Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One’s Anomalous Character

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Many discussions of the United States Court of Federal Claims reason about it by reference to the “other” federal courts—characterized as either Article III or Article I courts—and by analyzing the degree to which the Court of Federal Claims is or is not distinctive. In this essay, I offer a different perspective by putting the question of the Court of Federal Claims into the context of the broader narrative of the many changes within the federal judicial system over the past century.

When the first Claims Court was created in the middle of the nineteenth century, it was an oddity and an invention. Although it dealt with monetary claims arising from contract disputes, it provided no juries. Instead, it had a separate cadre of judges. Further, all of the court’s cases involved the government as a party, and specifically as a defendant. And the court had special links to Congress, both because it could receive cases by reference and because implementation of its remedies depended on congressional appropriations of funds to provide payments.

By the end of the twentieth century, the Court of Federal Claims had ceased to have such an unusual character—not so much because of the relatively minor changes within that court, but because, during the intervening years, Congress had invented many other courts and agencies and had also engrafted variations onto the “regular” federal courts.

What do we learn from weaving together the history of the Court of Federal Claims with that of the federal adjudicatory system in general? First, while that court once marked a frontier, in hindsight, it anticipated structural developments of the twentieth century, both in terms of devolving adjudication to agencies and in terms of staffing federal adjudication with non–life-tenured judges. For example, magistrate and bankruptcy judges now serve within Article III courts in numbers in excess of life-tenured district judges.

Second, the legality of these innovations depended on the United States Supreme Court, which, through constitutional interpretation of Article III, permitted a range of variations in federal adjudicatory institutions.

Third, at a formal level, the Court of Federal Claims is identified by the provision of money damages against the government. In practice, however, both the Court of Federal Claims and other courts and agencies now permit a broader set of remedies against the United States. Moreover, the Court of

* Arthur Liman Professor of Law, Yale Law School. © Judith Resnik, All rights reserved. This essay was written for the Conference, Perspectives on Suing the Sovereign Here and Abroad, held in October of 2002 on the occasion of the Twentieth Anniversary of the United States Court of Federal Claims.

My thanks to the judges of that court and specifically to former Chief Judge Lawrence Baskir and to current Chief Judge Edward Damich for their invitation to participate, to Professors Steven Schooner and Gregory Sisk for a rapid education in the history and practices of the Court of Federal Claims, to Professors Vicki Jackson and Dennis Curtis for helpful discussion of this essay, and to Daphna Renan and Amina EI-Sayad for thoughtful research assistance.
Federal Claims is not the exclusive venue in which to seek monetary compensation from the federal government.

Fourth, the overlap between the jurisdiction of the Court of Federal Claims and other federal courts and agencies has prompted some to argue for the demise of the Court of Federal Claims and others to propose imposing limitations on where claimants can obtain relief against the government. Both kinds of proposals are misguided. The former seeks jurisdictional coherence but ignores the politics that shape the creation of courts. The latter relies on a formal approach that retreats from the functionalism of twentieth century procedure to leave litigants with fewer means of gaining relief against the government. Just as one reform of the twentieth century was to reread Article III so as to permit the manufacture of scores of federal judges who lacked Article III attributes, another reform of the twentieth century was to collapse the distinctions between law and equity and to permit liberal joinder of claims and parties—all to enhance the remedial capacities of courts.

Fifth, and finally, the fact that the Court of Federal Claims is no longer anomalous is cause for celebration. Its twentieth birthday should be the occasion on which to ask questions—about whether its charter suffices, whether its authority ought to broaden to encompass more parties and more claims, and whether other federal courts or agencies should have greater capacity to call the government to account. Evaluation of the Court of Federal Claims at twenty ought also to prompt contemplation of the remedial authority of both non-life-tenured judges and Article III judges to assess whether their powers suffice to provide the remedies necessary for claimants seeking accountability by and redress against governments in the twenty-first century.

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I. Questioning the Legitimacy of the Court of Federal Claims

At the celebration of the twentieth anniversary of the Court of Federal Claims in October of 2002, the focus was on the role played by the court in the federal system. Although it was a birthday party of sorts, some guests questioned the very existence of the guest of honor. Professor Steven Schooner argued that the Court of Federal Claims lacked a distinctive character and that its caseload could be dispersed without imposing undue burdens on other courts or on litigants.¹

Not surprisingly, Loren Smith—former Chief Judge and now a member of the Court of Federal Claims—disagreed with Professor Schooner’s proposal for the court’s demise.² Judge Smith relied on both the symbolic and legal import of the court as justifications for its existence. His commitment to the court was shared by J. Sheldon Plager of the United States Court of Appeals

for the Federal Circuit. Responsive in another fashion was the presentation by Professor Gregory Sisk, who proposed that either the Supreme Court, the Federal Circuit, or Congress revisit the jurisdictional charter to shore up the court's distinctive character by clarifying that the Court of Federal Claims—and not the district courts—had sole power to provide monetary relief against the United States for breach of contract obligations.

These discussions put the existing Court of Federal Claims in the forefront of the analysis and reason about the court by reference to the “other” federal courts—characterized as either Article III or Article I courts. In this essay, I offer a different perspective by putting the question of the Court of Federal Claims into the context of the broader narrative of the many changes within the federal judicial system over the past century.

Below, I explain why I disagree with Professor Schooner that the court's continuing existence ought to depend on its coherence as a unique federal adjudicatory institution. I also explain why I disagree with Professor Sisk on the desirability of shoring up the distinctiveness of the Court of Federal Claims by limiting other courts' capacities to grant monetary relief against the government. Further, although I join with Judge Smith and Judge Plager in appreciating the political import of an institution identified as providing redress against the government, I question the sufficiency of the charters of this and of other federal adjudicatory institutions to make good on that promise.

I do not worry about the loss of the peculiar character of the Court of Federal Claims. Rather, the fact that the court has ceased to be anomalous as the lone venue for providing monetary relief against the federal government is cause for celebration. The twentieth birthday of the institution should be the occasion on which to ask about how to expand the ability of it—and of other federal courts—to provide remedies to those alleging government wrongdoing. At issue is whether to reshape the mandates of the Court of Federal Claims to facilitate the joinder of parties such as government contractors, the bringing of class actions, or the expansion of joinder rules to enable more claims to come before it. Also needed is a review of the authority of both its judges and those of other federal courts to consider whether their powers suffice, in the twenty-first century, to provide the remedies necessary for claimants against governments. The current efforts by a bare majority of the Supreme Court to constrain federal remedial capacities,

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echoed by proposals here to limit the venues for obtaining remedies against the government, ought to be rejected in favor of devising methods by which to make the federal government more accountable to those who challenge its actions.\textsuperscript{8}

\section{Inventing Courts}

When a court of claims was first born in the nineteenth century,\textsuperscript{9} it was a true oddity and a real invention, responsive to specific needs of those times. In today’s language, we might realize that the Court of Claims was one of our first agencies. It had aspects that made it court-like, with judges presiding to consider claims for money damages against the United States government.

