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SEPARATION OF POWERS AND THE SEPARATE TREATMENT OF
CONTRACT CLAIMS AGAINST THE FEDERAL GOVERNMENT
FOR SPECIFIC PERFORMANCE

RICHARD H. SEAMON*

I. INTRODUCTION

A recent Supreme Court decision exposes the federal government to an estimated \$10 billion in damages for breach of contract.¹ Despite the obvious impact that such a large monetary obligation can have upon government operations, the government's liability for contract damages is well-settled.² In contrast, the government has always been immune from awards of specific performance in contract actions, on the theory that this type of relief would unduly interfere with government operations.³ This

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1. See *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2240 (1996) (holding United States liable for breaches of contracts with several financial institutions); Paul M. Barrett, *High Court Backs S&Ls on Accounting, Declines to Hear Affirmative Action Case*, WALL ST. J., July 2, 1996, at A3 (noting that *Winstar* exposes government to estimated \$10 to \$18 billion in liability).

2. See *Winstar*, 116 S. Ct. at 2463 (noting that federal government may be liable for contract damages as any other defendant in civil cases).

3. See Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1486 n.19 (1962) ("The courts will not enforce specific performance of contracts against the government.") (quoting Comment, *Immunity of Government Officers: Effects of the Larson Case*, 8 STAN. L. REV. 683, 685 n.15 (1956)); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 402 (1970) ("A long line of cases [prior to 1949] held that federal courts cannot give an individual specific performance of a contract with the United States."); Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 530 & n.14 (1991) (noting that historically exception to rule barring claims against government could not be used to enforce contract claims); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 742 (1990) (referring to "the government's immunity from specific performance of its contracts"); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 860 (1957) [hereinafter *Developments*] (referring to "well-recognized ground that courts will not order specific performance of government contracts"); cf. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 218, 220-21 (1965) (discussing exceptions to rule barring actions against government in cases involving constitutional violations, but stating that "[f]or the most part the Court will not entertain . . . actions [against the government] to enforce contracts").

Closely related to specific performance are injunctions barring defendants from breaching a contract and injunctions prohibiting defendants from rendering the bargained-for performance to anyone else. See 5A ARTHUR LINTON CORBIN,

Article explores the history and continued validity of the rule barring the specific performance remedy in contract actions against the federal government.⁴

The rule barring specific performance emerged in the nineteenth century. It was an anomaly from the very start. Notwithstanding sovereign immunity, other types of specific relief were already available against the federal government on many *noncontract* claims—claims based on the Constitution, federal statutes and torts—through suits against federal officers.⁵

CORBIN ON CONTRACTS § 1138, at 106 (1964) (noting that specific performance consists of court order compelling promisor to perform actions promised in contract); 11 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 1418, at 644 (3d ed. 1968) (noting that specific performance enables court at equity to compel party to contract to perform either exactly or substantially); *see also* Lumley v. Wagner, 42 Eng. Rep. 687 (Ch. 1852) (granting injunction preventing defendant from performing at competing opera house); RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981) (stating that rules for granting specific performance are similar to those for granting injunction preventing breach of contract); *id.* § 367 cmt. c (discussing how contracts for personal services have limited availability of injunctive relief). Because the case law discussed in this Article does not distinguish among these types of relief, this Article uses “specific performance” as an umbrella term encompassing them all.

4. For a discussion of the immunity enjoyed by both the federal government and the states from suits for specific performance of their contracts, *see infra* notes 91-95 and accompanying text.

Although the rule has often been noted in legal commentary, this author believes this Article is the first study of its origins and justifications. *Cf.* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 15-16 (1972) (discussing case law holding that officer could not be held personally liable for breaching government contract); Harold Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1566-67 (1992) (noting that rule barring specific performance is corollary of doctrine that allows government to terminate contracts “for convenience,” and arguing that termination for convenience doctrine is supported by separation of powers concerns); David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 738-42 (1988) (arguing that Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1994), as amended in 1976, permits awards of specific performance on contract claims against federal government); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 427-28 (1987) (arguing that nineteenth century officer liability did not depend solely on distinction between tort and contract). The most significant difference between the federal government and the states in this context is that the Contract Clause makes it unconstitutional for states to breach their contracts. *See* U.S. CONST. art. I, § 10 (“No state shall . . . pass any . . . law impairing the obligation of contracts.”). The Contract Clause does not, however, apply to the federal government. *See* Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 n.9 (1984).

This Article defends the rule barring specific performance against the federal government. The defense depends on, among other considerations, the fact that the rule restricts relief only when the government’s conduct amounts to nothing more than a breach of contract. The rule does not limit relief for the government’s violation of the Constitution or other law. That defense has little or no application when the states breach their contracts, because many such breaches will violate the Contract Clause.

5. *See* DAN B. DOBBS, REMEDIES § 3.1, at 135 (1973) (noting that specific relief is intended to give plaintiffs very thing to which they claim entitlement). Specific performance is a type of specific relief based on contract obligations. *See id.* Other

Moreover, the federal government had been liable for money damages in contract actions since the mid-nineteenth century, and it remains so under the Tucker Act of 1887.⁶ Thus, the rule barring specific performance in contract actions against the federal government has been a peculiarly enduring restriction on the relief available to a party injured by government action.

The continued validity of the rule, however, has been called into doubt. The rule may have been eliminated by a 1976 amendment to the Administrative Procedure Act (APA).⁷ The 1976 APA amendment generally waives the federal government's sovereign immunity from suits for specific relief.⁸ Arguably, the amendment could be read to authorize awards

types of specific relief include injunctions and awards of restitution of specific property or sums of money based on noncontractual obligations. *See* Laycock, *supra* note 3, at 696 (discussing various types of specific remedies including injunctions, specific performance and restitution). Specific performance differs from "substitutional" relief, which is intended to compensate the plaintiff for being deprived of an entitlement. *See* DOBBS, *supra*, at 135 (noting that substitutional relief does not give plaintiffs performance to which they are entitled, but instead furnishes money substitutes). In addition to the distinction between specific and substitutional relief, the law distinguishes between equitable and legal relief. *See* Laycock, *supra* note 3, at 696. Whereas the distinction between specific and substitutional relief is functional, the distinction between equitable and legal relief is historical. *See id.* The latter depends on whether a particular remedy was available in a court of equity or in a court of law when those courts were separate in the United Kingdom and this country. *See id.* Specific performance is an equitable remedy, as are many but not all other types of specific relief. *See id.* (noting that several forms of specific relief "are historically legal: ejectment, replevin, mandamus, prohibition, and habeas corpus"). This Article will use "money damages" to mean all forms of substitutional relief. Keep in mind, however, that an award of money may constitute specific, rather than substitutional, relief in some instances. For example, after a buyer has accepted goods under contract, the buyer may be ordered to pay the seller the price under contract. *See* U.C.C. § 2-709 (1996) ("When buyer fails to pay the price . . . the seller may recover . . . the price [of the goods]."). Such an order constitutes specific relief. *See* EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 11.4.1, at 306 (1989) ("An action [by the seller] to recover the price is the analogue of specific performance . . . on behalf of the buyer.").

6. 28 U.S.C. §§ 1346(a), 1491 (1994) (establishing jurisdiction of United States Court of Federal Claims over actions against United States).

7. 5 U.S.C. §§ 551-706 (1994).

