act would not afford a cause of action to Hubbard for violation of his First Amendment rights).
\textsuperscript{281} Back Pay Act, 5 U.S.C. § 5596(b)(1) (2000); see also \textit{Hubbard}, 982 F.2d at 542 n.4 (Edwards, J., dissenting) (explaining why the Back Pay Act did not provide a statutory remedy to
Accordingly, given the absence of any other remedy under another statutory waiver of sovereign immunity, the D.C. Circuit found that Hubbard could maintain his action to be appointed to the federal position under those provisions of the APA authorizing judicial review when a person suffers a legal wrong because of agency action and contends that the agency action is “contrary to constitutional right.” Although the Supreme Court in Fausto regarded the CSRA as exclusive on personnel matters and constituting an affirmative denial of judicial relief for those not expressly afforded a remedy under the CSRA, the D.C. Circuit departed from the majority of circuits and concluded that any presumption of exclusivity was overcome when the claim asserted deprivation of a constitutional right.

As the Hubbard case came again before the D.C. Circuit en banc in 1992, the only remaining question was the relief available. Every member of the court agreed that Hubbard’s request to be given the position—his claim for “instatement”—fell within the APA; no member of the court disputed that his claim for the prospective relief of being granted the position was available under the APA. The more difficult question was whether he could obtain backpay under the APA, that is, the salary that he had been unable to earn because he had been excluded from the job. With Bowen v. Massachusetts as the template, could an award of backpay incidental to the remedy of instatement be regarded as equitable relief and therefore outside Hubbard because he was not a federal employee within the terms of that statute). For more information on the Back Pay Act as not applying to applicants for federal employment, see also Wrenn v. Sec’y, Dept. of Veterans Affairs, 918 F.2d 1073, 1077 (2d Cir. 1990); Holmes v. United States, 3 Cl. Ct. 521, 523 (1985).

283 Id. § 706(2)(B).
284 Hubbard v. U.S. EPA Adm’r, 809 F.2d 1, 11 & n.15 (D.C. Cir. 1986), vacated in part and aff’d sub nom. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (en banc); cf. Webster v. Doe, 486 U.S. 592, 603 (1988) (articulating a general presumption of reviewability for constitutional challenges). A majority of the circuits have held that the CSRA precludes direct District Court review of challenges by federal employees to adverse personnel actions even when denial of constitutional rights is asserted and even when the CSRA provides for little or no judicial review in a case. See, e.g., Leistikow v. Stone, 134 F.3d 817, 820 (6th Cir. 1998) (holding, because position of National Guard technician was excluded from the judicial review protections of the CSRA, the technician’s removal from his position was not subject to judicial review and that his “attempt[] to constitutionalize his wrongful discharge claim” by pleading violations of due process did not overcome the CSRA exclusivity ruling); Saul v. United States, 928 F.2d 829, 843 & n.27 (9th Cir. 1991) (holding that the CSRA precludes a federal employee from seeking injunctive relief for his asserted constitutional injury and noting that “the D.C. Circuit differs from other circuits by permitting federal employees to vindicate their constitutional rights through suits against their supervisors and employing agencies for injunctive relief, but not for damages”); Lombardi v. Small Bus. Admin., 889 F.2d 959, 961–62 (10th Cir. 1989) (holding that the CSRA displaces an action for injunctive relief in District Court by a federal employee complaining of denial of a constitutional right); Pinard v. Dole, 747 F.2d 899, 909–12 (4th Cir. 1984) (holding that the CSRA is the exclusive remedy for federal employees complaining of unconstitutional “prohibited personnel practices” and that “[t]he absence of a provision for direct judicial review of prohibited personnel actions among the carefully structured remedial provisions of the CSRA is evidence of Congress’ intent that no judicial review in district court be available for the actions involved in this case”).

285 Hubbard, 982 F.2d at 532.
The Tapestry Unravels

of the APA exclusion of “money damages” relief? The District Court ruled that Hubbard could not receive backpay as a remedy for the violation of his First Amendment rights under the APA. On appeal, a divided three-judge panel of the D.C. Circuit answered “yes” to the backpay question, thus reversing the District Court.

Upon rehearing, the en banc D.C. Circuit affirmed the District Court’s denial of backpay relief under the APA. Judge Wald, who had dissented from the three-judge panel opinion and now wrote for the majority of the en banc court, necessarily began with the distinction drawn by the Supreme Court in Bowen v. Massachusetts between specific relief under the APA and money damages which are excluded from the scope of the APA. Citing the definition of specific relief as granting the requestor “the very thing to which he was entitled,” the majority explained that the only “entitlement” of which the government had deprived Hubbard was the job offer and thus instatement was the specific relief for that deprivation. The loss of income attributable to that denial of the job was a consequential harm, like any emotional distress or harm to his reputation that he may also have suffered; because “the classic remedy for that loss is money damages,” that relief is excluded from the APA. Judge Wald found that Bowen v. Massachusetts did “not resuscitate Hubbard’s claim.” Unlike Massachusetts in that case which had sought to enforce a statutory entitlement to receive withheld federal grant-in-aid funds, “Hubbard’s basic claim is not for enforcement of any legal mandate that the [government] pay him a sum of money; rather, it is to force the [government] to offer him the job it denied him.” Moreover, the majority pointed out that backpay as a form of relief is never mentioned in the legislative history of the APA, which probably reflects Congress’s understanding that backpay claims were already covered by the Back Pay Act (which is enforced through the Tucker Act and, when the amount in controversy is $10,000 or more, must be heard in the Court of Federal Claims).

286 Id.
287 The District Court initially ordered that Hubbard both be instated to the position and be awarded backpay. Hubbard v. Adm’r, EPA, 735 F. Supp. 435, 441 (D.D.C. 1990). On the government’s motion to alter or amend the judgment, the District Court, however, revisited that decision and concluded that backpay would be an award of damages excluded as a remedy under the APA. Hubbard v. Adm’r, EPA, 739 F. Supp. 654, 655–56 (D.D.C. 1990).
289 Hubbard, 982 F.2d at 533 (citing Bowen v. Massachusetts, 487 U.S. 879, 897 (1988)).
290 Id. at 533–34.
291 Id. at 533 (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973)).
292 Id.
293 Id.
294 Id. at 536.
295 Id.
296 Id. at 533–35 & n.8.
Judge Randolph (joined by now–Justice Ginsburg) wrote a concurring opinion arguing that what Hubbard lost as a result of being denied the position was not wages but rather “the opportunity to earn those wages.”

Thus, he concluded—using the Bowen v. Massachusetts test—awarding backpay would not be providing the claimant with the thing that was lost, that is, the very thing to which he was entitled, but rather would be a form of compensation for the lost chance to have earned those wages through work.

Judge Edwards (who had authored the three-judge panel majority opinion) dissented from the en banc decision. He argued that backpay was not compensation for a loss but rather the very thing of which Hubbard was deprived. In his view, Hubbard was deprived of both the job and of the pay:

Back wages in this case are not a “substitute” for what Hubbard would have earned, or “compensation in lieu of” his salary, or even the “value” of the job. Wages are the very thing of which Hubbard was deprived, and the only thing needed to make his relief complete.

Moreover, Judge Edwards argued that the award of backpay was merely “‘incidental to or interwined with’ injunctive relief.” In this regard, he placed great weight upon the passage in Bowen v. Massachusetts where the Supreme Court distinguished between damages and specific relief and then listed “reinstatement of an employee with back pay” as an example of specific relief. By this statement, Judge Edwards contended, the Supreme Court expressly placed backpay in the specific relief category. By contrast, the majority read this phrase from the Bowen v. Massachusetts opinion as saying only that backpay commonly accompanies the specific relief remedy of reinstatement, not as suggesting that backpay itself is specific relief. In any event, the majority concluded, that phrase in Bowen v. Massachusetts was only dictum and runs directly contrary to established law that treats backpay as a damages remedy. On this point, Judge Edwards in dissent strongly responded that the majority’s opinion amounts to a “cavalier” dismissal of the Supreme Court.

As the Supreme Court acknowledged in Bowen v. Massachusetts, to uphold the District Court’s authority under the APA it is not sufficient that a claim ask for specific relief rather than money damages as excluded by § 702; for the APA to be available the plaintiff must also demonstrate that there is

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298 Hubbard, 982 F.2d at 539 (Randolph, J., concurring) (emphasis added).
299 Id.
300 Id. at 540–42 (Edwards, J., dissenting).
301 Id. at 542.
302 Id. at 541 (quoting Chauffers, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 571 (1990)).
303 Id. at 544 (quoting Bowen v. Massachusetts, 487 U.S. 879, 893 (1988)).
304 Id.
305 Id. at 536–37.
306 Id.
307 Id. at 540 (Edwards, J., dissenting).
no adequate remedy in another court as provided in § 704. Because the majority of the D.C. Circuit sitting en banc found Hubbard’s claim for backpay excluded from the APA as money damages, it was not necessary to take the next step in the analysis by examining the restriction of the APA to claims for which there is no other adequate remedy in another court.

Judge Edwards, however, in dissent addressed that issue, as he was obliged to support his conclusion that Hubbard could proceed under the APA to obtain backpay. Judge Edwards acknowledged that, in most cases involving employment disputes, there are alternative remedies and thus the Tucker Act or the CSRA would be an adequate remedy barring or impliedly forbidding an APA remedy. As discussed earlier, however, Hubbard did not have another avenue to obtain backpay. The CSRA applies only to claims by “employees,” and Hubbard was not yet an employee. Additionally, the Tucker Act does not apply to claims under the First Amendment, because that constitutional provision has not been found to be money-mandating. In sum, Judge Edwards concluded that, although a backpay remedy may be available generally in employment cases, its unavailability to Hubbard in that particular instance meant that the APA vehicle could be used.

So, in conclusion, what does the Hubbard case mean and portend for the future? While the D.C. Circuit was willing to blaze a new path in recognizing a cause of action under the APA and outside the CSRA/Tucker Act when constitutional rights are implicated in a federal civilian employment dispute, a majority of the court regarded the additional step of extending a monetary backpay award in such a lawsuit to be a radical departure. The

309 Hubbard, 982 F.2d at 542–43 & n.5 (Edwards, J., dissenting).
310 Id.
311 See supra notes 277–81 and accompanying text.
312 See id.
313 Id.
314 Hubbard, 982 F.2d at 542–43 & n.5 (Edwards, J., dissenting). For more on the § 704 “adequate remedy” test, see infra Part IV.B.2.
315 As noted earlier, the D.C. Circuit’s decision in this regard has not been embraced elsewhere. See supra note 284.
316 With the notable exception of the United States Court of Appeals for the Second Circuit in the decision next discussed and some dicta by a few other courts, most of the other federal courts to directly address the issue have agreed that backpay or lost wages are not available to a federal employee in an APA action. Leistiko v. Sec’y of the Army, 922 F. Supp. 66, 72 (N.D. Ohio 1996), aff’d on other grounds, 134 F.3d 817 (6th Cir. 1998); Taydus v. Cisneros, 902 F. Supp. 278, 284 (D. Mass. 1995) (following Hubbard and holding backpay not available under APA); Klaskala v. U.S. Dep’t of Health & Human Serv., 889 F. Supp. 480, 486 & n.6 (S.D. Fla. 1995) (holding, with citation to Hubbard and Bowen v. Massachusetts that backpay should be classified as money damages and thus unavailable under the APA). But see Poole v. Rourke, 779 F. Supp. 1546, 1556 (E.D. Cal. 1991) (holding in a military employment case that “a suit for reinstatement with backpay is an equitable action for specific relief and not an action at law for damages” (citing Bowen v. Massachusetts, 487 U.S. 879, 893 (1988))). For dicta concerning availability of backpay as equitable remedy under the APA, see Randall v. United States, 95 F.3d 339, 347 & n.10 (4th Cir. 1996) (holding that a military servicemember who had been denied promotion did not have a viable backpay claim and noting, in dictum with citation to Bowen v. Massachusetts, that the United States Court of Appeals for the Fourth Circuit “arguably adopted the Bowen
majority was unwilling to take *Bowen v. Massachusetts* to its logical extreme and permit the APA to be used as a vehicle to recover backpay, however cleverly framed as a suit for specific relief. Judge Edwards, however, would have read *Bowen v. Massachusetts* to extend that far, even to reach a backpay claim of the type traditionally falling under the Tucker Act. In so doing, was the *Hubbard* court faithful to *Bowen v. Massachusetts*, or disloyal as the dissent charged? Whatever the answer, turbulent uncertainty obviously remains in the wake of *Bowen v. Massachusetts*.

Even the D.C. Circuit majority in *Hubbard* did not close the door completely on backpay claims under the APA; the majority was willing to contemplate the possibility of backpay as permissible specific relief under some special circumstances. In Hubbard’s case, as discussed, he had been denied employment and thus, in the majority’s view, was not yet entitled to any pay. The only specific relief to which he could lay claim was “instatement,” that is, being given the federal employment position. But in a footnote, the court majority suggested that backpay could be proper specific relief if a person was actually hired and performed the work but was not paid; under those circumstances, the majority indicated, the unpaid wages would indeed be precisely that to which the person was entitled. Is the *Hubbard* majority too generous in this suggestion, dictum though it is? Could employees who suffered demotions, and consequently received lower pay, bring an APA claim for backpay as specific relief for the wage difference? Couldn’t this same reasoning be used by an unpaid government contractor to bypass the CDA or the Tucker Act and sue under the APA by claiming that the withheld contract pay is exactly that to which the contractor is entitled? Has the *Hubbard* majority opened a door in its footnote that should have remained closed?

Unfortunately, confusion regarding the proper forum for resolution of backpay claims has moved beyond the *Hubbard* case and the unusual circumstances presented there. While the D.C. Circuit in *Hubbard* precluded a federal civilian employment claim for backpay even when the complainant lacked an alternative remedy in the Court of Federal Claims for lost wages, the United States Court of Appeals for the Second Circuit in *Ward v. Brown* looked beyond the APA to create an independent basis in District Court for recovery of backpay by a discharged civilian employee even though the Court of Federal Claims forum presumably was available.

In *Ward v. Brown*, a former nurse sought review in District Court of her discharge from employment with the Department of Veterans Affairs for

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317 *Hubbard*, 928 F.2d at 145–46.
318 *Id.* at 145 n.4.
having verbally abused a patient.\textsuperscript{320} The nurse brought suit in the District Court under the APA, seeking reinstatement, backpay, and the cleansing of his record.\textsuperscript{321} Finding that the Secretary’s penalty of discharge was arbitrary and capricious, the District Court remanded the case to the Secretary, but did not address the backpay claim.\textsuperscript{322} For the first time on appeal, the government argued that the suit fell within the exclusive jurisdiction of the Court of Federal Claims because the employee sought monetary relief in excess of $10,000.\textsuperscript{323} The Second Circuit acknowledged that “the Court of Federal Claims would have had jurisdiction over [the employee’s] suit had he chosen to bring it in that forum,” but held that the availability of the Tucker Act remedy did not divest the District Court of authority over the claim.\textsuperscript{324}

Interestingly, the Second Circuit agreed that the nurse’s suit could not be maintained in District Court under the APA, favorably citing the D.C. Circuit’s holding in \textit{Hubbard} that “[b]ackpay, as a claim for money damages, falls outside the scope of the APA.”\textsuperscript{325} The Second Circuit then found, however, that the Back Pay Act\textsuperscript{326} provided an independent waiver of sovereign immunity for a federal employee to bring suit in District Court if he or she has suffered a personnel action that has resulted in the withdrawal or reduction of pay.\textsuperscript{327} The Court of Appeals affirmed the District Court’s vacation of the Secretary’s imposition of the discharge penalty and remanded the case to the Secretary to reconsider the matter in light of the penalties imposed upon other department employees for like misconduct.\textsuperscript{328}

The Second Circuit’s decision in \textit{Ward} does far more potential harm to the centralization of civilian employment pay claims under the appellate review of the Federal Circuit than would have a contrary ruling by the en banc D.C. Circuit in \textit{Hubbard}. The dissent in \textit{Hubbard} emphasized that allowing backpay in that case would not “open[] a Pandora’s box of new claims against the Government” because of the unique posture of the case.\textsuperscript{329} In most instances, the \textit{Hubbard} dissent believed that an employee would have a remedy through the CSRA with judicial review in the Federal Circuit, or through the Tucker Act in the Court of Federal Claims.\textsuperscript{330} Only when no other remedy was available to a federal employee or applicant who had suffered a constitutional wrong would the \textit{Hubbard} dissent have permitted an award of backpay as an equitable remedy under the APA.\textsuperscript{331} By contrast, the

\begin{footnotes}
\footnoteref{footnotetext}{Id. at 517–18.}
\footnoteref{footnotetext}{Id. at 518.}
\footnoteref{footnotetext}{Id. at 518–19.}
\footnoteref{footnotetext}{Id. at 519.}
\footnoteref{footnotetext}{Id. The Second Circuit did not explain why this claim would not have fallen under the exclusive purview of the CSRA per the ruling of the Supreme Court in United States v. Fausto, 484 U.S. 439 (1988). \textit{See supra} notes 263–70 and accompanying text.}
\footnoteref{footnotetext}{\textit{Ward}, 22 F.3d at 520 (citing Hubbard v. Adm’r, EPA, 982 F.2d 531, 533 (D.C. Cir. 1992) (en banc)).}
\footnoteref{footnotetext}{Back Pay Act, 5 U.S.C. § 5596 (2000).}
\footnoteref{footnotetext}{\textit{Ward}, 22 F.3d at 520–21.}
\footnoteref{footnotetext}{Id. at 521–23.}
\footnoteref{footnotetext}{Hubbard v. Adm’r, EPA, 982 F.2d 531, 542 (D.C. Cir. 1992) (en banc) (Edwards, J., dissenting).}
\footnoteref{footnotetext}{Id. at 543.}
\footnoteref{footnotetext}{Id. at 542–43.}
\end{footnotes}
Second Circuit has thrown open the District Court–house doors to federal civilian employees who do have an alternative remedy, thus creating a parallel judicial review scheme for civilian employment disputes and the consequent reality of forum-shopping.

The manifest wrongness of the decision alleviates the potential harm of Ward, making it an aberrational appellate holding that has not attracted a following in the other federal courts. The Back Pay Act simply is not a self-contained and independent waiver of sovereign immunity that may be invoked to obtain relief in the District Court through jurisdiction under the general federal question statute. The Second Circuit in Ward v. Brown conflated the separate requirements of a statutory waiver of sovereign immunity and a cause of action. The Back Pay Act only supplies a cause of action while the Tucker Act provides the necessary waiver of sovereign immunity.

As the Supreme Court held in United States v. Hopkins, in language quoted by the Second Circuit in Ward but whose significance was not appreciated by that court, “[t]he Back Pay Act is the means by which appointed employees subjected to an unjustified personnel action are given a cause of action against the United States.” By contrast, a statutory waiver of sovereign immunity provides express permission to seek enforcement of a cause of action by the particular means of judicial review. The Supreme Court has adopted a stringent standard for such waivers: “A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied.” The Back Pay Act directs in pertinent part:

An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay . . . of the employee . . . is entitled, on

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334 See generally SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, supra note 1, at 477–79.
336 Ward, 22 F.3d at 520.
337 Hopkins, 427 U.S. at 128; see also United States v. Testan, 424 U.S. 392, 407 (1976) (“[T]he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position.”).
correction of the personnel action, to receive for the period for
which the personnel action was in effect . . . an amount equal to all
or any part of the pay . . . as applicable which the employee nor-
mally would have earned or received during the period if the per-
sonnel action had not occurred . . . .

Although the Back Pay Act mandates that the Office of Personnel Man-
agement pay lost wages to an employee who a court determines has suffered
an unjustified personnel action, the Act does not itself provide for judicial
review. Indeed, the Back Pay Act is codified as part of a larger statutory
chapter governing pay administration by the federal government, nothing in
which authorizes litigation against the United States.

Only when applied together with another statute, such as the Tucker Act
in the past or the CSRA today, does the Back Pay Act become operative to
provide the successful federal civilian claimant with a judicially-cognizable
claim for the backpay cause of action. In United States v. Testan, the Su-
preme Court explained that the Tucker Act established jurisdiction in the
then–Court of Claims but does not create any substantive right for money
enforceable against the United States, which thus must be found under an-
other statutory source of law. Thus, the Court examined two other statutes,
including the Back Pay Act, to determine if those provisions supplied
the substantive right for monetary relief. The Court concluded that, while
the Back Pay Act did provide for “retroactive recovery of wages” in the
then–Court of Claims for federal employees who had suffered a reduction in
grade, removal, suspension, or other reduction in pay, employees who chal-
lenged their failure to be promoted had no cause of action under the statute.
Likewise, in Bowen v. Massachusetts, the Supreme Court specifically
identified the Back Pay Act as one of those “statutes that have been ‘inter-
preted as mandating compensation by the Federal Government for the dam-
age sustained’ ” so as to trigger the Tucker Act. In United States v. Fausto,
The George Washington Law Review

The Court held that, because of the exclusivity of the CSRA, only the employing agency, the MSPB, or the Federal Circuit as the court with exclusive judicial review authority under that statute, henceforth could apply the Back Pay Act. As Judge Edwards explained in his Hubbard dissent, “[t]he Back Pay Act, which mandates a particular remedy for specific personnel actions, . . . depends on a prior finding of jurisdiction in the Federal Circuit under the Tucker Act” and thus could not be “trumped” by “allowing government employees with back pay claims to sue in District Court for reinstatement and back pay.”

Fortunately, both because it deviates so far from longstanding precedent and, frankly, is so plainly wrong, other circuits have not replicated Ward. While the breadth of the harm to the fabric of the tapestry of sovereign immunity waivers (at least outside the Second Circuit) is thus minimal, and while the analysis in Ward goes awry for reasons other than direct extrapolation from Bowen v. Massachusetts on the scope of the APA remedy, the decision nonetheless confirms that the fog of confusion on money claims engendered by the Supreme Court’s action has seeped ever deeper into the federal judiciary.