But it also lacked some of the trappings associated with other federal courts. Although it dealt with monetary claims arising under contracts, it provided no juries. Rather, it had a special and separate cadre of judges.\textsuperscript{10} Further, all of the court’s cases involved the government as a party, and specifically as a defendant.\textsuperscript{11} And the court had special links to Congress, both because it could receive cases by reference\textsuperscript{12} and because implementation of its remedies depended on congressional appropriations to provide payments.\textsuperscript{13} Thus, the Court of Claims was marked by a jurisdiction dependent upon the provision of the particular remedy (monetary awards) for a particular harm (breach of contract) and upon the presence of a particular defendant (the United States).

By moving forward 150 years to the end of the twentieth century, we can see the Court of Federal Claims in a different light. The court has ceased to have such an unusual character. The source of change has not only been its own reorganization,\textsuperscript{14} but the invention—during the intervening years—by Congress of many other courts and agencies. Jurisdictional peculiarities, congressional directions as to the forms and kinds of remedies permissible for particular causes of action, and special kinds of judges for different kinds of

\textsuperscript{8} See generally Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 STAN. L. REV. 1921 (2003).

\textsuperscript{9} See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612. Congress provided for the court, then called the Court of Claims, to hear claimants seeking money from the federal government because of a breach of contract. See generally Stanton J. Peelle, History and Jurisdiction of the United States Court of Claims, 19 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 1 (1916).

\textsuperscript{10} See Act of Feb. 24, 1855, 10 Stat. at 612. The president appointed three judges, in turn empowered to appoint commissioners to take testimony and to issue subpoenas.


\textsuperscript{12} See Act of Feb. 24, 1855, 10 Stat. at 612 (The court “shall hear and determine all claims . . . which may be referred to said court by either house of Congress.”). Remnants of that jurisdiction remain. See 28 U.S.C. §§ 1492, 375 (2000).

\textsuperscript{13} See Act of Feb. 24, 1855, 10 Stat. at 612.

\textsuperscript{14} Congress has revisited the structure of the Court of Claims several times. For example, in 1866, Congress provided for direct enforcement of the judgments of the Court of Claims and for review of its decisions by the Supreme Court. See Act of March 17, 1866, ch. 19, 14 Stat. 9. In 1887, Congress expanded the court’s powers by providing it with jurisdiction over all monetary claims against the federal government. See Tucker Act, ch. 359, § 1, 24 Stat. 505, 505 (1887) (codified at 28 U.S.C. § 1491 (2000)).
cases have all become the ordinary stuff of federal litigation. While once, the Court of Federal Claims was ahead of the curve, it is no longer. True, it is now a hodgepodge, with an odd assortment of kinds of cases (including public contracts, tax matters, Fifth Amendment takings, civilian and military pay claims, and vaccine litigation) and some remedial range. But today it is one of several such hodgepodes among the adjudicatory institutions that comprise the federal system.

Indeed, Article III courts are themselves composites, no longer purely populated by Article III judges. Although one could make the equation between an Article III court and an Article III judge 100 years ago, it is a mistake to now assume that so-called Article III courts are populated either exclusively or even predominantly by life-tenured judges. The configuration of the current Court of Federal Claims, with two cohorts of non–life-tenured trial judges (Court of Federal Claims judges and “special masters” dedicated to working on cases involving vaccines), resembles the configuration of the federal district courts, with two layers of non–life-tenured judges (magistrate judges and bankruptcy judges) joining life-tenured district court judges. Moreover, in today’s “Article III” courts, non–life-tenured judges outnumber those with life tenure on the trial bench.

By looking inside Article III courts, we can see that they have lost their Article III-ness if it is defined in terms of the way in which their judges are populated.

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15 Many such courts exist. One example is the evolution of the United States Tax Court (“Tax Court”) from its origins in 1924 as the United States Board of Tax Appeals (“Board”) to its current status as a court within the judicial branch. See Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 253, 336 (creating the Board); Revenue Act of 1926, ch. 27, §§ 1001(a), 1002, 42 Stat. 9, 109–10 (providing for direct appeals to the circuit courts); Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957 (creating the Tax Court); Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (shifting the institution from being an executive agency to the judicial branch). From the legislative history of the 1948 reorganization of the Judicial Code, Title 28, one learns that drafters had proposed to bring the Tax Court within the judicial branch in the late 1940s. A debate, however, emerged about whether accountants, admitted to practice before the Tax Court, would be eligible to represent disputants in the Tax Court, were it to be based in the judiciary. The proponents retreated. See Judicial Code and Judiciary: Hearing on H.R. 3214 Before a Subcomm. of the Senate Comm. on Judiciary, 80th Cong. 15–16 (1948) (statements of Chauncey W. Reed, congressman and Edward Devitt, congressman); id. at 167 (statement of W.A. Sutherland, American Bar Association).

16 See Schooner, supra note 1, at 721–36 (presenting an overview of the docket and data on the work that occupies the time of the court).

17 In 1901, life-tenured judges numbered 116; 70 served on the district courts. See History of Federal Judgeships, tbl.K, http://www.uscourts.gov/history/tablek.pdf (last visited Jan. 1, 2001) [hereinafter Authorized Judgeships]. This table listed one Article I judgeship as of that date. Id. Not included are United States commissioners, whose offices began with the First Judiciary Act. Commissioners, paid on a fee-for-service basis, undertook tasks sometimes seen to be “judicial in nature,” such as administering oaths and issuing warrants, but often described as more “ministerial” than judicial. The deployment of such persons built on English practice, in which justices of the peace—typically not lawyers—provided such assistance to the common-law courts.


appointed and serve. A few figures illuminate both the changes and the current composition of the federal trial bench. Consider first the growth in the numbers of life-tenured judges. As Figure 1 illustrates, in 1901, federal trial judgeships were exclusively life-tenured, and, at the beginning of the century, about seventy judges served. As of 2001, more than 660 positions had been authorized, evidencing the enormous growth in demand for federal adjudication. In addition to authorized judgeships, senior judges may also continue to work, resulting in a larger number of judicial officers than the number of authorized judgeships. For clarity, given that all these judges enjoy the constitutional attributes of life tenure and salary protections, I term them constitutional judges.