8. *See* Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. § 702). The 1976 APA amendment added these three sentences to § 702:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal

of specific performance on contract claims against the government.⁹ The amendment contains an exception, however, that may preserve the traditional rule barring specific performance.¹⁰ Specifically, the exception precludes specific relief if any other statute waiving sovereign immunity "impliedly forbids" such relief.¹¹ The Tucker Act, which outlines a plaintiff's rights in suits against the United States, may be such a statute.¹² The lower federal courts are divided on this issue.¹³ Most circuits addressing it have held that the Tucker Act does impliedly forbid specific performance on contract claims under the APA.¹⁴ One circuit court, however, has upheld a specific performance order against the government on a contract claim under the APA.¹⁵ That court relied on a Supreme Court decision suggesting that such relief is available.¹⁶

In light of the division in the lower federal courts and the Supreme Court's role in causing that division, the Court should decide whether the rule barring specific performance is still valid. The Court's task is one of statutory interpretation. It must decide whether the Tucker Act impliedly forbids specific performance on a contract claim against the government. Traditional tools of statutory interpretation indicate that the Tucker Act does indeed do so.¹⁷

Moreover, in light of the apparently anomalous and anachronistic nature of the rule, Congress could consider abolishing it. Although Congress could eliminate the rule, it also could reasonably decide that the benefits of the rule outweigh its costs. Perhaps most importantly, the rule allows the government to get out of contracts that are determined no

or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id.

9. *See id.*

10. *See id.* (precluding specific relief if any other statute waiving sovereign immunity impliedly forbids such relief).

11. 5 U.S.C. § 702. For the relevant text of § 702, see *supra* note 8.

12. *See* 28 U.S.C. §§ 1346(a), 1491 (1994) (setting forth jurisdiction of United States Court of Federal Claims over actions against United States).

13. For a discussion of the division among lower courts, see *infra* notes 157-204 and accompanying text.

14. For a discussion of decisions by federal circuit courts that consider whether the Tucker Act impliedly forbids specific performance under the APA, see *infra* notes 157-204 and accompanying text.

15. *See* *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1276-79 (10th Cir. 1991) (finding that district court had jurisdiction under APA to hear claim for specific relief arising from contract dispute with federal government). For a further discussion of *Hamilton*, see *infra* notes 160-73 and accompanying text.

16. *See* *Bowen v. Massachusetts*, 487 U.S. 879, 891-912 (1988) (holding that district court had jurisdiction under APA to review claim for specific relief against federal government).

17. For a discussion of how traditional rules of statutory construction lead to the conclusion that the Tucker Act impliedly forbids awards of specific performance under the APA, see *infra* notes 133-51 and accompanying text.

longer to serve the public interest. Additionally, the rule prevents undue judicial interference with discretionary decisions of the political branches. The rule thereby enforces the constitutional mandate of separation of powers, but it does not prevent judicial review of claims that an official has violated the law.¹⁸ Nor does it limit relief in cases involving an official's violation of the Constitution, a federal statute or a federal regulation. The rule does, however, prevent fully adequate relief for the government's breach of contract in cases in which money damages are inadequate. This is perhaps the biggest shortfall of the rule. Yet one can only speculate about the number of cases in which the rule prevents adequate relief. Congress might determine that the number of such cases is sufficiently low and that the costs of identifying such cases are sufficiently high (including the cost of curtailing government discretion in contracting matters) that the rule should remain in place.

Part II of this Article describes the history of the rule barring specific performance, tracing it to the nineteenth-century doctrines of sovereign immunity and officer liability.¹⁹ Part III discusses the current uncertain status of the rule resulting from the 1976 APA amendment.²⁰ Part IV determines that the rule was not abolished by that legislation.²¹ Part V argues that the rule is justified by the separation of powers doctrine.²² That argument rests substantially upon two propositions: (1) federal courts have only limited power to control conduct by the political branches and their officials that is "discretionary" (conduct that does not violate the Constitution or any federal statute or regulation) and (2) awards of specific relief are more intrusive on discretionary official conduct than are awards of money damages.²³

II. HISTORY OF THE RULE BARRING SPECIFIC PERFORMANCE

The history of the rule barring specific performance in contract claims against the federal government is important for two reasons. First, it bears upon the question of whether the rule was abrogated by the 1976 APA amendment. The resolution of that question requires one to deter-

18. See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1647 (1997) (discussing Framers' intent to divide delegated powers into three branches); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (same).

19. For a discussion of the history of the rule barring specific performance, see *infra* notes 24-111 and accompanying text.

20. For a discussion of the uncertain status of the rule barring specific performance in light of the 1976 APA amendment, see *infra* notes 112-204 and accompanying text.

21. For a discussion of why the rule barring specific performance was not abrogated by the 1976 APA amendment, see *infra* notes 205-29 and accompanying text.

22. For a discussion of how the separation of powers doctrine justifies the rule barring specific performance, see *infra* notes 230-330 and accompanying text.

23. For a further discussion of two propositions underlying the separation of powers justification, see *infra* notes 230-330 and accompanying text.

mine whether the Tucker Act impliedly forbids an award of specific performance under the APA, as amended in 1976. That determination, in turn, requires scrutiny of the legal context in which the Tucker Act and the 1976 APA amendment were enacted. Second, the history of the rule informs the question of whether, assuming that the rule was not eliminated in 1976, it should be eliminated now. That issue is illuminated by the original reasons for the rule.

A. *Officer Suits in the Nineteenth Century*

The rule barring specific performance stems from two doctrines developed during the nineteenth century: sovereign immunity and the "officer suit fiction." The doctrine of sovereign immunity, in theory, barred all judicial relief against the government without the government's consent.²⁴ The officer suit fiction partially filled this void by permitting judicial relief for a significant portion of governmental misconduct.²⁵ The officer suit fiction, however, never allowed suits based solely on the claim that an officer had breached a government contract.²⁶ Significantly, the Supreme Court repeatedly held that the fiction did not allow officer suits for specific performance of government contracts.²⁷ The Court based those holdings on its view that awards of specific performance unduly interfered with the conduct of the political branches.²⁸

1. *Nineteenth Century Officer Suits in General*

Sovereign immunity bars any type of judicial relief against the government, including specific relief, on any basis, including the government's breach of a contract, unless the government consents to the suit.²⁹ The doctrine came to this country from England.³⁰ There, it was said to be

24. See *McElrath v. United States*, 102 U.S. 426, 440 (1880). For a discussion of sovereign immunity, see *infra* notes 29-36 and accompanying text.

25. See, e.g., *Administrative Procedure Act Amendments of 1976: Hearings on S. 796-800, S. 1210, S. 1289, S. 2407-2408, S. 2115, S. 2792, S. 3123, S. 3296-3297 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong. 231 (1976) [hereinafter *1976 Senate Hearings*] (testimony of Richard K. Berg, Executive Secretary of the Administrative Conference of the United States) (noting that officer suits rest on "a legal fiction which the courts have developed over the years to mitigate the injustice arising from strict application of the sovereign immunity doctrine").

26. See *id.* For a discussion of breach of contract limitations in officer suits, see *infra* notes 57-95 and accompanying text.

27. See, e.g., *In re Ayers*, 123 U.S. 443, 503-06 (1887); *Hagood v. Southern*, 117 U.S. 52, 71 (1886); *Louisiana v. Jumel*, 107 U.S. (17 Otto) 711, 727-28 (1883).

28. See *id.*

29. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . ."); *McElrath*, 102 U.S. at 440 ("The government cannot be sued, except with its own consent.").

