Fairholme Funds, et al
Plaintiffs-Appellees

v. United States
Defendant-Appellee

v. Michael Sammons
Movant-Appellant

Federal Circuit Case No. 17-1015

Court of Federal Claims No. 13-465C

APPELLANT'S INFORMAL REPLY BRIEF
to Appellee Brief of Fairholme Funds, et al

After Michael Sammons field his Appellant's Brief, and the United States filed its Appellee Brief, the other appellee, Fairholme Funds, decided to file its own brief. The brief adds little to the briefs already filed. The brief does not explain, assuming the lower court erred as a matter of law on the Article III issue, how a decision premised upon such an error of law is not, by definition, an abuse of discretion. Nor does the brief explain how a motion to intervene, limited to a single question of law on undisputed facts and filed ***before*** an answer has even been filed below, could possibly be "untimely."

What the brief does do is misstate the history of the courts deciding constitutional takings cases. The best summary can be found in the attached law review article by Michael P. Goodman, J.D., Ph.D., "Taking Back Takings Claims: Why Congress Giving Just Compensation

Jurisdiction to the Court of Federal Claims is Unconstitutional", 60 Vill. L. Rev. 83 (2015) at pages 140-151. Attached is a courtesy copy of that article.

Michael Sammons, pro se
15706 Seekers St.
San Antonio, TX 78255
michaelsammons@yahoo.com
1-210-858-6199

Certificate of Service

I certify that a true copy of this Appellant's Reply Brief was delivered to all parties of record in this case.

Michael Sammons

TAKING BACK TAKINGS CLAIMS: WHY CONGRESS GIVING JUST COMPENSATION JURISDICTION TO THE COURT OF FEDERAL CLAIMS IS UNCONSTITUTIONAL

MICHAEL P. GOODMAN, PH.D.*

I. INTRODUCTION

THE federal government's response to the global financial crisis of 2008 has led to a series of some of the largest dollar-value lawsuits ever filed against the federal government. One of those cases involves Fannie Mae and Freddie Mac.[1] Both agencies faced a loss of investor confidence during the crisis that led to their placement into conservatorship and ultimately to the U.S. Treasury investing more than $100 billion in a new class of stock that guaranteed the government preferred status if they again became profitable.[2] Another case involves General Motors and the Chrysler Corporation, which the government assisted by acquiring a 60.8% ownership interest in each. The government also, allegedly, required them to terminate agreements with franchisees as a condition of the car manufacturers receiving financial assistance.[3] Perhaps the most notable of the bailout cases involves the American International Group, once a member of the Dow Jones Industrial Average, better known by its ticker symbol, AIG. In the midst of the crisis, AIG experienced a 95% plummet of its share price and was experiencing a liquidity crunch that threatened, as it just had for Lehman Brothers, to collapse the company. Then chairman of the Federal Reserve, Ben Bernanke, declared that AIG's bankruptcy could have "triggered a 1930's-style global financial and economic meltdown . . . ."[4] The United States Government bailed out AIG; in exchange for financial assistance, the United States became a controlling lender of the company and acquired 80% of its stock.[5] Not one of these cases has yet been resolved.

* Frank H. Marks Visiting Associate Professor of Law, George Washington University School of Law. University of Mary Washington, B.A; Duke Law School, J.D.; Emory University, M.A./Ph.D. I would like to thank Robert Brauneis, Gregory Dolin, Kristina Caggiano Kelly, and the members of the University of Maryland's junior faculty works in progress workshop for their comments to various drafts of this paper, to thank John Whealan for his support, and to thank my wife Melody for everything.

1. *See* Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718 (2014).

2. *See id.* at 720. Pursuant to authority authorized by the Housing and Economic Recovery Act of 2008, the Federal Housing Finance Administration placed the agencies in the conservatorship. *See id.*; *see also* Complaint at ¶¶ 3–7, Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718 (2014) (No. 13-465C), 2013 WL 3948512 (noting placement into conservatorship).

3. *See* A & D Auto Sales, Inc. v. United States, 748 F.3d 1142 (Fed. Cir. 2014); Colonial Chevrolet Co., Inc. v. United States, 103 Fed. Cl. 570 (2012); Alley's of Kingsport, Inc. v. United States, 103 Fed. Cl. 449 (2012).

4. Amended Verified Class Action Complaint at ¶ 58, Starr Int'l Co. v. United States, 106 Fed. Cl. 50 (2012) (No. 11-CV-00779(TCW)), 2012 WL 6789084 [hereinafter Starr Complaint] (quoting Federal Reserve Chairman, Ben Bernanke) (internal quotation marks omitted).

5. *See Starr*, 106 Fed. Cl. at 57.

As many Americans expressed frustration with the bailouts, Congress got involved. Congress held numerous hearings during which Treasury Secretary Timothy Geithner presented the executive branch's account of the crisis.[6] While the Treasury and Congress defended the bailouts on the basis that the taxpayers got something in return for assisting those institutions, it was the creditors of Fannie and Freddie, the dealerships who lost their franchises, and the shareholders of AIG who each felt they had lost more than they gained. Accordingly, each group filed a complaint alleging that the government owes them compensation for having taken their property.[7] Each of the bailout cases just discussed is based upon the Takings Clause and seeks "just compensation" pursuant to that constitutional provision.[8] The Takings Clause states: "nor shall private property be taken for public use without just compensation."[9]

Despite presenting constitutional questions, those complaints could not be filed in the ninety-four federal district courts within the independent federal judiciary. Instead, the citizens were forced to file those claims in the United States Court of Federal Claims, a unique court created by and subject to the very governmental entities responsible for the bailouts.

The thesis of this Article is that while Congress may be able to relegate certain types of claims to a non-Article III court, such as the Court of Federal Claims, relegating takings claims to that entity is unconstitutional. This Article demonstrates why claims based upon that provision must be brought before Article III judges.

The next section of this Article introduces the Court of Federal Claims and explores how that court's consideration of takings claims violates the values underlying Article III of the Constitution. The Article explores the various rationales the Court has used to justify the use of non-Article III courts and demonstrates why none of the rationales justify Congress' current use of such a court for takings cases.[10] There is no more essential time to evaluate the scheme Congress has established for considering large takings claims, as the Court of Federal Claims is now considering many claims, like the bailout cases, involving billions of dollars and great social import.

The third section of this Article explores how the current unconstitutional situation came to pass. The Supreme Court has never considered whether the

6. *See AIG Bailout Debate Must Focus on Future*, BUSINESS INSURANCE (Jan. 31, 2010, 6:00 AM), http://www.businessinsurance.com/article/20100131/ISSUE0202/301319988.

7. *See, e.g.*, Starr Complaint, *supra* note 4, at ¶¶ 10–12.

8. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999) ("When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution.").

9. U.S. CONST. amend. V, cl. 5.

10. This Article generally describes these entities as "Article I" courts, using that term interchangeably with "legislative" or "non-Article III," although these courts are not always created pursuant to Congress' Article I power, and are, at times, created pursuant to a specific provision found elsewhere, such as in *Canter*, which permitted the creation of territorial courts pursuant to Article IV, § 3, cl. 2. *See* Am. Ins. Co. v. Canter, 26 U.S. 511, 546 (1828).

Court of Federal Claims' adjudication of takings claims is consistent with Article III of the Constitution. While the Court previously approved the Court of Federal Claims' predecessor, the Court of Claims, considering takings claims,[11] that entity was an Article III court, not a legislative court.[12] In addition, whereas the Supreme Court once held that sovereign immunity principles justified Congress dealing with claims against the United States using a legislative court,[13] the Court's takings jurisprudence has established that sovereign immunity is inapplicable to claims brought under the "self-executing" Takings Clause.[14] Indeed, Congress appears to have relegated takings claims to a non-Article III court as an inadvertent byproduct of other decisions it made when creating the Federal Circuit, and that effect is inconsistent with Congress' expressed intent at the time.

The fourth section of the Article briefly explores some possible solutions to resolve this unconstitutional situation, including by granting takings case jurisdiction only to federal district courts. Those courts, staffed by Article III judges, are currently entrusted to protect each of the guarantees provided for in the Bill of Rights. Takings claims should receive no less protection.

II. WHY TAKINGS CLAIMS BELONG IN ARTICLE III COURTS

A. *The Court of Federal Claims, Claims for Just Compensation, and Article III Values*

The Court of Federal Claims operates much like a federal district court, but it deals exclusively with claims against the United States.[15] Although the court has the authority to adopt its own rules of procedure,[16] in practice it has adopted many of the rules applicable in the federal district courts, and Congress has required some of those rules to be identical.[17] Like district court decisions, the decisions of the Court of Federal Claims are final judgments.[18]

11. *See* 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.").

12. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 558 (1962).

13. *See* Williams v. United States, 289 U.S. 553, 580–81 (1933) (holding sovereign immunity principles justify Congress dealing with claims against United States using legislative courts).

14. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., Cal., 482 U.S. 304, 316 n.9 (1987).

15. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.); *see also* 28 U.S.C. § 1491 (2012) (the "Tucker Act") (establishing Court of Federal Claims' jurisdiction, which is exclusive for claims over $10,000); *id.* § 1346(a)(2) (the "Little Tucker Act") (establishing concurrent jurisdiction in district courts and Court of Federal Claims for claims not exceeding $10,000).

16. *See* 28 U.S.C. § 2503(b)–(c).

17. *See, e.g.*, *id.* § 460 (making applicable to Court of Federal Claims provisions for federal courts and judges described in 28 U.S.C. §§ 452–59, 462); Anderson v. United States, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003) (recognizing that Court of Federal Claims applies Article III's standing requirements).

18. *See* 28 U.S.C. § 1491(a).

The Court of Federal Claims is not entirely like the federal district courts, however. It is a specialized court with the unique responsibility, described in the Tucker Act:

> [T]o render judgment upon any claim against the United States 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 unliquidated damages in cases not sounding in tort.[19]

Beyond that specialized jurisdictional grant, there are important differences between the Court of Federal Claims and the federal district courts. One major difference is that there is no possibility of a jury hearing citizens' complaints in the Court of Federal Claims. Rather, the judges on the court only conduct bench trials.[20] Moreover, Congress did not create the Court of Federal Claims as an independent "constitutional" court pursuant to Article III of the Constitution. Instead, Congress explicitly provided, when creating it, that the new Court of Federal Claims is a "legislative court," created pursuant to Article I.[21] The distinction is one with a profound difference.

Article III of the Constitution, which establishes an independent judiciary, is one of the three pillars of the triumvirate federal government, based upon the concept of separation of powers. As the Supreme Court recently noted, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch."[22] The Court stressed that:

> [T]he basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary

19. *Id.* In the fiscal year ending in September 2013, the Court of Federal Claims issued decisions in 586 cases. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G-2A (2013), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/G02ASep13.pdf. Nearly 30% of those cases involved contract disputes with the government or protests of government contracts; approximately 25% involved claims related to federal employee pay; more than 15% involved tax, copyright, patent claims, or cases filed by Native American tribes; and 20% fell into other categories. *See id.* The remaining 10% or so, 64 decisions, involved takings cases, such as the bailout cases, which fall within the Court of Federal Claims' Tucker Act jurisdiction because they are "founded upon the Constitution." *See id.* The court also decided 1,030 vaccine cases, which are not included in these statistics because of the different way in which they are handled. *See id.*

20. *See* 28 U.S.C. § 174.

21. *Id.* § 171(a).

22. Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion)) (internal quotation marks omitted).

the power to override a Presidential veto.[23]

The entire purpose of Article III was to truly separate the judiciary from the other branches when we fear those other branches' influence:

> In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[] truly distinct from both the legislature and the executive." As Hamilton put it, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and executive powers."[24]

To ensure that separation, and the independence of the courts, Article III creates two particular requirements, both of which came out of the Declaration of Independence's complaints against King George, who had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[25] As incorporated into the Constitution, the requirements state: "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[26] The Good Behaviour Clause provides that judges who hear lawsuits in the Federal Judiciary serve lifetime appointments with no term limits.[27] The Court has held that the Clause guarantees that judges can only be removed through impeachment.[28] Of like importance, the Compensation Clause provides that judges can never have their salaries cut by

23. *Id.* (alterations in original) (quoting United States v. Nixon, 418 U.S. 683, 704 (1974)) (internal quotation marks omitted); *see also* Gordon v. United States, 117 U.S. 697, 701 (1864) ("[T]o insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.").

24. *Stern*, 131 S. Ct. at 2608 (citation omitted) (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also Gordon*, 117 U.S. at 706 ("In this distinct and separate existence (says Blackstone) of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated from the legislative and executive power." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *268, *269) (internal quotation marks omitted)).

25. THE DECLARATION OF INDEPENDENCE, para. 10 (U.S. 1776).

26. U.S. CONST. art. III, § 1, cl. 2; *see also* Freytag v. Comm'r, 501 U.S. 868, 907 (1991) ("Like the President, the Judicial Branch was separated from Congress not merely by a paper assignment of functions, but by endowment with the means to resist encroachment—foremost among which, of course, are life tenure (during 'good behavior') and permanent salary. These structural accoutrements not only assure the fearless adjudication of cases and controversies, they also render the Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence." (citations omitted)).

27. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also Stern*, 131 S. Ct. at 2609 (describing requirement that federal judges be permitted to serve "without term limits").

28. *See* United States *ex. rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955). *But see* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that federal judges may be removed by methods other than impeachment).

those who control the other branches of government. As the Federalist states:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*.[29]

The Supreme Court has described the purpose of the prohibition upon reduction in salary by stating:

> [T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.[30]

In short, the Compensation Clause guarantees that a judge's salary can never be reduced.[31]

There are sixteen active judges who serve on the Court of Federal Claims.[32] Those judges must live within fifty miles of the District of Columbia,[33] but they may conduct proceedings anywhere within the United States.[34] Because of Congress' decision to establish that body as a legislative court, the Court of Federal Claims judges, unlike their federal district court brethren who serve lifetime appointments, serve only for fifteen years.[35] Article III federal judges can only be removed by impeachment, which necessarily involves the legislative branch removing that judge.[36] Judges of the Court of Federal Claims, however, can be removed by a majority vote of the judges of the appellate court that reviews the Court of Federal Claims' decisions: the United States Court of Appeals for the Federal Circuit.[37] The chief judge of the Court of Federal Claims, selected from amongst its members, serves, quite literally, at the pleasure of the President, who can replace that

29. THE FEDERALIST NO. 79, at 1 (Alexander Hamilton) (Mclean ed., 1788).

30. Evans v. Gore, 253 U.S. 245, 253 (1920), *overruled in part by* United States v. Hatter, 532 U.S. 557, 567 (2001) (partially overruling *Evans*, but nonetheless "reaffirming" *Evans*'s explanation of importance of Compensation Clause).

31. *See* United States v. Will, 449 U.S. 200, 218–21 (1980).

32. 28 U.S.C. §§ 171(a), 172 (2012).

33. *Id.* § 175.

34. *Id.* § 173.

35. *See id.* § 171(a) ("The court is declared to be a court established under article I of the Constitution of the United States."); *id.* § 172(a) ("Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years.").

36. *See* Nixon v. United States, 506 U.S. 224, 235–38 (1993).

37. *See* 28 U.S.C. § 176. Retired members of the Court of Federal Claims are authorized to continue to hear cases as "senior" judges; there are, as of this writing, seven senior judges serving on the court. *See Judges—Biographies*, U.S. CT. OF FED. CLAIMS, http://www.uscfc.uscourts.gov/judges-biographies (last visited Nov. 4, 2014).

judge for any reason whatsoever.[38] Each of the judges can be removed from the judgeship "for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[39]

The salaries of the active judges who serve on the Court of Federal Claims are currently tied to the salaries of district court judges, although there is no guarantee that they will continue to be, and Congress could reduce their salaries if it chooses.[40] Because of the foregoing features of their employment, the judges who serve on the Court of Federal Claims are precisely what Congress labeled them: Article I judges unprotected by the guarantees of Article III of the Constitution.[41]

While Article III creates a limit upon Congress' authority to create non-Article III adjudicative bodies, it does not entirely prohibit Congress from creating courts that stray from Article III's requirements. Although a literal reading of the text of Article III might suggest that Congress can never create non-Article III courts, at this late date in the jurisprudence of this area, "virtually no one considers a literal interpretation possible."[42] Indeed, Chief Justice Marshall first approved Congress' authority to create courts and establish judgeships outside the boundaries of Article III in 1828 in *American Insurance Co. v. Canter*,[43] when assessing the use of non-Article III courts in the territories that were not yet states.[44] That decision relies upon the notion that in some circumstances, the policies underlying Article III are not implicated by Congress' formation of an Article I court, or at least are not greatly curtailed. In an effort to explain the *Canter* holding, the Court later opined that the outcome of the case flowed from "the character of the early territories and some of the practical problems arising from their administration . . . ."[45] The Court explained:

> [T]he realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails,

38. *See* 28 U.S.C. § 171(b).