Figure 1. Authorized Article III Federal District Court Judgeships, Nationwide: Comparing 1901, 1950, 2001

As Figure 2 below shows, however, the first picture does not include all who work as judges in “Article III courts.” In 1968, Congress invented magistrate judges. The legislature upgraded the prior system of United States commissioners by creating a new statutory position to assist Article III judges in a variety of tasks, including the pretrial processes of civil litigation and criminal matters. As Figure 2 details, in the 1960s and 1970s, the job was conceived primarily as a part-time task. Some 450 slots were made available, with relatively few (about 80) full-time positions. Within thirty years, however, the numbers had flipped, and the name had changed. Today, some 470 people serve full-time in the position of magistrate judge. Just a smattering of part-time positions (under sixty) remain across the ninety-four districts. The 1990 change in title from “magistrate” to

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21 The data come from Authorized Judgeships, supra note 17.
"magistrate judge" aptly captures the array of tasks now delegated. Between 1968, when Congress created the position, and 1990, when Congress renamed it, the legislature expanded magistrate judges' mandate to permit them to make more decisions in more kinds of proceedings.25 Today, magistrate and bankruptcy judges have an array of responsibilities, including the power to issue certain kinds of contempt orders26 and to preside, with parties' consent, at jury trials.27

Figure 3 brings us to another set of non--Article III judges—bankruptcy judges—also working inside Article III courts. In the late 1970s, Congress crafted a position28 for bankruptcy judges that the Supreme Court held un-
constitutional because of too broad a delegation of jurisdiction to non-Article III decisionmakers. The 1984 revisions responded with a somewhat narrower portfolio and authorized 230 bankruptcy judgeships. By the end of the twentieth century, their number had also grown such that some 325 now sit in the federal district courts.

Figure 3. Authorized Bankruptcy Judgeships: 1984, 1991, 2001

For clarity, I refer to magistrate and bankruptcy judges as statutory judges because Congress has commissioned them to serve for fixed (and renewable) terms. Further, Congress has provided that life-tenured judges do the selection and the reappointment of both sets of judges. One structural distinction between the two sets of statutory judges is that bankruptcy judgeships, like Article III judgeships, require that Congress authorize each individual judgeship line. Magistrate judgeships, in contrast, can be created directly by the Judicial Conference of the United States, which has the statutory power to add positions subject to the availability of funds. The bottom line is that Article III courts are not so "Article III" anymore. Indeed, at the trial level and within the Article III branch of government, more judgeships lack life tenure than have it. As of 2001, some 800

31 See 28 U.S.C. §§ 151–152 (bankruptcy judges appointed for fourteen-year terms by appellate judges of that circuit); id. § 631(e) (magistrate judges appointed for eight-year terms by district judges).
32 Id. § 631(a).
judgeships are designated for bankruptcy and magistrate judges in contrast to about 665 authorized for district court judges.\textsuperscript{33} Figure 4 depicts that allocation. Further, disaggregation of the data is also appropriate. As of 2001, in six federal district courts, the number of magistrate judges was greater than the number of life-tenured judges.\textsuperscript{34} In another sixteen districts, their numbers were equal.\textsuperscript{35} In some districts, magistrate judges are “on the wheel,” assigned to civil litigants when a case is filed. In the District of Oregon, for example, litigants have an equal chance of being assigned a magistrate or a district judge.\textsuperscript{36}

\textbf{Figure 4. Authorized Trial-Level Federal Judgeships in Article III Courts, Nationwide: 2001}

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\textsuperscript{34} As of January 2001, those districts were the Middle and Southern Districts of Alabama; the Western District of New York; the Eastern and Southern Districts of California; and the Western District of Texas. Telephone Interview with Staff, Magistrates Division, Administrative Office of the United States Courts (Jan. 9, 2001).

\textsuperscript{35} \textit{Id.} Those districts were in New Mexico; Arizona; the Northern District of New York; the Virgin Islands; the Western District of North Carolina; the Middle District of Louisiana; the Northern District of Mississippi; the Western District of Michigan; the Eastern District of Arkansas; the Northern and Southern Districts of Iowa, North Dakota, Idaho, Montana, and Oregon; and the Southern District of Georgia.

\textsuperscript{36} See D. OR. R. 72.1 (“The District of Oregon includes magistrate judges in the random assignment of new civil cases filings.”). As noted, the District of Oregon is one with equal numbers of magistrate and of life-tenured trial judges. \textit{See supra}, note 35. Consent for trial, however, cannot be inferred by a litigant’s decision not to object to that assignment. \textit{See Hajek v. Burlington N. R.R. Co.}, 186 F.3d 1105, 1108 (9th Cir. 1999). But consent can be inferred from a
As is familiar to many government lawyers and judges, my discussion thus far has not accounted for a host of other federal courts, some of which used to be called “Article I” courts, some of which are called agencies, and all of which provide adjudication—a good deal of it against the United States government—to thousands of claimants. Figure 5 permits a summary of those numbers, which includes the Court of Federal Claims.

Figure 5. Authorized Federal Judgeships, Including Article I Courts and Administrative Law Judges, Nationwide: Fall 2001

A word of explanation of the numbers is in order. Included are only those judges serving on courts listed in a federal database under the heading of “Article I” courts37 and those administrative law judges who hold office pursuant to the Administrative Procedure Act (APA).38 As administrative lawyers know well, however, agencies often rely on other officials (with various titles such as administrative judge and hearing officer) who also adjudicate but who work without the structural protections of the APA. Estimates are that about 2,000 such positions exist.39 I have used the smaller set of only Article I and APA judges, but even that group—2,300 or so—towers over all

litigant’s participation in a trial after notice has been provided of an opportunity to demur. See Roell v. Withrow, 123 S. Ct. 1696, 1699 (2003).

37 See Authorized Judgeships, supra note 17.
the life-tenured federal judges, numbering in the 800s in both trial and appellate courts.\textsuperscript{40}

These charts help one realize that the current structure of the Court of Federal Claims—with non–Article III judges sitting underneath an appellate group of Article III judges—is no longer an unusual arrangement. Moreover, the 1982 legislation that generated both the current Court of Federal Claims and the Federal Circuit is likely to provide a template for the future. My assumption is that one hundred years from now, life tenured judges will at best comprise about one quarter of the federal judicial work force and will mostly do appellate work, reviewing decisions of non–Article III judges. In short, the rest of the landscape of the federal system is catching up with the Court of Federal Claims.