C. Military Employment Claims

Although the CSRA generally now covers civilian employment claims, the Tucker Act continues to afford the primary vehicle for military employment claims. Although the Back Pay Act discussed previously does not directly apply to members of the military, a parallel provision, sometimes called the Military Back Pay Act, plays a similar role. Like the civilian service Back Pay Act, the Military Back Pay Act is a money-mandat-

Cir. 1991) (saying that the Supreme Court in Bowen v. Massachusetts had listed the Back Pay Act “as clearly within the purview of the Tucker Act” and further explaining that the Back Pay Act “is merely derivative in application, depending on a prior finding of appropriate jurisdiction in the Claims Court”). In Hambsch v. United States, 490 U.S. 1054 (1989), Justice O’Connor joined by Justices Scalia and Kennedy dissented from denial of certiorari in a case in which the Federal Circuit held that an administrative leave statute did not provide an express waiver of sovereign immunity so as to permit an injured Secret Service agent to recover backpay for the period of his convalescence. Id. at 1056. In the course of that dissent, Justice O’Connor did say that “the Back Pay Act itself is an explicit consent to suit by the United States.” Id. at 1057. Justice O’Connor, however, cited to prior decisions that refer to the Back Pay Act as creating a cause of action. Id. Moreover, Justice O’Connor’s opinion must be read in full context, particularly with reference to her argument that jurisdiction over the matter would properly have lain in the then-Claims Court and the question of whether the Back Pay Act would trigger Tucker Act jurisdiction in United States v. Testan, 424 U.S. 392 (1976). See Hambsch, 490 U.S. at 1054. In such context, it is apparent that Justice O’Connor was contending that the Back Pay Act, in tandem with the Tucker Act, provided the necessary waiver of sovereign immunity.

350 See supra notes 263–70 and accompanying text.
351 SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, supra note 1, at 480–500.
352 See supra notes 259–60 and 332–49 and accompanying text.
A discharged or dismissed military servicemember ordinarily will first seek relief in the form of correction of his or her service evaluation records before the Board for Correction of Military Records for that branch of the armed services:

This is a civilian body within the military service, with broad-ranging authority to review a servicemember’s ‘discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial),’ 10 U.S.C. § 1553(a), or ‘to correct an error or remove an injustice’ in a military record, § 1552(a)(1).

In addition to discharges or dismissals for other reasons such as misconduct or denial of reenlistment, a military officer who fails to obtain a promotion in rank under the military’s “up or out” policy eventually will be discharged. Promotion decisions are made by Selection Boards in each of the branches of the armed forces.

When the Selection Board has passed over an individual for a promotion in the ordinary process but the Correction Board later finds errors in the record upon which the Selection Board made its decision, Congress has established a special process to reevaluate promotion prospects. The Correction Board, upon determining that a servicemember’s record was faulty, may recommend to the Secretary of the pertinent branch of the armed forces that a Special Selection Board (“SSB”) be convened to review the matter. The SSB participates in the records correction process itself and is charged with reviewing the original promotion prospects of the officer—that is, determining whether the officer would have been promoted by the original Selection Board absent the error in the record. If the officer is not promoted by the special selection board, but is instead nonselected for promotion again, the [military department] presumes the SSB’s action ratifies and retroactively cures the earlier defective nonselection.

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356 Ricks v. United States, 278 F.3d 1360, 1362 (Fed. Cir. 2002) (observing that the “Air Force, like other service branches, has maintained an ‘up-or-out’ promotion system); see also Fluellen v. United States, 225 F.3d 1298, 1300 (Fed. Cir. 2000) (observing that officer who was twice not selected for promotion was then involuntarily discharged).

357 Sisk, Litigation with the Federal Government, supra note 1, at 492.


When the servicemember is separated from the military, a claim for backpay and restoration to rank may then be combined with a collateral request for correction of the military records, thus asking the court to review the underlying failure of the Board for Correction of Military Records to change the record information. In Clinton v. Goldsmith, the Supreme Court explained the options available to such a servicemember:

A servicemember claiming something other than monetary relief may challenge a Board for Correction of Military Record’s decision to sustain a decision to drop him from the rolls (or otherwise dismissing him) as final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.; see §§ 704, 706 . . . . In the instances in which a claim for monetary relief may be framed, a servicemember may enter the Court of Federal Claims with a challenge to dropping from the rolls (or other discharge) under the Tucker Act, 28 U.S.C. § 1491 . . . . Or he may enter a district court under the “Little Tucker Act,” 28 U.S.C. § 1346(a)(2) [for claims of $10,000 or less].

In the military employment context, however, no less than in the civilian, the deleterious influence of Bowen v. Massachusetts has been felt, although its manifestations have been different. The debate in the federal civilian employment context has focused upon the availability of backpay as a remedy in an APA action in District Court. In the military employment context, by contrast, the primary problem has been the forum-shopping effort by former servicemembers to split the cause of action into separate parts, seeking equitable relief in District Court that, once achieved, will lead to a retrospective monetary benefit, despite the availability of the Court of Federal Claims to provide complete relief.

In this regard, consider a discharged servicemember who decides first to seek specific relief, in the form of correction of military records, through an action under the APA in federal District Court, and further assume that the court in fact orders correction of the records, effectively granting reinstatement or a change in retirement status. Then, with that order in hand, suppose the servicemember files a second suit in the Court of Federal Claims under the Tucker Act seeking retroactive monetary relief and asserting that the District Court’s order for correction of records has already established that his or her discharge was improperly based on erroneous records (thus invoking issue preclusion). May the plaintiff split the equitable claims from the monetary claims and pursue two successive suits in this manner?


\[362\] Goldsmith, 526 U.S. at 539–40 (citations omitted).

\[363\] In many circumstances, a second suit probably would be unnecessary because the District Court’s injunctive order changing status would be honored by the military administratively as leading directly to a retrospective monetary benefit in terms of backpay or retroactive retirement benefits. That the District Court order, however, would be implemented administratively to provide a monetary benefit does not of course alter the fundamental nature of the underlying claim as a money claim, with a collateral question of proper status, for which exclusive jurisdiction properly lies only in the Court of Federal Claims, which has the authority to resolve the entire dispute, including both ordering backpay and directing change of status.
In *Bowen v. Massachusetts*, the Supreme Court was somewhat disparaging of the then–Claims Court and skeptical of its general ability to provide an adequate resolution to litigation disputes, aside from certain “special and adequate review procedures” in particular categories of cases. The Court emphasized that the Claims Court did “not have the general equitable powers of a District Court to grant prospective relief.” Even if, however, valid in other contexts, doubts about the effectiveness of a Court of Federal Claims judgment are misplaced in the context of an employment dispute. In 1972, Congress amended the Tucker Act to permit the Court of Federal Claims to grant certain types of equitable relief “incident of and collateral to” a money judgment. Congress enacted this provision so that aggrieved civilian and military service personnel could obtain full and adequate relief in a single action brought in the Court of Federal Claims. Indeed, in *Bowen v. Massachusetts* itself, the Supreme Court stated that the then–Claims Court “can offer precisely the kind of 'special and adequate review procedures' that are needed to remedy particular categories of past injuries or labors for which various federal statutes provides compensation.” Among the kinds of laws that attempt “to compensate a particular class of persons for past injuries or labors,” the Court singled out claims brought under the Back Pay Act. Military claims, for which backpay would be available as a remedy under the Military Back Pay Act together with the collateral remedies of correction of records and restoration to a position, comfortably fall within this category of cases for which the Court of Federal Claims may provide full and adequate relief.

Nonetheless, courts in the post–*Bowen v. Massachusetts* era have been divided on the question of whether a discharged servicemember may split a military employment claim into the specific relief and monetary components for separate adjudication. In *Kidwell v. Department of the Army*, the D.C. Circuit held that

> [e]ven where a monetary claim may be waiting on the sidelines, as long as the plaintiff’s complaint only requests non-monetary relief that has 'considerable value’ independent of any future potential for monetary relief—that is, as long as the sole remedy requested is declaratory or injunctive relief that is not ‘negligible in comparison’ with the potential monetary recovery—we respect the plaintiff’s choice of remedies and treat the complaint as something more than

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365 *Id.* at 903 (quoting *ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 101 (1947)).
366 *Id.* at 905.
369 *Bowen*, 487 U.S. at 904 n.39 (emphasis added).
370 *Id.* at 906 n.42.
371 *Mitchell v. United States*, 930 F.2d 893, 896-97 (Fed. Cir. 1991) (holding, with citation to *Bowen*, that the then–Claims Court had sufficient jurisdiction to handle military pay claims and thus that § 704 precludes District Court APA authority over military employment cases).
an artfully drafted effort to circumvent the jurisdiction of the Court of Federal Claims.\textsuperscript{373}

Accordingly, the D.C. Circuit permitted a discharged serviceman to obtain judicial review in District Court to change the status of his discharge from general to medical, notwithstanding that the practical effect of this change would have been to entitle the plaintiff to obtain retroactive disability benefits exceeding $50,000.\textsuperscript{374} Although the court held that the serviceman would obtain “a direct non-monetary benefit” because “resting [his] discharge on medical grounds would lift some of the shame associated with failing to receive an honorable discharge,”\textsuperscript{375} the court failed to consider whether the Court of Federal Claims was capable of granting the same relief collateral to a money claim for disability benefits.

In \textit{Burkins v. United States},\textsuperscript{376} however, the Tenth Circuit held on similar facts that the Court of Federal Claims had exclusive jurisdiction under the Tucker Act over a suit by a veteran for correction of military records to reflect a disability, rather than honorable, discharge.\textsuperscript{377} Even though the veteran’s complaint “did not explicitly seek monetary relief,” the court concluded that his “prime objective” in obtaining a correction of the records was to be able to claim retroactive disability benefits (in excess of $10,000).\textsuperscript{378} The Tenth Circuit did distinguish the D.C. Circuit’s \textit{Kidwell} decision, saying the veteran there had a significant nonmonetary purpose in seeking a change from a general to disability-related discharge because this change “would lift some of the shame associated with failing to receive an honorable discharge.”\textsuperscript{379} The Tenth Circuit, however,—in contrast with the D.C. Circuit—evaluated whether and concluded that the Court of Federal Claims could provide “complete relief” including placement in an appropriate retirement status and correction of the military records.\textsuperscript{380}

In its initial post–\textit{Bowen v. Massachusetts} foray into the controversy in 1991, the Federal Circuit in \textit{Mitchell v. United States}\textsuperscript{381} likewise affirmed the expertise and authority of the then–Claims Court to handle military employment claims, including both reviewing decisions of corrections boards and affording monetary relief.\textsuperscript{382} In \textit{Mitchell}, a discharged military reserve officer

\begin{footnotesize}
\begin{enumerate}
\item Id. at 284 (citations omitted).
\item Id. at 281–83; see also Poole v. Rourke, 779 F. Supp. 1546, 1553–57 & n.10 (E.D. Cal. 1991) (holding that a servicemember could maintain suit in the District Court to obtain reinstatement after being discharged for having used marijuana, even though backpay sum would reach $50,000, and further holding that the District Court could directly order payment of backpay as an equitable action for specific relief, with citation to \textit{Bowen v. Massachusetts}); Crane v. United States, 41 Fed. Cl. 338, 339-41 (1998) (holding that, where a discharged servicemember sought only reinstatement in his complaint, the Court of Federal Claims lacked jurisdiction, and further refusing to infer that plaintiff would eventually seek money damages and therefore transferring the case back to the District Court).
\item \textit{Kidwell}, 56 F.3d at 285.
\item \textit{Burkins v. United States}, 112 F.3d 444 (10th Cir. 1997).
\item Id. at 446–51.
\item Id. at 449.
\item Id. at 450 n.5 (quoting \textit{Kidwell}, 56 F.3d at 285).
\item Id. at 450.
\item Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991).
\item Id. at 896.
\end{enumerate}
\end{footnotesize}
filed suit in District Court seeking an order restoring him retroactively to active duty for an additional two years, which then would have qualified him for retirement with twenty years of service.\textsuperscript{383} After the District Court denied the government’s motion to dismiss or transfer the case to the then–Claims Court, the government filed an interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(d)(4)(A).\textsuperscript{384} Citing Bowen v. Massachusetts,\textsuperscript{385} the Federal Circuit concluded that this was “specifically the kind of claim for which the Claims Court can provide ‘special and adequate review procedures’” and thus for which the APA “direct[s] litigation away from the district courts.”\textsuperscript{386} The court explained that the “Claims Court has explicit statutory authority, which it has exercised, to provide all relief” that the plaintiff sought, namely backpay, reinstatement, and correction of records.\textsuperscript{386}

Unfortunately, some of what the Federal Circuit gave in 1991 in Mitchell in terms of clarity of jurisdictional lines and security of Court of Federal Claims authority over military employment cases, the Federal Circuit in 1998 then took away in James v. Caldera.\textsuperscript{387} In James, a former noncommissioned officer in the Army filed suit under the APA in District Court arguing that he had been prematurely discharged and was entitled to a five-month retroactive extension of his enlistment, as well as removal of a bar to reenlistment based upon alleged drug use.\textsuperscript{388} The District Court, relying upon Mitchell v. United States, ordered the case transferred to the then–Claims Court on the basis that the suit was “appropriately viewed as one for damages as well as specific relief” and that, by expressly adding a claim for backpay and retirement benefits, the plaintiff could obtain a complete remedy in the Claims Court.\textsuperscript{389} The Federal Circuit reversed, holding that the plaintiff’s request to remove the bar on reenlistment plainly did not seek money damages.\textsuperscript{390} More significantly, the majority held that even the request to extend enlistment, if framed in a particular manner, would not be a money claim under the Tucker Act and instead could be pursued under the APA, notwithstanding that the servicemember sought the retroactive extension to obtain twenty years of active service and thereby obtain military retirement benefits.\textsuperscript{391}

The Court of Appeals majority in James agreed that if this servicemember was claiming that his enlistment had been extended, either by an action of a superior officer or by direct force of a military regulation, and that he was wrongfully discharged before the end of that extended term of enlistment, then his right to pay continued to the end of the term and his backpay claim would thus be the basis for a Tucker Act suit in the Court of Federal Claims.\textsuperscript{392} Although the servicemember’s complaint was not a model of clarity, and contained some alternative or inconsistent statements, at least one

\begin{itemize}
  \item \textsuperscript{383} Id. at 894.
  \item \textsuperscript{384} Id. at 894–95.
  \item \textsuperscript{385} Id. at 896 (quoting Bowen v. Massachusetts, 487 U.S. 898, 900–01 n.31 (1988)).
  \item \textsuperscript{386} Id.
  \item \textsuperscript{387} James v. Caldera, 159 F.3d 573 (Fed. Cir. 1998).
  \item \textsuperscript{388} Id. at 575–78.
  \item \textsuperscript{390} James, 159 F.3d at 580–82.
  \item \textsuperscript{391} Id. at 580–84.
  \item \textsuperscript{392} Id. at 582.
\end{itemize}
paragraph in the complaint did fit this description, alleging that his “request for extension of enlistment was already approved and in effect” before he was subsequently barred from reenlistment and prematurely discharged. Accordingly, the Court of Appeals arguably should have concluded its analysis at that point by holding that at least one variation of his retroactive enlistment extension claim, as expressly stated in his well-pleaded complaint, fell within the jurisdiction of the Court of Federal Claims jurisdiction.

The Federal Circuit, however, declined to ground its decision on that particular (although apparently unambiguous) statement in the servicemember’s complaint. Instead, looking to other paragraphs in the pleading, the court viewed the allegations as susceptible to an alternative characterization in which the plaintiff complained not about discharge despite prior approval of the enlistment extension but rather argued that the Army “wronged [him] when it did not permit [him] to extend [his] enlistment for five months.”

If the plaintiff thereby was acknowledging that his superior officers had discretion under military regulations on whether to extend his enlistment, and thus was challenging the exercise of that discretion to deny him the extension, then the majority held that his claim for backpay would be sufficiently uncertain and, thus, insufficiently grounded upon a statute or regulation to give rise to Tucker Act jurisdiction. The majority distinguished Mitchell on the basis that the servicemember there had asserted a statutory entitlement to remain on active duty, thereby creating a backpay claim cognizable under the Tucker Act. The Federal Circuit remanded the case to the District Court to determine whether the military “regulations are of the ‘firm right’ kind, so as to confer Tucker Act jurisdiction, or whether they are discretionary, so as to defeat jurisdiction.”

Judge Michel, however, in dissent argued that James was nearly identical to and controlled by Mitchell, which likewise had involved a servicemember’s claim for retroactive extension of service to achieve a different retirement status. Because Judge Michel believed that “[a] fair reading of James’s complaint indicates that he is, at bottom, seeking only retirement pay and benefits,” he concluded that the action could not be sustained in District Court under the APA and was amenable to full disposition in the Court of Federal Claims. The servicemember’s requests for correction of his records to reflect twenty years of active service and removal of the bar to reenlistment were, in the dissent’s view, the type of injunctive relief that the Court of Federal Claims may provide collateral to a money judgment. For purposes of characterizing the claim as one for money cognizable under the

393 Id. at 577.
394 Id. at 580.
395 Id. at 582.
396 Id. at 583.
397 Id.
398 Id. at 588–89 (Michel, J., dissenting).
399 Id. at 586.
400 Id. at 584–88.
401 Id. at 586–87.
Tucker Act, the dissent declined to draw lines between claims asserted by an officer based upon a purported direct statutory right to continued enlistment (subject to the exclusive jurisdiction of the Court of Federal Claims) and those asserted by an enlisted man whose continued enlistment depends on the exercise of discretion (subject only to suit in District Court).402

Moreover, as I would add by way of my own further disagreement with the majority opinion in James v. Caldera, the authority of the Court of Federal Claims under the Tucker Act over a backpay claim does not turn on the merits of the claim but rather on its nature. The claim of right to backpay by statute—the money-mandating statutory right that triggers the Tucker Act—is founded upon the Military Back Pay Act, which simply directs that “the basic pay of the pay grade” be given to “a member of a uniformed service who is on active duty.”403 If the servicemember is found to have been wrongfully discharged, for whatever reason and on whatever basis, the Military Back Pay Act becomes operative to provide the right to payment of wages from the date of wrongful discharge. Whether a discharged servicemember claims entitlement to remain on active duty by direct force of a statute or regulation or by reason of the unlawful exercise of military discretion to deny extended enlistment404 is the statement of the question on the merits on the case. To be sure, the servicemember who challenges the exercise of discretion is less likely to succeed on the merits than one who can point to an unambiguous direction in a statute or regulation. But in either instance, if the discharged servicemember does succeed in obtaining a court-ordered retroactive extension of enlistment—if “the possibility that there would be an extension of a status”405 becomes a reality—he or she then would become entitled by the Military Back Pay Act to the compensation due that statute. To be a cognizable cause of action under the Tucker Act, nothing more than that possibility is required.406

Beyond the result in the particular case, the dissent attacked the majority holding in James as “frustrating the legislative purpose of the Tucker Act as amended and likely to create unnecessary confusion, unpredictability, expense, and delay in the litigation of claims for military pay and benefits.”407

402 See id. at 589.
404 For the plaintiff to succeed in any challenge to a discretionary decision, indeed to succeed in obtaining any review on the merits, he or she would have to establish that the exercise of discretion was unlawful by relying upon an improper factor or failing to give meaningful weight to an important factor under statutory or regulatory guidelines or by contravening standards of fairness derived from constitutional or statutory provisions. But, again, that evaluation is a question that goes to the merits, or perhaps to the justiciability of the military decision, and not to the jurisdictional question of proper forum.
405 See James, 159 F.3d at 582.
406 See Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1008 (Ct. Cl. 1967) (“[A] claimant who says he is entitled to money from the United States because a statute or regulations grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous, but arguable.”) (citations omitted); Spehr v. United States, 51 Fed. Cl. 69, 81 (2001) (saying that “[t]he likelihood of [a military serviceman’s] success on the merits of claim for reinstatement and backpay] is irrelevant to [the] determination of the jurisdiction of the Court of Federal Claims).
407 James, 159 F.3d at 584.
Unless the James decision is limited narrowly to its peculiar facts or understood to now be confined or undermined by subsequent Federal Circuit precedent, artful pleading of complaints as seeking non-monetary relief could weaken or dissipate the institutional authority of the Court of Federal Claims over military employment cases. Fortunately, the reach of the James v. Caldera decision is unlikely to be broad. First, the case was atypical to the extent that it is seen as raising a challenge to an exercise in discretion by military superiors rather than asserting a more direct infringement of statutory or regulatory mandates governing enlistment, promotion, or discharge. Second, as discussed later in this Article, the Federal Circuit subsequently has taken firm action to clarify and stabilize the impact of Bowen v. Massachusetts, which presumably takes precedence over any prior decisions inconsistent with that charge.408

In conclusion, the jurisdictional confusion, multiplied litigation in separate courts, and forum-shopping illustrated by the cases discussed above may be avoided by adherence to a simple principle: when the servicemember can frame his claim as one for monetary relief, then he must do so. Indeed, the Supreme Court in Clinton v. Goldsmith409 apparently understood this as the ordinary route for military employment claims, saying that “[i]n the instances in which a claim for monetary relief may be framed, a servicemember may enter the Court of Federal Claims [under the Tucker Act] [o]r he may enter a District Court under the ‘Little Tucker Act’ . . . .”410 In this way, the Court of Federal Claims will be restored to primacy over substantial military employment claims, thereby ensuring a level of expertise achieved through experience and providing a needed degree of uniformity in approach and result.411

D. Indian Money Claims

In terms of human impact and monetary value, it is difficult to overstate the importance of claims by Indians and Indian tribes as a category of civil litigation against the federal government. And the Court of Federal Claims (and its predecessors) long has served as a central forum for adjudicating disputes that flow from the nation’s uneasy and historically turbulent relationship with indigenous tribal peoples, who are treated sometimes as sovereign nations and at other times as dependent wards of a federal government guardian. When the interaction between the federal government and Native American tribes or members gives rise to a claim in which money is a remedy, the Tucker Act412 and its statutory cousin, the Indian Tucker Act413 (which extends the Tucker Act to claims made against the United States by Indian tribes), provide for suit against the United States in the Court of Fed-


410 Id. at 539–40 (emphasis added).

411 See Mitchell v. United States, 930 F.2d 893, 896 (Fed. Cir. 1991) (“[T]he Claims Court has extensive experience reviewing decisions of corrections boards in military pay cases.”).


eral Claims. Indeed, landmark Indian law decisions by the Supreme Court have been rendered upon review of claims originally filed in the predecessor to the Court of Federal Claims.414

One prominent commentator, Professor Robert A. Williams, Jr., summarizes Indian law in this manner:

Practitioners and students of United States Federal Indian Law are all intimately familiar with the three core, fundamental principles in the field from which all Supreme Court Indian law jurisprudence extends: the Congressional Plenary Power doctrine, which holds that Congress exercises a plenary authority in Indian affairs; the Diminished Tribal Sovereignty doctrine, which holds that Indian tribes still retain those aspects of their inherent sovereignty not expressly divested by treaty or statute, or implicitly divested by virtue of their status; and the Trust doctrine, which holds that in exercising its broad discretionary authority in Indian affairs, Congress and the Executive are charged with the responsibilities of a guardian acting on behalf of its dependent Indian wards.415

Under both the general Tucker Act and the Indian Tucker Act, a claimant must identify a source of substantive law outside of the Tucker Act itself.416 Thus, the third of the core doctrines of Indian law set forth above—the Trust doctrine—may give rise to a cognizable Tucker Act claim.417 Indeed, it is in this category—the Trust responsibilities of the federal government as steward or guardian of Indian assets—that civil claims by Indians and tribes against the United States are most likely to arise.418 In addition, as evidenced by the language of the Indian Tucker Act, referring to claims aris-


415 Robert A. Williams, Jr., Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination, 8 ARIZ. J. INT’L & COMP. L. 51, 67 (1991); see also William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 1–2 (2d ed. 1988); L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 COLUM. L. REV. 809, 810–11 & n.6 (1996). Professor Williams is highly critical of the state of Indian law, saying that “every time the current Supreme Court cites to any of these principles to uphold one of its Indian law decisions, it perpetuates and extends the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial discrimination against indigenous tribal peoples’ rights of self-determination.” Williams, supra, at 67–68. But see United States v. Sioux Nation of Indians, 448 U.S. 371, 435–37 (1980) (Rehnquist, J., dissenting) (decrying what he characterizes as “revisionist” historians of the settlement of the American West and approvingly quoting one historian who said of tribal defeats in Indian wars between 1860 and 1890 that “[f]ew conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded”). For a more dispassionate explication of Indian law, see generally CANBY, supra.