39. *Id.* § 176(a). Removal is effectuated by vote of a majority of the judges of the Court of Appeals for the Federal Circuit. *Id.* For a discussion of this unique power of an Article III court over the judges whose decisions it reviews, see Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 830 (2011).

40. *See* 28 U.S.C. § 172(b).

41. *But see* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 231–32 (4th ed. 2006) (arguing "that the Court of Federal Claims should be integrated more fully into the Judicial Branch by formally [being given] Article III status," and contending that "[g]iven that a judge of the Court of Federal Claims upon expiration of his or her fifteen-year term may become a senior judge and thereby continue to act in a judicial capacity and receive a full salary, the court already has been given *de facto* Article III status by Congress").

42. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 n.2 (2004).

43. 26 U.S. 511 (1828).

44. *See generally id.*

45. Glidden Co. v. Zdanok, 370 U.S. 530, 545 (1962).

it was unthinkable that they should be.[46]

Because the other branches were unlikely to interfere with the running of the territorial courts, the Court reasoned, the territorial courts did not need the protections of Article III.[47] The Court thus acknowledged the role of Article III in preserving the independence of the judiciary from the other branches of government, but suggested that the practical realities of administrating the territories made the protections of Article III less necessary in that particular situation.

Every subsequent decision in which the Court has addressed whether a non-Article III entity impermissibly encroaches upon Article III has included at least some discussion of that provision's purposes and values.[48] Nonetheless, this factor has not always been given controlling weight, and after the Court's approval of a pair of administrative structures in the mid-1980s,[49] commentators openly questioned whether "the original structure and the values embodied in [Article III] are still regarded as important."[50] Recently, in *Stern v. Marshall*,[51] the Court said the "short but emphatic answer is yes."[52] After exploring the dual purposes of the constitutional command, separation of powers and protection of the individual, the Court explained that "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[53] Describing Article III as "the guardian of individual liberty and separation of powers," the Court emphasized that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."[54] Those values, the Court has explained, are to put into effect the concept of separation of powers and to guarantee the impartiality of judges, to the benefit of litigants.[55] For takings claims, both of those values are

46. *Id.* at 546.

47. *See id.*

48. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–60 (1982) (plurality opinion); Williams v. United States, 289 U.S. 553, 561 (1933).

49. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (approving CFTC's consideration of state law counterclaims); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (approving use of binding arbitration provision within Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

50. Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 151 n.353 (1988).

51. 131 S. Ct. 2594 (2011).

52. *Id.* at 2620.

53. *Id.* at 2609.

54. *Id.* at 2615, 2620.

55. *See id.* at 2609 ("Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges."); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion) (characterizing Article III as "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch").

not only fully implicated, they are at their apex.[56]

The separation of powers principle is, in a nutshell, an attempt "to protect each branch of government from incursion by the others."[57] As Chief Justice Marshall recognized in *Canter*, the risk of undue influence is not equal in all situations. In that case, he apparently felt that concern that the other branches would try to influence the courts was minimized because the other branches were unlikely, and indeed in all likelihood were unable, to interfere with the running of the territorial courts.[58] Justice White opined that in his view, the bankruptcy courts were more permissible for just this reason, as they "deal with issues likely to be of little interest to the political branches . . . ."[59] In contrast to that slight risk of influence upon territorial courts, there are reasons to believe there is a significant risk that the other branches will care deeply about the outcomes of takings cases in the Court of Federal Claims. There are three factors that would tend to increase the government's interest in a case and therefore the risk that the government will want to influence the case's outcome: when the case involves the government, the Constitution, and the government's money. All three are involved in takings claims.

First, the separation of powers principle is implicated more in cases involving the government as a party than in cases in which the government has no direct interest. As Justice Brennan recognized in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[60] "[d]oubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual."[61] Indeed, it is a truism that the government's interests are most directly at issue in those cases in which the government is a party. But it is not only the fact that takings cases arise between the government and an individual that makes the possibility of pressure from the legislative or executive branches such a real concern. Many decisions adverse to the government can simply be overturned by legislative fiat. Because takings cases have a Constitutional basis, however, the elected bodies cannot overturn a takings decision, even if they want to. The concern that the elected branches would exert pressure over the judiciary, even if subtle, is even

56. This is in disagreement with Professor Sward, who has said:

> [T]here is virtually no encroachment on Article III values because sovereign immunity would have shunted such claims to the legislature prior to the waiver of sovereign immunity and because an Article III court reviews the legislative court's judgment. Thus, Congress's determination to give citizens with claims against the government a relatively expeditious judicial determination of those claims in a non-Article III court is a reasonable one.

Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1121 (1999).

57. *Stern*, 131 S. Ct. at 2609 (quoting Bond v. United States, 131 S. Ct. 2355, 2365 (2011)).

58. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 544–45 (1962) (discussing Chief Justice Marshall's opinion in *Canter*).

59. *See Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

60 458 U.S. 50 (1982) (plurality opinion).

61. *Id.* at 68 n.20.

greater for constitutional cases between the government and an individual.[62] Finally, the cases decided by the Court of Federal Claims, including takings cases, all involve money judgments. More particularly, they involve money that, if not used for judgments of the court, could be used for other congressional purposes. Even the most casual observer of Washington would agree that battles over money dominate beltway politics. The history of the Court of Federal Claims is a history of Congress attempting to maintain its influence over money judgments.[63] Before there was a Court of Claims, Congress decided for itself whether to pay claims against the government. After the court was established, Congress did not cease its attempts to exert influence over those decisions. The well-known *Pocono Pines Assembly Hotels Co. v. United States*[64] cases are instructive on this point.[65]

Pocono Pines involved a claim filed in the Court of Claims by a property owner after its hospital was damaged in a fire during a government lease of the building.[66] The government defended the case by arguing that the company had not met its burden to prove that the fire was the government's fault.[67] The Court of Claims ruled against the government and issued a final judgment in the amount of $227,239.53.[68] Congress did not simply pay that judgment, however.

Instead, after it received the Comptroller General's recommendation that Congress direct the Court of Claims to grant the government a new trial, Congress referred the case back to the Court of Claims with "instructions to find the facts and report them to the Senate, so that the Senate might conclude whether or not it would make an appropriation in this case."[69] The Court of Claims responded by docketing the case as a congressional reference matter.[70] The property owner then filed a writ of mandamus in the Supreme Court to stop further proceedings in the Court of Claims—a request that was denied.[71]

62. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 224 (1983) ("The threat of domination by the political branches of government, as well as of imposition of majoritarian tyranny, is greatest in such cases, for it is only such decisions which the political branches are unable to overrule through simple legislative action. It is therefore those decisions which the political branches are most likely to attempt to influence.").

63. For a discussion of Congress' attempts to maintain its influence over the Court of Federal Claims, see *infra*, section III.

64. Pocono Pines Assembly Hotels Co. v. United States (Pocono Pines II), 73 Ct. Cl. 447, 493 (1932); Pocono Pines Assembly Hotels Co. v. United States (Pocono Pines I), 69 Ct. Cl. 91, 99–100 (1930).

65. *See generally* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 675–78 (1985) (recounting history of *Pocono Pines* cases).

66. *See Pocono Pines I*, 69 Ct. Cl. at 99–100.

67. *See id.* at 106.

68. *See id.* at 110.

69. *See* Shimomura, *supra* note 65, at 675–76 (quoting 74 CONG. REC. 6076 (1931)) (internal quotation marks omitted).

70. *See* Pocono Pines II, 73 Ct. Cl. 447, 449 (1932).

71. *See Ex parte* Pocono Pines Assembly Hotels Co., 285 U.S. 526 (1932).

After that denial, the Court of Claims retried the case, again finding against the government, and reported the result to Congress.[72] While the judgment was not altered by Congress' actions, that case demonstrates just how important money judgments against the government can be to Congress. The entity that began its life as an institution reporting directly to Congress about whether to pay monetary claims against the government has never really shaken that role.[73] *Pocono Pines* and other examples like it demonstrate that Article III's purpose of ensuring "that the acts of each [branch of government] shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments,"[74] is as much implicated by the Court of Federal Claims as it is any legislative entity. As the Supreme Court recently explained, those issues about which the other branches care deeply are precisely when an independent judiciary is most needed.[75]

The Supreme Court has also said that in addition to maintaining the "checks and balances of the constitutional structure," Article III also works "to guarantee that the process of adjudication itself remained impartial."[76] In other words, it provides "judges who are free from potential domination by other branches of government."[77] The *Pocono Pines* judgment was for $227,239.53, which in today's dollars would be a little more than $3.2 million dollars.[78] One can only imagine how much interest Congress might show if the Court of Federal Claims were to award the AIG shareholders the $25 billion dollars they are seeking.

Still, the more insidious influence by the other branches is not the unlikely possibility that they would take any overt action, such as that taken in *Pocono Pines*. It is that the other branches' influence will be more subtle, perhaps even invisible to the judges themselves. Consider the power structure of the Court of Federal Claims. As noted earlier, the President can designate or remove the chief judge of the Court of Claims at will. The chief judge, in turn, has authority to decide which judge will hear any particular case and can replace the judge assigned to any case at will. Though the possibility of a replacement might be remote in any particular case, there is at least some concern that judges, aware that they might be replaced, may want to please their bosses and "get it right," which may mean deciding in favor of the government. Even the appearance that such concerns might come into play may already affect the

72. *See* Pocono Pines Assembly Hotels Co. v. United States (Pocono Pines III), 76 Ct. Cl. 334, 352 (1932); *see also* 76 CONG. REC. 40, 60 (1932).

73. For a discussion of the Court of Claims' institutional role in reporting to Congress regarding whether to pay monetary claims against the government, see *infra* notes 270–95 and accompanying text.

74. O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

75. *See* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011).

76. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion).

77. *Id.* (quoting United States v. Will, 449 U.S. 200, 217–18 (1980)) (internal quotation marks omitted).

78. Calculation completed using the U.S. Inflation Calculator. *See U.S. Inflation Calculator*, http://www.usinflationcalculator.com (last visited Nov. 4, 2014).

court's credibility.

Focusing on the AIG shareholder example, the plaintiffs are seeking an enormous amount of money from the government and accusing many government officials, including former Treasury Secretary Timothy Geithner, of impropriety. The other branches' interest in this case is great. Various members of Congress and the President have publicly discussed the bailouts, including the AIG bailout, multiple times. The Court of Federal Claims sits adjacent to the offices of the very individuals who are being accused of impropriety in the lawsuit. One can fairly say that the judge who conducts the proceeding sits both literally and figuratively in the shadow of the White House.

Even if there is no undue influence exerted by any members of Congress or executive officers, the structure lends itself to at least the appearance of impropriety. As the Court has recognized:

> The sole function of the [Court of Claims] being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable.[79]

Because the values underlying Article III are strongly implicated by takings claims for large amounts of money, those claims should not be heard in non-Article III courts. The bailout cases currently being considered by the Court of Federal Claims are completely unlike the types of claims Chief Justice Marshall thought did not need to be heard by the Article III judiciary. Instead, they involve takings claims that strongly implicate the purpose of Article III. Accordingly, they are precisely the types of cases that must be heard in Article III courts.

B. *None of the Justifications for the Use of Legislative Courts Validates the Court of Federal Claims' Consideration of Takings Claims*

The Supreme Court's Article III jurisprudence is not a model of consistency, and the Court does not always speak with one voice. The Court's consideration of when Congress may permit adjudication of a particular type of claim by a non-Article III body has generally involved cases with multiple dissents, has rarely achieved a strong majority in a particular case, and has caused many scholars and judges to suggest that the cases are incoherent.[80]

79. Williams v. United States, 289 U.S. 553, 562 (1933).

80. *See Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring) (describing this jurisprudence as involving "frequently arcane distinctions and confusing precedents"); *id.* at 91 ("The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis."); *id.* (describing Court's Article III precedents as "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night"); Saphire & Solimine, *supra* note 50, at 85 (describing Court's decisions about legislative courts as "amorphous and arcane"). Saphire and Solimine also describe the factors in the Court's decisions as inarticulate and incoherent. *See id.* at 86.

This Article does not attempt to criticize or evaluate the various rationales that the justices have relied upon and does not take sides in the debate about which of those factors, if any, should be determinative. Rather, this section reviews each of the factors the Court has used to permit Congress to stray from Article III's requirements and applies those factors to the Court of Federal Claims' consideration of takings claims. This review demonstrates that while the justices have not always agreed about the bounds of when Congress can permit non-Article III courts to adjudicate particular claims, none of those various frameworks or rationales that have ever been adopted by individual justices would permit the current framework that forces the bailout cases to the Court of Federal Claims. In short, it is not only poor policy for the Court of Federal Claims to consider takings claims, it is unconstitutional.

1. *Determining Just Compensation Is Not a Specific Congressional Power*

The first case in which the Supreme Court endorsed Congress' creation of non-Article III courts was the previously discussed case of *Canter*, wherein Chief Justice Marshall addressed Congress' creation of "territorial courts."[81] *Canter* involved a cargo of cotton purchased through a judicial sale that had been ordered by the territorial court then established in Key West, Florida. Because that court was established by the territorial legislature and not established pursuant to Article III, the insurers claimed that the order was void. In ruling against the insurance company, the Chief Justice explained that the courts were not "constitutional Courts," but were instead "legislative Courts" that need not comply with the requirements of Article III.[82] The Court offered little by way of explanation for that holding, but what was stated provides the foundation for the first two justifications for the use of non-Article III courts. The first justification, already discussed, was the Court's view that the failure of a claim to implicate Article III values weighs against the necessity of employing Article III courts. The second justification, the Court stated, was simply that the territorial courts were "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States."[83]

The *Canter* decision was the first in a series of cases holding that congressional authority to create non-Article III courts is derived from those congressional powers specifically enumerated in the Constitution.[84] In *Canter*, the enumerated power was the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

81. *See generally* Am. Ins. Co. v. Canter, 26 U.S. 511 (1828).

82. *Id.* at 546.

83. *Id.*; *see also* U.S. CONST. art. IV, § 3, cl. 2 (giving Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

84. *See* Saphire & Solimine, *supra* note 50, at 89 (collecting cases in which Court has justified Congress' creation of non-Article III courts based upon its Article I powers).

States."[85] Shortly thereafter, the Court relied upon that same rationale when it sustained Congress' creation of military courts pursuant to Congress' specifically delineated Article I powers "to provide and maintain a Navy," and "to make rules for the government of the land and naval forces."[86] The Court similarly approved Congress' creation of the United States Court in the Indian Territory upon the basis that "[C]ongress possesses plenary power" over the tribes,[87] and it affirmed that Congress may create non-Article III consular courts based on its enumerated power to enter into treaties and deal with foreign countries.[88]

In modern times, the Court has continued to consider whether Congress is effectuating a particular constitutional grant of power when deciding whether a legislative court is permissible. The Court's most recent explicit reliance upon that rationale was in 1973, in *Palmore v. United States*,[89] when the Court reaffirmed that Congress may create non-Article III courts to adjudicate disputes within the District of Columbia based upon its Article I power to: "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ."[90]

The Court later explained that this rationale applies when the subject matter considered by the courts at issue "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue."[91] The first rationale that emerges from the Court's Article III jurisprudence is thus: if the subject with which an adjudicative body deals is one wholly within Congress' purview, such as the rules governing military conduct, Congress need not

85. *See* U.S. CONST. art. IV, § 3, cl. 2. This rationale was also used by the Court to uphold the creation of the Court of Private Land Claims in 1894. *See* United States v. Coe, 155 U.S. 76, 85–86 (1894).

86. *See* Dynes v. Hoover, 61 U.S. 65, 78 (1857) (citing U.S. CONST. art. I, § 8).

87. *See* Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899) ("The United States court in the Indian Territory is a legislative court, and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and, assuming that congress possesses plenary power of legislation in regard to them, subject only to the constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument."); *see also* Wallace v. Adams, 204 U.S. 415 (1907).

88. *See Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929) (recognizing Congress' power to create consular courts "as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries"); Ross v. McIntyre, 140 U.S. 453 (1891).

89. 411 U.S. 389 (1973).

90. U.S. CONST. art. I, § 8, cl. 17; *see also Palmore*, 411 U.S. at 397–98 (relying upon this Article I provision in holding that Congress may create non-Article III courts to adjudicate disputes within District of Columbia).

91. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982) (plurality opinion).

concern itself with Article III.