30. See JAFFE, *supra* note 3, at 197-204 (discussing English origin and development of sovereign immunity); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476-77 (1953) (discussing development of

rooted in the maxim "the King can do no wrong."³¹ That notion obviously conflicts with the rule-of-law principle upon which the United States was founded.³² It is, therefore, unclear why the doctrine took hold in the United States.³³ The Supreme Court noted the uncertainty behind the

sovereign immunity and noting that "it is to early England that one must look for historical 'clarification'").

31. See Harold J. Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447, 447-49 (1919) (discussing immunity of British Crown from suit). William Blackstone summed up the doctrine of sovereign immunity in his famous maxim, "[t]he King can do no wrong." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244-45 (1783) ("The supposition of law therefore is, that neither the King nor either house of parliament, collectively taken, is capable of doing any wrong: since in such cases the law feels itself incapable of furnishing any adequate remedy."). Blackstone's *Commentaries on the Laws of England* strongly influenced American law. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2264 (1997) (noting that Blackstone's *Commentaries on the Laws of England* was "a primary legal authority for 18th and nineteenth century American lawyers"); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-19 (1996) (discussing Blackstone's impact on American law). That influence extended to Blackstone's account of the basis for sovereign immunity. See *Clinton v. Jones*, 117 S. Ct. 1636, 1646 n.24 (1997) (noting that United States has adopted doctrine of sovereign immunity as described by Blackstone in his commentaries on English law); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 165 (1803) (citing Blackstone's account of sovereign immunity). Scholars have since debated whether Blackstone was correct in connecting the maxim to the doctrine of sovereign immunity. See *Developments, supra* note 3, at 829 ("[T]he maxim 'the King can do no wrong' at one time meant simply that the King was not privileged to commit illegal acts."). They have also debated whether the maxim was descriptive or prescriptive, or in other words, whether it meant that, as a factual matter, the King was incapable of misconduct or that the King *must* not engage in misconduct (or must remedy any misconduct that he or his agents do engage in). See JAFFE, *supra* note 3, at 199; see also Engdahl, *supra* note 4, at 2 (noting that King was immune from suit because there was no higher court in which he could be sued); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963) (noting that doctrine of sovereign immunity and concept of royal infallibility "are distinct and independent concepts").

32. See *United States v. Lee*, 106 U.S. 196, 220 (1882) (holding that sovereign immunity did not bar action against federal officials holding land for government use and that to hold otherwise would ignore that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it"); see also Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060-61 & n.2 (1946) (noting that justification for sovereign immunity based on royal supremacy "clearly ha[s] no application in this country").

33. See Byse, *supra* note 3, at 1484 (noting that origin of sovereign immunity in United States is unclear). In a recent article, one commentator argued that the doctrine of sovereign immunity not only is inconsistent with the rule of law upon which this country was founded, but also is affirmatively barred by the Petition Clause of the First Amendment. See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 963 (1997) (arguing that because Petition Clause of First Amendment guarantees right of individual to pursue remedies against government, doctrine of sovereign immunity should be dismantled). That argument rested on Professor Pfander's view that the Petition Clause "ensure[s] the right of the people to seek redress [for government injuries] from the federal courts." *Id.* at 900. The textual and historical evidence upon which Professor

existence of the doctrine in 1882: “[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”³⁴ The Court recognized the doctrine in 1793³⁵ and applied it for the first time to defeat a claim against the United States in 1846.³⁶

Despite sovereign immunity, plaintiffs were able to secure judicial remedies for certain governmental misconduct through the officer suit fiction.³⁷ The officer suit fiction was the product of Supreme Court deci-

Pfander relied indicates that the Petition Clause ensures a right to petition for relief from *some* branch of the federal government. *See id.* at 926-62. The evidence does not, in this author’s view, warrant interpreting the Petition Clause to guarantee every petitioner a right to resort to the judicial branch of the federal government. In any event, Professor Pfander recognized that judicial remedies for the sovereign’s breach of contract were historically available only through suits against the sovereign entity itself and not in suits against its officers. *See id.* at 938. He also interpreted the drafting history of the Constitution as indicating the Framer’s expectation that “Congress [would] retain some discretion over the suability [sic] of the United States as an entity.” *Id.* at 950. In particular, he noted that this discretion would extend, at a minimum, to “claims sounding in debt or contract” that did not involve governmental violations of the law. *See id.* at 953. Thus, it appears that Professor Pfander would not construe the Petition Clause wholly to invalidate the rule barring specific performance, because the rule applies only in actions in which the plaintiff’s sole claim is that the government has breached a contract. *See id.* It appears that he would, however, recognize the validity of the rule only to the extent that it was prescribed or ratified by Congress. *See id.* For a discussion of whether the rule is prescribed by current law, see *infra* notes 205-29 and accompanying text.

34. *Lee*, 106 U.S. at 207; *see The Siren*, 74 U.S. (7 Wall.) 152, 153-54 (1869) (“It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent.”).

35. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J.) (noting that courts may be unable to entertain suits against United States because “there is no power which the Court can call to their aid” in enforcing judgments against United States).

36. *See United States v. McLemore*, 45 U.S. (4 How.) 286, 287-88 (1846) (holding that court could not enjoin United States from executing prior judgment in its favor because “the government is not liable to be sued, except with its own consent, given by law”); *see also* RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1002 (4th ed. 1996) (citing *McLemore* as earliest Supreme Court decision upholding plea of federal sovereign immunity); Byse, *supra* note 3, at 1484 & n.14 (same).

37. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803) (noting that English law allowed suits against King’s agents). The officer suit fiction, like the doctrine of sovereign immunity, came from England. *See Jaffe, supra* note 31, at 3 (noting emergence in England “of suits against an officer or agency of the Crown” as device to get relief from government); Laski, *supra* note 31, at 450-51, 457-63 (discussing development of British Crown’s immunity from suit). Indeed, the officer suit fiction may have sprung, as did sovereign immunity, from the notion that the King could do no wrong. Because the King could do no wrong, anyone who committed a wrong in the King’s name had to have been acting without the King’s authority and hence without benefit of his immunity from suit. *See Marbury*, 5 U.S. at 165 (noting that, although personal injury relief is impossible from British Crown, it may be possible from British Crown’s officers); Engdahl, *supra* note 4, at 4-5 (noting that relief was available against certain officers who caused injuries by

sions holding that sovereign immunity barred only suits that named the government as a defendant.³⁸ Under this "party of record" rule, a plaintiff could avoid sovereign immunity by naming a government officer, rather than the government, as the defendant.³⁹ As a result, suits against officers became "the basic judicial remedy for the protection of the individual against illegal official action."⁴⁰

Of course, to obtain judicial relief, the plaintiff in an officer suit had to do more than simply avoid the bar of sovereign immunity; he or she also had to establish a cause of action against the officer. Plaintiffs typically established a cause of action in one of two ways. First, plaintiffs could show that the officer had done something for which a private individual would be liable.⁴¹ Thus, nineteenth century plaintiffs successfully sued of-

defaulting their official duties or exceeding their official powers). In any event, the doctrine of sovereign immunity has long coexisted with the officer suit fiction. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2053 (1997) (Souter, J., dissenting) ("[There is] a history of officer liability riding tandem with sovereign immunity extending back to the Middle Ages."); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 957 (1988) ("[In 1789,] there existed a 'rich storehouse' of common law and equitable remedies, consisting mostly of 'nonstatutory' suits against government officers, that functioned as mainstays of the rule of law."); Jaffe, *supra*, note 31, at 20 ("It early became clear that a suit against an officer was not forbidden [by sovereign immunity] simply because it raised a question as to the legality of his action as an agent of the government or because it required him, as in mandamus, to perform an official duty."); *Developments, supra* note 3, at 830 (noting that officer suit fiction and sovereign immunity doctrine developed "[c]oncurrently").