416 White Mountain Apache Tribe, 123 S. Ct. at 1132 (“Neither [the Tucker Act nor the Indian Tucker Act], however, creates a substantial right enforceable against the Government by a claim for money damages.”); Navajo Nation, 123 S. Ct. at 1089 (same). See generally, supra notes 89–97 and accompanying text discussing need to find a money-mandating cause of action outside of Tucker Act.

417 On the trust relationship in general, see CANBY, supra note 415, ch. III.

418 See generally SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, supra note 1, at 500–17. On the evolution of statutory methods for Indian claims, including the Indian Tucker
ing under “treaties of the United States,” tribes also may maintain a direct action against the United States alleging violation of governmental obligations in treaties with the various tribes.\footnote{Indian Tucker Act, 28 U.S.C. § 1505 (2000).}

In \textit{United States v. Mitchell},\footnote{On treaties with Indian tribes, see generally \textsc{Canby}, supra note 415, ch. VI.} the leading decision on Indian-government trust responsibilities, the Supreme Court confirmed that the fiduciary relationship between the United States and a tribe when grounded in specific statutory language may create a trust duty enforceable through the remedy of a Tucker Act action for damages.\footnote{\textit{Id.} at 211–28.} In \textit{Mitchell}, the Court clarified that the Tucker Act both waives the sovereign immunity of the United States and directs subject matter jurisdiction to the then-Court of Claims.\footnote{\textit{Id.} at 211–16; \textit{see also supra notes 85–88 and accompanying text (discussing Tucker Act as waiver of sovereign immunity).}} If a substantive source of law, that is, a statute or a treaty, establishes a complete fiduciary relationship to manage Indian resources, especially if the federal government has pervasive control over those assets, then Indian tribes and members may obtain money damages from the United States under the Tucker Act for default in performance of its trust duties.\footnote{\textit{Mitchell}, 463 U.S. at 216–28.}

In \textit{United States v. White Mountain Apache Tribe},\footnote{United States v. White Mountain Apache Tribe, 123 S. Ct. 1126 (2003).} by a five-four decision rendered earlier this year, the Supreme Court held that, where the United States has “plenary” authority over the assets held in trust, the government assumes a duty to preserve those assets\footnote{\textit{Id.} at 211–28.} and thus the government’s alleged “breach of fiduciary duty to manage land and improvements held in trust for [an Indian Tribe]” gives rise to a cognizable claim for damages under the Indian Tucker Act.\footnote{\textit{Id.} at 1130; \textit{see also id.} at 1136 (Ginsburg, J., concurring) (stating that the “plenary control exercised by the United States as sole manager and trustee of Indian assets gave rise to a fiduciary duty enforceable under the Indian Tucker Act by a remedy of damages).} The Court majority further explained that, while the fact of a general trust relationship between the United States and Native Americans alone is not enough to imply a remedy in damages, and thus that “a further source of law [is] needed to provide focus for the trust relationship . . . once that focus [is] provided, general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation.”\footnote{\textit{Id.} at 1135.}

The federal government’s persistent dereliction of duty as steward of resources held in trust for American Indians—the issue on the merits in the \textit{Mitchell} case—is both a century-old saga and as fresh as today’s newspaper. Indeed, the continuing legal wranglings about the government’s trust obligations to Indians recently produced an extraordinary event, what “is believed to be the first time a federal judge has held a sitting cabinet member in con-

\begin{thebibliography}{9}
\bibitem{treaties} On treaties with Indian tribes, see generally \textsc{Canby}, supra note 415, ch. VI.
\bibitem{ginsburg} \textit{Id.} at 1133; \textit{see also id.} at 1136 (Ginsburg, J., concurring) (stating that the “plenary control exercised by the United States as sole manager and trustee of Indian assets gave rise to a fiduciary duty enforceable under the Indian Tucker Act by a remedy of damages).}
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tempt of court.” In 1996, a class action lawsuit on behalf of more than 300,000 Indians was filed as Cobell v. Babbitt in the United States District Court for the District of Columbia alleging that the United States had failed to account for billions of dollars earned on oil and logging leases of millions of acres of land allotted to Indians in the last century but held in trust for them by the federal government. The Cobell lawsuit has been described as the most significant Indian case and one of the largest lawsuits ever brought against the United States. According to the plaintiffs’ complaint and the court’s ultimate findings, the government has kept such poor records that it is incapable of determining what it owes each individual Indian, or for that matter even which individuals own which allotments, and has lost perhaps billions of dollars in earnings over the past century. Moreover, the government apparently has failed to ensure that all allotted lands have been put to productive use. As one newspaper editorial described the situation: “Picture a bank keeping records so poorly that it didn’t know who deposited or withdrew funds and what the balance was in individual accounts. Picture that going on for a century. Unimaginable, but that’s exactly what the government did with funds belonging to Native American tribes.”

When the government in discovery in Cobell failed to turn over records for Indian trust accounts promised by Department of Justice lawyers, Judge Lamberth took the extraordinary step of holding Interior Secretary Bruce Babbitt, Treasury Secretary Robert Rubin, and Assistant Interior Secretary for Indian Affairs Kevin Gover in contempt and later imposed hundreds of thousands of dollars in fines to pay for the plaintiffs’ attorney’s fees and expenses. In his opinion, Judge Lamberth wrote that the government had “abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception of the court. I have never seen more egregious conduct by the federal government.” The court explained that misconduct by the federal government in litigation is especially troubling; “[t]he institutions of our federal government cannot continue to exist if they cannot be trusted.”

Ultimately the government had to admit that it was unable to produce the records, many of which had been lost or destroyed or stored in wooden sheds exposed to the weather. Government attorneys and officials began pointing fingers at one another, with Interior Department officers contending

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429 Lambers the State—Again, LEGAL TIMES, Mar. 1, 1999, at 12.
433 Cobell, 240 F.3d at 1088–90; Cobell, 91 F. Supp. 2d at 6–12; Gibeaut, supra note 431, at 40–47, 98–99; Jackson, supra note 431.
436 Cobell, 37 F. Supp. 2d at 38.
437 Id.
438 Gibeaut, supra note 431.
that the Department of Justice attorneys had bungled the case because of their unfamiliarity with the complexities of Indian law, while the attorneys blamed the Interior Department, as the client agency, for failing to provide necessary information, assist their counsel in understanding the problem, and diligently search the records. In the meantime, of course, generations of Indians have been cheated out of the income generated on their allotments of land. The only point of consensus, at long last, is the government’s belated admission that it had breached its fiduciary duty to the Indians.

At the end of 1999, Judge Lamberth entered judgment on most of the claims in Cobell v. Babbitt after a bench trial, finding that the United States is incapable of providing an accurate accounting and therefore had violated its fiduciary responsibility to these Indians. He concluded:

The United States’ mismanagement of the [Individual Indian Money] trust is far more inexcusable than garden-variety trust mismanagement of a typical donative trust. For the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people.

Judge Lamberth retained continuing jurisdiction over the matter, including periodic review of the government’s ongoing efforts to prepare a full accounting of the trust. The Court of Appeals affirmed the order on appeal in 2001. More than two years later, near the end of 2002 (when this Article was written), the parties and the District Court were still at work attempting to create order out of the chaos caused by the government’s mismanagement of the Indian land allotment program, with a new contempt citation being issued to another cabinet secretary, Interior Secretary Gale A. Norton, in a succeeding administration based upon findings of deception and abject failure in continuing efforts to reform the trust system.
Somewhat lost in the story of egregious government misconduct and adjudication of high-ranking government officials in contempt is the fact that the jurisdiction of the District Court—rather than the Court of Federal Claims—over the entire matter was doubtful and only possible through a generous reading of the *Bowen v. Massachusetts* decision. The Department of Justice, however, failed to raise any jurisdictional objection until late in the game, and the belated motion to transfer the case to the Court of Federal Claims was denied. The government failed to renew its jurisdictional argument on appeal, although the D.C. Circuit addressed the matter in two brief paragraphs to assure itself of proper jurisdiction and waiver of sovereign immunity.

Before *Bowen v. Massachusetts*, the *Cobell v. Babbitt* lawsuit would have been recognized as a classic money claim within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act or the Indian Tucker Act. Under pre-*Bowen v. Massachusetts* caselaw, where the “primary objective,” “prime effort,” or “real effort” of the lawsuit “is to recover money allegedly wrongfully withheld by the federal government,” the jurisdictional limits of the Tucker Act “cannot be evaded or avoided by framing a District Court complaint to appear to seek only injunctive, mandatory or declaratory relief” against the federal government or officials. Because the Native American plaintiffs ultimately hope to recover a large sum of money, not only in the future through improved record-keeping and management, but also through reconciliation of accounts based upon past mismanagement by the government (retrospective relief), no effort to frame the suit as seeking solely equitable or specific relief would have been permitted to evade the gravitational pull to the Court of Federal Claims.

Nonetheless, with *Bowen v. Massachusetts* now providing the doctrinal foundation, Judge Lamberth repeatedly asserted District Court authority to grant both prospective and retrospective relief under the APA. Of course, and that the government was engaged in continuing and unjustifiable delay that endangered future of trust reform and success of historical accounting).

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449 Maier v. Orr, 754 F.2d 973, 982 (Fed. Cir. 1985).
450 Bakersfield City Sch. Dist. v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979).
451 *Pierce*, 706 F.2d at 474.
452 *Bakersfield City Sch. Dist.*, 610 F.2d at 628; accord *Maier*, 754 F.2d at 982. The “primary objective” or “prime effort” approach, while having the merit of focusing the court upon the monetary realities underlying the case, may be too subjective to serve as a legal rule. To the extent that the “primary objective” or “prime effort” test is seen to focus upon the subjective importance of an issue to the litigants (although it need not be so understood), the more appropriate legal query is whether a particular claim effectively seeks the payment of past-due money or is but a means to the end of a money judgment. While the motivations of the plaintiff, when discernible, may be revealing, the more appropriate bright-line test is whether the claim is directly or inextricably tied to a request for past-due money. *See infra* Part IV.B.1.
The plaintiffs’ request for prospective relief, to the extent that it was forward-looking only and not a disguised attempt to set the stage for retroactive monetary relief, would not have constituted a claim for money damages under any interpretation of the APA. Even if reconfiguration of government accounting practices affected the payment of money in the future, such prospective relief with not-yet-realized monetary effects could not plausibly be characterized as seeking “money damages” within the exclusion of § 702 of the APA.454

The plaintiffs in Cobell, however, forthrightly sought as well what the court recognized as “retrospective relief,” namely an historical accounting of the accrued, past-due sums of money present in individual Indian trust accounts.455 For this claim, Judge Lambert stated the “crucial issue” as “whether the plaintiffs’ requested retrospective remedy of an accounting is an equitable, specific claim, or whether it is simply a money damages claim in disguise.”456 To keep their claim in the District Court under the auspices of the APA, the Cobell plaintiffs carefully disavowed that they sought “to recover any money or other substitutionary relief.”457 Thus, rather than praying for an actual order requiring the payment of money due,458 the plaintiffs asked “solely for a declaration of the defendants’ trust duties and an accounting of money already existing in the account.”459 The plaintiffs denied that they were asking for any “cash infusion” into the accounts “to recompense the plaintiffs for lost or mismanaged funds,”460 a request that Judge Lambert apparently recognized would be indisputably compensatory in nature and thus would constitute “money damages” within the APA exclusion.461 Because the plaintiffs’ complaint in fact asked for broader relief, including recovery of lost funds, Judge Lambert generously struck those statements from the complaint that would have enlarged the case beyond what he regarded as the permissible parameters of the APA.462 As for the government’s argument that the equitable accounting remedy was only the prelude to a request for monetary relief in accordance with the results of the accounting, Judge Lambert declared that there was no evidence that the true nature of the plaintiffs’ claims was to obtain eventual monetary reimbursement.463 In any event, he ruled, “[a]t most, the enforcement of this statutory right [to an accounting] may partially support some future monetary claim (but not necessarily ‘money damages’), which, because this is plaintiffs’ own money, will be compensatory only to the extent that the money is missing from the trust.”464

454 See Cobell, 30 F. Supp. 2d at 30–35 (addressing claims for prospective relief).
455 Id. at 29, 38–42.
456 Id. at 39.
457 Cobell, 91 F. Supp. 2d at 24.
458 Id. at 27 (“Plaintiffs have expressly disavowed seeking an order for the payment of money in this case.”).
459 Cobell, 30 F. Supp. 2d at 40.
460 Id.
461 Id. at 40 & n.17.
462 Id. at 40 n.18.
464 Id. at 28.
Judge Lamberth’s conclusion that an historical accounting of the records is a form of specific relief that may be pursued outside of a Tucker Act claim for money in the Court of Federal Claims—even if the practical effect of the lawsuit is to set the stage for the payment of money owed and withheld because of the government’s past book-keeping failures—is perhaps plausible under *Bowen v. Massachusetts*.

Indeed, parallels between *Cobell* and *Bowen v. Massachusetts* can be drawn, as each case involved a challenge to governmental accounting decisions with respect to certain funds to which the plaintiffs claimed entitlement, which the respective courts were willing to treat as requests for specific relief despite the retroactive monetary implications of both lawsuits. Quoting the pertinent language from *Bowen v. Massachusetts*, Judge Lamberth said that the plaintiffs sought “‘the very thing to which they are entitled,’ an accounting of their money that actually exists in the [Individual Indian Money] trust.” The court summarized its *Bowen v. Massachusetts* analysis as follows:

The principles of the distinction between money damages and specific relief, as enunciated in *Bowen*, show that the plaintiffs’ claim for an accounting is indeed one for specific relief. The plaintiffs do not ask this Court to compel the defendants to pay money to substitute for losses resulting from the mismanagement of the IIM accounts. Nor do they ask the Court to order a cash infusion into the IIM trust system. Instead, the plaintiffs ask only for a declaration that the defendants have breached their trust duties and a decree ordering the defendants to properly account for the money that already sits in the trust fund to which the plaintiffs are beneficiaries. These facts belie any claim that the plaintiffs’ requested remedy is for money damages.

In a terse paragraph, the D.C. Circuit upheld this analysis with citation to *Bowen v. Massachusetts*, finding that the plaintiffs’ request for an accounting constituted “specific relief other than money damages” which the District Court had authority to hear under the APA.

Indeed, had the plaintiffs in *Cobell v. Babbitt* not disavowed a request for an order to pay the money found to be in the accounts through the mandated accounting effort, that claim might have been sustainable as well under a broad interpretation of *Bowen v. Massachusetts*. As Judge Lamberth noted, even “if the claimant’s eventual purpose is to seek ‘monetary redress,’” the action does not necessarily fall outside of the APA’s waiver of sovereign im-

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465 Prior to the *Cobell v. Babbitt* case, Dean Nell Jessup Newton had suggested that *Bowen v. Massachusetts* “holds out the possibility that Indian tribal advocates may be able to obtain federal District Court jurisdiction by invoking the Administrative Procedure Act as a waiver of sovereign immunity, at least in a case in which the relief requested can be fairly characterized as equitable, even though the result may be a release of funds looking very much like a money damages remedy.” Newton, supra note 418, at 838 n.498.

466 See generally supra Part II (discussing *Bowen v. Massachusetts*).


munity.\textsuperscript{470} Although pre–Bowen v. Massachusetts \textit{caselaw} precluded a plaintiff from “transform[ing] a claim for damages into an equitable action by asking for an injunction that orders the payment of money,”\textsuperscript{471} Bowen v. Massachusetts \textit{set} that constraint on its ear. In Bowen v. Massachusetts, the plaintiff State of Massachusetts sought the direct recovery of a sum of money to which it was entitled, which the Supreme Court held was not compensatory in nature and thus not within the § 702 exclusion from the APA of claims seeking “money damages.”\textsuperscript{472} To the extent that the Cobell plaintiffs sought only to recover the money presently existing in their accounts, but not properly recorded due to government bookkeeping mismanagement, and eschewed any request for compensation for funds that had been lost or misappropriated, Bowen v. Massachusetts logically may be read to allow characterization of that claim as a permissible form of specific relief under the APA.

Although the assertion of District Court jurisdiction in Cobell v. Babbitt may reflect a plausible if expansive reading of Bowen v. Massachusetts, that does not mean it is a salutary result. Rather, Cobell v. Babbitt stands as another example of the way in which the Bowen v. Massachusetts analysis openly encourages imaginative lawyers to dress money claims in the garb of requests for specific relief for the fashionable purpose of cloaking their lawsuits from the jurisdictional restrictions of the Tucker Act. In this way, the reality of a dispute with the federal government and the true purpose underlying a lawsuit against the United States—the recovery of past-due money—is concealed by the pleading party. The Bowen v. Massachusetts opinion tempts the District Court likewise to avert its eyes and pretend that the claim is devoid of monetary consequence so as to bring it within the safe harbor of the APA.

Looking at the question with a “practical eye,”\textsuperscript{473} and piercing through to the heart of the matter, the Cobell v. Babbitt case is about money—how the government was obliged as a fiduciary to safeguard it, how the government egregiously mishandled it, to whom it is owed, and how much of it is due. To be sure, for the immediate purposes of the District Court case, the plaintiffs disavowed any request for an actual award of money, but the demand for a retrospective accounting, and thus a determination or estimate of the money owed, confirms that the case at its core is about past-due money.

The Cobell plaintiffs did not seek an accounting from the government because they value bookkeeping exactitude in the abstract or appreciate the intrinsic beauty of a well-prepared financial statement. Rather, they sought an accounting for the practical purpose of hastening the day that the government will be called to account for—that is, required to \textit{pay}—the money that it has wrongfully withheld. The historical accounting procedure was not an end in itself, but rather “merely a means to an end of satisfying a claim for

\textsuperscript{470} Cobell, 91 F. Supp. 2d at 26.
\textsuperscript{471} Jaffee v. United States, 592 F.2d 712, 715 (3d Cir. 1979).
\textsuperscript{473} See New Mexico v. Regan, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984) (arguing that § 702 of the APA should be “read with a practical eye” so as not to cover claims for monetary relief).
the recovery of money.”

Indeed, had the suit been filed under the Tucker Act in the Court of Federal Claims, the connection between the accounting and the payment of money would have been openly revealed; the retrospective accounting would have proceeded, not in the guise of an independent equitable remedy, but forthrightly as a mechanism by which to determine the monetary liability of the government for past-due funds owed to the Indian claimants.

Moreover, while the Cobell v. Babbitt invocation of District Court jurisdiction may be a logical extension of the reasoning in Bowen v. Massachusetts, it nonetheless constitutes a dramatic expansion of that decision beyond its particular context of a statutory grant-in-aid program that had significant implications for federal-state relations and an unprecedented projection of District Court authority into the province of the Court of Federal Claims over money-based claims by Indians against the United States.

The deleterious consequences of that expansion should not be underestimated. The Cobell approach represents yet a further dilution of the money judgment competence of the Court of Federal Claims and a diminution of its authority over yet another category, Indian money claims, that traditionally fell within its purview. In this way, the result undermines the purpose of the FCIA, which created both the then–Claims Court and the Federal Circuit in order to provide uniform adjudication and centralized treatment of nontax Tucker Act claims at a level below the Supreme Court. In United States v. Hohri, the Supreme Court expressed exceptional solicitude for the exclusive appellate jurisdiction of the Federal Circuit given the “comprehensive [statutory] framework and the strong expressions [by Congress] of the need for uniformity in the area” of money claims under the Tucker Act. If the

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474 See Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999) (holding that an equitable lien placed by a subcontractor upon the United States for funds owed to the prime contractor was a claim for money damages excluded from the APA because the lien was “merely a means to an end of satisfying a claim for the recovery of money”).

475 As discussed in Part IV.B.2 infra, when a plaintiff can assert a claim as one for monetary relief, that is, a monetary remedy is available, then such a remedy presumably is adequate. In all but the most unusual of cases, the plaintiff is obliged forthrightly to seek the monetary relief through an action under the Tucker Act in the Court of Federal Claims; since a judgment for monetary relief is binding upon the government as a matter of collateral estoppel, the plaintiff seldom would have the need for additional equitable relief (not available in the Court of Federal Claims).


481 Id. at 72–73.
authority of the Court of Federal Claims is weakened, then the authority of the Federal Circuit as the appellate court that reviews all judgments of the Court of Federal Claims necessarily is degraded as well.

Finally, the Cobell v. Babbitt jurisdictional ruling is an open invitation to forum-shopping. “The potential for the evil of forum shopping arises the moment two forums are made available.” 482 Because the Court of Federal Claims presumably retains concurrent authority with the District Courts to hear Indian money claims against the United States that the plaintiff chooses to plead openly and directly as seeking a money judgment, 483 Indian claimants who allege financial harm as a result of governmental wrongdoing will now have a choice between the two courts for strategic reasons, 484 assuming a minimal capacity for lawyerly cleverness in drafting the complaint to suit the purpose of the moment. Now, the casting or recasting of disputes about money owed—into a Tucker Act claim when convenient or into a request for specific relief when desiring to evade the jurisdictional and remedial limitations of the Tucker Act—will proceed with the perceived blessing of the Supreme Court in Bowen v. Massachusetts.

E. Government Spending Program Claims

Because Bowen v. Massachusetts involved a public welfare program funded by federal appropriations, one would expect that the decision’s influence would be strongest and most uniform in the field of government spending programs. A comprehensive evaluation of the decision’s impact on government spending program disputes is made difficult by the diversity of such programs, in terms of the parties involved, to whom the money is distributed, the purpose for which the money is appropriated, and the manner in which funds are disbursed. Because of such multifarious factors, confusion reigns here as well. Before Bowen v. Massachusetts, the great weight of authority among the courts of appeals in cases where the jurisdictional issue was expressly presented was that claims for reimbursement or withheld payments under federal grant-in-aid or spending programs were Tucker Act claims, meaning requests in excess of $10,000 were delegated exclusively to the then–Claims Court for adjudication. 485 But, of course, Bowen v. Massa-

482 Bray v. United States, 785 F.2d 989, 991 (Fed. Cir. 1986).

483 See, e.g., Shoshone Indian Tribe v. United States, 51 Fed. Cl. 60 (2001) (involving claims by Indians or Indian tribes for breach of trust for mismanagement of natural resources, including an accounting of the government’s handling of funds, which was brought in the Court of Federal Claims).