III. Legitimating the Ingenuity

What flows from an understanding of the changing composition of the federal trial courts? A first conclusion is the diminished coherence of attempting to contrast Article I courts with Article III courts. Indeed, given the amalgam of actors within the system, that vocabulary no longer serves us well. We can be clearer if we identify judges (rather than courts) as either Article III or non–Article III judges or use the terms constitutional and statutory judges.

The legality of the current system brings me to my second conclusion—that, during the twentieth century, a major shift in the understanding of Article III itself took place. Interpretations by the Supreme Court about the constitutional meaning of Article III are predicates to the system we have begun to take for granted.\textsuperscript{41} Recall that a 1932 Supreme Court decision (\textit{Crowell v. Benson})\textsuperscript{42} refused to permit the delegation of “jurisdictional facts” to administrative hearing officers in a dispute about damages owed when a longshoreman fell. Compare that with a 1985 Supreme Court decision (\textit{Thomas v. Union Carbide})\textsuperscript{43}, concluding that Congress could constitutionally give an arbitrator virtually final authority to decide a monetary dispute between private litigants seeking redress under a statutory scheme.

The blossoming of agency-based adjudication became clear in the 2002 term. In \textit{Federal Maritime Commission v. South Carolina State Ports Author-
ity, the Supreme Court held that states, able to assert sovereign immunity claims in federal courts, could do the same in agency-based adjudication. The five person majority reiterated what the United States Court of Appeals for the Fourth Circuit had said about the administrative adjudicatory processes of the Federal Maritime Commission, that the proceeding “walks, talks, and squawks very much like a lawsuit” and that its “placement within the Executive branch cannot blind us to the fact that the proceeding is truly an adjudication.” As the Fourth Circuit had put it: “Administrative judges are what the name says they are—judges.”

This shift in doctrine and in practices has been driven by deeply pragmatic instincts—the need to staff cases, to cope with growing dockets, to avoid confrontations with Congress, and to respond to litigants’ needs and rights. But the authorization of judgeships outside of Article III was not only responsive to such pressures. It was also inventive, aimed at reshaping and professionalizing judicial roles as the country itself was moving toward a nationalized economic structure. Further, the developments in this area of constitutional law were of a piece with other twentieth-century readings of the Constitution, also expanding the flexibility of national governance.

In sum, in the nineteenth century, the Court of Claims marked a frontier by anticipating structural developments of the twentieth century in terms of populating federal adjudication with non–life-tenured judges. The legality of those innovations depended on a significant change brought about by the interaction between the Supreme Court and Congress on the variations in forms of federal adjudication sustainable under Article III.

IV. Evaluating the Court of Federal Claims

Given these developments, Professor Schooner properly raises questions about the continued coherence of this court (and inferentially, about other specialty adjudicatory arrangements within the federal system). Whether having a Court of Federal Claims makes sense in 2002 thus depends on what metrics are used. Professors Schooner and Sisk rely on jurisdictional distinctiveness as a measure of the propriety of the Court of Federal Claims. Professor Schooner argues that, lacking any, the court should cease to exist, while Professor Sisk seeks to etch brighter jurisdictional divisions. Judges Smith and Plager offer another approach, focused on the social utility of the

45 Id. at 751 (quoting S.C. State Ports Auth. v. Fed. Maritime Comm’n., 243 F.3d 165, 174 (4th Cir. 2001)).
47 The pragmatism is sometimes explicit. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 540 (1962) (discussing the utility of understanding the United States Court of Customs and Patent Appeals as an Article III court because, with such denomination, other Article III judges could be designated to comprise a quorum).
48 See Resnik, Inventing the Federal District Courts, supra note 5, at 625–43, 647–49 (analyzing the factors contributing to these developments).
49 Schooner, supra note 1, at 717–21.
50 Sisk, supra note 4, at 606, 676–87, 691–93.
court as an institution specifically identified with challenges to government actions.\textsuperscript{51}

The disagreements among the four stem from their reliance on different metrics, ranging from data on workload and volume to the blurring of identities based on jurisdictional differences to the symbolic import of having a discrete court that marks the right of citizens to bring suits against their government. But the authors all share an assumption that this adjudicatory institution needs to be explained by reference to its unique charter, which is the question to which I turn below.

V. Formalism, Functionalism, and the Court of Federal Claims

At a formal level, the court is identified as focused on a singular remedy (money damages) and permits lawsuits against a particular defendant (the federal government). But happily, as the articles in this volume detail, the Court of Federal Claims is no longer unique in being a place from which to gain money damages from the federal government. So-called regular district courts may award such relief under the Federal Torts Claims Act (FTCA),\textsuperscript{52} through the “Little” Tucker Act,\textsuperscript{53} through other constitutional or statutory provisions,\textsuperscript{54} and by virtue of the Supreme Court’s interpretation in Bowen v. Massachusetts\textsuperscript{55} that under the APA, sometimes money can be a form of relief permitted.\textsuperscript{56} Moreover, agency boards (such as the Board of Contract Appeals) have a lively trade in such claims as well.\textsuperscript{57} And we could conceptualize recipients of federal benefits (such as social security claimants) as arguing that the government has breached its contractual obligations and money is due. Further, as Professor Seamon instructs, the Court of Federal Claims has some cases in which it too can provide forms of equitable relief—specifically in employment disputes.\textsuperscript{58}

What are we to make of this multiplicity of fora for and forms of relief against the government? For Professor Schooner, it calls the very existence of the Court of Federal Claims into question.\textsuperscript{59} For Professor Sisk, it prompts an interest in sharpening the special character of the Court of Federal Claims by eliminating competing venues that provide monetary relief based on con-

\textsuperscript{51} Plager, \textit{supra} note 3, at 796–97; Smith, \textit{supra} note 2, at 773–75.


\textsuperscript{53} Tucker Act, 28 U.S.C. § 1346(a)(2) (providing the district courts with concurrent jurisdiction over nontort claims seeking up to $10,000 in damages).


\textsuperscript{56} \textit{Id.} at 912.

\textsuperscript{57} \textit{See} Contract Disputes Act, 41 U.S.C. §§ 601–613 (2000); \textit{see also} Schooner, \textit{supra} note 1, at 753–67 (discussing the overlap and similarities between the Court of Federal Claims and the Board of Contract Appeals).


\textsuperscript{59} \textit{See} Schooner, \textit{supra} note 1, at 716, 772.
tract claims against the government.\textsuperscript{60} Such proposals rely on formal conceptions of distinctions between law and equity and between Article I and Article III courts.\textsuperscript{61} Were one to limit the availability of monetary relief in federal district courts either through statutory amendment or by case law interpretation, the Court of Federal Claims might conform more closely to its nineteenth-century roots.