38. See *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872) ("In deciding who are parties to the [officer] suit the court will not look beyond the record."); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) ("It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment . . . is, of necessity, limited to those suits in which a State is a party on the record."); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139-40 (1809) (finding that Eleventh Amendment did not bar judicial attachment of property to which state had title because state was not named as party in attachment proceeding); see also *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875) (rejecting argument that plaintiff bringing officer suit was "in effect, proceeding against the State itself" but noting that mandamus or injunction would lie to require performance of "plain official duty" in favor of any person who would otherwise sustain injury). For a further discussion of the repudiation of the party of record rule by the Court in the late nineteenth century, see *infra* notes 81-85 and accompanying text.

39. See *Davis*, 83 U.S. at 219-20 (noting that party of record rule obviated sovereign immunity defense in officer suits, but finding that rule was inapplicable in case).

40. ATTORNEY GENERAL'S COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 81 (1941); accord Cramton, *supra* note 3, at 398 ("The basic device for circumventing the bar of sovereign immunity was . . . the 'officer's suit.'").

41. See *In re Ayers*, 123 U.S. 443, 501-02 (1887) (vacating injunction against Attorney General of Virginia and judgment of contempt for violating vacated injunction because circuit court lacked authority). The *Ayers* Court noted:

This feature will be found . . . to characterize every case where persons

ficers in a variety of actions such as *assumpsit*,⁴² *trover*,⁴³ *detinue*,⁴⁴ *replevin*,⁴⁵ *ejectment*⁴⁶ and *trespass*⁴⁷ and other actions sounding in tort.⁴⁸

have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character.

Id.; *accord Coeur d'Alene Tribe*, 117 S. Ct. at 2035 (noting that, under nineteenth century decisions of Court, "where the individual would have been liable at common law for his actions, sovereign immunity was no bar regardless of the person's official position").

42. *See Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 266-67 (1839) (noting that *assumpsit* would lie against federal collector of import duties if duties exceeded statutory rate and plaintiff protested at time of collection); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 150, 156-58 (1836) (same); *see also Erskine v. Van Arsdale*, 82 U.S. (15 Wall.) 75, 76 (1872) (holding that citizen was entitled to recover illegally assessed taxes paid to revenue collector); *City of Phila. v. Collector*, 72 U.S. (5 Wall.) 720, 731 (1866) (construing internal revenue statutes to authorize action in *assumpsit* against internal revenue collectors for "duties or taxes erroneously or illegally assessed"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 402 (1821) ("The citizen who has paid his money to his State, under a law that is void [because it is unconstitutional], is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money . . .").

43. *See Teal v. Felton*, 53 U.S. (12 How.) 284, 289-93 (1851) (holding that action for *trover* lay against postmaster for failure to deliver newspaper worth six cents); *Otis v. Bacon*, 11 U.S. (7 Cranch) 589, 595 (1813) (allowing action for *trover* against deputy custom collector for third party's theft of goods from ship that collector had seized without statutory authority).

44. *See Poindexter v. Greenhow*, 114 U.S. 270, 285-300 (1884) (holding that action in *detinue* may lay against state tax collector who seized plaintiff's property to satisfy tax debt after improperly refusing plaintiff's tender of coupons that state had, by statute and contract, agreed to accept in payment of taxes); *see also Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285-87 (1912) (upholding action to recover taxes from state officer collected under unconstitutional statute).

45. *See Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 12 (1817) (allowing *replevin* action against officer whose seizure of vessel's cargo exceeded his authority under embargo act, because officer "had no legal right to detain the property"); *cf. Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-39 (1827) (holding that *replevin* would not lie against officer who confiscated plaintiff's goods pursuant to valid order of court martial).

46. *See Tindal v. Wesley*, 167 U.S. 204, 211-23 (1896) (allowing action for *ejectment* against state officers holding land to which plaintiff had title); *United States v. Lee*, 106 U.S. 196 (1882) (holding *ejectment* lay against federal officers holding land to which plaintiff had title); *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 16-18 (1815) (same); *cf. Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 371-82 (1867) (holding in favor of government in action in *ejectment* against federal officer); *Brown v. Huger*, 62 U.S. (21 How.) 305, 316-22 (1858) (same); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 509, 515-17 (1839) (same).

47. *See Bates v. Clark*, 95 U.S. 204, 209 (1877) (holding that military officers were liable in damages for *trespass* if they seized property that was not in "Indian country" and therefore not within officers' statutory authority to seize); *Buck v.*

Colbath, 70 U.S. (3 Wall.) 334, 340-47 (1865) (holding that trespass lay against federal marshal for seizing, under writ of attachment, property that was not shown to belong to defendants in underlying proceeding); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851) (holding that trespass lay against military officer who appropriated private property without authority); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 335-36 (1806) (holding that action in trespass lay against federal officer who seized plaintiff's goods under order of court martial that assessed fines against plaintiff based on court's erroneous determination that plaintiff was subject to military duty); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-79 (1804) (finding naval commander liable in damages for detaining ship pursuant to presidential order that misconstrued nonintercourse statute); *see also* *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371, 373-74 (1945) (noting that, under prior decisions, public officer cannot invoke unconstitutional statute as justification for trespass and, instead, officer becomes personally liable for those actions and government is not indispensable party because of insufficient interest in controversy); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (noting that officer who imprisoned person under void judgment would be "guilty of false imprisonment"); *cf.* *Stanley v. Schwalby*, 162 U.S. 255, 269-71, 277-78, 283 (1896) (holding that action in trespass against federal officers holding land for United States to which United States had good title should be dismissed because United States had not consented to suit).

48. *See* *Land v. Dollar*, 330 U.S. 731, 738 (1947) ("[When] public officials . . . become tortfeasors by exceeding the limits of their authority . . . [and] unlawfully seize or hold a citizen's realty or chattels, . . . [the citizen] may bring his possessory action to reclaim that which is wrongfully withheld."); *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 642-43 (1911) ("Immunity from suit is a high attribute of sovereignty . . . which cannot be availed of by public agents when sued for their own torts."); *Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("[T]he exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property have wrongfully been invaded or injured, even by Authority of the United States."); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452 (1883) (noting that sovereign immunity has not barred cases in which "an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence [sic] is that he has acted under the orders of the government").