484 Given that some regard the Court of Federal Claims as an unfavorable forum for Indian claimants, see Newton, supra note 418, at 789–92 (arguing that Indian trust claims have been “remarkably unsuccessful” in the Court of Federal Claims), the prospect of routine forum-shopping is a very real likelihood in this area of law.

485 See, e.g., Chula Vista City Sch. Dist. v. Bell, 762 F.2d 762, 764–65 (9th Cir. 1985) (involving withheld funds under impact aid program that reimbursed school districts for giving a free education to students whose parents live or work on federal property not taxed by state or local authorities), vacated on other grounds by 474 U.S. 1098 (1986); Minnesota v. Heckler, 718 F.2d 852, 857–60 (8th Cir. 1983) (involving state claim for reimbursement from Department of Health and Human Services under Medicaid participation payment program); Portsmouth Redevelopment & Hous. Auth. v. Pierce, 706 F.2d 471, 474 (4th Cir. 1983) (involving housing authority’s
chusetts now precludes deciding these cases on the simple and straight-forward basis that past-due money is at stake.

As addressed further below, the Bowen v. Massachusetts case arose in the context of an ongoing spending program involving periodic disbursements of federal funds, and the Supreme Court emphasized that sensitive issues of federalism implicated by the federal-state partnership were more suitable for resolution in the District Courts and regional courts of appeals. Accordingly, both Justice Scalia in dissent and early commentators expressed the hope that its precedential reach would be “limited to those suits where a state claims that the Federal Government erred in ruling that a program was ineligible for grant-in-aid reimbursement.”

That hope was soon dashed, as courts regularly have permitted claims under the APA to secure payment of funds withheld by the government under spending programs which neither (1) raise the federalism concerns underlying a federal-state financial participation program nor (2) involve continuous disbursements such that an injunction to pay funds could be viewed as merely adjusting the accounting on future payments. In the immediate period following Bowen v. Massachusetts, the lower federal courts naturally acted quickly to assume District Court jurisdiction over suits that most closely resembled Bowen v. Massachusetts, that is suits involving claims by state agencies against the federal government for past-due disbursements in ongoing public welfare programs. It was not long, however, before Bowen

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486 See infra notes 546–52 and accompanying text.
488 Id. at 930 (Scalia, J., dissenting).
489 Noone & Lester, supra note 39, at 603.
490 See, e.g., Illinois v. Sullivan, 919 F.2d 428, 431 n.3 (7th Cir. 1990) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a suit by a state against the federal Secretary of Health and Human Services challenging the denial of funds for services in correctional facilities under the Social Security Act); Esch v. Yeutter, 876 F.2d 976, 977–87 & n.5 (D.C. Cir. 1989) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over an action by farmers challenging suspension of farm subsidy benefits, although the farmers framed their claim as a request for “annulment” of the department decision to suspend more than $600,000 in benefits rather than for an order requiring payment of any sum “immediately due and owing”); Grimesy v. Huff, 876 F.2d 738, 740–41 n.3 (9th Cir. 1989) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, of a third-party complaint by a state against federal Department of Health and Human Services regarding reimbursement to the state of payments under the Aid to Families With Dependant Children (“AFDC”) program); S.C. Dep’t of Soc. Servs. v. Bowen, 866 F.2d 93, 95 (4th Cir. 1989) (holding with citation to Bowen v. Massachusetts that District Court, not Court of Appeals by petition for direct review, had jurisdiction over a claim by a state for reimbursement by federal Secretary of Health and Human Services for state expenditures under the Child Support Enforcement Act); Ohio v. Sullivan, 789 F. Supp. 1395, 1398 (S.D. Ohio 1992) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a claim by a state regarding penalty disallowance of federal reimbursement funds under the AFDC program); Johnson v. Sullivan, 758 F. Supp. 1406, 1499–1500 (N.D. Ga. 1991) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts,
v. Massachusetts also was cited to uphold District Court authority under the APA over ongoing public spending programs involving parties other than state governments,\(^\text{491}\) and then as well over claims that involved neither states nor continuing relationships between the parties.\(^\text{492}\)

over challenge by a state to disallowance of federal reimbursement funds in Medicaid program; New Jersey v. Secretary of U.S. Dep’t. of Health & Human Servs., 748 F. Supp. 1120, 1124 (D. N.J. 1990) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a state challenge to disallowance of federal funds for administration of Medicaid program). Although it no longer could claim exclusive jurisdiction under the Tucker Act over such claims, the then–Claims Court from the beginning of the post–Massachusetts v. Bowen era has held that it too may hear state claims for disallowed reimbursement under federal programs when the suit is brought in that court. Kentucky ex rel. Cabinet for Human Res. v. United States, 16 Ct. Cl. 755, 759–62 (1989) (rejecting dictum in Massachusetts v. Bowen questioning the authority of the Claims Court under the Tucker Act to hear a suit by a state regarding disallowed federal reimbursement for expenses of court-appointed guardians ad litem in paternity cases pursuant to child support enforcement program). But see Malone v. United States, 34 Fed. Cl. 257, 262–63 (1995) (holding, with citation to Bowen v. Massachusetts dictum, that the Court of Federal Claims lacks jurisdiction to hear grant-in-aid disputes where the claimant asserts a statutory entitlement to the federal funds and does not seek monetary compensation as damages; Malone has not been cited or followed in subsequent decisions of the Court of Federal Claims or the Federal Circuit).

\(^\text{491}\) See, e.g., Nat’l Ctr. for Mfg. Scis. v. United States, 114 F.3d 196, 198–202 (Fed. Cir. 1997) (holding, with citation to Bowen v. Massachusetts, that a request by a research and development consortium to order the Air Force to release remaining research funds was not a demand for “money damages,” because the case involved “a cooperative, ongoing relationship” between the Air Force and the grantee regarding allocation of use of funds that might justify a prospective injunction, and thus the suit should be heard in District Court under the APA and should not be transferred to the Court of Federal Claims); Southeast Kan. Cmty. Action Program, Inc. v. Sec’y of Agric., 967 F.2d 1452, 1455–57 (10th Cir. 1992) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a challenge by a local nonprofit organization to nonrenewal of federal contract to administer a child nutrition program, including a claim for continued provision of funds, which apparently included retroactive restoration of omitted funding); Peterson Farms v. Madigan, 782 F. Supp. 1, 3–4 (D.D.C. 1991) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over claims by farming partnerships challenging both suspension from federal farm program and withholding of payments due, even though the court acknowledged “a reversal of the administrative decision on the merits would result inexorably in payment of money from defendant to plaintiffs”); United States v. Goode, 781 F. Supp. 704, 708–10 (D. Kan. 1991) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a claim by a dairy farmer to obtain past-due payments and recover all setoffs pursuant to a milk diversion program). In Southeast Kansas Community Action Program v. Lyng, if the nonprofit organization had sought merely prospective renewal of funding, the claim plainly would not have been one for payment of past-due funding under the Tucker Act even under pre–Bowen v. Massachusetts caselaw. From a reading of the District Court decision, however, the organization’s claim for “a mandatory injunction compelling the defendants to continue funding” probably included a claim for retrospective restoration of funding omitted since nonrenewal. See Southeast Kan. Cmty. Action Program, Inc. v. Lyng, 758 F. Supp. 1430, 1432 (D. Kan. 1991), aff’d, 967 F.2d 1452 (10th Cir. 1992).

\(^\text{492}\) See, e.g., Graham v. Fed. Emergency Mgmt. Agency, 149 F.3d 997, 1005 (9th Cir. 1998) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over a claim by applicants for disaster relief that the federal government be enjoined to pay its share of funds for pending claims arising out of typhoon); Vandervelde v. Yeutter, 774 F. Supp. 645, 648–49 (D.D.C. 1991) (upholding District Court jurisdiction, with citation to Bowen v. Massachusetts, over claims by dairy farmers who had been denied payment for contract under the Dairy Termination Program to sell cattle for slaughter).
To illustrate the kind of uncertainty in jurisdiction for judicial review that plagues government spending programs in the wake of *Bowen v. Massachusetts*, two of the many controversies that may arise are outlined below: (1) treatment of claims by someone other than the designated recipient of grant funds, and (2) treatment of grant programs involving a contractual arrangement. Cases arising under a particular federal housing program serve to illustrate both of these areas of controversy.

First, on the question of to whom a statutory entitlement applies and whether a party intervening to redirect funds is seeking specific relief or damages, consider the decision of the United States Court of Appeals for the Third Circuit in *Zellous v. Broadhead Associates*. In that case, the plaintiffs were tenants in a privately owned apartment complex whose rents were subsidized through payments by the federal government to the landlord under a federal housing program. The plaintiffs sought retrospective injunctive relief requiring the federal government to reimburse them for the rent they paid beyond what would have been due had the Department of Housing and Urban Development (“HUD”) properly made timely adjustments in utility allowances. Under the “Section 8” housing program, the federal government subsidizes the rental costs of low and very low-income families to assist them in finding housing in private accommodations. The rental subsidies are actually paid to the private apartment project’s owners; a “housing assistance payment” contract between HUD and the owner sets the maximum monthly rent to which the owner is entitled. Pursuant to federal statute and regulations, the low-income tenant’s contribution toward rent then is calculated on the basis of adjusted income and with an allowance for the cost of utilities (where the tenant is responsible for the payment of utility bills for the unit). The federal government then makes assistance payments to the property owner for the difference between the maximum monthly rent figure set in the contract and the rent paid by the low-income tenant under the formula. Thus, the federal government through subsidy payments to the apartment owner effectively makes up the difference between what a low income household must pay to the apartment owner and the fair market rent for the unit.

493 Another jurisdictional controversy implicated by government spending programs concerns whether an award of money from an agency after the applicable appropriated fund has lapsed or been fully obligated may still be considered specific relief under the APA. See City of Houston v. Dep’t of Hous. & Urban Dev., 24 F.3d 1421, 1426–28 (D.C. Cir. 1994) (holding that the court could not award grant funds based upon an appropriation that had both lapsed and been obligated and that award of funds from any other source would constitute money damages excluded from the APA).


495 Id. at 95.

496 Id.


498 Id. § 1437f(b)(1), (c)(1); 24 C.F.R. § 880.201 (defining “housing assistance payment”); see also *Zellous*, 906 F.2d at 98 n.8.

499 42 U.S.C. §§ 1437f(a), 1437f(c)(1), (3); 24 C.F.R. §§ 880.201, 880.610; see *Zellous*, 906 F.2d at 98.

500 42 U.S.C. § 1437f(c)(3); see also *Zellous*, 906 F.2d at 98 n.8.
In the *Zellous* case, the tenants claimed that HUD had failed to properly adjust the utility allowances to reflect inflation in the price of energy, thus meaning they paid more in rent to the apartment owners than was lawfully permissible under the Section 8 program. They filed suit in District Court under the APA requesting both prospective relief in terms of future adjustments of the utility allowance and retrospective monetary relief in the form of an ordered “reimbursement” by the federal government of the higher rents paid in the past. Because the utility allowances were adjusted subsequent to the filing of suit, the District Court held that the request for prospective declaratory and injunctive relief was moot. Accordingly, all that remained before the court was the tenants’ request to be paid money to reimburse them for their past high rental payments to their landlord. The District Court dismissed the claim as one seeking money damages which are excluded from the APA.

Relying heavily upon *Bowen v. Massachusetts*, the Third Circuit reversed. The court acknowledged, without deciding, that the tenants’ claim might well have been pursued under the Tucker Act, and still could have remained in the District Court under the Little Tucker Act because the individual claims did not exceed $10,000. If the tenants’ claims, however, were founded upon the Little Tucker Act, then appellate jurisdiction over the case would have been vested exclusively in the Federal Circuit. Nonetheless, the Third Circuit held that the possibility that the District Court could have invoked Little Tucker Act jurisdiction over the claim did not divest the District Court (or the Third Circuit on appeal) of alternative authority over the matter based on the APA. As for the argument that the tenants’ request for reimbursement constituted money damages excluded under the APA, the Third Circuit held that the tenants did not seek “compensatory damages for injuries they allegedly suffered as a result of HUD’s failure to make timely adjustments in the utilities allowance,” but rather sought merely to enforce the statutory mandate concerning a properly-calculated utility allowance for Section 8 tenants. Concluding that the tenants sought “only that to which they were entitled” under statute and that the sought reimbursement merely would require HUD to pay expenses it should have borne all along had it implemented timely utility allowance adjustments, the Third Circuit remanded the case to the District Court to be heard on the merits. The Court of Appeals also reversed the District Court’s holding that the request for prospective relief had been mooted by the subsequent upward revision of

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501 *Zellous*, 906 F.2d at 95.
502 *Id.* at 95, 98.
503 *Id.* at 95, 100.
504 See *id.* at 95.
505 *Id.* at 95–100.
506 *Id.* at 95–96 & n.2.
507 *Id.* at 96.
508 *Id.*
509 *Id.* at 98.
510 *Id.* at 99.
511 *Id.* at 100.
the utilities allowance, holding that questions about that revision remained as well because of the possibility that the alleged events could recur.\textsuperscript{512}

Although the \textit{Zellous} case does not present the federalism concerns raised in \textit{Bowen v. Massachusetts} because no state governmental entity was a party, it at least did involve a grant-in-aid program of an ongoing nature. Still, even beyond its expansion of \textit{Bowen v. Massachusetts} to private party grant disputes, the Third Circuit decision is fundamentally flawed because it finds judicial authority under the APA to order payment of money as a form of specific relief to someone other than the federal program grantee. The tenants in \textit{Zellous} sought reimbursement from the federal government of the higher rent they had paid to the private landlords. But those rents were paid to the private property owners; the federal government did not own the apartment complex nor did it collect rent from tenants. Moreover, under the Section 8 program, the federal government subsidy is paid to the private landlord; the funds appropriated by Congress for this program are reserved for housing assistance payments to the project owners.\textsuperscript{513} In sum, neither by rental contract nor by statutory mandate was there any direct financial relationship between the federal government and the tenants. The federal government simply had not taken or withheld any funds from the plaintiff tenants. That is not necessarily to say that the plaintiffs would not be able to recover for their overpayments, but the recovery would have been in the nature of compensatory damages and thus outside of the scope of the APA.

Thus, the \textit{Zellous} tenants had no viable claim of entitlement to any funds held by the federal government. Rather, by asking for reimbursement for having been forced to pay excessive rents to the private apartment owner, the tenants were seeking \textit{compensation} for the consequential harm caused by the government’s allegedly unlawful failure to adjust the utility allowance and thereby increase its subsidy payments accordingly to the project owners. Even under the terms of \textit{Bowen v. Massachusetts}—which defines APA-excluded “money damages” as compensation for a loss\textsuperscript{514}—the \textit{Zellous} decision is difficult to sustain.\textsuperscript{515} The Third Circuit, however, is not alone in treating

\begin{itemize}
  \item \textsuperscript{512} \textit{Id.}
  \item \textsuperscript{513} \textit{See supra} notes 497–500 and accompanying text.
  \item \textsuperscript{514} \textit{Bowen v. Massachusetts}, 487 U.S. 879, 893–94 (1988).
  \item \textsuperscript{515} The Third Circuit in \textit{Zellous} argued that the “scheme of indirect support for tenants” did not “transform[ ] the character of the relief they [sought] into a substitute remedy.” \textit{Zellous}, 906 F.2d at 98. The court further relied upon language from \textit{Bowen v. Massachusetts} in which the Supreme Court in dictum described an earlier decision, in which a town was required to reimburse parents for private special educational costs that Congress intended the town to bear, as an example of what was not compensatory “damages.” \textit{Id.} at 98–99 (citing \textit{Bowen}, 487 U.S. at 894, which cited Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 370–71 (1985)). The \textit{School Committee of Burlington} case, however, was enforcing a direct statutory and financial obligation by the town to the parents of a handicapped child—which was to provide a free public education suitable for the handicapped child—and reimbursement of the costs of private education became simply a means to enforce that immediate responsibility. \textit{Sch. Comm. of Burlington}, 471 U.S. at 570 (stating that, without a right to reimbursement when a parent is forced to place a child in private education due to the town’s failure to provide a suitable education, “the child’s right to a free appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete”). Moreover, the \textit{School Committee of Burlington} Court in disputing the town’s characterization of the
\end{itemize}
The George Washington Law Review

claims by people intervening to redirect federal grant funds from the designated recipients to themselves as falling within the ambit of a mere claim for specific relief under the APA. Furthermore, by bypassing the simple money/nonmonetary dichotomy and, instead, adopting such a malleable jurisdictional test as compensatory damages versus specific monetary relief, the Supreme Court’s Bowen v. Massachusetts approach set the stage for expansive constructions of what constitutes specific relief and how broadly entitlement can reach and to whom.

Second, cases arising under the Section 8 housing program illustrate another source of jurisdictional confusion in the field of government spending programs. Congress often implements grant-in-aid programs through the mechanism of contractual arrangements between the government and the recipient. Contract claims traditionally have fallen under Tucker Act jurisdiction. Under Section 8, a housing assistance payment contract to subsidize the rent of low-income tenants may be entered between the federal government and a housing project owner, as in Zellous, or between the federal government and a local government housing authority, which in turn would then seek participation by local property owners, as was the case in Katz v. Cisneros, decided by the Federal Circuit. While the Third Circuit in Zellous neglected to address the contractual aspect of that case, the centrality of a contract to the scheme was front and center in the Katz case.

In Katz, a housing developer filed suit in District Court under the APA, seeking payments from HUD for allegedly having failed to properly calculate the rents for low-income tenants in accordance with the regulations. Because the federal government in that case had contracted with a public hous-

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516 See, e.g., Linea Area Nacional de Chile, S.A. v. Meissner, 65 F.3d 1034, 1042–44 (2d Cir. 1995) (holding that an airline’s claim to be reimbursed for expenses incurred for detention of alien passengers who applied for asylum upon arrival in the United States was not a claim for money damages outside the scope of the APA, despite the fact that the statute involved provided funding for the Immigration and Naturalization Services to bear those costs and did not provide for any payments to be made to airlines; and joining the “Third Circuit [in Zellous] in holding that the lack of a statutory requirement that the disputed payments be made directly to the plaintiff does not bar relief: the precise nature of the mechanism by which a plaintiff receives that to which a statute entitles him cannot defeat his entitlement.”); Beverly Hosp. v. Bowen, 872 F.2d 483, 487 (D.C. Cir. 1989) (holding in a brief sentence with citation to Bowen v. Massachusetts that hospitals could seek under the APA, as “funds to which they [were] entitled under a statute,” reimbursement for costs of photocopying records for peer review organizations, which the Secretary of Health and Human Services should have paid to those peer review organizations which would then have paid the hospitals when requesting photocopies of those records).

517 See supra Parts I and III.A.

518 Katz v. Cisneros, 16 F.3d 1204 (Fed. Cir. 1994).

519 Id. at 1206.
The Tapestry Unravels

The claim in *Katz* was vulnerable to the same objection levied in *Zellous* that the claimant was not seeking a true statutory entitlement to funding but rather compensation for losses incurred, although the Federal Circuit did not address that problem. The courts in *Katz*, however, were forced to confront the fact that the case revolved around the existence of a contract between the federal government and the public housing authority; indeed, the developer included claims of breach of contract and third party beneficiary of contract in his complaint.521 The District Court transferred the case to the Court of Federal Claims.522

The Federal Circuit reversed and remanded the case back to District Court to proceed under the APA, although over a dissent.523 The majority held, despite the existence of the contract between HUD and the local government housing agency, that the essence of the developer’s claim was not a contractual one.524 Rather, because the developer sought a payment of money based upon HUD’s erroneous interpretation or application of its regulations for calculation of subsidized rents, the court did not view the claim as one for money damages for breach of contract.525 Moreover, because there was no direct contractual relationship between HUD and the developer, the majority held that the Tucker Act was not applicable and thus could not provide adequate relief nor forbid the requested relief, either expressly or impliedly.526

Judge Rader dissented, arguing that *Bowen v. Massachusetts* did not alter the fundamental principle that “contract cases for money damages” were governed by the Tucker Act and could not be shoe-horned into the APA.527 Although the majority denied it was a contract case, Judge Rader observed that the complaint itself invoked contractual relief and effectively sought injunctions to enforce the underlying housing assistance payments contract.528 To the majority’s argument that the case fell outside the Tucker Act because the developer was not party to a contract with the federal government, the dissent responded that “this court must accept the plaintiff’s pleadings at face value” and that “[t]hose pleadings charge breach of contract and name the Government’s agent as defendant.”529 Judge Rader concluded by emphasizing the importance of preserving the Court of Federal Claims as the exclusive

\[ \text{Id. at 1205–06.} \]
\[ \text{Id. at 1206.} \]
\[ \text{Id. at 1207.} \]
\[ \text{Id. at 1210.} \]
\[ \text{Id. at 1207.} \]
\[ \text{Id. at 1208–09.} \]
\[ \text{Id. at 1209–10; see also Foxglen Investors Ltd. P’ship v. Hous. Auth., 844 F. Supp. 1078, 1083 (D. Md. 1993) (upholding District Court jurisdiction over a Section 8 dispute regarding contract rents where the complaining party was not in contractual privity with HUD, reasoning that the Court of Federal Claims would lack jurisdiction for that reason under the Tucker Act), aff’d, 35 F.3d 947 (4th Cir. 1994).} \]
\[ \text{*Katz*, 16 F.3d at 1210–11 (Rader, J., dissenting).} \]
\[ \text{Id. at 1211–12.} \]
\[ \text{Id. at 1212.} \]
forum to provide “uniform interpretation [of government contracts] for the benefit of all parties.”

Subsequently, in Brighton Village Associates v. United States, another Section 8 housing program case, the Federal Circuit clarified and limited the effect of the Katz decision. In Brighton Village, the suit was brought by the owner of a housing project who was an immediate party to a housing assistance payments contract with HUD and who brought the action concerning annual rental adjustments in the Court of Federal Claims. In an opinion authored by the dissenting judge in Katz, the Federal Circuit in Brighton Village distinguished the Katz decision as involving a party who was not in privity with the federal government and thus did not feature a direct contract claim against the United States. By contrast, the court held the Brighton Village case “features a contractor in privity with the Government” and consequently falls “under the standard rule for determining the nature of a contract action.” In addition, the Katz case had involved a claim for prospective relief in calculating future contract rents, whereas the Brighton Village case involved the developer’s claim for retroactive monetary relief for HUD’s failure to adjust rents under the contract. Accordingly, the Brighton Village case was properly lodged in the Court of Federal Claims as a claim for money damages under contract.