While the Court found that rationale applicable in cases involving congressional power over the territories, the military, the tribes, and the District of Columbia, the Court explicitly rejected the notion that takings claims are the province of the legislature back in 1893. In *Monongahela Navigation Co. v. United States*,[92] the Court explained:

> [W]hen the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[93]

The Takings Clause thus cannot be said to be "historically understood as giving the political Branches of Government" any control at all over the determination of just compensation. Rather, the historical understanding is that it grants that authority to the judiciary. The first rationale the Supreme Court used to permit Congressional use of legislative courts therefore does not appear to apply to takings claims.

2. *Takings Claims Are Not "Public Rights"*

An early attempt to define the line between those types of controversies that implicate Article III and those that do not was the Supreme Court's 1856 decision in *Murray's Lessee v. Hoboken Land and Improvement Co.*[94] In that case, the Court held that a treasury official's determination that certain property would be sold in order for the United States to collect a debt did not, at that time, involve a "judicial controversy" at all. An Article III judge was not,

92. 148 U.S. 312 (1893).

93. *Id.* at 327.

94. 59 U.S. 272 (1855). This case did not precisely involve a legislative court. Rather, it involved the actions of an administrative official. Nonetheless, in assessing the scope of the executive official's authority and what limitation, if any, Article III places upon the Executive, the Court referred to Article III's limitations as if they apply equally to both legislative courts explicitly established by Congress as well as executive actions that indirectly implicate statutory commands originating from Congress. Some commentators have suggested that there is no reason why the mandate of Article III should apply any differently to an administrative agency or to a legislative court. *See, e.g.*, Redish, *supra* note 62, at 201 ("[T]heir work cannot be functionally or theoretically distinguished."). In *Stern*, the Court suggested, however, that there may be reason to treat administrative agencies and legislative courts differently. The Court discussed the public rights doctrine as limited to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." Stern v. Marshall, 131 S. Ct. 2594, 2613 (2011). As so described, this exception permits adjudication by a non-Article III body of some claims decided by an administrative agency but does not permit any adjudication by a legislative court.

therefore, necessary.[95] To contrast those types of cases that require an Article III judge with the types of adjudications that do not, the Court stated that Congress could not:

> [B]ring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[96]

Through that statement, the Court provided what is perhaps the single most important justification that the Supreme Court has offered for permitting Congress to establish Article I courts: sovereign immunity.[97] The rationale is that because the federal government generally enjoys sovereign immunity from suits, Congress need not permit its citizens to file lawsuits against the sovereign in the first place. Congress may choose to prohibit such lawsuits in any forum, and may therefore, if it chooses to permit the lawsuits at all, control the forum in which such suits may be brought. It may even relegate such lawsuits to a non-judicial forum.[98]

One of the most important cases in which the Court expressly relied upon the sovereign-rights based "public rights" doctrine is the *Ex parte Bakelite Corp.*[99] decision of 1929. In *Bakelite*, the Court upheld Congress' authority to establish the Court of Customs Appeals as an Article I court. The Court explained that Article I courts:

> [M]ay be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is

95. *See Murray's Lessee*, 59 U.S. at 281.

96. *Id.* at 284.

97. Professor Pfander asserts that *Murray's Lessee* has been misread and does not actually stand for this proposition at all. *See* Pfander, *supra* note 42, at 731–38. Whatever may have been the Court's intention in *Murray's Lessee*, the case has come to stand for this proposition as applied by later decisions of the Court.

98. *See Murray's Lessee*, 59 U.S. at 284. Like most—if not all—of the justifications the Court has deemed sufficient to legitimize legislative courts, this rationale has received its fair share of criticism. *See, e.g.*, Redish, *supra* note 62, at 212–13. Professor Redish asserts that even if Congress is not obliged to permit a suit, the unconstitutional conditions doctrine suggests that once Congress has permitted a lawsuit, it may not condition the right to sue upon the waiver of Article III protections. *See id.* He also argues that it is not clear that Congress could, either legally or practically, decide all of the public rights issues. *See id.* at 213. Others have been less critical of the sovereign immunity rationale. *See, e.g.*, Sward, *supra* note 56, at 1123 ("[T]his makes some sense given that in the absence of a court for such claims, citizens asserting a claim against the government would have to go to Congress itself, seeking private legislation to pay the claim.").

99. 279 U.S. 438 (1929).

> completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.[100]

As is clear from that passage, the Court viewed the fact that a matter is one "arising between the government and others" as a necessary, but not sufficient, condition to conclude that a right is a "public right." The Court's rationale for the public rights distinction was sovereign immunity: "The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide . . . ."[101]

The public rights doctrine has been extensively discussed and applied in the Court's recent Article III decisions. In *Northern Pipeline*, Justice Brennan's plurality decision explicitly recognized that the primary justification for excluding public rights from Article III is "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."[102] Justice Brennan also explained that, in his view, the public rights rationale is consistent with and "draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government."[103] Thus, he explained, the public rights doctrine applies "*only* to matters that historically could have been determined exclusively by those departments."[104] This assessment is really no different from the rationale captured in Justice Brennan's discussion of Congress' Article I power, which, he explained, permits establishing non-Article III entities for areas that have "been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue."[105] Whether the justification can be categorized as falling within either the public rights exception to Article III or the first exception ultimately does not matter. The rationale is that when a matter is one that "the Framers expected that Congress would be free to commit . . . completely to nonjudicial executive determination . . . there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency."[106]

In sum, "public rights" are those matters involving disputes between an entity and the federal government to which sovereign immunity applies, such that Congress need not have permitted the lawsuit in the first place.[107] They

100. *Id.* at 451.

101. *Id.*

102. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion).

103. *Id.*

104. *Id.* at 68 (emphasis added).

105. *Id.* at 66.

106. *Id.* at 68.

107. The concept of sovereign immunity applied to the federal government has been roundly and repeatedly criticized. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 550 (2006) ("Current

are "matters that could be conclusively determined by the Executive and Legislative branches," as contrasted with "matters that are 'inherently . . . judicial.'"[108] The public rights rationale for permitting the creation of non-Article III courts has been heavily criticized on a number of fronts, with some commentators suggesting that the doctrine should be abandoned altogether.[109]

Nonetheless, the Court has not abandoned the sovereign immunity based rationale, declaring: "The rule that the United States may not be sued without its consent is all-embracing."[110] Still, despite such a broad proclamation, the public rights doctrine cannot justify the Court of Federal Claims considering takings claims.

For the majority of the cases that fall within the Court of Federal Claims' jurisdiction, the sovereign immunity rationale arguably has some force.[111] The majority of the cases heard in the Court of Federal Claims involve waivers of sovereign immunity and therefore fit into the "public rights" category that the Supreme Court has described.[112] With respect to the majority of the cases for

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sovereign immunity doctrine is very hard to square with a federalism premised on 'the protection of individuals.'" (quoting New York v. United States, 505 U.S. 144, 181 (1992))). This Article takes no position about whether sovereign immunity should apply generally but only that it does not apply to takings claims against the federal government.

108. *Northern Pipeline*, 458 U.S. at 68 (alteration in original) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68 (1989) (Scalia, J., concurring in part) ("[C]entral to our reasoning was the device of waiver of sovereign immunity . . . ."); *Ex parte Bakelite*, 279 U.S. at 451 (explaining that public rights are matters "which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.").

109. For example, Professors Saphire and Solimine have decried the sovereign immunity factor as not "speak[ing] to the theoretical limits on Congress's ability to assign public rights cases to non-article III tribunals." Saphire & Solimine, *supra* note 50, at 116. Describing the factor as one that "merely suggests that the government has some leeway in determining whether Congress can assign the determination of rights *it creates*, and which it could adjudicate itself, to non-article III tribunals," they contend that "[t]he separation of powers rationale begs the questions of whether and when congressional reliance on non-article III tribunals encroaches on the article III judicial power." *Id.* Because they find the doctrine to be unhelpful, and lacking in historical justification, they propose that the Court "abandon the doctrine altogether." *Id.* at 120. Professor Redish asserts that even if Congress is not obliged to permit a suit, the unconstitutional conditions doctrine suggests that once Congress has permitted a lawsuit, it may not condition the right to sue upon the waiver of Article III protections. *See* Redish, *supra* note 62, at 212–13.

110. Lynch v. United States, 292 U.S. 571, 581 (1934).

111. Some commentators have suggested that even contract cases, the bread and butter of the Court of Federal Claims, do not involve public rights but should instead be treated as private rights. *See, e.g.*, Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 AM. U. L. REV. 385, 412 (1984) ("In its proprietary capacity, the government deals with citizens in the same way that individual citizens deal with each other. For example, the government enters into contracts and compensates persons for damages it causes. The mere fact that the government is a party to a contract does not reasonably suggest that public rights are implicated. In fact, the rights at issue are more in the nature of private rights.").

112. *See supra* note 19.

monetary compensation filed in the Court of Federal Claims, that rationale for permitting Congress to elect to have an Article I legislative court decide them has some common-sense appeal. After all, although the practice has been criticized, if the alternative is that Congress could choose not to permit the case in the first place, it is not irrational that Congress gets to choose its own forum when it magnanimously allows its citizens to sue. But that rationale does not work for cases that Congress could not have prevented a citizen from filing. If a citizen could file a claim regardless of Congress' permission to do so, then the sovereign immunity rationale has no force, and Congress may not rely upon this rationale to relegate a case to an Article I court. Such is the case for takings claims, which do not involve waivers of sovereign immunity and are therefore not public rights.

The first evidence that takings claims are not public rights is the Court's 1893 decision in *Monongahela*. As discussed earlier, the Court therein held that determining just compensation is not a task for Congress but is instead a "judicial inquiry."[113] That statement directly undermines the notion that takings claims are public rights, which, the Court has said, "do not require judicial determination . . . ."[114] The Court has since made even clearer that a waiver of sovereign immunity is not necessary for citizens to file a takings claim.

In 1919, the United States requisitioned land to store supplies for the Army and agreed to pay the owner, Seaboard Air Line Railway Company, $235.80 plus 6% interest.[115] Unhappy with that amount, Seaboard sued and was awarded $6,000, as determined by a jury, plus 7% interest.[116] The government appealed the award of interest, arguing that the United States had not consented to pay interest on takings, or any other, claims.[117] The court of appeals accepted the government's position, holding that the United States could not be forced to pay interest because, as a sovereign, it is immune from payments other than those it has agreed to pay: such "conditions necessarily arise in dealing with the sovereign, and for which there is no redress."[118] The Supreme Court reversed, rejecting the government's premise that the United States needed to waive its sovereign immunity as to that claim.[119] While recognizing that there was no statute authorizing interest awards, the Court held that "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."[120] Finding that "[a] promise to pay is not necessary," the Court ordered the government to pay the interest, which the district court had determined would be just compensation

113. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

114. *See Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929).

115. *See* Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 302–03 (1923).

116. *See id.* at 303.

117. *See id.*

118. United States v. Seaboard Air Line Ry. Co., 280 F. 349, 352 (4th Cir. 1922), *rev'd*, 261 U.S. 299 (1923).

119. *See Seaboard*, 261 U.S. at 304–06.

120. *Id.* at 304.

for the taking.[121] Thus, whereas the general rule is "that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity," the Takings Clause creates an exception to that rule.[122] The decision regarding Seaboard Air Line Railway Company stands for the proposition that sovereign immunity does not apply to takings claims.[123]

Were there any doubt of that holding, the Court reiterated it a decade later, in 1933, in *Jacobs v. United States*.[124] After the Fifth Circuit Court of Appeals had denied claims for interest against the government on the basis that the claims were filed pursuant to the Tucker Act rather than as part of condemnation proceedings, the Court held:

> This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.[125]

Since 1933, it has thus been clear that takings claims filed pursuant to the Tucker Act do not require waivers of sovereign immunity. The Court has not strayed from that conclusion. Indeed, that takings claims are not limited by sovereign immunity makes perfect sense. For an action to constitute a taking in the first place, the government must exercise its power pursuant to its sovereign power of eminent domain.[126] If the government could do so while simultaneously asserting that, as sovereign, it may not be sued to collect compensation for that taking, then the constitutional command, "nor shall private property be taken for public use, without just compensation," would have no meaning whatsoever.[127]

The Court has described this principle, that the Takings Clause has independent force without the government's permission or waiver of sovereign

121. *See id.* at 304–05.

122. Library of Cong. v. Shaw, 478 U.S. 310, 311 (1986).

123. The various states began to understand their respective state constitutions' just compensation provisions as abrogating sovereign immunity around the same time *Seaboard Air Line Railway Company* was decided in the 1920s. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 138–39 (1999).

124. 290 U.S. 13 (1933).

125. *Id.* at 16.

126. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954).

127. *See* U.S. CONST. amend. V.

immunity, as the "self-executing" nature of the Clause.[128] The Court has explained that while the government can file a claim to condemn or formally take a property, the government may also take property by "physically entering into possession and ousting the owner," in which case owners can also file "inverse condemnation" cases to seek the compensation to which they are entitled by the Fifth Amendment.[129] The Court has explained that "[t]he owner's right to bring such a suit derives from 'the self-executing character of the constitutional provision with respect to condemnation . . . .'"[130]

In a landmark decision, in which the Court explained that the Tucker Act is a jurisdictional statute that does not itself waive sovereign immunity as to the types of cases for which it grants jurisdiction, the Supreme Court was careful to distinguish takings claims from other types of claims against the United States.[131] The Court explained the general rule that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity," and rejected a contrary rule based upon cases applying the Takings Clause.[132] The Court distinguished the takings cases from the general rule by explaining that "[t]hese Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States."[133]

To the extent there was any lingering doubt that the Takings Clause trumps the government's assertion of sovereign immunity, the Court removed that doubt in 1987, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*.[134] In that case, the government argued, as amicus curiae, that the "Constitution did not work a surrender of the immunity of the States, and the Constitution likewise did not withhold this essential 'attribute[] of sovereignty' from the Government of the United States."[135]

128. *See* United States v. Clarke, 445 U.S. 253, 257 (1980); *see also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (quoting *Clarke*, 445 U.S. at 257).

129. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 (1984); *see, e.g.*, United States v. Lee, 106 U.S. 196 (1882). *Lee* is a bedrock case that involved the former estate of General Robert E. Lee, where Arlington Cemetery now sits. In that case, the United States had acquired the land for nonpayment of taxes, even though the taxes had in fact been paid. The owners filed an ejectment action against the government officials who held the land, and the Court held that the action was not one against the sovereign and therefore was not barred by sovereign immunity. *See* Malone v. Bowdoin, 369 U.S. 643, 645–46 (1962) (describing *Lee*). As the Court later described the *Lee* case, it demonstrated "the constitutional exception to the doctrine of sovereign immunity." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 696 (1949).

130. *Kirby*, 467 U.S. at 6 n.6 (alteration in original) (quoting *Clarke*, 445 U.S. at 257).

131. *See* United States v. Testan, 424 U.S. 392, 400–01 (1976).

132. *Id.*

133. *Id.* at 401 (citation omitted) (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974); Jacobs v. United States, 290 U.S. 13, 16 (1933)).

134. 482 U.S. 304 (1987).

135. Brief for the United States as Amicus Curiae Supporting Appellee at 17, *First English*, 482 U.S. 304 (1987) (No. 85-1199), 1986 WL 727420 (alteration in original)

Rejecting that argument, the Court held that its cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."[136]

It is worth noting that Congress established the Court of Federal Claims in 1982, five years before the *First English* decision. To the extent that Congress, like the government, misunderstood this aspect of the Takings Clause before that decision, there can be no misunderstanding now.[137] After *First English*, it is now explicit that property owners enjoy the right to bring takings claims, not because Congress has consented to their doing so, but because the Constitution guarantees that right. It is the recognition of that self-executing provision that forecloses the Court of Federal Claims' consideration of takings cases.

3. *Review by the Federal Circuit Does Not Justify the Court of Federal Claims Deciding Takings Claims*

After *Bakelite* created a fairly clear line between cases that can be considered by a non-Article III body (the public rights) and those that cannot (the private rights), the Court quickly complicated matters by holding that even private rights need not necessarily be considered by an Article III court. In *Crowell v. Benson*,[138] the Court adopted a new rationale for the use of non-Article III judges, establishing that such tribunals may sometimes be permissible if the decisions of those tribunals are reviewed by Article III courts such that they are merely adjuncts of the Article III court.

Crowell involved a claim brought by an employee against his employer before the United States Employees' Compensation Commission, a non-Article III entity created pursuant to a federal statute.[139] Starting with the "public rights" distinction, the Court first noted that the claim was not against the government and was therefore a "private right."[140] Nonetheless, the *Crowell* Court upheld the authority of the United States Employees' Compensation Commission to adjudicate such disputes between private parties, because an Article III judge of a U.S. District Court conducted a de novo review

(citation omitted); *see also* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1654–62 (1988) (discussing Government's arguments in *First English*).