These decisions could be read to suggest that officers were liable only for torts, and not for other wrongs. That reading, however, cannot be squared with the many cases in which the Court upheld actions against officers in assumpsit. *See* *Woolhandler*, *supra* note 4, at 427-29 ("[To] describe line between official liability and nonliability as the difference between tort and contract is . . . an oversimplification."). The action in assumpsit (and its predecessor trespass on the case) were forerunners of the modern action in contract and thus were not tort actions. *See generally* E. ALLAN FARNSWORTH, *CONTRACTS* § 1.6, at 15-20 (2d ed. 1990) (discussing historical development of action of assumpsit); James Barr Ames, *The History of Assumpsit: I Express Assumpsit*, 2 HARV. L. REV. 1, 4-16 (1888) (discussing development of express assumpsit). The Court, however, never upheld officer liability based exclusively on breach of contract. Thus, none of the actions in assumpsit against officers that were upheld by the Court involved a claim based on an express or an implied-in-fact contract. Rather, they rested on "wholly fictional" promises cognizable in assumpsit, often imputed on the basis on what today would be called principles of "implied-in-law" or "quasi" contract. *See* A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 504 (1st ed. 1975) ("Liability came . . . to be sanctioned by actions of assumpsit upon wholly fictional promises to satisfy a liability imposed by law."); *see also* C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 363 (1949) (noting that assumpsit would lie for claims based on actual contract (ex contractu) and for claims asserting duties to pay fixed sums of money imposed by

Plaintiffs in these actions could obtain specific relief or money judgments.⁴⁹ In addition, plaintiffs could seek a writ of mandamus or an injunction for an officer's failure to perform "ministerial" legal duties.⁵⁰

Officers could avoid liability by showing that their conduct was authorized by a valid federal statute or court order.⁵¹ This defense has come

statute, law, custom or equitable considerations); James Barr Ames, *The History of Assumpsit: II Implied Assumpsit*, 2 HARV. L. REV. 53, 63-68 (1888) (noting that common law action of indebitatus assumpsit provided remedy for certain quasi-contract claims, including claims based "upon a statutory, official, or customary duty" to pay money). For a further discussion of the Court's denial of officer liability solely for breach of contract, see *infra* notes 57-95 and accompanying text.

49. See, e.g., *Lee*, 106 U.S. at 196 (affirming suit for ejectment against federal officials holding land to which plaintiff had title); *Slocum*, 15 U.S. at 11-13 (affirming lower court's judgment against customs officer in replevin suit); Laycock, *supra* note 3, at 696 (discussing various specific relief remedies available in equity and at law). Judgments in ejectment, replevin and mandamus constitute specific relief. See *id.* For examples of cases upholding awards of money damages, see *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 136-38 (1870) (holding money damages may be awarded for officers' failure to comply with writ of mandamus); *Little*, 6 U.S. at 177-79 (permitting money damages in trespass action).

50. See *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 171-72 (1893) (holding that injunction was available to prevent Secretary of Interior from revoking right of way because revocation would be ultra vires); *Cunningham*, 109 U.S. at 452-53 (noting that mandamus is available "where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process," but duty "must be merely ministerial"); *United States v. Schurz*, 102 U.S. 378, 395-97 (1880) (holding that writ of mandamus is appropriate remedy to compel Secretary of Interior to deliver land patent that was otherwise validly executed); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-16 (1838) (holding that mandamus was permissible to require Postmaster General to award credits to plaintiff); cf. *Reeside v. Walker*, 52 U.S. (11 How.) 272, 289-92 (1850) (holding that mandamus was would not lie against Secretary of Treasury for money due under post office contracts because there was no clear legal duty to pay); *Brashear v. Mason*, 47 U.S. (6 How.) 92, 102 (1848) (holding that mandamus would not lie against Secretary of Navy for pay allegedly due to naval officer because such payment was not "a mere ministerial act"); *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97 (1845) (holding that mandamus was unjustified because Postmaster General's delay in awarding credits was discretionary); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515-17 (1840) (holding that mandamus would not lie to require Secretary of Navy to pay pension). See generally, FALLON ET AL., *supra* note 36, at 996-97 (discussing availability of mandamus and other prerogative writs in actions against federal officials).

51. See *Philadelphia Co. v. Stimson*, 223 U.S. 605, 622-23 (1912) (holding that suit to enjoin federal official would fail if official "was acting by virtue of authority validly conferred by a general act of Congress"); *Cunningham*, 109 U.S. at 452 (noting that officer sued in tort could avoid liability by showing that "his authority was sufficient in law to protect him"); *Buck*, 70 U.S. at 343 (noting that action for trespass would not lie against officer who seized property specifically described in valid court order); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-39 (1827) (holding that replevin would not lie against officer who confiscated plaintiff's goods pursuant to valid order of court martial); see also *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 129 (1868) (noting that government cannot be liable for implied promise to repay tax when collection of tax is authorized by law); *Respublica v. Sparhawk*, 1 U.S. (1

to be known as "official immunity."⁵² By the same token, the defense would fail if the officer's conduct violated a court order,⁵³ exceeded his or her statutory authority⁵⁴ or was carried out in a manner or under a statute that was unconstitutional.⁵⁵ In those circumstances, the officer was said to

Dall.) 357, 362-63 (1788) (holding that Congress could authorize city officials to seize private property for safeguarding in war time even though "otherwise, it would clearly have been a trespass"). See generally *Developments, supra* note 3, at 831-32 ("The Supreme Court early adopted the rule that a government agent is personally liable for the breach of any duty imposed by the common law or by statute unless the court can characterize his action as authorized.").

52. See generally *Jaffe, supra* note 3, at 241-44 (discussing history of discretionary immunity of various officials); *Engdahl, supra* note 4, at 14-21, 41-55 (same); *Woolhandler, supra* note 4, at 414-77 (positing two competing models to explain Supreme Court decisions on immunity of officials). Unlike today, for most of the nineteenth century, most officers could not get official immunity from an award of compensatory money damages merely by showing that they acted in good faith. See *Bates*, 95 U.S. at 209 (noting that claim by military officers who seized goods without authority that they acted in good faith "might excuse" them from punitive damages, but was not complete defense); *Buck*, 70 U.S. at 342-44 (discussing circumstances under which federal marshal would be immune if acting under valid court order); cf. *Spalding v. Vilas*, 161 U.S. 483, 493-99 (1895) (holding that head of executive department had absolute official immunity for official acts other than those palpably beyond his authority). Moreover, even when it applied, official immunity shielded officers only from money damages and not from injunctive relief for conduct that violated the Constitution or a federal statute. See *Developments, supra* note 3, at 834 (discussing immunity of executive officers).

53. See *Amy*, 78 U.S. at 136-38 (upholding damages for officers' violation of writ of mandamus and stating "[t]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct"); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 335-36 (1806) (holding that action in trespass lay against federal officer for conduct under invalid order entered by court martial); see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (noting that officer who imprisoned person under void court judgment would be "guilty of false imprisonment").

54. See *Stimson*, 223 U.S. at 619-20 (noting that "[t]he exemption of the United States from suit does not protect its officers from personal liability to persons whose rights they have wrongfully invaded" and when rights are threatened, injunction is available against "[f]ederal officer[s] acting in excess of his authority or under an authority not validly conferred"); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 266-267 (1839) (noting that assumpsit would lie against federal collector of duties on imports, in his personal capacity, "where the duties have been illegally demanded, and a protest of illegality has been made at the time of payment"); *Slocum*, 15 U.S. at 10-13 (holding officer liable for seizure of vessel's cargo because seizure exceeded his authority under embargo act); *Little*, 6 U.S. at 179 (holding that officer could not avoid liability in damages by relying on presidential orders because, even though his conduct comported with those orders, it exceeded his statutory authority); cf. *Sundry African Slaves v. Madrazo*, 26 U.S. (1 Pet.) 110, 124 (1828) (finding that Governor of Georgia was not personally liable because he "ha[d] done nothing in violation of any law of the United States").