Although the outcome in Brighton Village appears eminently correct and commendably reaffirms the authority of the Court of Federal Claims over contract-based claims, when it is placed side-by-side with such dubious decisions as Katz and Zellous, anomalous results may follow. For grant-in-aid recipients who have a direct, typically contractual, relationship with the federal government, Brighton Village confirms that the Tucker Act is the sole remedy and the Court of Federal Claims is the exclusive judicial forum. But for downstream beneficiaries of a government spending program, who do not have a direct relationship with the federal government (and thus probably have a weaker claim of right to recover at all), the District Court not only is available but also may be the only proper forum under Katz and Zellous. Yet not only may these cases arise out of the very same government

530 Id. at 1212–13.
532 Id. at 1057–58.
533 Id. at 1059.
534 Id. at 1060.
535 Id.
536 Id.; see also OXY USA, Inc. v. Babbitt, 268 F.3d 1001, 1008 (10th Cir. 2001) (en banc) (“An award of damages is the common form of relief for breach of contract.”).
537 See also 1610 Corp. v. Kemp, 753 F. Supp. 1026, 1029-34 (D. Mass. 1991) (holding that Claims Court had exclusive jurisdiction over claims by owner of housing project against HUD alleging breach of housing assistance payment contract under Section 8 by wrongful reduction of payments, including equitable claims which were ancillary claims within jurisdiction of Claims Court). But see Jackson Square Assocs. v. U.S. Dep’t of Hous. & Urban Dev., 869 F. Supp. 133, 134–35, 139–40 (W.D.N.Y. 1994) (citing Katz and holding that, even where the housing owner had a direct contractual relationship with HUD under the Section 8 program and sued for breach of contract as well as assertions that HUD’s actions on the contract violated the empowering statute and regulations, the District Court had authority over the entire action under the APA).
spending program, implicating the same statutes and regulations, but the essential nature of each is to obtain payment of withheld, allegedly past-due money.

In sum, looking only at a few published decisions in which *Bowen v. Massachusetts* is cited and which arise in the context of a single example drawn from the myriad of federal spending programs, the only safe conclusion that can be drawn is that the dust has not yet settled and more litigation about where to litigate may be expected in the future. Of course, these debates would be avoided if the courts instead return to the simple bright-line test of money versus nonmoney claims as the jurisdictional pivoting point.

IV. Mending the Tear: Restitching the Court of Federal Claims into the Tapestry

Everyone is familiar with the old saying, “if it ain’t broke, don’t fix it.” But by virtue of the preceding discussion, which provides a fairly detailed survey of the landscape of nontort money claims against the federal government since *Bowen v. Massachusetts*, it should be apparent that the jurisdictional journey of money claims to the federal courts indeed does proceed along a broken path. The question remains how to rectify the situation. If we conceive of the collection of various statutory waivers of sovereign immunity as a well-sewn, if admittedly not seamless, tapestry, then the questions before us are both how to mend the hole that has been torn and who—the Judicial Branch or the Legislative Branch—should repair the weaving.

A. The Judiciary as Seamstress

1. Reconsideration by the Supreme Court

Given that the Supreme Court’s own actions began to unravel the tapestry of statutory waivers of sovereign immunity, it would be fitting for that Court to play the role of seamstress and tighten the stitches it has loosened.

Writing from a vantage point in time just a couple of years after *Bowen v. Massachusetts*, Professor David A. Webster expressed the hope that the “signals of distress” that radiate from the lower courts eventually would prompt Supreme Court reconsideration. As the foregoing discussion reveals, the breadth and depth of that jurisdictional misery has grown with each passing year. The Supreme Court understandably is reluctant to disturb statutory precedents given that Congress remains fully empowered to correct any error that it perceives in the Court’s interpretation of a statute. But

538 Webster, *Choice of Forum in Claims Litigation*, supra note 25, at 536 (Webster expressed hope that the “Supreme Court will simply see the light and reverse itself, perhaps after enough lower courts send appropriate signals of distress;” although agreeing with the availability of nondamage monetary relief in District Court, Webster criticized *Bowen v. Massachusetts* for its “interpretations of . . . both the Claims Court’s Tucker Act jurisdiction and the doctrine of adequate remedies” as the limitation on the APA’s scope).

539 See *supra* Part III.

540 See, e.g., *Neal v. United States*, 516 U.S. 284, 295 (1996) (“One reason that we give great weight to stare decisis in the area of statutory construction is that ‘Congress is free to change this Court’s interpretation of its legislation.’”) (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736)
even in cases of statutory interpretation, “stare decisis is not an inexorable command.” As the Supreme Court held in *Patterson v. McClean Credit Union*, one “traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.” Such manifestly is the case here.

As discussed at length previously, not only has the rationale of *Bowen v. Massachusetts* proven impossible to apply consistently in practice over the past fourteen years, but considerable debate remains as to the very nature of that rationale. The confusion about the meaning and scope of the decision is engendered by lingering doubts about its reasoning and its unfortunate (and mistaken) dicta. The resulting uncertainty has played havoc with jurisdictional dividing lines outlined in the statutes governing federal government litigation. Far from being a routine precedent establishing the meaning of a particular statute in a confined context, *Bowen v. Massachusetts* has significantly disrupted an integrated network of statutes waiving the sovereign immunity of the United States, thereby creating doctrinal and jurisdictional instability. When, as here, a statutory precedent remains the “subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts,” renewed Supreme Court attention is justified.

The outright rejection of *Bowen v. Massachusetts* and a return to traditional Tucker Act and Administrative Procedure Act doctrine would be ideal and would constitute the most theoretically perfect, doctrinally consistent, and universally applicable resolution to the continuing problem. Even without eliminating the precedent altogether, the Court still could greatly narrow the parameters of uncertainty. The factual and regulatory backdrop to *Bowen v. Massachusetts*, together with crucial elements of the Court’s multifaceted reasoning in that case, offers the possibility of a limiting construc-

(1977) (“[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction . . . .”).

541 State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (unanimously overruling statutory interpretation precedent); see also Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 418 (2001) (“[T]here is no absolute rule of stare decisis, even for cases of statutory interpretation.”). Congressional inaction is not a sufficient basis to avoid reconsideration of a statutory precedent when special circumstances warrant a fresh look. See *Patterson v. McClean Credit Union*, 491 U.S. 164, 172–75 n.1 (1989) (holding that, while not demonstrated in that case, a statutory precedent may be overruled when a “special justification” is shown and observing that “[i]t is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation” (quoting Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987))).


543 *Id.* at 173 (internal citations omitted).

544 See supra Part III (discussing the jurisdictional chaos created by the *Bowen v. Massachusetts* decision for several types of claims) and infra Part IV.A.2 (discussing critique by judges of the Federal Circuit of *Bowen v. Massachusetts* as creating an unworkable rule and generating confusion and mischief).

tion of the decision. As discussed earlier, \textit{Bowen v. Massachusetts} arose in the particular context of a grant-in-aid program involving an ongoing partnership between the federal government and a state to finance a public welfare program for the disadvantaged. The Supreme Court emphasized (1) that the federal-state financial participation program at issue in that case raised sensitive questions of federalism more suitable for resolution in the District Courts and regional Courts of Appeals,\footnote{See supra Part II.} and (2) that the ongoing program was administered through advanced payment streams, meaning that an order requiring reimbursement of certain withheld funds involved little more than an accounting adjustment for future disbursements.\footnote{Id. at 893 (explaining that a disallowance decision, or the reversal of a disallowance, is not “properly characterized as an award of ‘damages’” because such decisions involve “an adjustment—and, indeed, usually a minor one—in the size of the federal grant” paid by the federal government on an “open account” in quarterly installments; \textit{see also} Fallon, supra note 126, at 526–27 (“It seems significant that \textit{Bowen} involved a grant program in which the central, operating rules of a classic administrative state bureaucracy potentially affected a stream of payments over time, not a one-time claim of entitlement.”).} The Court explained that the then–Claims Court was not well-suited to hear the case, because “managing the relationships between the States and the Federal Government that occur over time and that involve constantly shifting balance sheets requires a different sort of review and relief process.”\footnote{Bowen, 487 U.S. at 905 n.39.}

Based upon these aspects of the majority opinion, Professors Michael F. Noone, Jr. and Urban A. Lester early on expressed the hope that the reach of \textit{Bowen v. Massachusetts} would be “limited to those suits where a state claims that the Federal Government erred in ruling that a program was ineligible for grant-in-aid reimbursement.”\footnote{Noone & Lester, supra note 39, at 603; \textit{see also} Fallon, supra note 126, at 529 (predicting that the “practical effect of \textit{Bowen} will be to establish concurrent federal district court and Claims Court jurisdiction in cases involving the administration of federal grant programs”); Cynthia Grant Bowman, \textit{Bowen v. Massachusetts: The “Money Damages Exception” to the Administrative Procedure Act and Grant-in-Aid Litigation}, 21 Uva. L. Rev. 557, 577–78 (1989) (suggesting that the “most likely interpretation” of \textit{Bowen v. Massachusetts} is that it does not “transfer matters traditionally within the exclusive jurisdiction of the Claims Court” to District Courts, but rather applies to cases involving “equitable ‘reimbursement’” in which a party has “expended funds in reliance upon the federal government’s statutory obligation to reimburse” the party for those expenditures, thus most directly covering “grant-in-aid litigation involving funding by the federal government of state and local programs”)).} Indeed, in dissent, Justice Scalia urged the lower courts “to limit it to the single type of [grant-in-aid program] suit before us.”\footnote{Bowen, 487 U.S. at 930 (Scalia, J., dissenting).} Although, as discussed above, not all of the lower courts have heeded that advice, the Supreme Court could clarify the limited application of \textit{Bowen v. Massachusetts} to cases involving similar peculiar facts.
In two encouraging recent decisions, the Supreme Court has returned to the *Bowen v. Massachusetts* precedent and begun the process of clarifying and limiting its reach. First, in 1999, the Supreme Court again addressed the availability of the APA to provide relief for claims involving money in *Department of the Army v. Blue Fox*. In that case, a subcontractor on a federal project who had not been paid by the prime contractor attempted to impose an “equitable lien” upon funds held by the United States, asserting that the federal government had wrongly failed to ensure that the prime contractor posted a payment bond. The Court of Appeals, relying upon *Bowen v. Massachusetts*, approved this clever gambit as a proper action under the APA for specific relief. The Supreme Court unanimously reversed, finding that liens “are merely a means to the end of satisfying a claim for the recovery of money” and thus fall within the exclusion under the APA of actions for “money damages.” Because a lien’s “goal is to seize or attach money in the hands of the Government as compensation for the loss,” and thus does not constitute a true form of specific relief, the Court declared that the action fell outside of § 702’s waiver of sovereign immunity.

Does *Blue Fox* signal a retreat by the Court and a recognition that *Bowen v. Massachusetts* has engendered confusion? To be sure, the *Blue Fox* Court did not question the continuing validity of *Bowen v. Massachusetts* in the course of its analysis. But far from extending *Bowen v. Massachusetts* to its logical limits, the Court made clear that artful framing of money claims as requests for specific relief may go only so far. The actual holding in *Blue Fox*—that the assertion of a lien is a claim for money damages—may be narrow and certainly arose from an atypical scenario. Attempts to levy a lien against the United States Treasury or federal property have been routinely rebuffed in the past—indeed there is something faintly absurd about the idea of attaching or executing a claim against federal property (it evokes such humorous prospects as the execution of a judgment against a post office building). And after *Blue Fox*, such attempts are unlikely to be repeated. The decision, however, may have larger significance by indicating that the types of lawsuits or litigation devices that traditionally have been designed to recover money should be recognized for what they are in substance—money claims. Thus, traditional monetary claims may be declared off-limits for the APA.

Second, in early 2002, in a case to which the federal government was not a party, the Supreme Court further clarified the limited scope of *Bowen v. Massachusetts* and appeared to undermine its central rationale. In *Great-West Life & Annuity Insurance Company v. Knudson*, the Court consid-

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554 *Id.* at 256–57.
556 Blue Fox, 525 U.S. at 262–63.
557 *Id.* at 263.
558 *Id.* at 261–62.
559 *Id.* at 264 (citing Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1845); United States v. Ansonia Brass & Copper Co., 218 U.S. 452, 471 (1910); United States *ex rel.* Hill v. American Surety Co. of N.Y., 200 U.S. 197, 203 (1906)).
ered an action by an employment health care plan seeking reimbursement of medical expenses paid on behalf of a beneficiary who was injured in an automobile accident and subsequently recovered against third party tortfeasors, including the manufacturer of the automobile.561 According to a reimbursement provision, the plan was given a right to recover any payments made when the beneficiary is entitled to recover from a third party. Under the Employment Retirement Income Security Act (“ERISA”), a civil action may be brought in federal court to obtain “appropriate equitable relief” to enforce the terms of the plan. By a five-to-four majority, the Supreme Court ruled that the attempt to “impos[e] personal liability . . . for a contractual obligation to pay money” was not relief that was “equitable” in nature and thus could not be a basis for an ERISA suit in federal court.

In the majority opinion by Justice Scalia, the Court rejected the plan’s reliance upon Bowen v. Massachusetts as supporting its characterization of a request for an injunction to pay money as “equitable” relief. To begin with, the Court held that Bowen v. Massachusetts was inapposite, because “Bowen ‘did not turn on distinctions between ‘equitable’ actions and other actions . . . but rather [on] what Congress meant by ‘other money damages’ in the Administrative Procedure Act.” The Court also went on to explain that the Bowen suit “was not merely for past due sums, but for an injunction to correct the method of calculating payments going forward.” Moreover, in an earlier part of the opinion addressing the nature of equitable relief versus an action at law, the Great-West Court adopted the following language from the dissent in Bowen:

“Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.”

Thus, in two significant ways, the Great-West decision limits and undermines Bowen v. Massachusetts. First, by observing that Bowen involved a significant claim for prospective relief, the Court’s analysis suggests that claims involving only retrospective relief (or claims in which retrospective relief alone would be sufficient) fall outside the scope of District Court authority created by Bowen v. Massachusetts. Second, by elevating crucial language from Justice Scalia’s Bowen v. Massachusetts dissent to the status of majority approval, the Great-West Court cracked the foundation for pursuing...

561 Id. at 206–08.
562 Id.
566 Id. at 210–12.
567 Id. (quoting Dep’t of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999)).
568 Id. at 212.
569 Id. at 210 (quoting Bowen v. Massachusetts, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting)).
monetary claims under the APA. A central pillar of the *Bowen v. Massachusetts* decision, and the source of much of the resulting jurisdictional confusion, was the proposition that certain requests to compel the federal government to pay past-due sums of money did not constitute "money damages" within the meaning of the exclusionary language in § 702 of the APA. By now affirming Justice Scalia's previously dissenting observation that a claim to compel payment of money, however framed, traditionally has been understood to be a claim for "money damages," the *Great-West* majority left *Bowen* without a justifying rationale for its contrary result. At the very least, the *Great-West* decision suggests that the suits seeking monetary relief rarely will be permitted to proceed in the guise of a claim for specific relief, with *Bowen v. Massachusetts* standing as an anomalous exception.

Through *Blue Fox* and *Great-West*, the Supreme Court has begun to blaze a trail out of the jurisdictional wilderness created by *Bowen v. Massachusetts*, but whether the path marked thus far can guide the lower federal courts all of the way through remains to be seen. There are encouraging signs, as some lower courts have viewed the Supreme Court's recent actions as narrowing the reach of the APA and limiting the impact of *Bowen*. Likewise, as discussed next, the Federal Circuit has begun to take a leadership role in defining the jurisdictional lines between the District Courts and the Court of Federal Claims. But given the understandable caution of the lower courts in trying to read the signals from the Supreme Court regarding

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571 See, e.g., United States v. Hall, 269 F.3d 940, 942–43 (8th Cir. 2001) (holding that a prisoner's motion for monetary compensation for seized property that the government could not return was a claim for money damages under the Tucker Act, the Little Tucker Act, or the FTCA, and observing that although *Bowen v. Massachusetts* "suggested that a statute granting power to award equitable relief against the United States authorizes the award of incidental monetary relief," the "sovereign immunity landscape has changed in the last ten years," citing *Blue Fox*); Amerada Hess Corp. v. Dep’t of Interior, 170 F.3d 1032, 1035–36 & n.5 (10th Cir. 1999) (holding that a claim by a federal gas lessee for reimbursement of overpaid royalties to the Department of the Interior had to be brought in the Court of Federal Claims under the Tucker Act, stating with citation to *Dep’t of the Army v. Blue Fox* that the fact that the party framed the request for repayment in equitable language did not change analysis and that claims for past-due sums of money traditionally have been regarded as damages, not specific relief, with citation to Justice Scalia’s dissent in *Bowen v. Massachusetts*); Bank of N.H. v. United States, 115 F. Supp. 2d 214, 218–20 (D. N.H. 2000) (holding, with citation to *Dep’t of the Army v. Blue Fox*, that a bank’s claim of unjust enrichment against the federal government which accepted proceeds from a business’s accounts receivable in payment of taxes owed, which accounts receivable allegedly were collateral for a loan by the bank upon which the business defaulted, plainly sought money damages rather than specific relief and thus was outside the APA’s waiver of sovereign immunity). But see Cobell v. Babbitt, 91 F. Supp. 2d 1, 26–28 (D.D.C. 1999) (holding that a claim for accounting of funds, although likely to result ultimately in payment of past-due funds, was a proper claim under the APA for specific relief, and rejecting the argument that *Blue Fox* stands for the proposition that actions whose eventual purpose is to obtain monetary redress fall outside the APA, but rather stating that the “equitable-lien action in *Blue Fox* was itself a claim for money damages in disguise” and that the “thrust of Blue Fox’s suit was compensation”), aff’d, 240 F.3d 1081 (D.C. Cir. 2001).
2003] The Tapestry Unravels 681

the vitality and validity of one of its precedents, more direction from the Court may be needed.

2. Stabilization by the Court of Appeals for the Federal Circuit

Given the category of government claims involved, judicial clarification of the scope of Bowen v. Massachusetts and stabilization of the jurisdictional foundation for money claims against the government may be achieved to a substantial if not complete extent at a step below the Supreme Court. When it comes to money claims against the federal government under the Tucker Act, the United States Court of Appeals for the Federal Circuit stands in a unique position as an intermediate appellate court with nationwide jurisdiction.572 Because Congress envisioned that the court would provide definitive and centralized resolution of certain issues including Tucker Act money claims,573 the Federal Circuit properly may play a leadership role on these questions, without being accused of disrespect for the Supreme Court. Indeed, the Supreme Court itself expansively described the scope and purpose of exclusive Federal Circuit jurisdiction over Tucker Act appeals in United States v. Hohri:574


When Congress in 1988 expanded the Federal Circuit’s exclusive jurisdiction over Tucker Act disputes to allow for appeals from District Court orders granting or denying transfer of cases to the then–Claims Court, the House committee report explained that Congress wished to “ensure uniform adjudication of Tucker Act issues in a single forum.”576

572 28 U.S.C. § 1292(d)(4) (2000) (granting the Federal Circuit exclusive interlocutory jurisdiction over appeals from district orders granting or denying motions to transfer to the Court of Federal Claims); id. § 1295(a)(2) (granting Federal Circuit exclusive jurisdiction over appeals from District Courts in Little Tucker Act cases); id. § 1295(a)(3) (granting Federal Circuit exclusive jurisdiction over appeals from the Court of Federal Claims); see supra notes 98–108 and accompanying text.


575 Id. at 71–72.

Accordingly, in light of “this comprehensive framework [for appellate jurisdiction in the Federal Circuit] and the strong expressions of the need for uniformity in the area,” it is fitting and proper for the Federal Circuit to fulfill its original purpose by establishing uniform and predictable jurisdictional lines between the Tucker Act in the Court of Federal Claims and the APA in the District Courts.

In 2001, the Federal Circuit took a bold but well-considered step forward in restoring jurisdictional clarity and stability in assignment of claims between judicial institutions, in a manner that respectfully accounted for Bowen v. Massachusetts but at the same time narrowly confined Bowen to its specific context as defined by the terms of its own reasoning. In Consolidated Edison Company v. United States Department of Energy, nuclear utilities brought suit in District Court against the United States and the Department of Energy, challenging the constitutionality of provisions of the Energy Policy Act that assessed payments from utilities for the government’s costs in decontaminating and decommissioning uranium processing facilities. Under the Act, the government paid sixty-eight percent of the costs of this environmental clean-up, with the remaining thirty-two percent covered by annual assessments against nuclear utilities that had contracted with the government for uranium enrichment services. Instead of directly seeking refunds of prior assessments in the District Court, the utilities sought a declaratory judgment that the statute was unconstitutional and an injunction against enforcement of the assessments. The government moved to transfer the case to the Court of Federal Claims, asserting that adequate relief in the form of a refund would be available through the Tucker Act if plaintiffs were successful on the merits. After the District Court denied transfer and asserted authority under the APA, with citation to Bowen v. Massachusetts, the government took an interlocutory appeal to the Federal Circuit.