But narrowing the range of remedies would render such institutions backward looking, divesting them of their contemporary functional character. Just as one reform of the twentieth century was to reread Article III so as permit the manufacture of scores of federal judges who lacked Article III attributes, another reform of the twentieth century was to collapse the distinctions between law and equity. The great procedural project of the twentieth century was the promulgation in 1938 of the Federal Rules of Civil Procedure.\textsuperscript{62} Those rules are premised on the merger of law and equity, on the easy joinder of claims and parties—all to enable a single lawsuit to dispose at one time with all claims arising from a common nucleus of facts. Proposals to return the Court of Federal Claims to a singular focus on monetary relief or to limit district courts to prevent them from providing monetary relief against the United States entail a retreat from the functionalism that permeates the Federal Rules.

As we enter the twenty-first century, however, that very effort—to recreate sharp divides between forms of relief—has been undertaken by a narrow majority of the Supreme Court.\textsuperscript{63} As Professor Sisk noted,\textsuperscript{64} in 2002 the Supreme Court interpreted a provision of the Employee Retirement Income Security Act (ERISA)\textsuperscript{65} that addressed the remedial powers of federal judges. The Court held that when Congress authorized federal judges to provide “appropriate equitable relief,” Congress had not also empowered federal judges to award monetary relief, classified as a remedy at law.\textsuperscript{66} Absent congressional specification of such power, federal judges lacked it. That decision—Great-West Life & Annuity Insurance Co. v. Knudson—was five to
four, with Justice Scalia writing for a majority that included the Chief Justice and Justices O'Connor, Kennedy, and Thomas. That majority has become familiar through cases addressing congressional powers under the Commerce Clause, the Eleventh Amendment, and the Fourteenth Amendment. Another ruling of relevance comes from a decision in 1999 (with the same configuration of justices) in which Justice Scalia, again writing for the majority, concluded that when a litigant is seeking monetary damages in federal court, federal judges lack the power to provide an interim injunction, freezing assets.

A quick summary is that this majority has narrowed the power of life-tenured federal judges to provide remedies. If litigants have statutory rights to equitable relief, Article III judges have been told that they lack power to provide legal relief. And if litigants seek legal relief, courts cannot provide interim equitable remedies. In the decisions, the majority argued that these doctrines reflect accurately the division between law and equity in 1789 and that such distinctions ought to govern federal judicial power today. Not all specialists on English or American equity share that view. Rather, they point to examples of broader exercises of common-law power by early federal judges as well as to the conception that equity is itself founded on flexibility.

Professor Sisk's approach bears some resemblance to the resurgence of formalism adopted by the current majority on the Supreme Court. To justify the existence of the Court of Federal Claims by shoring up a distinction between legal and equitable remedies and by attempting to harden a line between prospective and retrospective relief would impose high costs. The

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67 The majority held that, while restitution was a remedy at equity as well as at law, the form of restitution ordered was not equitable. *Id.* at 212–13. Justice Ginsburg, writing on behalf of herself and Justices Stevens, Souter, and Breyer, disagreed. *Id.* at 224. Justice Stevens also filed a separate dissent. *Id.* at 221.


70 For an analysis of both cases, see Resnik, *Constricting Remedies*, supra note 6, at 231–72.


72 See Eskridge, supra note 71, at 996–98; see also John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653–54 (2001) (approving of a narrow reading of judicial power but agreeing with Professor Eskridge that some early decisions of federal judges provide examples of broad remedial approaches).
movement toward functionalism during the twentieth century was predicated on the inefficiencies of attempting to circumscribe disputes by the remedy requested. Moreover, even as the Supreme Court itself has drawn lines between the grant of prospective and retrospective relief against governments, it has noted the difficulty of delineating between remedies that respond to future problems and those aimed at past injuries. Both forms of relief can have monetary impact on government treasuries, as Professor Vicki Jackson ably demonstrates in her discussion of the history of monetary claims against the federal government and particularly of the case of Kendall v. Stokes.

VI. Common Law and Constitutional Remedies Against Governments

Judges—who came together to celebrate the birth of the Court of Federal Claims—should be leery of constricting the remedial capacities of the federal courts. Specifically, the powers of both the Court of Federal Claims and of the Federal Circuit could be clipped under such an approach. The Supreme Court cases to which I alluded above proceed from the predicate that Article III courts lack the power to make federal common law. I—and others—think that view wrong as a matter of history, constitutional interpretation, and policy. Indeed, the work of the Court of Federal Claims provides an example of the desirability of the federal common-law process, here focused on developing the common law of federal contracts. Elaboration of the rights and obligations of government contracts often proceed without detailed statutes providing rules of decision. As theorists of common lawmaking explain, its utility lies in the ability to shape rules to build from direct experiences with a range of fact patterns.

Could the Court of Federal Claims continue to do common-law interpretation, were the Supreme Court to limit further that power in cases stemming

73 See, e.g., Edelman v. Jordan, 415 U.S. 651, 667 (1974) (imposing a line between permissible prospective and impermissible retrospective relief against states but noting that, as "in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte Young will not in many instances be that between day and night").


75 Kendall v. Stokes, 37 U.S. 524, 626 (1838) (affirming the judgment of the Circuit Court of the District of Columbia that ordered a writ of mandamus against a postmaster to compel performance that required the postmaster to credit relators under their contracts for the transportation of mail for the United States), discussed in Jackson, supra note 74.

76 See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, reprinted in A MATTER OF INTERPRETATION 13 (Amy Gutman ed. 1997) (arguing that, in "the federal courts . . . with a qualification so small it does not bear mentioning, there is no such thing as common law").


from other federal courts? Its work might be sheltered from general attacks on federal common lawmaking by identifying this pocket of law as a peculiar and unique federal interest,\(^7^9\) or by construing its enabling statutes as congressional grants of specific powers.\(^8^0\) But the underlying currents against remediation would likely inhibit the interpretive work of both the Court of Federal Claims and the Federal Circuit. The Supreme Court majority opposed to federal common lawmaking is also loath to permit judge-made implication or elaboration of remedies.\(^8^1\) Further, some commentators assume that non-life-tenured judges have less power than do life-tenured judges to craft relief.\(^8^2\)

The recent retrenchment in judicial remedial capacity puts the Court of Federal Claims at risk. Its powers could be similarly construed as limited. And like other courts, its dependence on congressional delineation of its powers is now greater. Were the Court of Federal Claims to make rulings perceived to be hostile to governmental interests, it could spark a negative reaction from Congress. Yet the very purpose of the Court of Federal Claims is to enable those arguing harm from the government to obtain redress. Increasing courts dependence on the government that they judge undercuts the political and symbolic import of the ability to call government to account. Further, such constraints reverse the historical trend giving the Court of Federal Claims greater autonomy to enforce judgments against the government.