55. See, e.g., *Noble*, 147 U.S. at 176 (holding that Secretary of Interior's revocation of right of way violated due process and therefore could be enjoined); *In re Ayers*, 123 U.S. 443, 500 (1887) (noting that officer-defendants could not avoid personal liability by relying on authority under state statute where statute was found to be unconstitutional); *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1884) (holding that state tax collector could not use state law as defense to personal

be stripped of official authority.⁵⁶

2. *Breach of Contract Limitation on Nineteenth Century Officer Suits*

The officer suit fiction could not be used if the plaintiff's sole claim was that an officer had breached a government contract.⁵⁷ The Supreme Court relied on policy concerns in refusing to extend the fiction to such claims.⁵⁸ The Court expressed different policy concerns, depending on whether the plaintiff sought money damages or specific performance.⁵⁹ This Article argues that the concern underlying the Court's denial of specific performance—the need to avoid judicial interference with conduct of the political branches and their officials—is justified by the separation of powers doctrine.⁶⁰

The Court's earliest decision holding that an officer could not be

liability where state law was determined to be unconstitutional); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1676, at 460 (4th ed. 1873) (noting that if government oppression occurs “in the exercise of unconstitutional powers, then the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed”).

56. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2036 (1997) (“Under this line of reasoning a state official who committed a common law tort was said to have been ‘stripped’ of his official representative character.”); *Ex parte Young*, 209 U.S. 123, 160 (1908) (stating that official who acts under unconstitutional statute is “stripped of his official or representative character”); *Poindexter*, 114 U.S. at 288 (holding that defendant was without defense because of stripping of his official character and defendant's confession of his personal violation of plaintiff's rights).

57. See *Belknap v. Schild*, 161 U.S. 10, 17 (1896) (stating principle that officer could not be sued for breach of government contract was derived from English law); *Garland v. Davis*, 45 U.S. (4 How.) 131, 148-49 (1846) (same); *Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56 n.(a) (1817) (same); *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 363-65 (1803) (same); Jaffe, *supra* note 31, at 9 (stating principle that judgment could not be entered against officer unless King disclaimed officer's act); Laski, *supra* note 31, at 458 & n.69 (deeming principle that officer could not be sued for breach of government contract as “justifiable”); see also *Land v. Dollar*, 330 U.S. 731, 737 (1947) (holding injunctive relief available in federal officer suit and noting that this type of suit “is not an attempt to get specific performance of a contract to deliver property of the United States”); *Ickes v. Fox*, 300 U.S. 82, 96 (1937) (holding injunctive relief available in federal officer suit and noting that “the suits do not seek specific performance of any contract”). For a case applying the principle to a foreign officer, see *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) (halting oral argument in contract action against French Consul General because Justices “were unanimously and clearly of opinion, that the contract was made on account of the government; that the credit was given [by plaintiff] to it as an official engagement; and that, therefore, there was no cause of action against the present Defendant”).

58. See *Belknap*, 161 U.S. at 17 (noting various policy concerns for principle that officer could not be sued for breach of government contract).

59. For a discussion of the various concerns behind refusing to extend the officer suit fiction to breach of contract cases, see *infra* notes 116-32 and accompanying text.

60. For a discussion of the separation of powers justification supporting the Court's denial of specific performance in these types of suits, see *infra* notes 230-330 and accompanying text.

held liable for the breach of a government contract was *Hodgson v. Dexter*.⁶¹ In *Hodgson*, the plaintiff sued a federal officer for damage to a building that the officer had leased from the plaintiff for government use (a contemplated use that had been disclosed to the lessor).⁶² In upholding a judgment for the officer, the Court found it "too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority; his contracts made on account of the government, are public and not personal."⁶³ The Court based its refusal to hold the officer personally liable upon two English decisions rejecting officer liability for breach of government contracts.⁶⁴ The Court explained that this doctrine of nonliability was "consonant to policy, justice and law" because

[a] contrary doctrine would be productive of the most injurious consequences to the public as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account.⁶⁵

This rationale resembles the one currently used to justify official immunity, rather than sovereign immunity.⁶⁶ Indeed, the Court could not have relied on sovereign immunity in *Hodgson* because of the party of record rule.⁶⁷ The Court did, however, rely on sovereign immunity in later officer suits for the breach of government contracts, all of which sought specific relief.⁶⁸ At the same time, the Court narrowed and eventually

61. 5 U.S. (1 Cranch) 345 (1803).

62. *Id.* at 345-49.

63. *Id.* at 363.

64. *See id.* at 363-64 (citing *Unwin v. Wolseley* (K.B. 1787), *reprinted in* 1 C. DURNFORD & E. EAST, *TERM REPORTS IN THE COURT OF KING'S BENCH* 98, 103-05 (3d ed. 1834) (holding officer not liable in case involving contract made under seal); *Macheath v. Haldimand*, 99 Eng. Rep. 1036 (K.B. 1786) (finding officer who contracted on behalf of government was not liable for breach of contract)).

65. *Id.*

66. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (discussing rules of official immunity, which reflect, among other considerations, that imposition of officer liability would cause "the deterrence of able citizens from acceptance of public office").

67. For a discussion of the party of record rule, see *supra* notes 37-56 and accompanying text.

68. *See Louisiana v. Jumel*, 107 U.S. (17 Otto) 711, 727-28 (1883) (relying on sovereign immunity in officer suits for breach of government contract); *In re Ayers*, 123 U.S. 443, 503-06 (1887) (same); *Hagood v. Southern*, 117 U.S. 52, 71 (1886) (same).

There are probably three main reasons why the Supreme Court cases after *Hodgson* involved claims for specific relief, rather than money damages. First, *Hodgson* and the English precedent on which it was based firmly established that officers were not liable in money damages. *See Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56 n.(a) (1817) (stating it is generally established that officer cannot be held personally responsible for breach of government contract). Second, even if money damages were available in an officer suit, they generally could be recovered only

abandoned the party of record rule.⁶⁹

from the officer, and not from the government treasury. See *Case v. Terrell*, 78 U.S. (11 Wall.) 199, 201-02 (1870) (holding that appearance of Comptroller of Currency in action did not justify entry of money judgment against United States); *Reese v. Walker*, 52 U.S. (11 How.) 272, 289-91 (1850) (noting that Constitution forbids money judgments against United States Treasury except with congressional approval); see also *Roberts v. United States*, 176 U.S. 221, 229-31 (1900) (validating writ of mandamus requiring Treasurer of United States, in accordance with federal statute, to pay interest on certificates issued by board of audit of District of Columbia); Jaffe, *supra* note 31, at 32 & n.106 (discussing mandamus cases requiring payment of money or conveyance of land in possession of government). The typical nineteenth century officer was probably no better able to pay money damages than an officer today. Officers were, therefore, generally not worth suing for damages. Third, after 1863, money damages were available for the breach of federal contracts in the Court of Claims by a suit directly against the government. See Act of March 3, 1863, ch. 93, § 3, 12 Stat. 765 (expanding authority of federal courts to enter final judgments against United States), *repealed by* Act of March 17, 1866, ch. 19, 14 Stat. 9. That made it unnecessary to sue a federal officer for such relief. See *id.*