In 2000, a divided three-judge panel of the Federal Circuit initially affirmed the District Court’s denial of the motion to transfer. The majority acknowledged that the District Court suit was properly characterized as an exercise in forum-shopping by the utilities given their previous lack of success in suits for refunds in the Court of Federal Claims, but nonetheless stated that “jurisdictional anomalies may permit forum shopping.” Believing that

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577 Hohri, 482 U.S. at 73.
579 Id. at 1380–81.
580 Id. at 1381 (citing 42 U.S.C. § 2297g-1(c)).
581 The utilities had, however, filed parallel suits in the Court of Federal Claims seeking refunds of the payments. Id. Those suits had proven unsuccessful on the merits, which led the utilities to shop for a new hearing in an alternative forum, thus leading to the suit in District Court. Id.
582 Id.
583 Id.
584 Id. at 1382. The District Court’s decision is reported at Consol. Edison Co. of N.Y. v. United States, 45 F. Supp. 2d 331 (S.D.N.Y. 1999).
586 Consol. Edison Co., 231 F.3d at 645.
a generous reading of *Bowen v. Massachusetts* dictated the outcome, the majority ruled that the utilities did not seek excluded money damages under the APA because they sought equitable relief against future assessments, and that the Court of Federal Claims could not provide an adequate remedy because it was unable to grant that prospective relief.\footnote{Id. at 645–48.} The panel majority, however, expressed some dissatisfaction with the result it felt compelled to reach:

> [I]n the fullness of time it may well be that the rule announced by the Supreme Court in *Bowen* will prove so unworkable that the Court will choose to change it. If so, we will have one less area of indeterminate jurisdictional line-drawing, and plaintiffs will be precluded from doing the kind of forum shopping they did here.\footnote{Id. at 648 (footnote omitted).}

Judge Gajarsa dissented from the initial panel decision in *Consolidated Edison*, arguing that “under the rubric of affording [the utilities] an opportunity to seek equitable relief, the majority opinion countenances an end run around the Tucker Act by expanding the government’s limited waiver of sovereign immunity far beyond its statutory constraints.”\footnote{Id. (Gajarsa, J., dissenting).} First, Judge Gajarsa reasoned that, although the utilities may not have specifically requested monetary relief, the action to enjoin the government from collecting the assessments “cannot be . . . camouflaged to be anything but an action for damages.”\footnote{Id. at 650; see also id. at 650 n.2 (“If it quacks like a duck, waddles like a duck, struts like a duck, it must be a duck.”).} Second, the dissent contended that, because the Court of Federal Claims could provide effective relief through a money judgment for refund of past assessments, the Tucker Act provided the exclusive basis for jurisdiction in the case.\footnote{Id. at 648, 651–52.} With respect to *Bowen v. Massachusetts*, Judge Gajarsa argued that the facts were very different, as “in the present case, unlike *Bowen*, the payment does not involve an amount that is dependent on constantly fluctuating multiple variables.”\footnote{Id. at 652–53 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 901 n.31 (1988)).} Nor did *Consolidated Edison* involve the type of “intricate ongoing relationship” between the federal government and a state that the Supreme Court thought made *Bowen* unsuited for disposition in the then–Claims Court.\footnote{Id. at 648, 651–52.} The dissent offered a further pointed commentary on *Bowen v. Massachusetts*:

> The majority [in *Bowen v. Massachusetts*] surely could not have meant that the Tucker Act can be by-passed at will simply by rephrasing a complaint in declaratory judgment terms—something that could occur in virtually every case exactly as the parties did in this case. Many cases decided since *Bowen* have limited it basically to its facts; however, it has created and continues to generate much mischief. It is time that the Supreme Court apply the coup de grace to *Bowen*; otherwise courts will continue to be confused . . . and

\footnote{Id. at 645–48.}

\footnote{Id. at 648 (footnote omitted).}

\footnote{Id. (Gajarsa, J., dissenting).}

\footnote{Id. at 650; see also id. at 650 n.2 (“If it quacks like a duck, waddles like a duck, struts like a duck, it must be a duck.”).}

\footnote{Id. at 648, 651–52.}

\footnote{Id. at 653.}

\footnote{Id. at 652–53 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 901 n.31 (1988)).}
place many cases outside the jurisdiction of the [Court of Federal Claims].\textsuperscript{594}

In an unusual step, the Federal Circuit, acting en banc, vacated the first panel decision in the \textit{Consolidated Edison} case and then reassigned the opinion to the panel for revision, which produced a reversal of the outcome.\textsuperscript{595} In a new panel opinion issued in 2001, Judge Rader for the Federal Circuit concluded that the Court of Federal Claims could offer an adequate remedy, thus depriving the District Court of jurisdiction under the APA.\textsuperscript{596} The court now held unanimously that, although the nuclear utilities may have avoided the “money damages” exclusion in § 702 of the APA by seeking only prospective relief,\textsuperscript{597} the District Court nonetheless was ousted from jurisdiction under § 704 of the APA because the Court of Federal Claims was empowered to provide an effective remedy.\textsuperscript{598} If the utilities were successful in a suit for refund of previously paid assessments under the Tucker Act in the Court of Federal Claims,\textsuperscript{599} that judgment would operate by principles of res judicata to preclude the government from continuing unlawful assessments in the future.\textsuperscript{600} Thus, because “[r]elief from its retrospective obligations will also relieve it from the same obligations prospectively,” the Court of Federal Claims through a money judgment “can supply an adequate remedy even without an explicit grant of prospective relief.”\textsuperscript{601} For that reason, the court now rejected the utilities’ “blatant forum shopping to avoid adequate remedies in an alternative forum.”\textsuperscript{602}

As for the precedential effect of \textit{Bowen v. Massachusetts}, Judge Rader noted that the Supreme Court there had “emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program.”\textsuperscript{603} Unlike \textit{Bowen v. Massachusetts}, the suit by the nuclear utilities for refunds of assessments did not involve a state party

\begin{itemize}
\item \textsuperscript{594} Id. at 654.
\item \textsuperscript{596} Id. at 1380, 1386.
\item \textsuperscript{597} Id. at 1382–83.
\item \textsuperscript{598} Id. at 1384–85.
\item \textsuperscript{599} Ultimately, the utilities were unsuccessful on the merits, as the Court of Federal Claims ruled in a parallel lawsuit for refunds in that court, and the Federal Circuit affirmed by a divided en banc panel, that the monetary assessment against nuclear utilities for remediation of environmentally contaminated uranium processing centers owned by the United States did not constitute a taking without just compensation, a breach of a contract with the government, or a violation of due process. Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29 (2000), aff’d, 271 F.3d 1327 (Fed. Cir. 2001) (en banc).
\item \textsuperscript{600} Consol. Edison Co., 247 F.3d at 1384–85.
\item \textsuperscript{601} Id.
\item \textsuperscript{602} Id. at 1385.
\item \textsuperscript{603} Id. at 1383. In a prior decision, the Federal Circuit also had focused upon the ongoing federal-state relationship as central to the result in \textit{Bowen v. Massachusetts}. See Brighton Vill. Assocs. v. United States, 52 F.3d 1056, 1059 n.3 (Fed. Cir. 1995) (observing that the \textit{Bowen v. Massachusetts} case involved certain “features unique to Medicaid disallowance disputes,” specifically “the congressional intent for the Medicaid program, the role of state law in Medicaid disallowance actions, and the long-term Medicaid interactions between the states and the Federal Government involving ever-shifting balance sheets”).
\end{itemize}
and did “not involve the complexities of government-to-government relationships.”

Thus, when a case does not involve “a complex ongoing federal-state interface,” the Court of Federal Claims may well be able to supply an adequate remedy through a money judgment. Moreover, the Federal Circuit observed that, unlike the Medicaid disallowance dispute in *Bowen v. Massachusetts*, constitutional challenges and claims of illegal exaction of funds had long been the subject of suits in the Court of Federal Claims. In sum, the Federal Circuit reasoned, the Supreme Court’s decision in *Bowen v. Massachusetts* was linked to “a specific set of circumstances” that defines the scope of its reach.

Judge Plager offered a concurring remark to the *Consolidated Edison* opinion:

This case confronts the court with a choice between a seemingly illogical Supreme Court rule, calling for a less-than-sensible result, on the one hand, or underruling the Supreme Court decision, here *Bowen v. Massachusetts*, on the other. This time the court has chosen the latter course. I cannot disagree; it remains to be seen whether the Supreme Court will.

The Supreme Court subsequently denied a petition for certiorari filed by nuclear utilities, thus acquiescing at least for the moment in the Federal Circuit’s restrictive reading of the *Bowen v. Massachusetts* precedent.

If the Federal Circuit stands firmly by its thoughtful and sensible decision in *Consolidated Edison*, including the limitation of *Bowen v. Massachusetts* to the peculiar circumstances of an ongoing federal-state financial relationship, then the pernicious effects of that decision may soon be arrested. The success of the Federal Circuit’s stabilization project, however, depends upon two things:

First, to be sure, the Federal Circuit must keep its own house in order. Although the Federal Circuit generally has been a friend to jurisdictional harmony, that court has strayed in the past from the path of clarity and simplicity in evaluating whether a claim by a discharged servicemember or by a housing developer concerning federal housing assistance payments may be pursued in the District Court rather than the Court of Federal Claims. Given that *Consolidated Edison* with its apparent en banc approval reflects a reinvigorated appreciation of the institutional strengths of the Court of Federal Claims and a more stable approach to the jurisdictional dilemma, further harmonization seems likely as similar disputes return to the Federal Circuit for reconsideration in the future.

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604 *Consol. Edison Co.*, 247 F.3d at 1384.
605 *Id.* at 1383.
606 *Id.* at 1384.
607 *Id.*
608 *Id.* at 1386 (Plager, J., concurring) (citation omitted).
610 *See supra* notes 387–408 and accompanying text (discussing James v. Caldera, 159 F.3d 573, 581-84 (Fed. Cir. 1988)).
611 *See supra* notes 518–30 and accompanying text (discussing Katz v. Cisneros, 16 F.3d 1204 (Fed. Cir. 1994)).
Second, uniform resolution of Tucker Act versus APA conflicts depends on vigilance and prompt action by federal government lawyers to ensure that the exclusive appellate jurisdiction of the Federal Circuit is invoked at the earliest possible stage. Failure to recognize a jurisdictional question and seek early disposition of it not only delays ultimate adjudication of the case but may result in appellate resolution of the jurisdictional problem outside of the Federal Circuit.

On appeal from a final trial court judgment, the Federal Circuit has exclusive jurisdiction over appeals from Little Tucker Act cases heard in the District Courts and from Big Tucker Act cases heard in the Court of Federal Claims.\footnote{28 U.S.C. § 1295(a)(2), (a)(3) (2000).} The Federal Circuit, however, has disclaimed exclusive authority over an appeal from a final District Court judgment in the so-called “disguised Big Tucker Act” case, in which the government argues that what is effectively a Tucker Act claim seeking more than $10,000 has been wrongly filed in District Court rather than the Court of Federal Claims.\footnote{Sisk, \textit{Tucker Act Appeals}, supra note 98, at 41–45.} In \textit{Smith v. Orr},\footnote{\textit{Smith v. Orr}, 855 F.2d 1544 (Fed. Cir. 1988).} the Federal Circuit held that it had been granted exclusive appellate jurisdiction over appeals from District Court decisions only where the District Court itself had proper trial jurisdiction.\footnote{Id. at 1547.} Thus, where claims for more than $10,000 are filed in a District Court, the regional courts of appeals have concurrent appellate jurisdiction with the Federal Circuit to determine whether the case states a monetary claim cognizable under the Tucker Act and whether the amount in controversy exceeds $10,000 so as to mandate that the claim be pursued in the Court of Federal Claims.\footnote{See id.; see also Sisk, \textit{Tucker Act Appeals}, supra note 98, at 41–45.}

In 1988, as a partial response to \textit{Smith v. Orr}, Congress enacted legislation permitting an immediate appeal by either plaintiffs or the government from adverse District Court rulings on motions to transfer actions to the Court of Federal Claims.\footnote{Pub. L. No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)). In my former life as an attorney with the Department of Justice, I drafted this legislation providing for interlocutory appeal to the Federal Circuit from District Court decisions on motions to transfer to the then-Claims Court; the pertinent language of the House Judiciary Committee report was borrowed from a draft of my article on Tucker Act appeals to the Federal Circuit that was published in the Federal Bar News & Journal. \textit{Compare} H.R. Rep. No. 889, at 51–54 (1988), \textit{reprinted in} 1988 U.S.C.C.A.N. 5982, 6011–14, \textit{with} Sisk, \textit{Tucker Act Appeals}, supra note 98. Although my Justice Department colleagues honored (teased) me by referring for a time within the office to such interlocutory appeals to the Federal Circuit as “Sisk appeals,” that appellation understandably has not come into any general usage.} To ensure uniform adjudication of Tucker Act issues in a single forum, the interlocutory appeal is within the exclusive jurisdiction of the Federal Circuit. Thus, when a plaintiff or the government seeks appellate review at this early stage in the proceedings, the Federal Circuit may determine whether a case involves a “disguised” Big Tucker Act claim for more than $10,000 wrongly filed in District Court, and the jurisdictional dispute can be decided before the case has been litigated on the merits in the District Court.\footnote{Sisk, \textit{Tucker Act Appeals}, supra note 98, at 45.}
It must be emphasized, however, that the Federal Circuit’s exclusive jurisdiction and ability to maintain uniform precedent on these matters may be invoked only by a timely interlocutory appeal from a District Court ruling on a motion to transfer to the Court of Federal Claims. If the government fails to file a motion to transfer or fails to seek immediate Federal Circuit appellate review of the denial of such a motion, any subsequent appeal of the disguised Big Tucker Act case may or may not come to the Federal Circuit. Thus, if the Federal Circuit’s exclusive authority is to be protected and if intercircuit conflicts on the jurisdictional line between the Tucker Act and the APA are to be avoided or minimized, government lawyers must diligently identify jurisdictional problems when money claims (or what should be money claims) are misfiled in District Court and then must promptly raise jurisdictional objections.

B. Congress as Tailor

Should the courts prove unwilling or unable to mend the gaping hole in the tapestry created by the interpretations of the APA and the Tucker Act found in Bowen v. Massachusetts, then the task must fall to the Congress to bind the tear through legislative needlework. Fortunately, little stitching is necessary here and the pattern is not complex. If undertaken with the primary goal of restoration of simple and bright lines, the legislative tailoring need consist only of modest embroidery to produce a suitable and durable piece of statutory textile.

For three reasons, in what follows, I have declined to suggest a major restructuring of the governing statutes and have deliberately hewed to a moderate course. First, for practical reasons, the proposals presented here are deliberately modest and restorative in nature, rather than proposing a radical revision. Even though I am suggesting possible legislative intervention, I propose minor repairs that would not provoke new controversies or demand the kind of extensive legislative attention attendant to major reforms. Moreover, as addressed above, because it remains my first hope that the courts themselves might correct the erroneous course set in Bowen v. Massachusetts, the proposals offered below are ones that are consonant with and tend to confirm or clarify existing statutory mandates and remain faithful to Tucker Act tradition. Thus, while presented here in the form of legislative revisions, these same justifying rationales offer a path that also may be taken by the courts without engaging in undue judicial legislation.

Second, to the limited extent that these proposals include enhancements beyond mere statutory restoration, such as to reinforce the remedial authority of the Court of Federal Claims, these proposed adjustments constitute incremental and modest changes that are well-grounded in experience. For twenty years, the court has exercised without controversy the authority to grant certain limited injunctive or declaratory relief collateral to a money claim. A temperate proposal to augment those equitable powers of the Court of Federal Claims in cases otherwise within its jurisdiction fits comfort-

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619 See supra Part IV.A.
620 See infra notes 686–97 and accompanying text.
ably within the existing statutory structure, while alleviating concerns about the ability to afford complete relief in that forum.

Third, I am not yet convinced that any alternative jurisdictional scheme would be preferable to the traditional assignment of claims between alternative judicial venues. Although it may appear less interesting, particularly to other academics, for me to endorse much of the status quo, I believe that prudence and experience discourages categorically innovative proposals in this field. The present dividing line, which directs cases involving claims upon the United States Treasury to the Court of Federal Claims, is one that does turn upon the category of case, even though the classification may not be measured by the field of substantive law. Before the disruption and confusion introduced by Bowen v. Massachusetts, this approach had worked for a century with only minor and periodic adjustments implemented as particular problems were identified. Any major structural change in approach would create new points of dispute and reveal new and unanticipated weaknesses or omissions. For example, adopting an approach that pivots instead upon certain types of causes-of-action might simply substitute one set of uncertainties for another. Before abandoning the generally efficient and effective approach for allocating claims between alternative forums that evolved in both Congress and the courts since the original enactment of the Tucker Act in 1887, we should explore whether modest course corrections and adjustments may continue to well serve the purpose and restore stability in jurisprudence and sensible outcomes.

1. Exclusion of Monetary Relief from the Administrative Procedure Act

My first proposal for legislative reform would restore the integrity of the Tucker Act and the institutional viability of the Court of Federal Claims by amending § 702 of the APA to except all claims for monetary relief, however defined or characterized, from the judicial review provisions of that statute. At present, § 702 waives the sovereign immunity of the federal government to allow judicial review of agency action when “seeking relief other than money damages.” Because the Supreme Court in Bowen v. Massachusetts somewhat surprisingly found this term “money damages” to be

622 An earlier version of the legislative proposals offered in this Article was presented in Gregory C. Sisk, Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court, 37 FED. B. NEWS & J. 47, 48–51 (1990) [hereinafter Sisk, Two Proposals]. Working independently, but during the same time period, the Committee on Jurisdiction of the United States Claims Court Advisory Council likewise proposed substituting the term “monetary relief” for “money damages” in § 702 of the APA. U.S. CLAIMS COURT ADVISORY COUNCIL, JURISDICTION OF THE UNITED STATES CLAIMS COURT, supra note 134, at 6, 23. The committee was chaired by David M. Cohen, Director of the Commercial Litigation Branch of the Civil Division at the Department of Justice, and consisted of other leading experts on the subject from the courts, government, and private practice, including Judge Christine C. Nettesheim (now Miller) of the then–Claims Court and Judge Randall R. Rader, then of the Claims Court and now of the Federal Circuit. The report produced by this blue-ribbon committee, which unfortunately has received less attention than it deserves, includes a number of other thoughtfully suggested legislative reforms, most of which are beyond the scope of this Article.
unclear and susceptible to a technical and narrow construction. This first proposal would remove any doubt by substituting the unambiguous and unqualified phrase “monetary relief.” Through this clarifying “monetary relief” exclusion amendment to § 702, the APA once again would be understood as waiving the sovereign immunity of the federal government for lawsuits challenging agency action that seek relief other than a past-due sum of money. At the same time, the Tucker Act would be revived as the presumptive vehicle for money claims against the United States based upon the Constitution, statutes, regulations, and contracts. Indeed, as a parallel (and purely clarifying) reform, the Tucker Act itself might be amended to say expressly what always has been implicit, that it applies to claims for “monetary relief.”

This proposal for legislative reform would discard the division formulated in Bowen v. Massachusetts between specific monetary relief pursuable under the APA and money “damages” available only under the Tucker Act, a semantical line that was not faithful to historical legal understanding and was ill-suited for practical application. As Justice Scalia wrote in dissent in Bowen v. Massachusetts, and more recently for the majority of the Court in Great-West Life & Annuity Insurance Company v. Knudson at common law, a judgment for money was one for “damages,” not specific relief:

Part of [the common-law] tradition was that a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff’s loss is a suit for damages, not specific relief; a successful plaintiff thus obtains not a decree of specific performance requiring the defendant to pay the sum due on threat of punishment for contempt, but rather a money judgment permitting the plaintiff to order “the sheriff to seize and sell so much of the defendant’s property as was required to pay the plaintiff.” . . . Almost invariably, however, suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for “money damages,” as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.

624 See supra notes 157–77 and accompanying text.
625 U.S. Claims Court Advisory Council, Jurisdiction of the United States Claims Court, supra note 134, at 4 (“[I]t ought to be presumed in any case in which the principal claim for relief against the United States is a claim for a sum of money that is past due that the Claims Court possesses exclusive jurisdiction to entertain the claim.”).
626 A committee of judges of the Court of Federal Claims in 1993 drafted proposed legislation that would revise 28 U.S.C. § 1491 by inserting the words “for monetary relief” after “any claim against the United States” in paragraph (1) of subsection (a). Ad Hoc Committee on Jurisdiction, United States Court of Federal Claims, [Proposed] United States Court of Federal Claims Administrative and Jurisdictional Amendments (1993) (copy on file with author) [hereinafter Proposed U.S. Court of Federal Claims Jurisdictional Amendments]. This draft legislative package by the judges committee includes a number of other suggested reforms worthy of further attention by Congress.
Specific relief generally was not available for the recovery of money for a past loss;630 “[e]quity would never direct the return of money unless it was so unique that it could be considered an irreplaceable chattel.”631 More important for present purposes:

By the time Congress passed the Tucker Act in 1887, any claim for, or award of, a money judgment arising from an action at law would be described, albeit improperly, as “damages”—without regard to the theory of liability on which the plaintiff relied. The term “damages” was also used to describe monetary awards granted as part of equitable relief.632

In any event, whatever its historical provenance and understanding, the *Bowen v. Massachusetts* definition of “damages” as applying to money compensating for loss but not to monetary relief to which the plaintiff asserts entitlement as of right has proven unworkable and infinitely malleable in the lower courts.633

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630 Id. at 918.

631 Noone & Lester, *supra* note 39, at 593; see also Bowen, 487 U.S. at 919 n.3 (Scalia, J., dissenting) (“Suit for a sum of money is to be distinguished from suit for specific currency or coins in which the plaintiff claims a present possessory interest. Specific relief is available for that, through a suit at law for replevin or detinue, or through a suit in equity for injunctive relief, if the currency or coins in question (for example, a collection of rare coins) are ‘unique’ or have an incalculable value.” (citations omitted)). The *Bowen v. Massachusetts* majority thus based its contrary definition of “damages” on a “false premise,” because “[b]oth references related to those rare cases where a court will treat specie as property and use its equitable powers to direct the return of identifiable funds,” such as the return of specific currency or pieces of gold. Noone & Lester, *supra* note 39, at 598–99 n.191.


633 Professor David A. Webster agrees that the *Bowen v. Massachusetts* decision “opened a can of worms” by suggesting that claims to enforce a statutory right to money would not constitute “damages.” David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 Ohio St. L.J. 725, 735 (1988) [hereinafter Webster, *Beyond Federal Sovereign Immunity*]. Nonetheless, he argues that an action framed to seek a declaratory or injunctive remedy to pay money would not constitute “damages.” *Id.* As discussed immediately above, with the exception of the rare request for specific relief of certain identifiable currency, Webster’s argument does not comport with the historical understanding of monetary relief as constituting “damages.” Moreover, a plaintiff should not be permitted to evade the jurisdictional limitations of the Tucker Act by artfully pleading a claim for money as a suit for an injunction to compel payment. The contrary suggestion in *Bowen v. Massachusetts* that form may prevail over substance has since been disavowed by the Supreme Court. *See supra* notes 157, 551–57 and accompanying text. In any event, even if an historical or theoretical argument could be made for certain types of claims for past-due money as being something other than a request for “damages,” such a definition is too amorphous to be a workable rule for application by the courts and is too uncertain to serve as a solid foundation for a jurisdictional standard. That is not to deny that certain types of claims for money may be poorly-suited for adjudication in the Court of Federal Claims. But such claims should be addressed by specific statutory exceptions, not by adopting a blurred and shifting jurisdictional line between the District Court-APA and the Court of Federal Claims-Tucker Act. *See infra* notes 684–85 and accompanying text.
A simple bright-line distinction between monetary and non-monetary relief would make the determination as to the proper cause of action and the related question of the proper forum much more certain, simple, and uniform in adjudication. Nonmonetary relief would include all forms of prospective remedies, including those that may have financial consequences for the government in the future, while monetary relief would cover all claims for past-due money based upon prejudgment events.