Both Professor Schooner and Professor Sisk erroneously proceed from the assumption that the existence of the Court must be justified by a peculiar mandate. The history of the fabrication of courts in the United States is not one of coherent institutional design but one of politics. As Professor Daniel Meador detailed in his oral account of the 1982 legislation that created the current Court of Federal Claims, the Department of Justice had considered an institution comprised of Article III trial judges but, to avoid opposition from the Judicial Conference of the United States, relied on non-life-tenured judges instead.\(^8^3\) As Judge Bruggink noted, the current contours of the Federal Circuit also represent a compromise, resulting in a court with a special

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\(^7^9\) See Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (creating, in an opinion by Justice Scalia, the federal common-law rule immunizing government contractors in certain cases).


focus on patents as well as a general mandate that reduced opposition from constituencies concerned about overspecialization.\textsuperscript{84}

Rather than bemoan the lack of distinctiveness of the Court of Federal Claims, one ought to be glad that the peculiarities that marked this court's existence have diminished. While once it was unusual to obtain relief against the United States, today—happily—it is less unusual. The enactment of the FTCA and the APA are proud additions to the legislation providing for claims in contract against the United States. Likewise, the development of entitlement theory endowing recipients of federal benefits with rights against the United States is also to be celebrated.\textsuperscript{85}

The capacity of individuals to obtain a wide range of remedies against governments under different jurisdictional provisions and in different institutions is a positive step in bringing to fruition Abraham Lincoln's promise that adorns the Court of Federal Claims: "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."\textsuperscript{86}

Thus, interpretations such as \textit{Bowen v. Massachusetts}, permitting money relief in some instances under the APA,\textsuperscript{87} might be used as examples of the need for the Court of Federal Claims to seek revision of its own charter to include more authority to provide appropriate equitable remedies. Further, perhaps through rulemaking or statutes, other innovations are in order—to enable the joinder of parties (such as subcontractors), to permit intervention and class actions—all to enable the Court of Federal Claims to function as a modern court, focused on parties' needs for remedies.\textsuperscript{88} Rather than call for the demise of the Court of Federal Claims, one could support it as one of dozens of particular litigating schemes, crafted in an effort to capture a specific set of problems—akin to administrative adjudication in the Social Security Administration, the Tax Court, the Veterans Claims Court, and the like.

Moreover, one might worry about centralizing too much adjudication related to the government in a single forum and see, in the current overlap of jurisdictional mandates detailed by Professor Schooner, some protection against capture by such a powerful litigant as the United States. As Professor Jackson has explained,\textsuperscript{89} the activity of making governments responsible to

\textsuperscript{84} See Eric G. Bruggink, \textit{supra} note 11, at 879 n.2 (commenting that the linkage between the Court of Federal Claims and the Federal Circuit came, in part, from the "serendipity" that both courts were housed in the same facility and in part to lessen the "mono-thematic" aspect of the Federal Circuit, created to centralize patent appeals).


\textsuperscript{86} \textit{Cong. Globe}, 37th Cong., 2d Sess. 2 (1861). That quote is engraved in the lobby of the courthouse of the Court of Federal Claims, and it adorned the brochure for the Conference celebrating the twentieth anniversary of the court.


\textsuperscript{88} See Madsen & Smith, \textit{supra} note 7, at 15-22 (suggesting revisions to provide litigants with the ability to join multiple parties in the Court of Federal Claims).

\textsuperscript{89} Jackson, \textit{supra} note 74.
their citizenry puts judges at risk of incurring the displeasure of either legisla-
tures, the Executive, or specific constituencies. Spreading that work across
several courts and agencies may deflect such anger and buffer judges from
protests aimed at undermining their authority. The Court of Federal Claims
would then become normalized as part of a variegated landscape dotted by a
variety of adjudicatory configurations.

But appreciation for the utility of redundant jurisdictional grants need
not result in an assumption that the current mix is optimal. One question—
unanswered empirically by the papers presented at the Conference—relates
to whether that redundancy burdens or creates systematic advantages for any
classes of litigants. Another is the sufficiency of the authority of the institu-
tions providing redress against the government. As both Judge Smith and
Judge Plager have explained, the Court of Federal Claims stands as a symbol
that the United States can be called to account. But, as we have learned from
the discussion of the remedies provided in some European countries, the
reality may still fall short of providing full redress. Several countries impose
more obligations on their governments than does the United States. Further,
in the United States, we have used life tenure to mark judges of special im-
port, but Court of Federal Claims judges do not have that status. Thus, the
twentieth anniversary of the Court of Federal Claims ought to be the occa-
sion on which to address the need for broader jurisdictional mandates and
greater judicial independence as means to fulfill the promise made in the
nineteenth century to adjudicate claims against the government.

To conclude, the puzzling aspects of the Court of Federal Claims should
be assessed from the vantage point of federal adjudication more generally.
First, the Court was once a major innovation but is no longer. It foreshad-
owed a tremendous growth in adjudicatory possibilities through the
fabrication of many federal courts, today called courts or agencies, and
staffed by constitutional and statutory judges. Second, as Professor Vicki
Jackson has detailed, the creation of the Court of Federal Claims was consist-
tent with the promise of Marbury v. Madison to provide legal redress when
government wronged individuals. That commitment to the rule of law has
prompted Congress to enact other statutory mechanisms (such as the APA

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90 Several years ago, Robert Cover articulated the many benefits of jurisdictional redun-
dancy, then focused on the replication and overlap between state and federal court systems. See
Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22
91 See Madsen & Smith, supra note 7, at 825, 832–35 (discussing the need for a “level
playing field” and raising concerns about the burdens on contractors of disagreeing with the
government).
92 See James E. Pfander, Government Accountability in Europe: A Comparative Assess-
ment, 35 GEO. WASH. INT’L L. REV. 611 (2003) (comparing the failure of the common law in the
United States to respond, as does the French system, to enforce government accountability and
provide individual awards of damages for wrongful acts by government); Rolf Stürner, Suing the
Sovereign in Europe and Germany, 35 GEO. WASH. INT’L L. REV. 663 (2003) (discussing the
availability of making claims against governments in a variety of fora rather than the concentra-
tion in a single court).
93 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
94 Jackson, supra note 74.
and the FTCA) and to locate jurisdiction for claims against the government in both courts and agencies.