136. *First English*, 482 U.S. at 316 n.9.

137. *See* Berger, *supra* note 107, at 530 ("[T]here is good reason to think that sovereign immunity doctrine should not apply to the Takings Clause."). The issue Professor Berger discusses is the confluence of the Takings Clause and the principle of sovereign immunity in the context of takings claims against the states. *See generally id.* That issue is more complicated than the issue of takings claims against the federal government because of the existence of the Eleventh Amendment and the fact that takings claims against the states proceed through incorporation by the Fourteenth Amendment. Nonetheless, he concludes: "Indeed, text, structure, and, I would argue, history all suggest that the Takings Clause should trump state sovereign immunity." *Id.* at 601–02. Application of this "collision" to takings claims against the Federal government is more straightforward and reaches the same result.

138. 285 U.S. 22 (1932).

139. *See id.* at 36.

140. *See id.* at 51.

of the legislative agency's decision.[141] The Court explained that as long as an Article III court has the authority to ultimately decide the issue, then it is permissible for that "adjunct" legislative court to first decide the question.[142]

The Court applied this doctrine in 1980, in *United States v. Raddatz*,[143] when assessing the constitutionality of a provision of the Federal Magistrates Act.[144] The Act permits a federal district court to submit a case to a magistrate, to conduct an evidentiary hearing and prepare findings of fact and recommendations that the district court judge then uses to rule upon a motion to suppress evidence, rather than conducting another evidentiary hearing.[145] The Court upheld that procedure after recognizing that "the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction."[146] As the Court noted:

> [T]he magistrate's proposed findings and recommendations shall be subjected to a *de novo* determination "by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order." Moreover, "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge."[147]

The Court explained that a magistrate's role is not different from that of "masters in chancery or commissioners in admiralty where the proceeding is 'constantly subject to the court's control.'"[148]

The task of describing the "essential attributes" of judicial power that must be retained in the Article III courts continued in *Northern Pipeline*, as Justice Brennan, writing for the plurality, applied this factor to the bankruptcy courts.[149] He noted that, as the Court held in *Crowell*, for this rationale to apply, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art[icle] III court."[150] He also explained that the Court had permitted such adjunct fact finding in *Raddatz* because the work of a magistrate judge is "subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence."[151]

In rejecting the notion that the bankruptcy courts were mere adjuncts,

141. *See id.* at 62–63.

142. *See id.*

143. 447 U.S. 667 (1980).

144. *See* 28 U.S.C. § 636(b)(1)(B) (2012).

145. *See Raddatz*, 447 U.S. at 669.

146. *Id.* at 681.

147. *Id.* at 681–82 (alterations in original) (citation omitted) (quoting S. REP. NO. 94-625, at 3 (1976); Mathews v. Weber, 423 U.S. 261, 271 (1976)).

148. *Id.* at 682 (quoting Crowell v. Benson, 285 U.S. 22, 61 (1932)).

149. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 (1982) (plurality opinion).

150. *Id.* at 81.

151. *Id.* at 79.

Justice Brennan listed some of the powers enjoyed by those courts, emphasizing their power to enforce their own judgments, rather than—like the agency the Court assessed in *Crowell*—issuing orders that "could be enforced only by order of the district court."[152] He also suggested that an Article III court reviewing the findings of the non-Article III entity under a "substantial evidence" standard weighs in favor of permitting the system, whereas the "clearly erroneous" review conducted by Article III courts of bankruptcy judges' factual findings brought that adjudicatory body's actions too close to the inherently judicial line.[153]

In a concurring opinion, Justice Rehnquist noted that whatever the boundaries of the "adjunct" doctrine that originated in *Crowell*, "traditional appellate review by Art. III courts" is not sufficient to make a court a permissible "adjunct."[154] In dissent, Justice White explained that in his view, *Crowell* rested upon the proposition that as long as questions of law were preserved for determination by Article III courts, the delegation of factual determinations to non-Article III judges is permissible.[155]

In *Stern*, the majority of the Court agreed with the notion "that *Crowell* by its terms addresses the determination of *facts* outside Article III."[156] The *Stern* majority also noted that the *Northern Pipeline* decision had confined the permissible work of adjuncts to making "only specialized, narrowly confined factual determinations regarding a particularized area of law . . . ."[157] In addition, the Court reaffirmed that the power to enter a final judgment, at least, is an essential attribute of the Article III judicial power.[158] The Court found objectionable the bankruptcy courts' "power to enter 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal."[159] The Court concluded, "[g]iven that authority, a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals."[160]

The fact that Court of Federal Claims decisions are reviewed by the

152. *Id.* at 85.

153. *See id.*

154. *See id.* at 91 (Rehnquist, J., concurring). Indeed, as Professor Resnik has noted, permitting appellate review to justify the use of non-Article III courts might support a transformation of Article III judges into administrators who supervise inferior judges. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 668–69 (2002).

155. *See Northern Pipeline*, 458 U.S. at 110 (White, J., dissenting).

156. Stern v. Marshall, 131 S. Ct. 2594, 2612 n.6 (2011).

157. *Id.* at 2618 (quoting *Northern Pipeline*, 458 U.S. at 85) (internal quotation marks omitted).

158. *See id.* at 2619.

159. *Id.* (quoting 28 U.S.C. § 257(b)(1)).

160. *Id.* The Court has since reaffirmed that holding, stating that a bankruptcy court may enter proposed findings of fact and conclusions of law only if they are reviewed de novo by district courts. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014).

Federal Circuit—which is an Article III appellate court—does not render the current structure permissible. The Court of Federal Claims judges exercise more judicial power than the bankruptcy judges that the Court held are not adjuncts.[161] While Justice White noted, "a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court," less controversial does not equal proper.[162] Indeed, while Justice Brennan suggested that review by an Article III court may be a necessary condition for adjudication by a non-Article III body, no Justice has suggested that it is sufficient. And while commentators who have proposed appellate review theories of Article III have gone so far as to suggest that "sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III," even the most ardent supporters of that theory would require a level of review from the Article III courts that is unavailable under the current scheme, wherein the Federal Circuit reviews the Court of Federal Claims.[163]

Under any of the competing standards described in the Court's recent decisions, the Court of Federal Claims cannot be considered an adjunct of the Federal Circuit. Under either the *Northern Pipeline* plurality's or *Stern* majority's rationale, the fact that Court of Federal Claims judges issue final decisions is fatal to their constitutionality.[164] In contrast to the *Stern* majority's description of permissible entities as those adjuncts making "only specialized, narrowly confined factual determinations regarding a particularized area of law,"[165] the Court of Federal Claims issues judgments dependent upon both fact and law in any area of law that arises during its consideration of takings claims. The *Northern Pipeline* plurality also found it impermissible that bankruptcy judges' factual findings were reviewed only under a "clearly erroneous" standard.[166] That is the same standard the Federal Circuit applies to review the Court of Federal Claims' factual findings in takings decisions.[167]

Even those commentators who have suggested that the primary consideration of whether an adjudication scheme comports with Article III

161. This point has also been succinctly made by Sward and Page, who recognized that the Claims Court was much more like the bankruptcy courts that the Supreme Court invalidated in *Northern Pipeline* than a permissible adjunct. *See* Sward & Page, *supra* note 111, at 414–15.

162. *Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

163. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988). Professor Fallon would require de novo review of constitutional issues, including "the application of constitutional norms to particular facts . . . ." *Id.* at 976; *see also* Pfander, *supra* note 42, at 743 (proposing unifying theory of "inferiority" of non-Article III tribunals and agreeing that "inferiority should require de novo review of any claim that Article I adjudication violates constitutional rights").

164. *See Stern*, 131 S. Ct. at 2619; *Northern Pipeline*, 458 U.S. at 85.

165. *Stern*, 131 S. Ct. at 2618 (quoting *Northern Pipeline*, 458 U.S. at 85) (internal quotation marks omitted) (describing permissible entities).

166. *See Northern Pipeline*, 458 U.S. at 85–86.

167. *See, e.g.*, City of El Centro v. United States, 922 F.2d 816, 819 (Fed. Cir. 1990).

should be the level of review available in an Article III court have suggested that review of fact finding should be done under a less deferential standard than is currently applied to the Court of Federal Claims' fact finding.[168] The Federal Circuit review that is currently available would also fail to meet the standard of the *Northern Pipeline* concurring opinion, which stated that "traditional appellate review by Art. III courts" is not sufficient to make a court a permissible "adjunct."[169]

Finally, while the *Northern Pipeline* dissent suggested that the bankruptcy judges qualified as adjuncts because questions of law were reserved to Article III judges, Court of Federal Claims judges decide both issues of fact and law, and therefore would not meet even that standard.[170] Indeed, the Court of Federal Claims is not an adjunct of the Federal Circuit any more than all district courts are adjuncts of courts of appeal. Thus, like the other rationales, this one is unavailable to justify the current scheme.

4. *Takings Claims Are Neither Created by Congress nor Closely Intertwined with a Federal Regulatory Program Congress Has Enacted*

Another factor, which is an extension of the previously described "public rights" doctrine, is the notion that Congress has augmented authority to use non-Article III entities to resolve disputes when they involve rights Congress has itself created. This is the consideration that justifies much of the administrative state.

When discussing the public rights doctrine in his *Northern Pipeline* plurality decision, Justice Brennan stressed that one limitation upon the public rights doctrine is that it involves matters that "at a minimum arise 'between the government and others.'"[171] He also opined, however, that "it is clear that *when Congress creates a substantive federal right*, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges."[172] Elaborating upon that principle, he stated:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals

168. *See, e.g.*, Saphire & Solimine, *supra* note 50, at 144 ("While the 'clearly erroneous' standard may be appropriate for appellate review of the factual findings of an article III trial judge, it seems entirely too deferential for other contexts, and would reduce article III review—the only time a litigant will have her case before an article III tribunal—to little more than a formality."). In professors Saphire and Solimine's view, the Bankruptcy Act's reliance on that standard is itself reason enough to invalidate the Act. *See id.* at 147.

169. *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring).

170. *See id.* at 110 (White, J., dissenting).

171. *Id.* at 69 (plurality opinion) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

172. *Id.* at 80 (emphasis added).

> created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.[173]

Justice Brennan contrasted that situation with one in which the rights at issue are not created by Congress. In that case, he explained, Congress has less discretion to assign fact finding related to that issue to a non-Article III entity.[174]

This factor is not unlike the sovereign immunity rationale underlying the public rights exception. In the public rights context, the rationale is that if Congress permits suits against the government when it had no obligation to do so, Congress may specify how those lawsuits proceed. Similarly, the rationale here is that if Congress creates rights between private parties, again when it had no obligation to do so, Congress may specify how lawsuits involving those rights proceed. This doctrine is thus an extension of the public rights rationale described earlier, and in modern cases, the courts describe the public rights doctrine as including both categories of cases, that is, both those disputes that involve the government as a party as well as those involving private entities' dispute over a federally created right.[175]

The Court overtly relied upon this rationale in *Thomas v. Union Carbide Agricultural Products Co.*,[176] when it upheld Congress' decision to require binding arbitration within the federal regulatory scheme involving pesticides.[177]

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173. *Id.* at 83 (footnote omitted).

174. *See id.* at 81–82; *see also id.* at 84 ("Congress' authority to control the manner in which [a non-congressionally created] right is adjudicated, through assignment of historically judicial functions to a non-Art. III 'adjunct,' plainly must be deemed at a minimum."); *id.* at 71 (describing public rights as involving "congressionally created benefits"). Although Justice Brennan's discussion of the distinction between congressionally created, statutory rights and rights not of congressional creation took place within the context of the "adjunct" exception, the distinction has had independent applicability to cases not involving entities purporting to be adjuncts.

175. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 596 (1985) (Brennan, J., concurring) (recognizing that public rights doctrine, "as that concept had come to be understood," includes disputes "arising from the Federal Government's administration of its laws or programs"). For a discussion of the evolution of the public rights doctrine, see Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 (1986); *see also* Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 68 (1989) (Scalia, J., concurring in part) ("It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of waiver of sovereign immunity, as a means of converting a subject which, though its resolution involved a 'judicial act,' could not be brought before the courts, into the stuff of an Article III 'judicial controversy.' Waiver of sovereign immunity can only be implicated, of course, in suits where the Government is a party. We understood this from the time the doctrine of public rights was born, in 1856, until two Terms ago . . . .").

176. 473 U.S. 568 (1985).

177. *See id.* at 589–94.

There, the Court, describing the doctrine as the public rights doctrine, stated:

> In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced.[178]

The Court then noted that the dispute in that case involved a right that was created by Congress,[179] and explained that, accordingly, "Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized [] data submitters for their contributions of needed data."[180] Because the dispute therefore involved a function that the Court described as "essentially legislative," the Court held that it could be resolved by non-Article III entities.[181]

Shortly after that decision, in *Commodity Futures Trading Commission v. Schor*,[182] the Court extended the doctrine beyond those rights actually created by Congress to also permit a non-Article III entity to consider additional counterclaims that were not created by Congress, as long as adjudication of those additional claims is necessary in order to effectively adjudicate the congressionally created right.[183] The Court stated:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[184]

In *Granfinanciera, S.A. v. Nordberg*,[185] the Court again described this extension of the public rights doctrine.[186] While the dispute was between two private parties and did not technically involve the federal government, Justice Brennan, writing for the majority, described the public rights doctrine as broad enough to encompass litigation between private parties if that litigation is pursuant to a complex regulatory scheme.[187] The Court described the doctrine as involving those rights that are "closely intertwined with a federal regulatory

178. *Id.* at 589 (quoting *Northern Pipeline*, 458 U.S. at 68).
179. *See id.*
180. *Id.* at 590.
181. *See id.* (citing St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 49–53 (1936)).
182. 478 U.S. 833 (1986).
183. *See id.* at 857.
184. *Id.* at 840 (quoting *Thomas*, 473 U.S. at 593) (internal quotation marks omitted).
185. 492 U.S. 33 (1989).
186. *See id.* at 54–56.
187. *See id.*

program Congress has power to enact . . . ."[188]

Takings claims do not fit into this category. Unlike those subject matters that Congress may have a justifiable basis for keeping under its thumb, Congress did not create takings claims. Unlike the "essentially legislative" task at issue in *Thomas*, deciding takings claims is a "judicial inquiry."[189]

Commentators have previously expressed reasonable concern when Article III has been interpreted rigidly, such that it could be said to "delegitimize[] many of the institutions of the modern administrative state."[190] It is worth mentioning, therefore, that although this Article calls into question the ability of the Court of Federal Claims to adjudicate takings claims, it has no effect on the myriad administrative agencies that the Court has approved or not yet addressed. Most, if not all, of those agencies are primarily tasked with adjudicating statutorily created rights and fall within this exception to Article III. In addition, their consideration of issues beyond their narrow area of expertise, is, as the Court explained in *Schor*, "incidental to, and completely dependent upon, adjudication of [] claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the [] claim."[191] As some commentators have described them, they are "adjudicatory schemes designed to solve unique and unforseen [sic] problems."[192]

In contrast, the Court of Federal Claims is exceptional in that it is currently the only non-Article III entity being asked to adjudicate a constitutional, as opposed to statutory, right. The constitutional problem identified in this Article therefore does not encompass Congress' use of agency adjudicators in the various areas in which they are currently employed. Unlike the various administrative entities that fit within this exception, the justification does not apply to the Court of Federal Claims considering takings cases.

5. *The Court of Federal Claims' Deciding Takings Claims Fails the Modern Balancing Tests*

While this Article has already touched upon many of the Court's recent decisions when describing the different factors that the Court has considered in this area, some of those decisions warrant slightly more expansive consideration, as they demonstrate how the Court has combined and weighed the factors in recent years.

In *Northern Pipeline*, the Court considered whether it was constitutional for Congress to give bankruptcy court judges the authority to consider state law

188. *Id.* at 54. For an engaging perspective on the effect the development of the administrative state has had upon the consideration of claims against the United States, see Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517 (1991).

189. *Compare Thomas*, 473 U.S. at 590, *with* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

190. Saphire & Solimine, *supra* note 50, at 112.

191. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986).