A jurisdictional demarcation between prospective and retroactive relief has a solid pedigree in the law. The courts have long used this distinction to determine what forms of legal relief appropriately may be sought from state officials in their official capacities without infringing upon the immunity of the states under the Eleventh Amendment to the United States Constitution, a form of immunity that the Supreme Court recently confirmed bears significant analogies to federal sovereign immunity. In Edelman v. Jordan, the Supreme Court held that an award against a state officer in his official capacity for a "monetary loss resulting from a past breach of a legal duty on the part of . . . state officials," even if framed in equitable terms, has a "practical effect indistinguishable in many aspects from an award of damages" against a state government and thus is barred under the Eleventh Amendment. Accordingly, the Edelman Court held, "a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." An injunction against a state or state official that mandates future action or restrains a continuing violation of federal law, even if that impending governmental action or restraint will require future expenditure of resources, does not constitute a claim for monetary relief as long as it is wholly prospective in nature. Significantly, the determination of whether relief sought is pro-

634 U.S. Const. amend. XI. On the preclusion of retrospective monetary relief against a state or state official under the Eleventh Amendment, versus the permitting of a prospective injunctive relief, see generally III DAVIS & PIERCE, supra note 121, § 19.6, at 272–73.

635 See Alden v. Maine, 527 U.S. 706, 749–50 (1999) ("It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege."); see also Richard H. Seamon, The Asymmetry of State Sovereign Immunity, 76 Wash. L. Rev. 1067, 1090 (2001) (agreeing that "the Court has often treated the States' sovereign immunity as symmetrical to the United States' sovereign immunity," but arguing that by force of the Fourteenth Amendment, this symmetry does not extend to the context of state takings of property without just compensation when suit is brought in the state’s own courts rather than federal court).


637 Id. at 668 (holding that claim against state official for retroactive welfare benefits wrongfully denied was barred by Eleventh Amendment).

638 Id. at 677; see also Quern v. Jordan, 440 U.S. 332, 346–47 (1979) (stating that, for determining what relief may be awarded against a state official consistent with Eleventh Amendment immunity, the question is whether the relief "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury'").

639 See, e.g., Wilder v. Va. Hosp. Ass’n, 496 U.S. 498, 503–05 & n.4 (1990) (upholding prospective relief ordering the state to establish a new formula for reimbursing Medicaid costs incurred by health care providers that will expend additional state resources in the future); Milliken v. Brady, 433 U.S. 267, 288–90 (1977) (holding, in school desegregation case, that de-
spective or retroactive turns upon an analysis of the substance, not the form, of the relief sought.\textsuperscript{640}

Likewise, before the aberrational \textit{Bowen v. Massachusetts} decision, the retrospective versus prospective distinction was well-established in the Tucker Act context as well. For example, in \textit{United States v. Testan},\textsuperscript{641} the Supreme Court held that a Tucker Act claim in the then–Court of Claims would be cognizable if a federal employee had been discharged or suspended and thus suffered a loss of or reduction in wages resulting in past-due monetary losses, but not where the federal employee complained about the failure to achieve a higher pay classification or a promotion.\textsuperscript{642} The Court thus distinguished “between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other.”\textsuperscript{643}

Similarly, in \textit{United States v. Mitchell},\textsuperscript{644} the Court emphasized the importance of a Tucker Act remedy in the then–Claims Court for retrospective damages caused by the government’s breach of its fiduciary duty to manage resources held in trust for Indians, because “prospective equitable remedies” available under the APA would be “totally inadequate” in deterring government mismanagement and ensuring that the Indians received the proper value of the managed resources.\textsuperscript{645}

Some understandably might suggest that the jurisdiction of the Court of Federal Claims would better be defined on the basis of the subject matter of particular cases rather than on the basis of the type of relief granted. But, because the primary purpose of that court is to resolve financial disputes with the government, and thus any subject matter definition likely would begin and end with cases implicating the public treasury in some manner, such an approach would not be an improvement over a clear jurisdictional line based on the pursuit of monetary relief. Generally defining the Court of Federal Claims docket by the nature of the case type rather than by its primary purpose of providing a forum for money claims would likely result in categories that are both overinclusive and underinclusive.

Instead, it remains appropriate to adhere to the traditional money claim as the primary grist for the Court of Federal Claims mill. Characterizing the money/nonmoney relief dichotomy as an anachronistic preservation of the long-discarded division between law and equity in the federal courts is not a telling critique in this particular context. For a venerable institution like the Court of Federal Claims, history not only cannot be escaped but must be embraced so that any changes are successfully integrated into the existing structure. Only with a stable foundation, and one necessarily grounded in

\textsuperscript{642} \textit{Id.} at 401–04.
\textsuperscript{643} \textit{Id.} at 403 (citing Edelman v. Jordan, 415 U.S. 651 (1974) (discussing retroactive remedies in the context of the Eleventh Amendment)).
\textsuperscript{645} \textit{Id.} at 226–28.
the historical evolution of the court, may we construct a more refined and updated edifice. The foundation of the Court of Federal Claims of course was and remains monetary claims against the federal government. As we continue to gain experience with the types of cases best handled in that forum and for which its expertise or uniform adjudication is particularly important, adjustments in cognizable claims and appropriate remedial approaches should be made. When appropriate, the exclusive jurisdiction of the Court of Federal Claims may be either expanded or contracted.

But, first and foremost, the erosive effects flowing from *Bowen v. Massachusetts* must be arrested. Before adding to the structure, we must shore-up the existing foundation of the court. The firm soil upon which to build remains the jurisdictional focus on the public treasury. The greatest strength of the Court of Federal Claims lies in its expertise in understanding appropriations and other money-mandating statutes, perceiving when money claims against the federal government are appropriately recognized, and providing a uniform national voice on claims by citizens for compensation from the public fisc. As I said at the outset of this part, the modest goal of this Article is to achieve stabilization of Tucker Act doctrine and Court of Federal Claims jurisdiction. Future architectural improvements as appropriate may proceed thereafter.

Moreover, properly insisting that the Tucker Act is the primary vehicle for monetary claims against the United States is not to say that every claim for monetary relief is most appropriately adjudicated in the Court of Federal Claims. Indeed, a strong argument can be made that claims for reimbursement made by state governments under federal grant-in-aid programs, such as the Medicaid program at issue in *Bowen v. Massachusetts*, are more appropriately heard in the regional courts. Especially because there is a specific statute providing for review in the regional Courts of Appeals of disputes between the federal government and the States over the general plan for administration of Medicaid and other public-assistance programs under the Social Security Act, there is no logical reason why individual disputes over allowance of a particular type of expenditure under the plan should not be reviewed in the same manner.

When a particular type of claim is more appropriately heard in a District Court or a regional Court of Appeals, however, Congress should make that intention plain through a specific judicial review provision in that particular statutory scheme. In the absence of such a special provision, the Tucker Act should be recognized as the sole avenue for seeking money judgments against the United States. Any other approach is a recipe for chaos, as has been shown in the past decade.

646 See supra notes 486–89 and 546–52 and accompanying text (discussing federal grant-in-aid context of *Bowen v. Massachusetts*).

647 Fallon, *supra* note 126 (“The general administration of the Medicaid Act is not an area in which the Claims Court has specialized subject matter expertise.”).


649 Professor David A. Webster fears that eliminating the *Bowen v. Massachusetts*–created authority of the District Court under the APA over nondamage monetary relief claims would not merely reassign cases from the District Court to the Court of Federal Claims but would
reinstate a sovereign immunity bar to some monetary relief claims. Webster, *Choice of Forum in Claims Litigation*, supra note 25, at 536. He contends that the Court of Federal Claims lacks power over certain categories of money claims, meaning that removing such claims from the District Courts would leave certain claimants without a remedy in any court. *Id.* at 535. Webster identifies three such forms of monetary relief as beyond the power of the Court of Federal Claims: “monetary restitution, specific performance where money is its subject, and injunctive decrees ordering payments or expenditure.” *Id.* With respect to the latter two “types of relief,” Webster is correct that the Court of Federal Claims cannot provide relief in these particular forms, but that is no cause for concern. As discussed in detail above, see *supra* Part III.A, specific performance has never been available as a remedy in contract against the federal government, for good and substantial reasons, under either the APA or the Tucker Act, but those aggrieved by the government’s failure to perform in contract are entitled to money damages. And the elimination of so-called injunctions ordering payment of past-due money is precisely the point of this proposal for legislative reform. Specific relief in the form of an order to pay money is something of an oxymoron, as the common law rarely permitted recovery of money in equity. *See supra* notes 627–33 and accompanying text. The novel conception in *Bowen v. Massachusetts* of injunctions to compel payment of money under certain ill-defined circumstances has birthed nothing but confusion. In such cases, the ordinary remedy of retrospective monetary relief, however, remains available in the Court of Federal Claims under the Tucker Act, thus leaving no substantive void in remedy. With respect to what Webster describes as “monetary restitution,” the answer ultimately is the same but the analytical path to the answer is somewhat more complicated. To the extent that a plaintiff desires a “restitution” remedy “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money,” the claim is a legal one not substantively different from a claim for ordinary damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (quoting *Restatement of Restitution* § 160, Comment a, at 641–42 (1936)). Thus, recognizing such a misnamed “restitution” claim to be the equivalent of an ordinary plea for past-due money, the claim may be remedied in the Court of Federal Claims. To the extent that a plaintiff seeks “restitution” of funds wrongfully paid to or seized by the government, the Court of Federal Claims long has had jurisdiction to enter a money judgment under the “illegal exaction” doctrine, articulated in *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (holding that the Tucker Act waives immunity when “the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation”); *see also* Consol. Edison Co. of N.Y. v. U.S. Dept. of Energy, 247 F.3d 1378, 1384 (Fed. Cir. 2001) (observing that Court of Federal Claims had authority under illegal exaction doctrine to address claims by nuclear utilities that they were unconstitutionally assessed by government for costs of decontamination of uranium processing facilities), *cert. denied*, 534 U.S. 1054 (2001). To the extent that Webster is complaining that the government is not bound by “implied-in-law” contracts, in which unjust enrichment or detrimental reliance are offered as equitable substitutes for such contract elements as mutual consent and consideration, *see* Webster, *Beyond Federal Sovereign Immunity*, *supra* note 633, at 754–55 n.212; he thereby objects to the longstanding rule of law that the government’s liability in contract “extends only to contracts either expressed or implied in fact, and not to . . . contract implied in law.” *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996). Because the government’s liability in contract was not expanded by the enactment of the sovereign immunity waiver in the APA, an “implied in law” contract claim would not be cognizable in District Court any more than in the Court of Federal Claims. *See generally supra* Part III.A (addressing traditional limitations on government contract liability, such as the preclusion of specific performance, as preserved under the APA as relief “impliedly forbidden” by the Tucker Act); *see also* H.R. REP. NO. 94-1656, at 12–13 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133 (explaining that the amendment to § 702 of the APA “does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts”). In sum, despite Webster’s concerns, there is no remedy gap created by removing monetary relief claims from District Courts and returning them to the Court of Federal Claims, as per the understanding prior to *Bowen v. Massachusetts*. To the extent any confusion remains, a clarifying amendment to the Tucker Act could specify that it applies to “any claim against the United States for monetary relief.” *See Proposed U.S. Court of Federal Claims Jurisdictional Amendments*, *supra* note 626 (proposing amendment to 28 U.S.C. § 1491(a)(1) to insert after
2. The Adequacy of Monetary Relief Under the Tucker Act Precludes Administrative Procedure Act Review

If the Tucker Act is to be the primary vehicle for resolving monetary claims against the United States, then litigants who could plead a plausible claim for past-due money must not be allowed to preempt the Court of Federal Claims from deciding the legal merits underlying Tucker Act claims by filing an action in a District Court on the basis of some purportedly prospective-only effect of the governmental action at issue. Otherwise, plaintiffs could evade the jurisdictional limitations of the Tucker Act by the mere expediency of bringing an initial action for declaratory or injunctive relief under the APA in District Court. After securing a judgment for prospective specific relief, such litigants might subsequently seek past-due monetary relief on the same grounds in the Court of Federal Claims under the Tucker Act by asserting the collateral estoppel effect of the District Court’s declaratory or injunctive judgment. This relegation of the Court of Federal Claims to the status of a mere paymaster is untenable and such claims-splitting is contrary to the purpose of centralizing monetary claims in that court to ensure uniformity of results in nontort money actions against the United States.

To begin with, the usual rules of preclusion, which are designed to prohibit litigants from splitting closely-related claims between different lawsuits or judicial fora, ordinarily should prevent such a scenario from being realized. “[T]he doctrine of res judicata—or ‘claim preclusion,’ as it is now known—prevents ‘splitting’ and requires all grounds upon which a single claim is based to be asserted and concluded in one action, on pain of being barred from separate suit.”650 A party who alleges a past injury that could be

650 CHARLES A. WRIGHT, LAW OF FEDERAL COURTS, § 78, at 562 (5th ed. 1994); see also Montana v. United States, 440 U.S. 147, 153–54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”); Stone v. United States, 4 Cl. Ct. 264, 268 (1984) (applying res judicata to a claimant against the government under the Tucker Act and observing that a “plaintiff who splits his claims and does not raise his entire demand in the first action . . . may not later seek to relitigate the claim”); 1B JAMES WM. MOORE, JO DESHA LUCAS & THOMAS S. CURRIER, MOORE’S FEDERAL PRACTICE ¶ 0.405[3], at 192 n.2 (2d ed. 1984) (“The principle that a plaintiff may not assert grounds for recovery that he could have asserted in a prior suit resolved by final judgment derives from the rule against splitting a single cause of action.”). To be sure, a traditional exception to claim preclusion allows a plaintiff to pursue a second action on the same cause of action when “[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . .” Restatement (Second) of Judgments § 26(1)(c) (1980). As discussed below, under the legislative proposal offered here, if a plaintiff truly is unable to obtain judicial disposition of every legal issue properly presented in his or her dispute with the federal government through a money judgment in the Court of Federal Claims, assuming success on the merits, then the plaintiff should be permitted to raise any unaddressed nonmonetary relief claim through a parallel suit in District Court under the APA. Duplicative lawsuits, however, ought to be the exception, not the rule. First, in certain types of cases, such as federal employment disputes, the Court of Federal Claims has the authority to grant equitable relief collateral to a money judgment, see supra notes 80–83 and accompanying text, thus affording full and complete relief by any definition. Second, as discussed further below, when a money judgment is available, it ordinarily will
remedied in full by an award of money should bring a Tucker Act suit and not be permitted to evade the jurisdiction of the Court of Federal Claims by framing a prospective relief claim under the APA as a basis to shop for a District Court forum. If a party determines to forgo a retrospective monetary claim in the Court of Federal Claims that would be a sufficient remedy in order to bring an action for prospective specific relief in District Court, he or she should be held to that election, at the very least. Nonetheless, given the confusion wrought by Bowen v. Massachusetts, and in the absence of judicial clarification, it may be appropriate to make this expectation plain in statutory text. More important, even if a plaintiff would prefer to seek prospective injunctive relief and professes a willingness to waive any claim for retrospective money relief (perhaps hoping that the government voluntarily will act administratively to make the plaintiff financially whole without the need to obtain a formal judgment in the Court of Federal Claims), the adequacy of a money claim under the Tucker Act to redress the plaintiff's grievance nonetheless should preclude any resort to the APA.651

Accordingly, as a second general proposal for legislative revision, the APA should be amended to state explicitly that, where available, monetary relief should be presumptively regarded as an adequate alternative remedy. Section 704 of the APA currently provides, in pertinent part, that: “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”652 Under this provision, where a litigant could bring a claim for money under the Tucker Act and such a monetary judgment would resolve be sufficient to redress the plaintiff's grievance, even if the court does not or cannot accompany the award of money with gratuitous equitable relief. See also Webster, Choice of Forum in Claims Litigation, supra note 25, at 535 (“A fundamental canon of equity is that injunctive relief will be denied if an adequate legal remedy is available.”).

651 In an earlier version of legislative proposals to clarify the divide between the Tucker Act and the APA, I suggested that a plaintiff with a retrospective monetary claim might waive that claim and seek prospective-relief-only in District Court, despite the forgone availability of a money claim in the Court of Federal Claims. See Sisk, Two Proposals, supra note 622, at 51. For the reasons explained above and in the following text, I now have concluded that allowing a purported waiver of a money claim to control the choice of forum is unwise and defeats the purpose of jurisdictional assignment of claims to the proper court. Thus, as explained above, I now appreciate that if a past-due money claim is available to the plaintiff and adjudication of that claim would address all legal issues properly raised by the plaintiff, then the plaintiff must pursue such a claim in the Court of Federal Claims, whether or not the plaintiff would prefer to frame the claim as one for monetary relief or instead purport to waive money as a remedy and seek only specific future-looking relief (perhaps on the assumption that the government administratively would make good on any retrospective obligations if the plaintiff prevailed in court on prospective claims). Of course, pursuant to the Little Tucker Act, a plaintiff could waive recovery above $10,000, in order to file suit in the District Court which has concurrent jurisdiction with the Court of Federal Claims over actions seeking no more than that amount in controversy under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The adequacy of the monetary remedy under the Tucker Act ordinarily should preclude obtaining equitable relief under the APA, however, whether the case is maintained in District Court or the Court of Federal Claims. Importantly, if a plaintiff were to waive recovery above $10,000 in order to maintain a Little Tucker suit in District Court, appellate review would remain within the exclusive province of the Federal Circuit, 28 U.S.C. § 1295(a)(2), and thus national uniformity on resolution of money claims against the federal government would be preserved at the appellate level.

the dispute, an APA action presumptively should be precluded because there indeed is another “adequate remedy.”

Unfortunately, as discussed previously, the Supreme Court in *Bowen v. Massachusetts* ruled otherwise in that particular case and some of the language in that opinion could be read to create an opposing presumption in favor of the District Court as a preferred forum. Without explaining why a judgment for money would not have been adequate to remedy the state’s claim for financial reimbursement in the *Bowen* case, the Court simply observed that money might not be a sufficient remedy in every case involving the operation by a state of a federal welfare program: “We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties.”

That, of course, is no answer. The critical question is whether monetary relief would be an adequate remedy in a particular case, not whether it will serve as a sufficient resolution to every dispute. As Justice Scalia wrote in dissent in *Bowen v. Massachusetts*:

> [T]he phrase “adequate remedy” . . . has an established, centuries-old, common-law meaning in the context of specific relief—to wit, that specific relief will be denied when damages are available and are sufficient to make the plaintiff whole. Thus, even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an “adequate remedy” in all but the most extraordinary cases.

If a claim for monetary relief under the Tucker Act could be stated on the facts of a particular case and a money judgment would resolve all of the legal issues raised, then the case should be recognized as a Tucker Act claim and the monetary remedy as adequate. As the United States Court of Appeals for the Fifth Circuit commented, “asking for ‘more’ relief where monetary relief will satisfy the claimant’s needs cannot defeat the jurisdictional scheme set up by Congress—to centralize money claims against the government, except those claims under $10,000 and those sounding in tort, in the *Court of Federal Claims*.”

653 See supra Part II.


655 *Id.* at 926 (Scalia, J., dissenting) (“The Court does not dispute that in the present cases an action in Claims Court would provide respondent complete relief.”).

656 *Id.* at 925 (citations omitted).

657 Far from being an “unprecedented” interpretation of § 704 of the APA, as this proposition was characterized by the majority in *Bowen*, 487 U.S. at 904, the leading administrative law scholars who proposed and supported the 1976 amendment to the APA agreed that the monetary relief permitted under the Tucker Act could provide an adequate remedy and therefore preclude an APA-based action. *See, e.g.*, Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1530 n.157 (1962); 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. 389, 405 (1970).

Accordingly, my second legislative reform proposal would enhance § 704 of the APA by adding the following sentence: “When available, monetary relief shall be considered an adequate remedy if the legal issues raised would be resolved in adjudicating a money claim.” This proposal would codify the common-law rule that equitable relief was not to be awarded “when damages are available and are sufficient to make the plaintiff whole.”

In cases where a claim for retroactive monetary relief could be made and would resolve all the legal issues raised, there is no need to obtain prospective equitable relief as well. Even when a dispute concerns an ongoing relationship between the parties, a monetary remedy when available ordinarily will be adequate. Every decision has a future effect, even if the controversy it actually resolves pertains entirely to past events. The Court of Federal Claims in adjudication of a money claim against the federal government never renders a “naked money judgment.” Rather, the nature of the claims pending and the reasons for a ruling should be addressed in a written decision on the merits by the Court of Federal Claims judge. Especially given that actions against the federal government generally are tried to the bench without a jury, the disposition of the matter will not be hidden behind a general verdict but rather will be stated in written findings of fact and conclusions of law. Any judgment by the Court of Federal Claims awarding monetary relief for past breaches of a duty or a misreading of a statute will deter the federal government from repeating that conduct in the future, both as a matter of the doctrine of issue preclusion (collateral estoppel) as to those particular litigants and as a matter of precedent as to other concerned entities.

659 Bowen, 487 U.S. at 925 (Scalia, J., dissenting).
660 See id. at 905 (arguing that “a naked money judgment” by the then–Claims Court may not be adequate where the parties have a “rather complex ongoing relationship”).
661 Lehman v. Nakshian, 453 U.S. 156, 161 (1981) ("Jury trials . . . have not been made available in the Court of Claims for the broad range of cases within its jurisdiction under the [Tucker Act]"); 28 U.S.C. § 2402 (2000) (providing that, with certain exceptions, non-tax suits under the Little Tucker Act and the Federal Tort Claims Act “shall be tried by the court without a jury”). On the general rule that there is no right to a jury trial against the United States, see generally SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, supra note 1, at 72–79.
662 See FED. C L. R. 52 (“In all actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . .”)
663 “Issue preclusion prevents relitigation of any issues that were actually presented in a prior lawsuit and that were necessary to the final judgment in that prior suit.” JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 166 (1998). The Supreme Court long has confirmed that mutual collateral estoppel binds the United States to the determination made by a court on issues previously litigated between the same parties. United States v. Stauffer Chem. Co., 464 U.S. 165, 169 (1984); Montana v. United States, 440 U.S. 147, 157–58, 162–63 (1979).
664 Bowen, 487 U.S. at 926–27 (Scalia, J., dissenting) (observing that a money judgment in the then–Claims Court “would have not only precedential but collateral-estoppel effect” thereby “provid[ing] effective prospective relief as well”); Consol. Edison Co. of N.Y. v. U.S. Dep’t of Energy, 247 F.3d 1378, 1384–85 (Fed. Cir. 2001) (holding that because a successful suit for a refund of allegedly wrongfully exacted assessments would operate by principles of res judicata to preclude the government from continuing unlawful assessments in the future, “[r]elief from [plaintiff’s] retrospective obligations will also relieve it from the same obligations prospectively),
Before any activity has occurred giving rise to a claim for monetary relief, an action for declaratory relief perhaps could go forward in District Court under the APA. In such a case, a money claim is not yet available; events simply have not yet progressed to the point of ripeness. One might argue that a litigant need not delay until actual harm has occurred giving rise to a monetary claim, but may, where otherwise appropriate under law, seek to preempt any allegedly unlawful governmental activity through a declaratory judgment action. If actual harm, however, has already occurred or arises before adjudication of a claim for specific relief, then the opportunity for meaningful prospective relief separate from a claim for money has passed. In sum, once retrospective harm is present, then a monetary claim when available under a statutory waiver of federal sovereign immunity ordinarily will provide a sufficient remedy for all past and future harm.