69. See *Jumel*, 107 U.S. at 725 (narrowing party of record rule); see also *Ayers*, 123 U.S. at 505-08 (repudiating party of record rule). It is tempting to resort to the common law of private agency to explain why the Court allowed tort suits, but not contract suits, against government officers. See Engdahl, *supra* note 4, at 15 (discussing case law and concluding officer could not be held personally liable for breaching government contract); see also FALLON ET AL., *supra* note 36, at 1017 ("In contrast to the liability of officers engaging in tortious conduct, officers agreeing to contracts on behalf of the government would not, under principles of the general law, be personally liable if the government committed a breach."). At common law, agents were generally liable for torts committed on behalf of a private principal. See *id.* In contrast, the common law "ordinarily exempt[ed] agents who [we]re acting within the scope of their authority, from all liability" for contracts entered into on behalf of disclosed private principals. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 262, at 309 (9th ed. 1882). Nonetheless, the common law governing private agents cannot account for the rules that the Supreme Court developed for officer suits. For one thing, the Court sustained actions in assumpsit against government officers, even though such actions do not sound in tort. For a discussion of successful actions in assumpsit against government officers, see *supra* note 42 and accompanying text. Furthermore, as a leading commentator on agency law of the era emphasized, the rule governing the contract liability of public agents was "very different" from that governing private principals. See STORY, *supra*, § 302, at 369 (comparing contract liability of public agents with private principals). The essential difference was that a private agent could be held personally liable on a contract made for a principle unless the agent made clear that he or she did not intend to be personally bound. See *id.* § 264, at 311-12; *id.* § 266, at 319-20; *id.* § 267, at 321; *cf.* U.C.C. § 3-402(b) (1990) (discussing representative's signature on negotiable instrument). In contrast, there was a strong presumption that public agents did not intend to be personally responsible for the government's contracts. See STORY, *supra*, §§ 302-307a, at 369-75. The reasons for the different treatment of private and public agents are rooted in the policy concerns cited in the relevant Supreme Court decisions. Nonetheless, the Court sometimes justified the immunity of officers from breach of contract claims using the concept of privity developed in the law governing private disputes. See *Ayers*, 123 U.S. at 503 (noting that because officer was "not part[y]. . . to th[e] contract, [he] was not capable in law of committing a breach of it"); *Jumel*, 107 U.S. at 723 (holding that officer suit would not lie for breach of state's contract because officers "ha[d] no contract relations" with plaintiffs).

The first of these cases was *Louisiana v. Jumel*,⁷⁰ decided eighty years after *Hodgson*.⁷¹ The Court in *Jumel* held that state bondholders could not sue state officers to require them to honor the bonds.⁷² The Court did not explicitly base that holding on the state's Eleventh Amendment sovereign immunity.⁷³ Indeed, the Court did not clearly articulate any specific basis for its holding. The Court did, however, worry that "[t]he remedy sought . . . would require the court to assume all the executive authority of the State."⁷⁴ Accordingly, the Court refused to follow the party of record rule to permit relief against the officers.⁷⁵

Three years after *Jumel*, in *Hagood v. Southern*,⁷⁶ the Court firmly relied on sovereign immunity to reject two officer suits for specific performance of a state contract.⁷⁷ The *Hagood* Court determined that all such suits are really suits against the government:

70. 107 U.S. 711 (1883).

71. Compare *id.* at 711 (deciding case in 1883), with *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 345 (1803).

72. *Jumel*, 107 U.S. at 727-28 (holding that sovereign immunity applied even as to agents).

73. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). The Court has construed the Eleventh Amendment as reflecting a broad immunity implicit in the Constitution as a whole, which bars suits in federal court by private plaintiffs against unconsenting States. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997) ("[S]uits invoking the federal question jurisdiction of Article III courts may also be barred by the Amendment."); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that federal statute enacted in exercise of Commerce Clause power abrogated Eleventh Amendment immunity from certain employment discrimination suits).

74. *Jumel*, 107 U.S. at 727. The relevant passage, quoted at greater length, provides:

The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law [creating the contract with the bondholders], and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. . . . When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done. . . . But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.

Id. at 727-28; see *id.* at 752 (Harlan, J., dissenting) ("I understand the court, in effect, if not in terms, to hold that [the suits] cannot be maintained without violating [the Eleventh] amendment.").

75. See *id.* at 724-26.

76. 117 U.S. 52 (1886).

77. *Id.* at 71 ("The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name.").

These suits are accurately described as bills for the specific performance of a contract between the [plaintiffs] and the state of South Carolina Though not nominally a party to the record, [the state] is the real and only party in interest [T]he things required by the [lower court] decrees to be done and performed by [the officer-defendants] are the very things which . . . constitute a performance of the alleged contract by the state The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the eleventh amendment.⁷⁸

As in *Jumel*, the *Hagood* Court emphasized that specific relief would control “the performance of an obligation which belongs to the state in its political capacity.”⁷⁹ Moreover, the Court read its precedent on the party of record rule even more narrowly than it did in *Jumel*.⁸⁰

In 1887, the Court formally repudiated the party of record rule, treating its death as the “settled doctrine of this court” in *In re Ayers*.⁸¹ The Court again held that an officer suit based on a state contract “the object of which is . . . its specific performance . . . is in substance a suit against the State itself” and hence is barred by the Eleventh Amendment.⁸² According to the Court, the Eleventh Amendment rejected the notion that “the administration of [the states’] public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent.”⁸³

78. *Id.* at 67.

79. *Id.* at 70.

80. *See id.* at 69-71 (narrowing but not repudiating party of record rule).

81. 123 U.S. 443 (1887).

82. *Id.* at 504.

83. *Id.* at 505. In later cases, the Court likewise rejected officer suits for specific performance of state contracts. *See Murray v. Wilson Distilling Co.*, 213 U.S. 151, 168 (1909) (“[I]t is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a court of the United States.”); *Pennoyer v. McConaughy*, 140 U.S. 1, 9 (1891) (noting that “[i]t is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent” and that “it is equally well settled that a suit against the officers of a state to compel them to do acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself”); *North Carolina v. Temple*, 134 U.S. 22, 30 (1890) (rejecting suit “in the nature of a bill for a specific performance of a contract” to require state to raise taxes to pay interest owed on state bonds); *see also Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (citing *Hagood* and *Ayers* with approval); *In re New York*, 256 U.S. 490, 500-01 (1921) (relying on rule against specific performance to dismiss officer suit concerning maritime tort, reasoning that rule “extends to such [suits] as will require [the state] to make pecuniary satisfaction for any liability”); *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 642 (1911) (“No suit . . . can be maintained against a public officer which seeks to compel him . . . to execute a contract, or to do any affirmative act which affects the State’s political or property rights.”); *Tindal v. Wesley*, 167 U.S. 204, 221 (1897) (upholding officer suit and noting that it is “no[t] one in which the plaintiff seeks

Although the Court repudiated the party of record rule, it did not move to the opposite extreme of holding that *all* officer suits for specific relief were barred by sovereign immunity.⁸⁴ On the contrary, the Court in *Ayers* emphasized that its decision

is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus.⁸⁵

To illustrate this point, the Court cited *United States v. Lee*,⁸⁶ in which the Court had affirmed a judgment of ejectment in favor of the estate of Robert E. Lee's wife against the federal officers occupying Arlington Cemetery.⁸⁷ The Court in *Lee* found that such relief was appropriate because the officers' possession was tortious and unconstitutional.⁸⁸ Notably, the Court cited *Lee* not only in *Ayers*, but also in *Hagood* and *Jumel*.⁸⁹ The Court's repeated reliance on *Lee* shows that the Court perceived (in its words) an "obvious" difference between officer suits for specific relief based on contractual rights and those based on "other rights of person and property."⁹⁰

The Court's citation of *Lee* in decisions such as *Ayers*, *Hagood* and *Jumel* reflect another important aspect of the history of the rule barring specific performance: the Court did not distinguish the sovereign immunity of the

to compel the specific performance by the State of any contract alleged to have been made by it").