192. Saphire & Solimine, *supra* note 50, at 112.

claims related to bankruptcy, in addition to their more traditional role in considering the bankruptcy itself.[193] The bankruptcy judges in question were appointed by the President to fourteen-year terms with the advice and consent of the Senate, were subject to removal by a "judicial council of the circuit," and were issued salaries subject, at least in theory, to periodic adjustment.[194] The judges thus clearly were not Article III judges.[195]

The Justices took very different approaches to deciding whether the bankruptcy court was acting contrary to constitutional command.[196] In the plurality opinion, Justice Brennan offered what has been described as a "categorical approach" to the problem.[197] Justice Brennan first explained that the grant of power Congress had entrusted to bankruptcy judges did not derive from an "exceptional grant of power," such as Congress' authority over the District of Columbia, the Territories, or the nation's military forces.[198] To fall within that category, Justice Brennan explained, the subject matter relegated to a non-Article III entity must be one that "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue."[199] The plurality also rejected the possibility that the grant of power fits within the public rights exception to Article III, noting that public rights are those that arise "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[200] Finally, the plurality rejected the notion that the bankruptcy courts were permissible "adjuncts" to Article III courts.[201] Considering the breadth of the powers of the bankruptcy court and the lack of de novo review of that court's conclusions by Article III courts, the plurality

193. *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion). The Bankruptcy Act of 1978 created bankruptcy courts as "adjuncts" to the district court of each judicial district. *See id.* at 53. The judges of those courts exercised jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." *See id.* at 54 (quoting 28 U.S.C. § 1471(b) (1976), *invalidated by Northern Pipeline*, 458 U.S. 50).

194. *See id.* at 53.

195. *See id.* at 60.

196. Continuing the widespread criticism of the Court's Article III jurisprudence, Professor Redish described all of the opinions as adopting guidelines that are "without legitimate basis in logic or in constitutional language, history, or policy." Redish, *supra* note 62, at 200; *see also* Eric G. Behrens, Stern v. Marshall*: The Supreme Court's Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 AM. BANKR. L.J. 387, 396–97 (2011) (describing *Northern Pipeline* decision as "controversial" and "analytically excoriated"); Erwin Chemerinsky, *Ending the Marathon: Is It Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 311–12 (1991).

197. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 243–46 (1990); Pfander, *supra* note 42, at 661.

198. *See Northern Pipeline*, 458 U.S. at 70–71.

199. *Id.* at 66.

200. *Id.* at 67–68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)) (internal quotation marks omitted).

201. *See id.* at 87.

concluded that they were not acting solely as adjuncts.[202]

In dissent, Justice White rejected the plurality's attempts to approach the problem based upon the type of cases that Congress sent to a non-Article III court, suggesting that "[t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts."[203] Nonetheless, Justice White did not believe that Congress may relegate cases to legislative courts whenever it wants. Instead, he proposed a balancing test in which the Court would weigh the values underlying Article III against the legislative interest in having such cases heard by non-Article III courts:

> I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.[204]

Justice White then proposed two considerations relevant to conducting that balancing test. First, legislative courts reviewed by Article III courts should be "less controversial" than legislative courts that "entirely [] avoid judicial review in a constitutional court."[205] Second, Article I courts would generally be permissible when they are "designed to deal with issues likely to be of little interest to the political branches, [as] there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government."[206] Applying those considerations to the bankruptcy courts, Justice White noted that there was substantial opportunity to appeal bankruptcy judges' decisions both to district courts and courts of appeals, that "[b]ankruptcy matters are, for the most part, private adjudications of little political significance," and that the "tremendous increase in bankruptcy cases" combined with the "extreme specialization" of bankruptcy proceedings justified

202. *See id.* at 84–86.

203. *Id.* at 113 (White, J., dissenting).

204. *Id.* at 115. The first criticism of the balancing test was the *Northern Pipeline* plurality decision, which describes the balancing approach as one "in which Congress can essentially determine for itself whether Art. III courts are required." *Id.* at 70 n.25 (plurality opinion). The problem with assessing the values underlying Article III on a case-by-case basis is that, when those values are weighed against the immediate legislative interests involved when Congress creates any particular non-Article III body, the concrete values that drove Congress to that decision will necessarily be more recognizable than the Article III interests, which are designed to prophylactically protect against subtle pressure on judges. "Thus, any case-by-case balancing process will always tend to find the benefit of maintaining these protections illusory." Redish, *supra* note 62, at 222.

205. *Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

206. *Id.*

Congress' creation of legislative courts to deal with those issues.[207]

Shortly after *Northern Pipeline*, the Court issued *Thomas*, wherein it considered whether Congress violated Article III when it decided to require binding arbitration as the mechanism for resolution of disputes between manufacturers who registered their pesticides with the government.[208] In the majority decision, the Court held that resolution of the question of the appropriateness of using a non-Article III body to resolve disputes turns upon "practical attention to substance rather than doctrinaire reliance on formal categories . . . ."[209]

The Court therefore applied a balancing test, as Justice White had proposed in his dissent in *Northern Pipeline*.[210] On the one hand, the Court weighed "the nature of the right at issue," namely that the dispute involved a right Congress had created, as well as its opinion that the concerns motivating Congress to choose a non-Article III method of resolution were reasonable, in particular Congress' concern that delaying pesticide registrations would endanger public health.[211] Against those considerations, the Court weighed the purpose of Article III, concluding that the system Congress had established did not threaten the independent role of the judiciary or "diminish the likelihood of impartial decisionmaking, free from political influence."[212]

The next year, the Court extended its application of the "pragmatic" approach used in *Thomas* when it decided *Schor*.[213] The case raised the question of whether the Commodity Futures Trading Commission's (CFTC) consideration of state law counterclaims violates Article III.[214] Holding that it did not, a majority of the Court adopted a balancing approach similar to that Justice White had described in *Northern Pipeline*, explaining that "the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III."[215] That inquiry, the Court explained, is in turn guided by "practical attention to substance rather than doctrinaire reliance on formal categories . . . ."[216]

The Court began its inquiry by noting that one of the purposes of Article III is to protect a litigant's personal interest in having his or her claim "decided before judges who are free from potential domination by other branches of government."[217] The Court explained that because that interest is a "personal"

207. *Id.* at 116–18.
208. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985).
209. *Id.* at 587.
210. *See id.* at 589–90.
211. *See id.* at 590.
212. *Id.*
213. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847–59 (1986).
214. *See id.*
215. *Id.* at 847.
216. *Id.* at 848 (quoting *Thomas*, 473 U.S. at 587) (internal quotation marks omitted).
217. *Id.* (quoting United States v. Will, 449 U.S. 200, 218 (1980)) (internal quotation marks omitted).

interest, it can be waived,[218] and that, in the instant case, the litigant had "indisputably waived any right he may have possessed to the full trial of [the commodity future broker's] counterclaim before an Article III court" because he had "expressly demanded that [the commodity future broker] proceed on its counterclaim" before the CFTC.[219] The Court also held that Article III serves the separate structural interest of "safeguard[ing] the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts," an interest that cannot be waived.[220] Despite that personal waiver, the question of whether Congress has exceeded its authority in designating an issue for non-Article III adjudications cannot be waived. Therefore, the Court then turned to that question.

As the Court described the problem, it is one of determining "the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch . . . ."[221] To reach that question, the Court purported to weigh many of the considerations the Court has recognized over the years, bundling them into three general factors.

The first factor is "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts . . . ."[222] Applying that first factor to the CFTC, the Court found multiple features to weigh in favor of permitting that body to decide state law counterclaims:

- It deals only with a "particularized area of law."[223] This is in contrast to the bankruptcy courts' consideration of all claims "related to" cases under the bankruptcy code, which the Court invalidated in *Northern Pipeline*.[224]

- Its orders "are enforceable only by order of the district court," in contrast to the bankruptcy court's authority to enforce its own

218. *Id.* at 848–50.

219. *Id.* at 849.

220. *Id.* at 850 (second alteration in original) (quoting Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)); *see also id.* at 851 ("[T]he parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." (citation omitted) (citing United States v. Griffin, 303 U.S. 226, 229 (1938))).

221. *Id.*

222. *Id.*

223. *Id.* at 852 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982) (plurality opinion)) (internal quotation marks omitted).

224. *See id.* at 852–53 (quoting 28 U.S.C. § 1471(b); *Northern Pipeline*, 458 U.S. at 85).

orders.[225]

- Its orders are reviewed under the less deferential "weight of the evidence" standard, as opposed to the more deferential clearly erroneous standard.[226]

- It does not exercise "all ordinary powers of district courts."[227]

The second factor the Court considered is "the origins and importance of the right to be adjudicated . . . ."[228] Applying that factor, the Court recognized that the state law counterclaim involved a private right of the type that was historically subject to resolution by Article III courts and therefore warranted a searching inquiry.[229] Conducting that "searching" inquiry, the Court found it important that Congress had not entirely removed adjudication of the right at issue from the Article III courts but that, instead, "Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected."[230] The Court concluded: "Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."[231]

The third, and last, factor the Court considered was "the concerns that drove Congress to depart from the requirements of Article III."[232] Here, the Court noted that in authorizing the CFTC's jurisdiction, Congress' goal was "to create an inexpensive and expeditious alternative forum," and the "primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals."[233] Also weighing in favor of permitting the adjudicatory scheme was "the perception that the CFTC was relatively immune from political pressures," and "the obvious expertise that the Commission possesses" in the area in which it adjudicates.[234] Finally, the Court stressed that the objectionable portion of the CFTC's jurisdiction, its authority to decide common law counterclaims, "is incidental to, and completely dependent upon, adjudication of reparations claims created by

225. *Compare id.* at 853, *with Northern Pipeline*, 458 U.S. at 85–86.

226. *Compare Schor*, 478 U.S. at 853, *with Northern Pipeline*, 458 U.S. at 85.

227. *Schor*, 478 U.S. at 853 (quoting *Northern Pipeline*, 458 U.S. at 85) (internal quotation marks omitted).

228. *Id.* at 851.

229. *See id.* at 853–54.

230. *Id.* at 855.

231. *Id.* The Court's decision appears to rely upon the fact that the district courts retained jurisdiction to consider the same claims. *See id.* at 862–65 (Brennan, J., dissenting) (describing majority's approach as relying upon fact that "Congress does not altogether eliminate federal-court jurisdiction over ancillary state-law counterclaims," and that "the CFTC *shares* in, rather than displaces, federal district court jurisdiction over these claims . . . .").

232. *Id.* at 851 (majority opinion).

233. *Id.* at 855.

234. *Id.* at 855–56.

federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim."[235]

The Court considered another challenge to the constitutionality of a non-Article III entity in its 2011 decision in *Stern v. Marshall*.[236] In *Stern*, the question was whether a bankruptcy court's consideration of a counterclaim of tortious interference violates Article III.[237] The majority began and ended its analysis of that question by reflecting upon the purpose of that constitutional provision.[238] The Court also assessed whether the case fit within any of the categories outlined above.

First, the Court discussed the suggestion that the proceeding involved public rights. The Court began by rejecting the applicability of the original understanding of the public rights doctrine to the counterclaim, noting that it is "not a matter that can be pursued only by grace of the other branches," or "one that 'historically could have been determined exclusively by' those branches," but was instead one that "does not 'depend[] on the will of congress;' Congress has nothing to do with it."[239]

The Court then concluded that it also did not fall into one of the extensions of the public rights doctrines, as it "does not flow from a federal statutory scheme," and "is not 'completely dependent upon' adjudication of a claim created by federal law . . . ."[240] The Court concluded that the counterclaim "does not fall within any of the varied formulations of the public rights exception in this Court's cases."[241] In so concluding, the Court also noted that bankruptcy courts do not fit within the extension of the public rights doctrine that the Court had described in *Schor*:

> We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." The "experts" in the federal system at resolving common law counterclaims such as [the one at issue] are the Article III courts, and it is with those courts

235. *Id.* at 856.

236. *See* Stern v. Marshall, 131 S. Ct. 2594 (2011). In the interim, the Court held that it was unconstitutional for an Article IV judge, the Chief Judge of the District Court for the Northern Mariana Islands, to sit by designation on the Ninth Circuit Court of Appeals. *See* Nguyen v. United States, 539 U.S. 69, 72 (2003).

237. *See Stern*, 131 S. Ct. at 2600.

238. *See id.* at 2608.

239. *Id.* at 2614 (alteration in original) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982) (plurality opinion); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855)).

240. *Id.* at 2614 (quoting *Schor*, 478 U.S. at 855–56) (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584–85 (1985); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458 (1977)).

241. *Id.*

that [the] claim must stay.[242]

The Court next considered whether the bankruptcy courts' role could be described as that of an adjunct to the district courts. Because the bankruptcy courts did more than fact finding, instead deciding "'[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," and the bankruptcy courts have power to enter final judgments, the Court concluded that they were not adjuncts.[243]

In dissent, Justice Breyer applied the balancing approach, which he described as addressing the question whether Congress' use of a non-Article III body poses "a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch."[244] The dissent concluded that the bankruptcy courts' consideration of the counterclaim at issue in that case was permissible based upon a variety of the *Schor* factors.[245] Weighing in favor of constitutionality, the dissent explained, was that bankruptcy judges "enjoy considerable protection from improper political influence."[246] To explain this statement, Justice Breyer contrasted the earlier, impermissible scheme that had "provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate," with the fact that "current law provides that the federal courts of appeals appoint federal bankruptcy judges."[247] The dissent also found solace in the fact that "Article III judges control and supervise the bankruptcy court's determinations" and that district court judges may even "withdraw, in whole or in part, any case or proceeding referred [to the Bankruptcy Court] . . . on its own motion or on timely motion of any party, for cause shown."[248] The dissent next disagreed with the majority's conclusion that the litigant challenging the forum had nowhere else to go, asserting "he could have litigated it in a state or federal court after distribution."[249] Finally, the dissent addressed the nature and importance of the legislative purpose. Because Congress is specifically given authority to establish uniform bankruptcy laws by Article I, Section 8 of the Constitution, the dissent weighed that factor in favor of the constitutionality of Congress' decisions with respect to the extent of the bankruptcy courts' jurisdiction.[250]

As described in the previous sections, none of the primary rationales the

242. *Id.* at 2615 (citations omitted) (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)).

243. *Id.* at 2618–19 (alteration in original) (quoting *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring)).

244. *Id.* at 2624 (Breyer, J., dissenting).

245. *See id.* at 2626–28.

246. *Id.* at 2626–27.

247. *Id.* at 2627.

248. *Id.* (alterations in original) (quoting 28 U.S.C. § 157(d)) (internal quotation marks omitted).

249. *Id.* at 2628 (citing 11 U.S.C. § 523(a)(6)).

250. *Id.* at 2629.

Court has applied to justify the use of Article I courts weigh in favor of the Court of Federal Claims considering takings claims. The current scheme therefore fails under the categorical approach of the majority in *Northern Pipeline*. The scheme also fails to pass muster under the dissent's approach in *Northern Pipeline*, which described bankruptcy courts as involving "issues likely to be of little interest to the political branches," with "little political significance."[251] As outlined above, no one could seriously argue that AIG's shareholders' claim—that they are owed billions of dollars from the Treasury as a result of the government's bailout of that company—is not of interest to the political branches. As the *Schor* decision represents the lowest bar to date for permitting Congress to employ non-Article III tribunals to adjudicate claims, it is particularly telling to apply the *Schor* criteria to the Court of Federal Claims' consideration of takings claims.[252] The result is striking, as every factor the Court has looked to, even while it affirmed the CFTC's status as a non-Article III body, militates against the Court of Federal Claims considering takings cases. That court's continuing to do so does not even come close to clearing the low bar set in *Schor* and the dissent in *Stern*.

Both the *Schor* majority and *Stern* dissent noted that in the bankruptcy context, the litigants could have chosen to have the claims at issue decided by an Article III court but elected the bankruptcy forum instead.[253] In contrast, plaintiffs seeking to file a takings claim for greater than $10,000 have only one forum available to them: the Court of Federal Claims.[254] Thus, the AIG shareholders, and any other party bringing takings claims, indisputably have "nowhere else to go."[255] Whatever the force of that rationale in the context of the bankruptcy courts, it has none to the Court of Federal Claims.

With respect to the first *Schor* factor, "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts," the Court of Federal Claims is much more like an Article III district court than the CFTC, the entity whose jurisdiction the *Schor* majority found unobjectionable.[256] Indeed, as federal district courts have concurrent jurisdiction to consider takings claims seeking less than $10,000, the Court of Federal Claims can be said to be exactly like a district court with

251. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 115–16 (1982) (White, J., dissenting).

252. *See* Saphire & Solimine, *supra* note 50, at 120 (describing balancing analysis adopted in that decision as having "questionable capacity to impose any principled limitations on Congress's power to use non-article III adjudicatory institutions to implement federal policies").

253. *See Stern*, 131 S. Ct. at 2628 (Breyer, J., dissenting) ("[H]e could have litigated it in a state or federal court . . . ."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986) (concluding that "Schor indisputably waived any right he may have possessed to the full trial of [the commodity future broker's] counterclaim before an Article III court" because he had "expressly demanded that [the commodity future broker] proceed on its counterclaim" before CFTC").

254. *See* E. Enters. v. Apfel, 524 U.S. 498, 520 (1998).