Professor David A. Webster agrees that the other-adequate-remedy limitation on invocation of the APA in District Court serves the “larger purpose” of “protect[ing] the superior role of the [Court of Federal Claims] in government claims litigation . . . .” Nonetheless, in response to an earlier version of my legislative proposal, Webster contends that my suggested means toward that end sweep too broadly and share in the same error made by the Supreme Court in constructing categorical assumptions rather than examining the adequacy of the alternative remedy on a case-by-case basis:

Ironically, the Sisk proposal suffers from precisely the same defect—albeit in reverse—as Bowen v. Massachusetts. Bowen presumed conclusively that the Claims Court remedy was inadequate, regardless of the facts of the individual case, because of the potential that the Claims Court remedy might be inadequate in an abstract case. The Sisk proposal, on the other hand, presumes conclusively that the Claims Court remedy is adequate, regardless of the facts of the individual case, because of the likelihood that the Claims Court remedy will be adequate in the mine-run of cases.

Webster’s concern that each individual litigant receive an adequate remedy in each particular case is meritorious, but for several reasons the criticism is misdirected against the proposal presented here, especially (but not only) if the remedial authority of the Court of Federal Claims is enhanced (an aspect of my proposal that admittedly was not developed in its earlier incarnation).

First, I plead guilty to defending a presumption (but not an irrebutable one, as explained next) that a money judgment when available for retrospective harm precludes resort to the specific relief. If applied too loosely, or

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665 Webster, Beyond Federal Sovereign Immunity, supra note 633, at 750.
666 Webster, Choice of Forum in Claims Litigation, supra note 25, at 536; see also Webster, Beyond Federal Sovereign Immunity, supra note 633, at 749–50 (criticizing Supreme Court in Bowen v. Massachusetts for suggesting “a categorical inquiry by type of case” rather than “making the adequacy inquiry turn on the facts of each individual case”).

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mistakenly confused with the question of the merits of the case, the case-by-case approach advocated by Webster foments confusion and leaves too much room for inconsistent determinations, all at the threshold jurisdictional stage of the litigation and at the expense of expeditious resolution on the merits in the proper forum. As Professors Michael F. Noone, Jr. and Urban A. Lester warn, “Webster’s case by case approach encourages indeterminate outcomes—an unfavorable characteristic of the equitable law suit in our view.”

By restoring the presumption that a monetary remedy is adequate, the pre–Bowen v. Massachusetts approach incorporated within the legislative reform I suggest here would provide a standard or guide for the case-by-case analysis, clarifying that only exceptional circumstances would justify a parallel request for prospective injunctive relief when a claimant could plead a retrospective monetary claim.

Moreover, courts must be careful to distinguish the questions of whether the plaintiff has an adequate alternative remedy in another court from whether the plaintiff is entitled to relief on the merits. As the Federal Circuit explained in Mitchell v. United States, the adequacy of the Tucker Act remedy in the then–Claims Court for a military servicemember who sought active duty credit towards retirement and active duty backpay was unaffected by the government’s defense that the claim was time-barred: “[T]he question posed by APA Section 704 is whether the Claims Court offers adequate remedies, not whether [the plaintiff] will be entitled to receive those remedies. The Claims Court offers a full and adequate remedy even if [the plaintiff] does not qualify to receive that remedy.” In sum, if the Court of Federal Claims through a money claim under the Tucker Act offers an adequate remedy for that type of case, § 704 precludes use of the APA even when that Tucker Act remedy is unavailable to an individual plaintiff under the particular circumstances of a given case.

Second, under my proposal, a claim for monetary relief would be adequate only if all legal issues raised by the litigant would necessarily be resolved in adjudicating the money claim. If the plaintiffs raises separate legal issues that would or could not be addressed in the context of a claim for monetary relief under the Tucker Act in the Court of Federal Claims, a claim for prospective relief premised upon those legal issues may legitimately be pursued under the APA separately from any money claim. Ordinarily, the mere desire of a litigant to obtain an injunction as well as monetary relief would not properly be viewed as raising a separate legal issue justifying bifurcation of the action between the District Court and the Claims Court. Under certain circumstances, however, the adequacy of a money remedy is rebutted by the inability of the court to address the full panoply of legal issues properly raised in a particular case.

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667 Noone & Lester, supra note 39, at 594.
669 Id. at 897.
670 This exception in my proposal would not be an invitation to plaintiffs against the federal government to imaginatively frame claims raising novel or extraneous legal issues in order to evade the exclusive jurisdiction of the Court of Federal Claims over what at essence is a monetary dispute. To begin with, as addressed in the first proposed legislative reform, see supra Part
For example, as illustrated by the Federal Circuit’s decision in Loveladies Harbor, Inc. v. United States, cases may arise in which a plaintiff’s dispute with the federal government legitimately raises different or alternative legal theories that, due to jurisdictional limitations upon the courts, cannot be fully resolved in a single forum. First, the plaintiffs filed an APA suit in District Court challenging the denial of the permit, which suit ultimately proved unsuccessful. The APA claim challenging the validity of the agency’s action in denying the permit obviously could not have been pursued in the Court of Federal Claims because it was not a claim for money (nor was it merely a means to the end of monetary relief). Moreover, if the denial of the permit had been reversed in District Court, the plaintiff corporations would not have suffered a continuing taking of their property which obviously would have affected the amount of damages at issue in a subsequent taking suit. Second, the plaintiffs filed a Tucker Act suit in the Court of Federal Claims for a regulatory taking under the Fifth Amendment of the United States Constitution. This second suit was stayed pending conclusion of the parallel APA action in District Court. IV.B.1, any expressly stated claim for monetary relief would remain within the sole purview of the Court of Federal Claims and would be excluded from District Court authority under the APA. Likewise, artfully-pled claims for prospective relief that either order the payment of money or are mere means to the end of a monetary remedy are encompassed within the exclusion of monetary claims from the APA. Moreover, as outlined above, a plaintiff could not pursue parallel prospective specific relief claims in District Court when the same legal issues would have been addressed as part of the monetary case before the Court of Federal Claims; doctrines of collateral estoppel, res judicata, and precedent generally ensure that the government will abide by the determination of those legal issues as they affect future or ongoing relationships between the plaintiff and the government. The exception to the presumption of the adequacy of monetary relief proposed here applies not to alternative remedies, as such, but rather to legal issues that otherwise would be unaddressed. Finally, of course, any excessive creativity by plaintiff’s counsel will be constrained both by the practical concerns of having to maintain two lawsuits in two different fora and by the risk of sanctions for raising frivolous claims or issues.

671 Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).

672 See Bruggink, supra note 570, at 538 (observing that a taking claim in the Court of Federal Claims may often be the “flip side of a case brought in district court under the APA and section 1331 to challenge the validity of administrative action.”).

673 Loveladies Harbor, Inc., 27 F.3d at 1547.

674 Id.

675 In addition to the APA challenge to the validity of the permit denial, the plaintiffs also asked the District Court to declare that a taking had occurred. Id. at 1553. The government, however, argued that the District Court lacked jurisdiction over this count of the complaint, and the District Court agreed, dismissing that count without prejudice to the plaintiffs’ right to pursue the taking claim in the Court of Federal Claims. Id. at 1554.

676 Cf. Bruggink, supra note 570, at 538 (observing that, in the area of regulatory takings, “the plaintiff’s preferred remedy might be to have the agency action overturned and limit the money aspect of the claim to a temporary taking”).

677 Loveladies Harbor, Inc., 27 F.3d at 1547.

678 Id. When lawsuits against the United States involving the same claim are pending simultaneously in the Court of Federal Claims and another court, 28 U.S.C. § 1500 is implicated. Section 1500 prohibits the Court of Federal Claims from exercising jurisdiction “of any claims for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States . . . .” 28 U.S.C. § 1500 (2000). During the 1998 session of Congress,
Following disposition of the District Court suit, the plaintiffs proceeded with the suit in the Court of Federal Claims and won more than $2.6 million on the takings claim.679

In *Loveladies Harbor, Inc.*, the plaintiffs’ filing of parallel actions in different courts was “entirely logical—if the validity of a regulatory imposition is to be challenged, it makes sense to pursue the validity question first so as to determine the necessity for prosecuting the takings claim.”680 Indeed, under the precedent of the Federal Circuit, a party’s election of the Tucker Act remedy to be compensated for a taking without a previous APA challenge to the agency’s action constitutes a concession that the agency’s regulatory action was valid.681 Because the *Loveladies Harbor, Inc.* suit in District Court raised legal issues concerning the validity of the agency’s denial of a permit to develop wetlands, the alternative or contingent remedy of monetary compensation for a taking of the plaintiffs’ property was not an adequate remedy either under traditional understandings of the intersection between the APA and the Tucker Act or under my proposal to legislatively declare a rebuttable presumption that a monetary remedy is sufficient.

As another example, and one noted by the dissent in *Bowen v. Massachusetts*,682 an exception to the monetary-relief-as-adequate presumption might lie in that rare case where a litigant could prove that the government in bad faith would refuse to adhere in the future to the principles of law established in the Court of Federal Claims decision on the money claim. Such a contention would raise a separate legal issue and would justify a separate APA claim for injunctive relief. Because it generally may be assumed that the government would abide by a final judicial determination of the issues on the merits between the parties, as a matter of res judicata, collateral estoppel, the House of Representatives passed a bill that would have allowed property owners alleging takings of their property by the federal government to seek both equitable and monetary relief in either federal District Court or the Court of Federal Claims; the bill also provided for repeal of § 1500. 144 CONG. REC. H1135-40 (daily ed. Mar. 12, 1998). See generally Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 A.L.A. L. REV. 1161, 1171–72 (1999) (describing 1998 proposed legislation); Robert Meltz, “Property Rights” Bills Take a Process Approach: H.R. 992 and H.R. 1534, Congressional Research Service Report for Congress (1998) [hereinafter Meltz, “Property Rights” Bills]. On § 1500 and the rules governing jurisdiction in the Court of Federal Claims when a similar claim is pending against the government in another court, see generally Sisk, *Litigation with the Federal Government*, supra note 1, at 423–40; Kirgis, supra note 134.

Further analysis of this question, and the related problem of the so-called “Tucker Act Shuffle” in which cases framed on alternative legal theories may be bounced back-and-forth between courts is beyond the scope of this Article.

679 *Loveladies Harbor, Inc.*, 27 F.3d at 1547.
680 Id. at 1555 (holding that the plaintiffs had the right to have the permit denial reviewed, without giving up the legal right subsequently to obtain compensation for a taking of property under the Fifth Amendment).
682 *Bowen v. Massachusetts*, 487 U.S. 879, 925 (1988) (Scalia, J., dissenting) (saying that damages relief would not be an adequate remedy “if a State could prove that the Secretary intended in the future to deny Medicaid reimbursement in bad faith, forcing the State to commence a new suit for each disputed period, an action for injunctive relief in district court would lie”).
or precedent, a pattern of past government misconduct or some other evidence from which a reasonable inference of government nonacquiescence can be drawn would be required before a litigant could present a nonfrivolous allegation of the likelihood of prospective government bad faith. Moreover, the District Court presumably would stay any APA proceeding seeking an injunction to obey a court ruling in the future until after the underlying money claim had been addressed on the merits by the Court of Federal Claims.

Third, as discussed earlier with respect to my first general legislative proposal, exceptions are always possible and sometimes essential. Certain types of cases ought to be provided for separately and specially by statute, if access to immediate injunctive relief in such cases is so essential that even the availability of a monetary remedy would not be sufficient. In a dispute involving individual entitlement to benefits under a public assistance program, it may be inequitable to require the individual to wait for a final judgment on a monetary claim before obtaining prospective relief that grants or restores the benefits upon which the individual relies for the necessities of life. Given the inevitable delays in resolution of litigation, forcing a public assistance claimant to wait until final adjudication of a money claim and thus forgo immediate relief is unduly harsh and unjust. Accordingly, for such types or categories of cases, Congress appropriately may expressly authorize an alternative adjudicative mechanism. Indeed, illustrative statutory exceptions already exist. For example, a specific jurisdictional statute permits judicial review of claims for monetary relief in the form of Social Security disability insurance benefits and supplemental security income benefits. Such actions are appropriately brought in District Court, regardless of the amount in controversy, rather than under the Tucker Act, and may be combined with claims for equitable relief as well. But these types of cases are the exception rather than the rule, and should be the subject of special judicial review legislation enacted by Congress, rather than judicially-devised departures from the principle that monetary relief is ordinarily adequate.

Finally, if troubled by the inadequacy of the available remedy in the Court of Federal Claims, the answer is to expand its remedial power in appropriate ways, not to reassign money claims to the District Courts and dissipate the expertise developed by the Court of Federal Claims. Although the circumstances under which a prospective remedy is necessary to fully address the legal issues raised by the claimant should be few as discussed above, any objection to restricting alternative resort to equitable relief in the District Court would disappear entirely if the Court of Federal Claims were to be granted declaratory and injunctive authority. Professor Webster acknowled-

683 See Consol. Edison Co. of N.Y. v. United States, 247 F.3d 1378, 1381 (Fed. Cir. 2001) (noting the government’s argument that injunctive relief was not necessary because “res judicata would bar the Government from future assessments against [the plaintiff under the statute] in the face of a Court of Federal Claims illegal exaction judgment” and the government assurance “that it would not attempt to make future assessments after a loss in the Court of Federal Claims”), cert. denied, 534 U.S. 1054 (2001).
684 See supra notes 646–48 and accompanying text.
edges that a “full arsenal of relief” in the Court of Federal Claims properly would “oust the district courts.”686

Toward that end, proposals for legislative reform suggested in the wake of Bowen v. Massachusetts have recommended empowering the Court of Federal Claims to award equitable relief in cases that are otherwise within its jurisdiction.687 One thoughtful proposal suggested amending § 1491 of title 28 by adding the following language to the second paragraph of subsection (a): “In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate.”688 In 1998, the House of Representatives passed a bill that would have allowed property owners alleging takings of their property by the federal government to seek both equitable and monetary relief in the Court of Federal Claims (as well as the District Court).689 Unfortunately, this proposed legislation would have exacerbated the problem of overlapping Court of Federal Claims and District Court authority, with the attendant problem of forum-shopping, and the legislative proposal also was limited in application to property-rights claims.690

Although expanding the equitable authority of the Court of Federal Claims to cover all cases within its bailiwick might appear to be a dramatic enlargement of the powers of a court traditionally limited to monetary relief, it actually is a modest and incremental step justified by experience. To begin with, as with its current limited equitable powers under the Remand Act of 1972691 (such as the power to order an agency to restore an employee to a position or correct personnel records), the court under this proposal would not gain general equitable powers nor the authority to grant equitable relief detached from a monetary claim.692 The court only would be authorized to

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686 Webster, Beyond Federal Sovereign Immunity, supra note 633, at 748; see also Webster, Choice of Forum in Claims Litigation, supra note 25, at 535 (saying that Congress could avoid “the whole quagmire into which the Bowen Court stepped” by either abolishing the then-Claims Court and assigning all claims litigation to the District Courts or by “empower[ing] the Claims Court to issue any relief to which a claimant is entitled”).

687 U.S. CLAIMS COURT ADVISORY COUNCIL, JURISDICTION OF THE UNITED STATES CLAIMS COURT, supra note 134, at 23; PROPOSED U.S. COURT OF FEDERAL CLAIMS JURISDICTIONAL AMENDMENTS, supra note 626.

688 PROPOSED U.S. COURT OF FEDERAL CLAIMS JURISDICTIONAL AMENDMENTS, supra note 626.


690 Meltz, “Property Rights” Bills, supra note 678, at 3–4 & n.9 (1998) (observing that, there are other instances in which a claimant might have to “split causes of action arising from the same situation between the [Court of Federal Claims] and district courts” and noting that Professor Michael F. Noone, Jr., had suggested that the resolution of the problem “should not be limited to the context of property-rights-related claims”).


692 Given the substantial expertise of the Court of Federal Claims in military employment matters, see supra Part III.C, I also agree with the broader suggestion of the Committee on Jurisdiction of the United States Claims Court Advisory Committee that the court should be granted general equitable powers with respect to separation or discharge of a service member, that is, the authority to grant injunctive or declaratory relief unaccompanied by any underlying monetary claim. This committee proposed that the APA be amended to withdraw jurisdiction from the District Courts over suits seeking to enjoin a discharge from military service or to
grant equitable relief that is collateral to a cognizable Tucker Act claim for monetary relief. Moreover, because the Court of Federal Claims has national jurisdiction over the cases that fall within its purview and because a money judgment has future effect by reason of rules of preclusion and precedent as discussed above, the practical effect of enlarging the court’s equitable powers would be negligible in most cases. In the few cases in which these enhanced remedial powers would be implicated so as to provide meaningful relief beyond those consequences that flow from a money judgment, the new authority conferred on the Court of Federal Claims would make it possible to efficiently resolve all matters relating to a claim in a single forum. This injunctive power could be exercised only as appropriate under the circumstances, under basic principles of equity, and subject to limitations imposed by other statutory laws. In sum, the Court of Federal Claims would not be granted power over any new category of case or any new field of law but rather would be empowered to grant a complete remedy in a single forum in all cases within its jurisdiction.

Given that the Court of Federal Claims already possesses not inconsiderable, although limited, equitable powers, and that any enhanced remedial authority would be tied to the same types of matters it currently adjudicates, objections to the validity of injunctive relief issued by an Article I court are without merit. To begin with, the court properly has broad authority to adjudicate cases involving “public rights” where the government has waived sovereign immunity conditioned upon resort to a non–Article III forum. Even if the proposed vesting of injunctive and declaratory relief were understood to permit the Court of Federal Claims to evaluate the constitutional validity of statutes, there is nothing inherently wrong with allowing a so-called “legislative” or Article I court to pass upon the acts of the legislative branch that created it and authorized it to do so; any constitutional ruling by
the Court of Federal Claims would remain fully reviewable on appeal by an Article III judicial body, namely the Federal Circuit.\footnote{Fallon, supra note 67, at 917–18 (arguing that “the decision whether to use non–article III bodies to make initial determinations even of constitutional law should be largely discretionary with Congress,” provided that decisions by such non–Article III tribunals are reviewable on appeal by an Article III appellate court); Lederman, supra note 67, at 369 (concluding that there is “little dispute that Article I courts can decide constitutional questions” and that when such a court considers the constitutional validity of a statute, “[i]n effect, this allows the legislative branch to decide the constitutionality of its own statutes”). But see Meltz, “Property Rights” Bills, supra note 678, at 8–9 (noting that, while Article I courts may be given considerable and broad jurisdiction, the question remains “whether an Article I forum may be empowered to invalidate acts of Congress”)}

In any event, should Congress have any qualms about enlarging the powers of a court that, at least in formal terms, lacks the characteristics of an Article III court, the simple answer is to integrate the Court of Federal Claims more fully into the judicial branch by giving it Article III status.\footnote{Bruggink, supra note 570, at 531 (noting that the Court of Claims and its successor courts have not “been fully integrated into the judiciary, despite overlapping jurisdiction with Article III courts”); Dees, supra note 41, at 558 (arguing that “there are compelling reasons to elevate the [Court of Federal Claims] to the status of federal district courts with attributes such as lifetime tenure to ensure adequate independence”).}

Given that a judge of the Court of Federal Claims upon expiration of his or her fifteen-year term may assume “senior” status and thereby continue to act in a judicial capacity and receive a full salary, the court already has been given \textit{de facto} Article III status by Congress.\footnote{See Bruggink, supra note 570, at 541 (“In 1992 Congress changed the tenure provisions of [Court of Federal Claims] judges to give them \textit{de facto} salaries for life.”); Meltz, “Property Rights” Bills, supra note 678, at 9 n.26 (reporting the testimony of Court of Federal Claims Chief Judge Loren Smith on proposed legislation, in which he “asserted that since each [Court of Federal Claims] active-status judge has the option of taking lifetime senior status at the end of his or her fifteen-year term (if not reappointed), [Court of Federal Claims] judges are likely to have the same independence of judgment as Article III judges”).} For Congress now to acknowledge that the Court of Federal Claims in practice is indistinguishable from other federal courts and to enhance the standing of the court and its judges among their judicial brethren would be but a small step.

\textit{Conclusion}

If there is a less profitable expenditure of the time and resources of the federal courts and federal litigants than resolving a threshold issue of which particular federal court should have jurisdiction, it does not come readily to mind.\footnote{Sharp v. Weinberger, 798 F.2d 1521, 1522 (D.C. Cir. 1986) (Scalia, J.).}

By blurring the lines of demarcation between prospective nonmonetary claims properly brought in District Court under the Administrative Procedure Act and retrospective monetary claims properly reserved to the Court of Federal Claims under the Tucker Act, the Supreme Court’s ruling in \textit{Bowen v. Massachusetts} has sown jurisdictional chaos in the federal courts. The painful experience in the lower federal court over the past decade has demonstrated that the semantical distinction drawn in \textit{Bowen v. Massachusetts} between compensatory claims for “money damages” and noncompensatory
The Tapestry Unravels

2003]

Tory claims for “specific monetary relief”—for the important purpose of determining the correct forum—is unworkable in practice and a source of continuing and unnecessary confusion.699

The Supreme Court by overruling Bowen v. Massachusetts, the Federal Circuit by limiting it, or the Congress by modest legislative intervention should act to restore clarity and stability to jurisdictional lines. A clear, certain line of jurisdictional demarcation is necessary to avoid pointless and distracting litigation over the threshold question of the forum for a claim. Simple, uniform, “bright line” rules are preferable so that litigation about the proper forum does not overshadow the merits of the case.

Moreover, a clearer dividing line between retrospective monetary claims under the Tucker Act and prospective nonmonetary claims under the APA serves to assign claims between the Court of Federal Claims and the District Courts in a manner that appreciates the institutional strengths and expertise of each. Claims for relief in the form of past-due money, however framed or artfully pleaded, are not within the scope of the APA for District Court adjudication and instead should be resolved under the Tucker Act in the Court of Federal Claims. In all but the most exceptional of circumstances or where a specific statutory scheme mandates otherwise, a claim for monetary relief in the Court of Federal Claims provides an adequate remedy if the same legal issues which would be raised by a claim for specific or prospective relief would be definitively resolved in the adjudication of a monetary claim.

In this way, by preserving the fabric of District Court authority while also restitching the Court of Federal Claims into the cloth, the tapestry of statutory waivers of sovereign immunity may again be made whole.

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699 See Noone & Lester, supra note 39, at 574 (arguing that the approach taken in Bowen v. Massachusetts may be “superficially attractive” but has proven “intrinsically false”).