Third, and finally, one can agree with Professor Schooner that the court cannot easily be justified by reference to economies of scale or forms of expertise and also agree with Judges Smith and Plager that the court might nevertheless be an institution desirable to maintain—which is to accept the idea that, for the court "to make sense" does not require it to be peculiar. But a comfort with the propriety of the ongoing existence of the court ought not to result in complacency that its remedial regime suffices. Revisiting the mandates of the many institutions that hear claims against government is in order, with the goal of enlarging, rather than narrowing, their abilities to provide justice.
Article III and Expanding the Power of the United States Court of Federal Claims

Craig A. Stern*

The Fifteenth Judicial Conference of the United States Court of Federal Claims ("Court of Federal Claims") heard several proposals for expanding the power of the court.1 These proposals raise two questions: what constitutional limits on the power of this court exist because it is an Article I court rather than an Article III court, and what advantages this organization under Article I gives the court.

In 1855, Congress created the United States Court of Claims ("Court of Claims") to consider debts of the United States.2 Congress created the Court of Claims pursuant to Article I, not Article III.3 The current descendant of the Court of Claims is the Court of Federal Claims. Congress also created this court to be an Article I court.4 This court, however, does more than consider debts of the United States. It also has authority to order nonmonetary relief in some cases.5 The authority to grant nonmonetary relief makes the court an attractive forum for claims that would otherwise be brought elsewhere, notwithstanding the fact that those cases seek money from the federal treasury—the very sort of relief that the Court of Federal Claims exists to provide. For example, claims by federal or military personnel for back pay may be brought along with claims for reinstatement or correction of records.6 Without the power to award relief for these latter claims, the court would be a less hospitable forum. For cases in which a part must be filed in this court or nowhere, allowing this court also to grant nonmonetary relief prevents the expense and waste for both the claimant and the federal government that forcing the claimant to split its case would cause.

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2 Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612.
4 See 28 U.S.C. § 171(a) (2000). Notwithstanding this designation and the fifteen-year term for judges of the court, id. § 172(a), Congress has granted to judges of the court the option to adopt extended senior status with no diminution in pay, id. § 178. Judges are removable "only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability." Id. § 176(a).
5 See, e.g., id. §§ 1491(a)(2), (b)(2).
As an Article I court, the Court of Federal Claims is subject to constraints that Article III courts are not subject to but free of other constraints that do govern Article III courts. According to the Constitution, the court may not exercise "the judicial Power of the United States," because that power is vested solely in the Article III courts—courts the judges of which "hold their Offices during good Behaviour" and whose "Compensation... shall not be diminished during their Continuance in Office."\(^7\) It may decide questions of law, however, that have nothing to do with "cases" or "controversies."\(^8\)

The Article I status of the court well suits its chief role. Ordering that money from the federal treasury be paid to claimants lies squarely within the "public rights" category for Article I courts.\(^9\) Were they to exercise "the judicial Power of the United States," they would have to be courts vested with such power, as only Article III courts may be.\(^10\) But if they do not exercise "the judicial Power of the United States," they may be established by Congress with reference not to Article III, but only to the Article I powers of Congress.\(^11\)

Every debtor must decide what claims to pay. Doing so is not an exercise of judicial power, even when the debtor takes account of the law and applies it to the claim. Only when a claim is lodged with a tribunal at some distance from the debtor does deciding whether the claim should be honored entail an exercise of the judicial power.\(^12\) The Court of Federal Claims, though a respected court and operationally independent of both the executive and the legislative branches, is strictly, as a constitutional matter, acting for the federal government in determining what claims are to be paid.\(^13\) According to the public-rights theory, although the court must do this justly and fairly with solicitude for claims against the federal government, it, nonetheless, is acting for the federal government.

Inasmuch as the court is an Article I court of the public-rights stripe, the public-rights theory also would advocate that the Court of Federal Claims not hear claims raising private rights—rights not entailing claims by or against the federal government itself. Hearing such claims would require the court to exercise judicial power rather than to act as an organ of the federal government by determining what claims against it ought to be honored. Conversely, however, the court is authorized to issue advisory opinions in discharging its duty under its congressional reference power,\(^14\) a duty forbidden to Article III courts.\(^15\)

\(^7\) U.S. CONST. art. III, § 1.
\(^8\) See id. § 2.
\(^10\) U.S. CONST. art. III, § 1.
\(^11\) See Stern, supra note 9, at 1060–66.
\(^12\) See id. at 1052–53.
\(^13\) Id. at 1063.
If the paradigm public-rights case to be decided by the Court of Federal Claims is a claim for money owed by the federal government, what about related claims for injunctive relief or related claims among private parties? Would deciding such related claims require that the Court of Federal Claims be an Article III instead of an Article I court? To answer these questions according to the current doctrine of the United States Supreme Court entails a two-part inquiry. The Court has opined that the security Article III affords to judges serves two ends. First, it secures fairness to litigants because secure judges are less susceptible to improper influence. They may decide according to the law, aloof from the temptation to curry favor. According to the Court, a litigant may waive this protection of fairness. Seeking relief in the Court of Federal Claims, or perhaps participating in a federal contracting program, may work such a waiver.

The second end of Article III judicial security identified by the Court is to preserve the structural integrity of the federal courts. Article III establishes the judicial branch, or the federal courts, as a coequal branch, in part as a check and balance to the legislative and executive branches. Secure judges fulfill this role better than dependent judges. Protection of the judicial branch is not something litigants may waive. For this end, instead, the Court has embraced a balancing test, weighing the sacrifice of Article III protections against the achievement of Article I goals. The more the work of an Article I court resembles that of an Article III court, the greater the incursion into Article III protections. The more the rights determined by an Article I court owe their existence to Congress, the greater the possible advancement of Article I goals. So, the less an Article I court possesses the “essential attributes” of an Article III court, and the more the matters adjudicated resemble matters of public rights, the likelier the Court will hold that the tribunal need not be an Article III court.

One might think that vesting an Article I court with the power to grant injunctive relief against the federal government compromises Article III values and provides an Article I court with an element of the “essential attributes” of an Article III court. Two aspects of injunctive relief might support

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16 Injunctive relief is already available from the Court of Federal Claims. See supra note 6. On the other hand, the court’s lack of jurisdiction over disputes between private parties is a well-noted absence. See Steven L. Schooner, The Future: Scrutinizing the Empirical Case for the Court of Federal Claims, 71 GEO. WASH. L. REV. 714, 752 (2003).