255. *See Stern*, 131 S. Ct. at 2614.

256. *See Schor*, 478 U.S. at 851.

respect to the takings portion of its jurisdiction. Rather than dealing with a particularized area of law, the Court of Federal Claims' consideration of takings claims directly overlaps claims the district courts have developed expertise in considering. Moreover, unlike the CFTC, which does not exercise "'all ordinary powers of district courts,'" and whose orders "are enforceable only by order of the district court," the Court of Federal Claims exercises all of the same authority as a district court, up to and including the power to enforce its own orders and issue final judgments.[257] Finally, as noted previously, while the CFTC's decisions are reviewed under the less deferential "weight of the evidence" standard, the Federal Circuit reviews the Court of Federal Claims' decisions under the more deferential "clearly erroneous" standard that the *Schor* Court described as objectionable.[258]

The second *Schor* factor, "the origins and importance of the right to be adjudicated," could hardly apply more strongly than in a case dealing with the Takings Clause of the U.S. Constitution.[259] In *Northern Pipeline*, *Schor*, and *Stern*, the Court found that even state law claims trigger this factor.[260] If the state law claims at issue in those cases were important enough for this factor to weigh against non-Article III adjudication, then surely a federal right included in the Bill of Rights is entitled to at least that much weight.[261] The *Schor* Court found this factor counteracted by the fact that Congress had not entirely removed adjudication of the right at issue from the Article III courts, and instead "the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected."[262] In stark contrast, litigants such as the AIG shareholders have no option but to file their takings claims in the Court of Federal Claims. The "origins and importance of the right" factor thus weighs heavily against permitting takings claims to be adjudicated outside an Article III court.

The final *Schor* factor, "the concerns that drove Congress to depart from the requirements of Article III," does not save Congress' choice in this instance.[263] As noted earlier, the creation of the Court of Federal Claims as an Article I court appears to have largely been done with little study and almost as an afterthought to the creation of the Federal Circuit. To the extent Congress considered the new body's status at all, Congress was not focused upon that entity's Takings Clause jurisdiction, and it appears not to have recognized, or

257. *See id.* at 853 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982) (plurality opinion)).

258. *See id.*

259. *See id.* at 851.

260. *See Stern*, 131 S. Ct. at 2611; *Schor*, 478 U.S. at 852; *Northern Pipeline*, 458 U.S. at 84.

261. *See* WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 90 (Kraus Reprint Co., 1971) (1913) ("[N]ext to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.").

262. *Schor*, 478 U.S. at 855.

263. *See id.* at 851.

even considered, that the new structure it was creating would remove takings claims from an Article III court. A senate report captures Congress' thoughts about why it departed from the requirements of Article III:

> The court will be established under Article I of the Constitution of the United States. Because 28 U.S.C. 2509 of existing law gives the trial judges of the Court of Claims jurisdiction to hear congressional reference cases, which are not 'cases and controversies' in the constitutional sense, and because the cases heard by the Claims Court are in many ways essentially similar to the limited jurisdiction cases considered by the tax court, judges of the Claims Court are made Article I judges rather than Article III judges.[264]

Thus, according to Congress, the Court of Federal Claims is an Article I court so that it can continue to hear congressional reference cases and because the cases heard by the newly created court are similar to those heard by the tax court. While those justifications may or may not be valid with respect to some aspects of the court's jurisdiction, they do not justify Congress' decision to give the court jurisdiction to consider takings cases. Congress' desire to maintain some entity to consider congressional reference cases is understandable, as Congress reasonably wants an expert body to assist it in determining when to issue private bills.[265] That Congress may create such a body says nothing about whether it must be the same body that considers takings claims. If Congress wants to be able to send congressional reference cases—which are not "cases or controversies" and therefore do not require adjudication by an Article III court—to some entity of its creation, it may, of course, do so. By sweeping up takings cases in the same basket Congress created to deal with private bills, one can fairly say that Congress "sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch," which is precisely what the *Stern* dissent said it may not do.[266]

Congress' second rationale for making the Court of Federal Claims an Article I court, its recognition that the Court of Federal Claims "in many ways" resembles the tax court, also does not encompass takings cases. Instead, it appears that Congress was referring to the other subject matters the court considers, such as contract disputes and tax cases. While the public rights rationale could be applied both to those aspects of the court's jurisdiction as well as to the tax court, this Article has already demonstrated why it does not justify the Court of Federal Claims considering takings cases. Takings claims thus fall outside the "many ways" those courts are similar. The "concerns that drove Congress to depart from the requirements of Article III" therefore simply

264. S. REP. NO. 97-275, at 13 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 23.

265. *See generally* Matthew G. Bisanz, Current Development, *The Honor of a Nation and the Mysterious Evolution of 28 U.S.C. § 2509 Jurisprudence*, 24 GEO. J. LEGAL ETHICS 461 (2011).

266. *See* Stern v. Marshall, 131 S. Ct. 2594, 2624 (Breyer, J., dissenting).

do not apply to that aspect of the court's jurisdiction.

Finally, the *Schor* Court weighed in favor of non-Article III adjudication that deciding the otherwise impermissible claim was "incidental to, and completely dependent upon, adjudication of [] claims created by federal law."[267] The Court noted that the situation wherein the CFTC decided claims not created by federal law "in actual fact is limited to claims arising out of the same transaction or occurrence as the [created by federal law] claim."[268] In contrast, the Court of Federal Claims considers takings claims not only as counterclaims or when they are incidental to other claims but also entirely independent of its other jurisdictional grants.

C. *How the Court of Federal Claims Came to Be an Article I Court that Decides Takings Claims*

The previous section of this Article demonstrates that none of the rationales the Supreme Court has relied upon to justify Congress placing adjudicative responsibilities in a non-Article III body applies to justify the Court of Federal Claims considering takings claims. This section demonstrates that the status quo is actually a very recent development. Taking a longer view, Congress has generally expanded citizens' ability to sue the sovereign, and the history of the predecessors of the Court of Federal Claims reveals a series of expansions upon citizens' ability to hold the sovereign to task. In addition, the recent reduction of citizens' rights to sue the sovereign in a constitutional court appears to have been inadvertent and inconsistent with Congress' intentions when it created the Court of Federal Claims.

In the early years of the nation, at least since 1789, citizens who wanted to file claims for money against the government did so through petitions filed directly with Congress.[269] But not everyone thought that system worked well, including President John Quincy Adams who, while a congressman, stated:

> There ought to be no private claims business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or a Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative Assembly is the worst of all tribunals for the administration of justice.[270]

267. *Schor*, 478 U.S. at 856.

268. *Id.*

269. For a history, see Shimomura, *supra* note 65; *see also* Charles Chauncey Binney, *Origin and Development of Legal Recourse Against the Government in the United States*, 57 U. PA. L. REV. 372, 381 (1909).

270. William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 392 (1968) (quoting John Quincy Adams); *see also* STEVEN FLANDERS, THE FEDERAL CIRCUIT—A JUDICIAL INNOVATION: ESTABLISHING A US COURT OF APPEALS 120 (2010).

In order "to relieve the pressure on Congress caused by the volume of private bills," Congress created the U.S. Court of Claims in 1855.[271] Initially, the individuals who served on that court, and considered monetary claims against the federal government, were administrators who reported directly to Congress, having no real authority to decide cases at all.[272] As the Supreme Court has described the original Court of Claims, it was "originally nothing more than an administrative or advisory body . . . ."[273] Appropriately, as a creature of the legislature, that body was housed in the Capitol Building itself.[274]

The Court of Claims was reorganized in 1863, after President Lincoln opined:

> The investigation and adjudication of claims in their nature belong to the judicial department . . . . While the court has proved to be an effective and valuable means of investigation it in great degree fails to effect the objects of its creation for want of power to make its decisions final.[275]

In response to that and similar criticisms, in 1863, Congress passed "An Act to amend an Act to establish a court for the investigation of claims against the United States," which provided that appeals from the Court of Claims could be taken to the Supreme Court.[276]

That Act provided the Court with its first opportunity to address the status of the first Court of Claims in *Gordon v. United States*.[277] In that decision, the Court noted that based upon the powers Congress granted the Court of Claims, that body was not actually deciding any cases.[278] Instead, the statute called upon the Court of Claims, and the Supreme Court upon review, to provide advisory opinions to the Secretary of the Treasury, who would then provide Congress with an estimate, which Congress would then decide to fund or not to

271. Glidden Co. v. Zdanok, 370 U.S. 530, 552 (1962).

272. *See* Williams v. United States, 289 U.S. 553, 565 (1933) (citing Am. Ins. Co. v. Canter, 26 U.S. 511, 546 (1828)) (noting individuals serving on U.S. Court of Claims did not possess "judicial power defined by article 3 of the Constitution").

273. *Id.*

274. *See* FLANDERS, *supra* note 270, at 113.

275. Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 686 n.64 (1933) (alteration in original) (citing 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3252 (1897)).

276. *See* Gordon v. United States, 117 U.S. 697, 698 (1864).

277. 117 U.S. 697 (1864). *Gordon* is the well-known "lost opinion" of the Court. *See id.* at 698–99. The decision in the underlying case was first issued at 69 U.S. 561 (1864), with a suggestion that an expanded decision would be forthcoming. *See Gordon*, 117 U.S. at 697. That forthcoming decision was based upon the last written opinion of Chief Justice Taney, which he had circulated to the Justices before his death. *See id.* That opinion was lost sometime during the following year, and, after the clerk recovered it, it was published with the assent of the members of the Court. *See id.* In the preface to the publication of Chief Justice Taney's decision, the Court noted that it was being published after the fact because "[i]rrespective of its intrinsic value, it has an interest for the court and the bar . . . ." *Id.*

278. *See Gordon*, 117 U.S. at 698–99.

fund.[279] The Court noted: "Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments."[280] Such authority, the Court noted, is "like to that of an Auditor or Comptroller," and is not the "judicial power in the sense in which those words are used in the Constitution."[281] As the Court succinctly recognized, the Court of Claims, as it was structured in 1864, was not a court at all, and the values underlying Article III were not undermined by its actions.[282] That case offers little explicit guidance with respect to the question of the circumstances under which legislative courts may be established, because the court being considered was not yet even an Article I court at that time.

Beginning in 1865, Congress removed the requirement that Treasury prepare an estimate, began to make appropriations in advance of the Court of Claims' decisions, and enacted various statutes requiring the Court of Claims to resolve the multitude of claims that came out of the Civil War.[283] Along with that increased authority, the court was also given a new location, moving out of the Capitol into its own building near the White House, on Pennsylvania Avenue.[284] After those changes, the Court of Claims began deciding actual cases, while also providing non-binding opinions to Congress in what are known as congressional reference cases.[285] The Supreme Court agreed to

279. *See id.*

280. *Id.* at 699.

281. *Id.*

282. *See id.* at 700. As the Court recognized in *Glidden*, the *Gordon* decision is not technically the decision of the Court in that proceeding. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962). The *Glidden* Court stressed that the Court's refusal to hear the *Gordon* appeal was due solely to the fact that the Treasury Department could revise the decision, not due to the fact that an appropriation might not be forthcoming. *See id.* (citing United States v. Jones, 119 U.S. 477, 478 (1886)). Regardless, after Congress both removed Treasury's ability to revise the decisions and began to issue appropriations in advance of judgments, the Court began to hear appeals from the Court of Claims. *See id.*

283. *See* An Act in Relation to the Court of Claims, Sess. I, ch. 19, 14 Stat. 9 (1866). After those changes, the Supreme Court agreed to hear appeals from the Court of Claims, which it did first in *De Groot v. United States* and explicitly approved in 1871. *See* United States v. Klein, 80 U.S. 128, 133 (1871); De Groot v. United States, 72 U.S. 419, 427 (1866); *see also* Shimomura, *supra* note 65, at 663 n.307 (listing and detailing history of related cases).

284. *See* FLANDERS, *supra* note 270, at 113.

285. *See* 28 U.S.C. §§ 1492, 2509 (2012) (providing details of congressional reference cases). Congressional reference is a procedure that allows either house of Congress to refer a matter to the chief judge of the Court of Claims with directions to report findings back to the referring house. *See id.* § 2509. Under that procedure, the chief judge designates a hearing officer to make factual findings and a reviewing panel, consisting of three judges of the Court of Claims. *See id.* This procedure is still available to Congress, and reference cases are occasionally transmitted to the U.S. Court of Federal Claims, which will provide an advisory decision after reviewing the reference. *See id.* Under that procedure, the hearing officer must make findings in accordance with the rules of the Court of Federal Claims, and "[h]e shall append to his findings of fact conclusions sufficient to inform Congress whether the demand

consider appeals from the court's case-decisional authority, even while refusing to consider appeals from the congressional reference cases in what has been described as an "uneasy accommodation" based upon an understanding that the Court of Claims' participation in reference cases was only an "ancillary" function.[286] With those changes, the Court of Claims went straight from a non-adjudicatory body to an Article III court.

From 1866, when the Supreme Court first began to hear Court of Claims appeals, through 1925, the Court consistently treated that body as an Article III court.[287] Because the Court of Claims was perceived to be an Article III court during this timeframe, the Supreme Court's pronouncements tell us little about the circumstances necessary for Congress to permissibly establish the Court as an Article I court. Also, throughout this period, perhaps because of the history of claims against the United States proceeding only through presentation to Congress, the Supreme Court perceived the Court of Claims, and its jurisdictional basis, through the prism of sovereign immunity.[288] Thus, when a plaintiff in the Court of Claims, Thomas McElrath, objected to that court's consideration of a government counterclaim seeking $6,106.53 against him without providing him the opportunity to have that case heard by a jury as provided for by the Seventh Amendment,[289] the Court ruled in favor of the government in a decision explicitly grounded upon the principle of sovereign immunity:

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is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant." *Id.* § 2509(c).

286. *See In re* Sanborn, 148 U.S. 222, 226 (1893) (describing Court of Claims' advisory duties as "ancillary" function); Shimomura, *supra* note 65, at 662 (describing the "uneasy accommodation"); *see, e.g.*, Muskrat v. United States, 219 U.S. 346, 362–63 (1911) (affirming that Court would not consider appeals of reference cases); United States v. Jones, 119 U.S. 477 (1886) (giving one example of Supreme Court hearing appeal from Court of Claims during this period).

287. The first case in which the Supreme Court agreed to hear an appeal from the Court of Claims appears to be *De Groot*. *See De Groot*, 72 U.S. at 427. The Court explicitly approved doing so in 1871. *See Klein*, 80 U.S. at 133 (deciding case on appeal from Court of Claims); *see also* Shimomura, *supra* note 65, at 662 n.307 (detailing this history and listing additional cases during this time period). The last case in which the Court did so was *Miles v. Graham*. *See* Miles v. Graham, 268 U.S. 501, 505 (1925). In *Glidden Co. v. Zdanok*, the Court reviewed the history of the formation of the Court of Claims, noting that "there are substantial indications in the debates that Congress thought it was establishing a court under Article III." *Glidden*, 370 U.S. at 553. The Court explained that in its view, Congress had, throughout the history of that court, treated the Court of Claims as an Article III court. *Id.* at 555. The dissent in that case thought otherwise. *See id.* at 594 (Black, J., dissenting) ("Congress, however, has always understood that it was only establishing Article I courts when it created the Court of Claims . . . ."). In *Glidden*, the Court went so far as to say that "[t]he creation of the Court of Claims can be viewed as a fulfillment of the design of Article III." *Id.* at 558 (majority opinion).

288. *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."). At least since 1821, the Supreme Court had described the United States' sovereign immunity as absolute. *See id.*

289. *See* U.S. CONST. amend VII.

> The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. . . . If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.[290]

In 1887, Congress again changed the character of the court with the passage of the Tucker Act, which broadened the types of claims that could be submitted to the court, as opposed to directly to Congress.[291] Because the Tucker Act provided that "claims founded upon the Constitution" would be heard by the Court of Claims, takings claims were also, for the first time, to be brought in the Court of Claims.[292] In so doing, Congress created a court with much more authority than it previously enjoyed. Along with its upgraded status, the Court of Claims was placed in a new location in 1899, in what was then known as the Court of Claims Building.[293] From the time the court was moved out of the halls of Congress and given authority to decide cases, the court apparently thought of itself, and the Supreme Court considered it to formally be, part of the federal judiciary as an Article III or "constitutional" court.[294]

During that entire time period, the Supreme Court continued to describe the Court of Claims as an entity whose existence was entirely based upon waivers of sovereign immunity. As the Court stated, "the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition."[295]

During the twentieth century, there were various changes to the makeup of the Court of Claims. The primary change occurred in 1925, when Congress reorganized the court by designating a group of seven commissioners who would hear evidence and decide factual questions and whose findings would

290. McElrath v. United States, 102 U.S. 426, 440 (1880).

291. *See* CHARLES ALAN WRIGHT ET AL., STATUTORY EXCEPTIONS TO SOVEREIGN IMMUNITY—ACTIONS UNDER THE TUCKER ACT, 14 FED. PRACTICE & PROCEDURE § 3657 (3d ed. 2014).

292. See An Act to Provide for the Bringing of Suits Against the Government of the United States, ch. 359, 24 Stat. 505 (1887). This appears to be the first time takings claims could be filed in federal courts. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794–95 n.69 (1995) (discussing lack of judicial remedy for most federal takings until enactment of Tucker Act); *see also* Langford v. United States, 101 U.S. 341, 343 (1879) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation.").

293. *See* FLANDERS, *supra* note 270, at 113.

294. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 531–32 (1962).

295. Minnesota v. Hitchcock, 185 U.S. 373, 386 (1902); *see also* Kansas v. United States, 204 U.S. 331, 342 (1907) (quoting *Hitchcock*, 185 U.S. at 386).

then be reviewed by judges who served as an appellate body.[296] Congress had created a trial division made up of commissioners, who conducted trials, and a separate appellate division to review those findings.[297] There was no indication that Congress, or anyone else, considered the Court to be anything other than an Article III court. Under the Article III analysis described above, the old Court of Claims would have passed constitutional muster to consider takings claims, and there would be no need for this Article if things had stayed that way.

But in 1929, the Supreme Court altered its treatment of the Court of Claims, beginning to describe it not as subject to Article III, but instead as a legislative court established pursuant to Congress' Article I power. The Court first did so in dicta in the 1929 *Bakelite* decision involving the Court of Customs Appeals, opining that the Court of Claims:

> [W]as created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.[298]

While the Court recognized that "[o]ther claims have since been included in the delegation," the Court declared that "the court is still what Congress at the outset declared it should be—'a court for the investigation of claims against the United States.' The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination."[299]

Interestingly, even as the Justices changed course about whether the Court of Claims was an Article I or Article III court, the Supreme Court did not waver in its understanding that the basis of the Court of Claims' jurisdiction is a waiver of sovereign immunity. Indeed, as revealed in the *Bakelite* decision, the

296. *See* An Act to Authorize the Appointment of Commissioners by the Court of Claims and to Prescribe Their Powers and Compensation, Pub. L. No. 68-451, ch. 301, § 1, 43 Stat. 964 (1925); WILSON COWEN, PHILIP NICHOLS, JR. & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II 89 (1978) ("[T]his legislation authoriz[ed] the court to appoint a number of persons, not to exceed seven, to be known as commissioners who would have, and who would perform, in general, the same powers and duties as those pertaining to special masters in chancery.").

297. *See* An Act to Revise, Codify, and Enact into Law Title 28 of the United States Code Entitled "Judicial Code and Judiciary", ch. 165, § 2503, 62 Stat. 976 (1948). The status and authority of the commissioners changed over time. As of 1948, the commissioners' authority expanded to making recommendations for conclusions of law, which the Court of Claims judges would then review. *See id.* In 1953, Congress increased the number of commissioners to fifteen. *See* 28 U.S.C. § 171 (1958) (detailing appointment of judges). The commissioners' title was changed to "trial judge" in 1973. *See United States Court of Federal Claims: The People's Court*, U.S. COURT OF FED. CLAIMS, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Nov. 9, 2014).

298. *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929).

299. *Id.* at 452–53.

entire justification for determining that the Court of Claims was an Article I court was that the Court decided that Congress could have, if it had elected to do so, done all of the work then being done by the Court of Claims. This is explicit in the Court's statement that the Court of Claims' jurisdiction includes "nothing which inherently or necessarily requires judicial determination."[300] The *Bakelite* Court also noted the long history of the Court of Claims' issuing advisory opinions to Congress and noted that "[a] duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under article 3."[301] The *Bakelite* Court recognized that the Court of Claims was "undoubtedly and completely under the control of Congress."[302]

The Court expressly adopted the sovereign immunity/public rights rationale as its justification for determining that the Court of Claims could conduct its proceedings as a legislative court in the 1933 decision *Williams v. United States*.[303] The question presented in that case was whether Congress could reduce the salary of a judge serving on the old Court of Claims.[304] The Court held:

> Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body.[305]

The Court explained that the reason for its decision was the dicta presented in *Bakelite*: that the Court of Claims' function, "to examine and determine claims for money against the United States. . . . is one which Congress has a discretion either to exercise directly or to delegate to other agencies," and that "none of the matters made cognizable by the court inherently or necessarily requires judicial determination . . . ."[306] The Court explicitly held that the earlier utterances describing the Court as subject to Article III had been dicta. The Court never questioned, but instead explicitly relied upon, the proposition that the entire basis of the jurisdiction of the Court of Claims involved waivers of sovereign immunity.[307]

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300. *Id.* at 453. As one commentator aptly described the Supreme Court's understanding of the role played by the Court of Claims, it is "that the Court of Claims is most properly viewed as completely under the control of the legislative department." Comment, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133, 145 (1962).

301. *Bakelite*, 279 U.S. at 454.

302. *Id.* at 455.

303. 289 U.S. 553 (1933).

304. *Id.* at 561.

305. *Id.* at 579–80 (citations omitted) (citing *Bakelite*, 279 U.S. at 452, 458; United States v. Babcock, 250 U.S. 328, 331 (1919)).

306. *Id.* at 569 (quoting *Bakelite*, 279 U.S. at 438) (internal quotation marks omitted).

307. *Id.* at 568 (collecting cases supporting conclusion).

Congress had never actually asked for authority to downgrade the court's status to an Article I court, however. Congress therefore attempted to undo the *Williams* holding in 1953, by expressly declaring that the Court of Claims was "established under Article III of the Constitution of the United States."[308] In 1962, the Supreme Court again considered the Court of Claims' status in *Glidden Co. v. Zdanok*,[309] this time affirming that the Court of Claims was indeed a true constitutional court.[310] The context in *Glidden* was the constitutionality of a Court of Claims judge sitting by designation on an Article III court, which was only permissible if the Court of Claims judge was an Article III judge.[311] Explaining that the Court would not disregard Congress' declaration, a plurality of the Court held that the Court of Claims was, after all, an Article III court.[312]

In some ways, this decision is no more helpful to assessing whether the current Court of Federal Claims may constitutionally hear takings cases as an Article I court than was the Court's *Gordon* decision; in both cases, the Court determined that the entity it was assessing was not an Article I court and the Court, therefore, need not have explored the boundaries of what Congress could have done had Congress decided to establish a legislative court. The *Glidden* decision is instructive, however, not because of any question it answered, but because of one it raised. The *Glidden* decision was quite critical of the earlier *Williams* decision, which it described as of "questionable soundness."[313] The *Glidden* Court recognized that the earlier *Williams* decision equated Congress' perceived ability to establish the Court of Claims as an Article I court with Congress having actually done so.[314] As the Court noted, however, those

308. An Act to Amend Title 28, United States Code, Pub. L. No. 83-158, § 1, 67 Stat. 226 (1953) ("Such court is hereby declared to be a court established under article III of the Constitution of the United States."); *see also* Note, *The Constitutional Status of the Court of Claims*, 68 HARV. L. REV. 527, 527 (1955) ("Congress has recently attempted to reverse the result of the *Williams* case . . . .").

309. 370 U.S. 530 (1962).

310. *See id.* at 584. Because of that change in status to an Article III court, it was apparent that judges of the Court of Claims could no longer decide congressional reference cases. *See id.* In response, in 1966, Congress created a procedure whereby it would direct congressional reference cases to the chief commissioner of the Court of Claims rather than to the judges of the court. *See* Act to Amend Title 28, Entitled "Judiciary and Judicial Procedure," of the United States Code to Provide for the Reporting of Congressional Reference Cases by Commissioners of the United States Court of Federal Claims, Pub. L. No. 89-681, 80 Stat. 958, 958–59 (1966). Apparently Congress believed that in doing so it was preserving the independence of the judges as Article III judges and the commissioners as Article I judges. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 431 (1990). For a discussion of congressional reference cases, see Bisanz, *supra* note 265.

311. *Glidden*, 370 U.S. at 532–33. The Court was asked to address whether it was constitutional for Judge J. Warren Madden, then a judge on the Court of Claims, to have sat by designation on the U.S. Court of Appeals for the Second Circuit. *See id.*

312. *See id.* at 541.

313. *Id.* at 543 (noting criticism of *Williams* decision).

314. *See id.* at 549–50.

propositions need not logically follow.[315] Without addressing the extent of Congress' power to do something it had not done, the Court explicitly disagreed with the conclusion that the Court of Claims was an Article I court, holding instead that Congress had actually established that entity as an Article III court.[316]

Most importantly for this Article, while so holding, the Court in *Glidden* not only did not agree with the *Williams* holding—that Congress could commit the work then being performed by the Court of Claims to a non-Article III tribunal—but also explicitly refused to assess that question.[317] The Court instead took the opportunity to indicate that it had "certain reservations about" the accuracy of the *Williams* Court's description of the jurisdiction of the Court of Claims.[318] The Court explicitly recognized that, contrary to the *Williams* Court's description of that jurisdiction, the grant of authority "to award just compensation for a governmental taking, empowered [the Court of Claims] to decide what had previously been described as a judicial and not a legislative question."[319] Because the Court determined that the Court of Claims was an Article III court, it never had an occasion to correct that error.[320]

315. *See id.* at 549 ("But because Congress may employ such tribunals assuredly does not mean that it must.").

316. *See id.* at 552.

317. *See id.* at 549 ("Nor need we now explore the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article III courts.").

318. *See id.*

319. *See id.* at 549 n.21 (citing Williams v. United States, 289 U.S. 553, 581 (1933); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893)).

320. As noted above, in 1987, the Supreme Court reaffirmed, in *First English*, that takings claims do not require waivers of sovereign immunity. It is therefore not accurate to describe takings claims as involving waivers of sovereign immunity, and the *Glidden* Court's criticism of the *Williams* decision has been validated. The *Williams* decision was based upon the erroneous factual predicate that the cases considered by the Court of Claims only included those "which Congress has a discretion either to exercise directly or to delegate to other agencies." *See Williams*, 289 U.S. at 569 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929)) (internal quotation marks omitted). It turns out that was an overstatement. In contrast to the *Williams* Court's statement that "none of the matters made cognizable by the court inherently or necessarily requires judicial determination," the Takings Clause requires judicial determination. *See id.* At the time the *Glidden* decision was issued, the Court would have had to overturn *Williams* to correct that decision's error. The new Court of Federal Claims is, however, a different entity, with different rules governing the appointment of judges and their authority. Accordingly, the Court need not overturn *Williams* to correct, or allow a correction of, this error; all that is needed is that when the Supreme Court assesses the Court of Federal Claims' jurisdiction in the future, it recognize that, in addition to the contract claims and other matters considered by that court, it also hears takings claims, which do not require a waiver of sovereign immunity. *See Monongahela*, 148 U.S. at 327. *But see* Phillip R. Trimble, *Foreign Policy Frustrated*—Dames & Moore, *Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 381 n.291 (1984) ("There is no precedent for the proposition that the Constitution requires judicial determination for a takings claim or any aspect of it."). Because the rationale underlying *Williams* is that the federal government's immunity from suit is absolute, commentators point to the logic of sovereign immunity when they explain why the current Court of Federal Claims is an Article I court. *See, e.g.*, Pfander, *supra* note 42, at 658.

In 1966, Congress reaffirmed its intention that the Court of Claims be designated an Article III court.[321] The structure of the Court of Claims, from 1966 through to its dissolution in 1983, had many features that the Supreme Court has found to weigh in favor of permitting adjudication by adjuncts to Article III judges. While the Supreme Court did not assess that arrangement, the rationale from the Court's *Crowell* decision would likely justify the structure of the Court of Claims. In many ways the Court of Claims was analogous to the structure of the magistrates that the Court assessed in *Raddatz*. Like magistrate judges, the old commissioners, even when they were called trial judges, did not issue final judgments.[322] Rather, their decisions were reviewed de novo by Article III judges before the decisions were issued.[323] Also like a magistrate judge, in the old Court of Claims, the non-Article III judges worked "subsidiary to and only in aid of" the Article III judges, and "the entire process [took] place under the [Article III judge's] total control and jurisdiction."[324] They were very much adjuncts of the Article III judges. If that structure had not changed, the court that hears takings claims would still be an Article III court, and questions of that court's constitutionality vis-à-vis Article III would not be implicated.

That structure changed when Congress passed the Federal Courts Improvement Act of 1982: "An Act to establish a United States Court of Appeals for the Federal Circuit, to establish a United States Claims Court, and for other purposes."[325] When Congress created that new structure, it was focused upon the creation of a new appellate court, the United States Court of Appeals for the Federal Circuit, which would, for the first time, consolidate patent appeals into a single court.[326] To create the new appellate court, Congress, after ten years of study, decided to merge the Court of Customs and

321. *See* An Act to Provide for the Appointment of Two Additional Judges for the United States Court of Claims, and for Other Purposes, Pub. L. No. 89-425, 80 Stat. 139 (1966) (modifying 28 U.S.C. § 171 to state: "[T]he President shall appoint, by and with the advice and consent of the Senate, a chief judge and six associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under Article III of the Constitution of the United States.").

322. *See* Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 560 (2003) (describing authority of commissioners); *see also* 28 U.S.C. § 175(c) (1976) (amended 1982) ("Cases and controversies shall be heard and determined by a court or division of not more than three judges . . . ."); *id.* § 608 (providing that judges of court "shall function primarily in an appellate capacity") (repealed 1982); *id.* § 792 (authorizing Court of Claims to appoint commissioners and fixing commissioners' salaries) (repealed 1982); *id.* § 2503 (authorizing parties to appear before commissioners and giving commissioners specified duties and powers) (amended 1982 and 1992); CT. CL. R. 8, 14(a).

323. *See* Seamon, *supra* note 322, at 545.

324. *See* United States v. Raddatz, 447 U.S. 667, 681 (1980).

325. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

326. *See* Sward & Page, *supra* note 111, at 386–87. The Act's consolidation of patent appeals jurisdiction in a single federal appeals court is generally considered to be "[t]he most significant aspect of the Act . . . ." *See id.* at 386.

Patent Appeals with the appellate division of the Court of Claims.[327] Congress simply moved the Court of Claims judges to the newly created appellate court. But Congress still had to create a trial court to deal with the cases that had been decided by the old Court of Claims. In what appears to have been almost an afterthought, in the same act that created the Federal Circuit, Congress "elevated" the commissioners of the old Court of Claims, making those judges the first to serve on a new trial court, the United States Claims Court, which would later come to be called the United States Court of Federal Claims.[328] To explain the structure of the new trial court responsible for deciding claims against the federal government—claims previously the responsibility of the old Court of Claims—Congress stated:

> The establishment of the Claims Court accomplishes a much needed reorganization of the current system by assigning the trial function of the court to trial judges whose status is upgraded and who are truly independent. Presently, the commissioners of the Court of Claims are appointed by the Article III judges of that court and do not have the power to enter dispositive orders; final judgment in a case must be made by the Article III judges after reviewing findings of fact and recommendations of law submitted by a commissioner. The creation of the United States Claims Court will reduce delay in individual cases and will produce greater efficiencies in the handling of the court's docket by eliminating some of the overlapping work that has occurred as a result of this process.[329]

The creation of that new entity did not have the effect that Congress intended. Congress believed that the role of the Court of Federal Claims judges was to serve as "upgraded" versions of the commissioners from the old Court of Claims. That is not an accurate description of the solution that was implemented, however. While the status of the individual commissioners was

327. *See* Seamon, *supra* note 322, at 546 (providing history of Act). The public history of the court system presented by the judiciary recognizes that "[t]he establishment of the Federal Circuit followed more than ten years of study and debate over reform of the appellate structure of the federal judiciary." *See* FED. JUDICIAL CTR., *Landmark Judicial Legislation: The U.S. Court of Appeals for the Federal Circuit: "An Act to establish a United States Court of Appeals for the Federal Circuit, to Establish a United States Claims Court, and for Other Purposes"*, HISTORY OF THE FED. JUDICIARY, http://www.fjc.gov/history/home.nsf/page/landmark_22.html (last visited Nov. 9, 2014). No mention is made of any study of the effect the reform would have upon the trial division of the Court of Claims.

328. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 127, 133, 96 Stat. 25. As one commentator describes the process, "because the FCIA [Federal Courts Improvement Act] was directed to appellate reform, neither the FCIA's supporters nor Congress gave sustained attention to reforms needed at the trial level. The FCIA created the COFC, out of necessity, to take over the Court of Claims's trial functions . . . ." Seamon, *supra* note 322, at 545–46 (describing Court of Federal Claims' formation as "incidental to the creation of the Federal Circuit").