18 The Schor Court held, in part, that a party waived his personal right to having a state law counterclaim against him heard by an Article III court, instead of by the Commodity Futures Trading Commission (“CFTC”), by demanding that his opponent proceed against him there instead of in federal court and, apart from this express waiver, simply by seeking relief against his opponent before the CFTC, knowing that it would exercise jurisdiction over the counterclaim. Id. at 848-50. Seeking relief in the Court of Federal Claims would seem very much like seeking relief in the CFTC. But furthermore, the court might find that contracting with the United States under a regime that adjudicates contract disputes before the Court of Federal Claims suffices to waive personal Article III protection.

19 Id. at 850-51.

20 See id. at 851.

21 See id.

this view. The first aspect is the nature of injunctive relief. Injunctions, enforced by the contempt power, in some ways represent the pinnacle of the judicial power. Second, the questions of legality, and perhaps even constitutionality, that would serve as the predicate for granting injunctive relief also may appear to call for an exercise of an “essential attribute” of Article III judicial authority.

This analysis does not necessarily predict that the Court would hold that a federal court granting injunctions must be an Article III court. To decide this issue, the Court balances the compromise of Article III protections against the benefit that permitting injunctive power brings to Article I goals.

If Article I courts were permitted to decide claims among private parties in the context of a public-rights claim against the federal government, this permission would present a question of “essential attributes” in pressing the limits of the category of “public rights.” The Commodity Futures Trading Commission v. Schor Court adumbrates the approach of the Supreme Court to this question. In Schor, the Commodity Futures Trading Commission (“CFTC”) conducted reparation proceedings between private parties to vindicate violations of federal law governing the trading of commodity futures. The proceedings were conducted without the benefit of judges with Article III security. In addition to reparations, counterclaims founded upon state law also entered into the proceedings. The Court rejected an Article III challenge to the CFTC’s authority to decide the state law counterclaims. In the context of the comprehensive federal regulation of futures trading, the CFTC decision of such counterclaims made so small an incursion into Article III protections that, again, balanced against its advancement of Article I goals, the scheme caused no breach of Article III. Schor may suggest that lodging third-party jurisdiction with the Court of Federal Claims need not require transforming the tribunal into an Article III court to pass muster before the Supreme Court. It may suggest that the Court would hold that the comprehensive federal regulation of the matters typically brought before the Court of Federal Claims, along with the benefits of having those matters comprehensively litigated before such a court, advances Article I goals more than the litigation of related claims among the private parties before the Court compromises Article III protections.

In striking its balances, the Court should consult the principles that gave rise to the public-rights doctrine. The public-rights doctrine originates from a dispute over a title passed under a distress warrant issued by an official of the Treasury department to effect the collection of tax from a defaulting tax collector. The Supreme Court held that there was no need under Article

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23 Schor, 478 U.S. at 836-38.
24 Id. at 837.
25 Id. at 838.
26 Id. at 847-59.
27 The executive branch must determine public-rights claims. Even apart from the waiver of sovereign immunity, the government must resolve who owes it what amount in order to make claims against other entities.
III or the Due Process Clause for an Article III court to have issued the warrant. Though Congress could have outlawed such self-help and placed the issuance of a distress warrant within the exclusive province of an Article III court, the Constitution did not require it to do so. Like any other party, the federal government may determine it is owed a debt and may exercise appropriate self help. Should that debt be brought before a neutral federal tribunal, then Article III would require the involvement of Article III judges.

The questions regarding the expansion of the jurisdiction of the Court of Federal Claims implicate claims brought against, not by, the federal government. The principles supporting the public-rights doctrine are the same, however, whether the claims are brought by or against the government. Once it waives sovereign immunity, a government must determine what claims it will pay and what claims it will not pay. Like any other debtor, it must decide when to cut the check. To do so, the government presumably will act through the executive branch, and charge that branch with paying debts as prescribed by law. Only when an asserted debt becomes a claim brought before a neutral tribunal does Article III come into play with its requirement for judges with Article III security.

Again, the Court of Federal Claims is an Article I court, and, therefore, its judges lack Article III security. Functionally and analytically, it acts for the executive branch. However unbiased, fair-minded, and independent it is, the court cannot exercise the “judicial Power of the United States.” Instead, it decides for the government what claims it should pay. For a claim in that court to become the subject of the “judicial Power of the United States,” an appeal must be lodged with the United States Court of Appeals for the Federal Circuit, an Article III tribunal the judges of which do enjoy the protections assured by that Article. Notwithstanding, the Court of Federal Claims already has authority to grant injunctive relief. And why not? Congress, in innumerable statutes, has authorized executive officers to decide for or against government action. If the government must decide what debts to pay, it surely must decide, more broadly, what it will and will not do. Like the former decision, the latter does not require an exercise of “the judicial Power of the United States” but rather an exercise of executive power. Unless some other constitutional constraint comes into play, nothing prevents Congress from authorizing an Article I court that determines public-rights questions to decide claims that the government act in accordance with the law in ways other than by simply paying its just debts.

The question of third-party claims is more difficult to understand as an aspect of the traditional public-rights doctrine. It, nevertheless, can be so understood. To order the payment of any claim brought against the federal government, the Court of Federal Claims must determine both that the claim

31 See Bowen, 487 U.S. at 891–901.
is sound and that the claim is due to this particular claimant. If certain disputes among nongovernmental parties may be conceptualized as rival claims to shares of an overall claim made against the government itself, for the court to decide among these parties how much of the claim is owed to each of them would appear to fall equally within the public-rights doctrine. Likewise, if a third party were brought before the court to answer for a claim brought by the federal government, the public-rights doctrine would support the authority of an Article I court to decide the claims.

The Schor balancing test demands that the Court answer difficult questions when testing such arrangements as expanding the power of the Court of Federal Claims. These include questions regarding how much Article I goals are advanced, how much Article III protections are compromised, and whether the former measure or the latter carries more weight. Unless the Court is prepared to question its longstanding precedent based on the public-rights doctrine, those precedents may be taken for markers of regimes that do not upset the balance. Similarly, regimes analogous to, or otherwise in accord with, public-rights doctrine precedents presumably do not upset the balance. If so, authorizing the Court of Federal Claims to grant further injunctive remedies and to determine some third-party disputes does not require that it be reconstituted as an Article III court.

Cf. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (commenting on one of the Court’s Commerce Clause tests that “[t]his process is ordinarily called ‘balancing,’ . . . but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”).