329. S. REP. NO. 97-275, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 18.

upgraded from their previous positions as adjuncts to Article III judges, those newly elevated judges do not fill the role of the old commissioners. Unlike the commissioners who they replaced, the Court of Federal Claims judges issue final judgments that are not reviewed by Article III judges before the final judgments are issued.[330] In addition, while the traditional role of the old Court of Claims was limited to the award of monetary damages, the court now has expanded authority "[t]o provide an entire remedy and to complete the relief afforded by the judgment," which involves the granting of some equitable relief.[331] The judges of the Court of Federal Claims therefore exercise authority that is more akin to the authority of the Article III judges of the Court of Claims. From the perspective of litigants bringing claims in the Court of Federal Claims, the Court of Federal Claims judges stepped into the shoes of the old Article III judges of the Court of Claims, not the commissioners of that dissolved body. When the appropriate comparison is made, the new trial court judges have a reduced, not upgraded, status.

In addition, while Congress believed that in creating the Court of Federal Claims it was creating judges who are "truly independent," in effect Congress reduced the independence of the body that decides monetary claims against the United States. While the judges who had previously heard such claims were Article III judges, the judges who now hear those cases are appointed for limited terms and do not enjoy Article III's protections. Because the central purpose of Article III is to ensure the independence of the judiciary, by substituting Article I judges into the role once filled by Article III judges, Congress has actually reduced the independence of that body. Thus, through the 1982 restructuring, Congress, in effect, changed its mind about its decision to permit citizens to bring lawsuits for money to the judiciary. Instead it has decided that when citizens sue the federal government and believe they are entitled to more than $10,000, they may only pursue those large claims in legislative courts controlled by Congress.[332] But it is not at all clear that Congress intended that effect.

D. *Options Moving Forward*

The Supreme Court has not discussed whether the current structure of the Court of Federal Claims comports with the requirements of Article III.[333] As

330. *See* 28 U.S.C. § 1491 (2012); *see, e.g.*, M.A. Mortenson Co. v. United States, 996 F.2d 1177, 1179–80 (Fed. Cir. 1993).

331. *See* Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 89 (2013) (alteration in original) (quoting 28 U.S.C. § 1491(a)(2)) (internal quotation marks omitted).

332. The Tucker Act creates exclusive jurisdiction to consider monetary claims, other than tort claims, in which plaintiffs seek greater than $10,000 from the federal government. For claims seeking less than $10,000, the federal district courts have concurrent jurisdiction pursuant to the "Little Tucker Act." *See* 28 U.S.C. § 1346(a)(2). Tort claims may be filed in a federal district court, pursuant to the Federal Tort Claims Act. *See id.* § 1346(b).

333. The Supreme Court has granted certiorari to takings cases originating in the Court of Federal Claims on multiple occasions. *See, e.g.*, Ark. Game & Fish Comm'n v. United

shown above, none of the rationales that the Supreme Court has used to uphold non-Article III entities' authority to adjudicate claims applies to the Court of Federal Claims deciding takings claims. That is not to say, of course, that no such justification could be conceived. As the review of those rationales demonstrates, they have been added over time. Further, as Justice Scalia noted, they seem to have been added "almost randomly."[334] Indeed, in the Court's most recent discussion of those factors, Justice Scalia proposed what may be a new one, stating: "in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."[335] As shown in this Article, with respect to an Article I court deciding takings claims, there is no such firmly established historical practice. Barring conception of a new justification, it appears that under the Supreme Court's jurisprudence the status quo is unconstitutional.

As an aside, it is worth noting that even if it were not unconstitutional for Congress to insist that takings claims be filed in an Article I court, it is still a good idea for Congress to ensure that takings claims are decided by an Article III court for policy reasons. Because the Court of Federal Claims, as a result of its structure and history, is a political court, the current system lends itself to at least the appearance of unfairness. Worse still, by forcing only high dollar claims into its legislative court, Congress creates the appearance not only that the system is fixed, but also that it is fixed only for those cases that Congress really does not want to pay. It is essential that the body that hears lawsuits as expensive and important as the AIG shareholders' lawsuit is, and is perceived to be, independent from the Treasury and those who orchestrated the bailout. Congress recognized the value of the court's independence when it created the Court of Federal Claims. Because the Court of Federal Claims' independence would be augmented by making it an Article III court, which would be consistent with Congress' expressed intent, Congress should consider taking that step even if the Constitution did not require it and even if takings claims were no longer considered by that court.

Although the Court of Federal Claims, as it is currently structured, cannot constitutionally consider takings claims, those claims must be heard in some forum.[336] There are several potential solutions that would rectify the problem identified in this Article. First, in perhaps the most direct solution to the problem, Congress could formally elevate the court's status to that of an

States, 133 S. Ct. 511 (2012). When the Court has granted certiorari, it appears to have assumed that jurisdiction is proper based upon its statutory source, the Tucker Act, without assessing the Act's constitutionality. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016–17 (1984) (citing 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.")) ("[A]n individual claiming that the United States has taken his property can seek just compensation under the Tucker Act." (citation omitted)).

334. *See* Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

335. *Id.*

336. It would raise a different "serious constitutional question" if Congress were to deny any judicial forum for a colorable constitutional claim. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988).

Article III court.[337] Similarly, Congress could create a specialized Article III court just for takings claims, perhaps calling it the Court of Takings Claims. Both solutions would leave the existing state of affairs intact in that takings claims would continue to be decided by a specialized court. Another potential solution would be to eliminate the concurrent jurisdiction of the Court of Federal Claims and the district courts for takings claims, making the district courts the sole forum for citizens to bring takings actions. Of course, Congress could also dissolve the Court of Federal Claims entirely.[338] To some extent, then, choosing a solution to the problem involves assessing how important it is to maintain a specialized court: a question Congress has already answered with respect to takings cases.

While the history of the old Court of Claims involves an unbroken line of specialist courts deciding many types of claims against the government, since that time Congress has "'woven a broad tapestry of authorized judicial actions against the federal government,'" which "fit together into a reasonably well-integrated pattern of causes of action covering most subjects of dispute between the government and its citizens."[339] Times have changed since the Tucker Act first allowed citizens to file takings claims against the federal government in the old Court of Claims. Congress met the challenge of the nineteenth century by creating a special forum to allow citizens to sue the sovereign, but citizens now routinely do so, not only in a special court in Washington, but in all of the district courts across the nation. There appears, therefore, to be at least somewhat less motivation for Congress to keep that court specialized than there once was.

Proponents of specialized courts generally identify efficiency, subject matter expertise, and uniformity as the three benefits offered by judicial specialization.[340] With respect to takings claims, Congress has already eschewed a strong preference for those qualities, and indicated that it does not believe a specialized court is necessary, by granting generalist district court judges concurrent jurisdiction to consider takings claims for less than $10,000. While specialist courts may or may not have utility in certain complex legal areas,[341] Congress does not appear to think them necessary for deciding takings claims. If specialization is considered important, Congress could resolve the problem identified in this Article without creating an entirely new court; Congress could simply direct large takings claims to a single, existing, Article

337. Indeed, at least one commentator has proposed just that solution, arguing "that the Court of Federal Claims should be integrated more fully into the Judicial Branch by formally [being given] Article III status." *See* SISK, *supra* note 41, at 231–32.

338. *See* Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 716–21 (2003).

339. *See* SISK, *supra* note 41, at 91 (quoting Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 602–03 (2003)).

340. *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788, 793 (2013).

341. *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

III entity, such as the D.C. District Court.

The question about how best to deal with the problem identified in this Article also implicates the question of whether policymakers should simultaneously address other existing concerns with the Court of Federal Claims. Various commentators have presented concerns with the current structure of the Court of Federal Claims. For example, commentators have questioned the lawfulness of the Court of Federal Claims considering counterclaims in fraud.[342] Another commentator has suggested that because the public rights doctrine no longer appears to justify Congress' reliance upon Article I tribunals:

> [R]eliance appears less a permissible exercise of Congress's power of the purse than an attempt to shift matters within the judicial power of the United States to Article I tribunals. It thus seems appropriate to suggest some provision for the Article III judicial determination of all claims for money and property against the federal government.[343]

Other commentators have recognized that Congress' authority to pay a debt,[344] which is the only one of Congress' explicitly defined powers that could be used to justify that court's creation as an Article I court generally, is unlike the other powers that the Supreme Court had permitted Congress to rely upon to create Article I courts.[345] Those commentators reason that, whereas the other Article I powers are those unique to a sovereign, the payment of a debt "is an obligation of any existing entity—a sovereign, a corporation, or an individual," and "[a]lthough article I courts may be appropriate courts to consider issues that are unique to Congress' sovereign powers, they are less appropriate for cases in which Congress is merely exercising its inherent authority, without regard to its status as sovereign."[346] That logic undermines the Court of Federal Claims' ability, as an Article I court, to consider most of the cases currently within its jurisdiction. Each of those criticisms of the Court of Federal Claims affects the majority of the types of cases heard by the Court of Federal Claims, including contract and federal employee pay disputes, which comprise the majority of the claims in that body.[347]

While it is, of course, preferable to eliminate any potential concerns that commentators have identified in the course of addressing the one identified in this Article, this Article is concerned primarily with takings claims and how best to ensure their consideration by Article III judges. Moreover, as the Court of Federal Claims is currently exercising authority over a great number of claims related to the financial crisis that involve large sums of money and

342. *See, e.g.*, Elizabeth W. Fleming & Rebecca Clawson, *Fraud Counterclaims in the Court of Federal Claims: Not So Fast, My Friend*, 46 WTR PROCUREMENT LAW. 3 (2011).

343. Pfander, *supra* note 42, at 762.

344. U.S. CONST. art. I, § 8, cl. 1 (empowering Congress to repay debts).

345. *See* Sward & Page, *supra* note 111, at 411.

346. *Id.* at 411–12.

347. *See supra* note 19.

serious questions of public policy, developing a solution to the immediate problem identified in this Article, rather than waiting to see how the Supreme Court might address a challenge to the Court of Federal Claims' consideration of a takings claim, seems a prudent course. It is important, therefore, to keep simplicity in mind when assessing the available options. While Congress could eliminate the Court of Federal Claims, as some have proposed, that is a more dramatic solution than necessary to solve the problem identified herein. In addition, while Congress could elevate the court's status to an Article III court, that would affect many types of claims that need not be, and perhaps cannot be, decided by Article III courts. For example, the Court of Federal Claims currently continues to issue advisory opinions in congressional reference cases, which the court could not do if Congress were to make the court an Article III entity.

Moreover, while elevating the court to an Article III entity would be straightforward, it is not clear that simply elevating the existing court to Article III status would entirely solve even the problem identified in this Article. There is some question whether Congress would also have to provide for a jury trial, pursuant to the Seventh Amendment,[348] which is currently unavailable in the Court of Federal Claims.[349] In *Granfinanciera*, the Supreme Court held that Congress may avoid the Seventh Amendment's jury trial requirement only "where the Government is involved in its sovereign capacity under an otherwise valid statute *creating* enforceable public rights."[350] The Court explained that the question of whether adjudication of a right must be done by an Article III court, and the question whether a right to trial by jury is associated with that adjudication, are answered together:

> Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action . . . is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a

348. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

349. *See* 28 U.S.C. § 174 (2012).

350. Granfinanceria, S.A. v. Nordberg, 492 U.S. 33, 51 (1989) (emphasis added). As one commentator astutely noted, in *Granfinanciera*, the Court referred to public rights as "'statutory cause[s] of action' (six times) or 'statutory rights' (three times)." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 208 (1996) (alteration in original) (citing *Granfinanceria*, 492 U.S. at 53–54, 55 n.10).

> right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.[351]

Thus, whether Congress can submit a legal issue to a legislative court and whether that court can dispense with a civil jury on that legal issue are answered by the same analysis.[352] The Court stressed, however, that the two correspond only when the issue being adjudicated is a legal, as opposed to an equitable, question.[353] In a particularly interesting analysis, Eric Grant marshaled a great deal of support for the proposition that takings claims are legal actions, or, in the words of the Seventh Amendment, "suits at common law."[354] If he is correct, then a litigant who files a Fifth Amendment takings claim may be entitled to a jury trial pursuant to the Seventh Amendment.[355]

The conclusion that a takings claim brought against the federal government requires the availability of a jury trial was strengthened by the Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[356] There, the Supreme Court held that a takings claim brought pursuant to section 1983 requires the availability of a jury trial.[357] In so finding, the Court noted, based upon its analysis of historical precedent, that not all takings claims require jury trials: "[b]ecause the jury's role in estimating just compensation in condemnation proceedings was inconsistent and unclear at the time the Seventh Amendment was adopted, this Court has said 'that there is no constitutional right to a jury in eminent domain proceedings.'"[358] The Court explained, however, that "[e]arly authority finding no jury right in a condemnation

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351. *Granfinanciera*, 492 U.S. at 53–54 (citation omitted) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

352. *See id.*

353. *See id.* at 42 n.4. ("The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'").

354. *See* Grant, *supra* note 350, at 208. *But see* Sward, *supra* note 56, at 1125 ("The easy answer to the question whether suits against the government are suits at common law is that they are not.").

355. While that conclusion conflicts with the Court's categorical statement in 1880, that "[s]uits against the government in the Court of Claims . . . are not controlled by the Seventh Amendment," the decision that announced that rule, *McElrath v. United States*, like the *Williams* decision, was based upon the notion that all suits in the Court of Claims were permissible only because the federal government waived its sovereign immunity. *See* McElrath v. United States, 102 U.S. 426, 440 (1880) ("The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. . . . If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege."). As this Article has already demonstrated, the sovereign immunity defense does not apply to takings claims.

356. 526 U.S. 687 (1999).

357. *See id.* at 722.

358. *See id.* at 711 (quoting United States v. Reynolds, 397 U.S. 14, 18 (1970)) (citing Bauman v. Ross, 167 U.S. 548, 593 (1897)).

proceeding did so on the ground that condemnation did not involve the determination of legal rights because liability was undisputed . . . ."[359] In contrast, when an inverse condemnation proceeding is filed, liability is in question. Consider the AIG shareholder lawsuit. The government disputes not only the amount of compensation the shareholders seek, but also the issue of whether the government's actions amount to a taking. Under the Court's analysis in *City of Monterey*, there is at least some question whether a takings claim requires the availability of a jury.

With all of those considerations in mind, it appears that the simplest way to ensure that takings claims are heard and decided by Article III judges is for Congress to grant federal district courts jurisdiction to consider all takings cases, not just the takings cases seeking less than $10,000. In that way, Congress could address the particular issue identified in this Article without completely altering the status quo. An added benefit to that solution is that it would place takings claims in the same court that is currently entrusted to consider claims based upon the remainder of the Bill of Rights. There appears to be little downside to this solution. It would not significantly add to the workload of the district courts, as the number of takings claims filed in the Court of Federal Claims over the last decade amounts to the equivalent of less than one case per district court per year.[360]

III. CONCLUSION

When a citizen wants to sue the federal government to collect money pursuant to the Takings Clause of the Fifth Amendment to the Constitution, that takings claim can be filed in one of the Article III district courts if the citizen is seeking less than $10,000. If someone believes they are owed more than that amount, however, the citizen must file that takings claim in the Court of Federal Claims, an Article I court. A court not entirely independent from the political branches of government thus currently decides all large takings claims. Because Article III is designed to prevent interference by the political branches in those cases in which they might have some interest, the current scheme is precisely backward with respect to the policies underlying Article III. Moreover, the current scheme is not permissible upon any of the grounds that the Supreme Court has sanctioned for Congress' use of non-Article III entities. The current situation is, therefore, unconstitutional. That situation is also a recent development, appears to have been created accidently, and is inconsistent with Congress' intent to create a truly independent court to hear claims against the federal government. Now is the time to fix this error and bring takings claims back to Article III courts.

Right now, the Court of Federal Claims is deciding a number of takings claims involving the recent financial crisis in which the political branches have a profound interest. The tension between the policies of Article III and the

359. *Id.* at 712–13.

360. For statistics on cases in the Court of Federal Claims, see *supra* note 19.

current structure has thus extended from the theoretical realm to the tangible. Congress should act now to ensure that the judges who decide those and similar cases are truly independent by providing Article III district courts with jurisdiction to consider takings claims. While Congress could fix the problem in any number of ways, the simplest solution is for Congress to simply permit the federal district courts—which already consider takings claims—to also hear the more expensive, and important, takings claims. This approach would demonstrate that the United States is serious about ensuring that it complies with the constitutional command that private property not be taken for public use without paying just compensation.[361]

361. *See* U.S. CONST. amend. V.

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