84. *See Ayers*, 123 U.S. at 506.

85. *Id.*

86. 106 U.S. 196 (1882).

87. *Id.* at 196-99. The federal government took land owned by the Lee estate for nonpayment of taxes. *See id.* at 196. A friend of the Lees had, in fact, tendered payment of the back taxes to the federal tax collectors, but they had refused it on the ground that taxes had to be paid by the property owner in person. *See id.* After the tender, the land was purchased at a tax sale by the federal government and used for a cemetery and a fort. *See id.*

88. *Id.* at 218-21. The Court noted:

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure and by the verdict of a jury or judgment of the court the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed.

Id.; *see also* *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962) (stating that Court in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), read *Lee* narrowly so that it "has continuing validity only 'where there is a claim that the holding [of property by government officials] constitutes an unconstitutional taking of property without just compensation'" (quoting *Larson*, 337 U.S. at 697)).

89. *See Ayers*, 123 U.S. at 506 (discussing *Lee*); *Hagood v. Southern*, 117 U.S. 52, 70 (1886) (same); *Louisiana v. Jumel*, 107 U.S. 711, 726-27 (1883) (same).

90. *Ayers*, 123 U.S. at 503.

states from that of the United States.⁹¹ In cases involving state officers, the Court relied on decisions involving federal officers, and vice versa.⁹² This is particularly relevant because, in *Hodgson*, the Court denied money damages in a contract action against a federal officer.⁹³ If *Hodgson* left any doubt whether specific relief was also unavailable in these actions, that doubt was dispelled by *Ayers*, *Hagood* and *Jumel* even though they were suits against state officers.⁹⁴ Thus, by 1887 (the year in which *Ayers* was decided), the rule barring specific performance on contract claims against the government was firmly established.⁹⁵

91. *Id.* at 506 (discussing *Lee*); *Hagood*, 117 U.S. at 70 (same); *Jumel*, 107 U.S. at 726-27 (same).

92. *See, e.g., Lee*, 106 U.S. at 212-14 (relying on sovereign immunity case involving state officers as authority for case at bar involving federal government officers); JAFFE, *supra* note 3, at 216 (noting that "no distinction has ever been explicitly recognized in the cases between suits against state and against federal officers").

93. *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 365 (1803) (holding that federal officer could not be held liable for breach of government contract).

94. *Ayers*, 123 U.S. at 504 (holding that officer suit requesting specific performance of state contract is, in reality, suit against state and, thus, barred by sovereign immunity); *Hagood*, 117 U.S. at 71 (relying on sovereign immunity to reject two officer suits for specific performance of state contract); *Jumel*, 107 U.S. at 727-28 (holding that because of sovereign immunity, state bondholders could not sue state officers to require them to honor bonds); *see Wells v. Roper*, 246 U.S. 335, 338 (1918) (holding that sovereign immunity barred suit to enjoin First Assistant Postmaster General from canceling plaintiff's contract with government); *Goldberg v. Daniels*, 231 U.S. 218, 221-22 (1913) (holding that sovereign immunity barred petition for mandamus requiring Secretary of Navy to deliver ship that plaintiff allegedly contracted to buy).

95. *See Ayers*, 123 U.S. at 504; *Hagood*, 117 U.S. at 71; *Jumel*, 107 U.S. at 727-28. The scope of the rule, however, remained unsettled in one important respect. Specifically, it was unclear, as of 1887, whether the rule barred a suit in which the plaintiff claimed that an officer's conduct not only constituted the breach of a government contract, but also was tortious, exceeded the officer's statutory authority or was carried out in a manner or under a statute that was unconstitutional. For example, the Court in *Jumel* and *Hagood* rejected suits in which the plaintiffs claimed that an officer's breach of a state contract violated the Contract Clause. *Hagood*, 117 U.S. at 65 (rejecting plaintiffs' claim that officers violated state statute that remained in effect, despite later purported statutory repeal, because repealer violated Contract Clause); *Jumel*, 107 U.S. at 716-17 (quoting plaintiff's pleadings, which alleged that state statutes violated Contract Clause); *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . ."). Those decisions suggested that specific performance was barred even in suits involving a constitutional violation. In contrast, a bare majority of the Court upheld relief tantamount to specific performance in a suit involving a Contract Clause violation. *See Poindexter v. Greenhow*, 114 U.S. 270, 273-74, 285-301 (1885) (finding that action in detinue lay against state officer who seized plaintiff's property for taxes after refusing plaintiff's tender of state-guaranteed coupons and holding that officer acted under state statute that violated Contract Clause); *id.* at 330 (Bradley, J., dissenting) (arguing that these types of suits are "virtually suits against the state . . . to compel a specific performance by the state of her agreement"); *see also Board of Liquidation v. McComb*, 92 U.S. 531, 535, 540-41 (1875) (enjoining state officers from implementing state statute that "impairs the validity of the contract" previously entered into by state); *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 232 (1872) (holding that injunctive relief was warranted to prevent officers

B. *History of the United States Court of Claims*

Before the middle of the nineteenth century, contract claims directly against the federal government were barred by sovereign immunity and contract claims against federal officers would not lie. Unable to get relief in the courts, individuals with federal contract claims frequently petitioned Congress for private bills as an alternative.⁹⁶ Congress enacted numerous private bills providing monetary and other relief for contract and other claims.⁹⁷ The number of petitions for private bills grew with the

from enforcing provision of Texas Constitution that violated Contract Clause); JAFFE, *supra* note 3, at 218-21 (discussing *Davis* and *McComb*). To complicate matters, the Court in *Jumel* suggested that it would permit suits in which an officer's breach of a state contract constituted a tort or violated a specific statutory duty. *Jumel*, 107 U.S. at 725 (distinguishing *Osborn* on ground that conduct of officers in that case was actionable as conversion); *id.* at 725-26 (distinguishing *Davis* and *McComb* on ground that they involved enforcement of specific duties created by statute); see *Hagood*, 117 U.S. at 616-17 (distinguishing cases against officers "who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void"). After 1887, the Court clarified the scope of the rule. The Court held that Eleventh Amendment sovereign immunity did not bar *any* officer suit for specific relief from unconstitutional state action, including an officer suit alleging an unconstitutional breach of contract. See *Ex parte Young*, 209 U.S. 123, 149-60 (1908); see also *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 7-13 (1898) (affirming injunction that prevented city from unconstitutionally impairing obligation under contract with private water company); *Pennoyer v. McConnaughy*, 140 U.S. 1, 9-25 (1891) (upholding injunctive relief against action by state officers under state law that violated Contract Clause); *McCahey v. Virginia*, 135 U.S. 662, 662-85 (1890) (same). In other decisions, moreover, the Court upheld suits in which plaintiffs showed that an officer's breach of contract was tortious or exceeded the officer's statutory authority. See *Goltra v. Weeks*, 271 U.S. 536, 543-47 (1926) (stating that injunctive relief would be warranted against federal officers who committed trespass when they terminated lease between plaintiff and government by seizing leased property); *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 235-38 (1921) (stating that federal officials could be enjoined from canceling plaintiff's selection of public lands because their actions exceeded their authority under federal statute that gave plaintiffs contract rights). *But cf.* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701 & n.24 (1949) (disapproving reasoning of *Goltra*). Thus, by the first quarter of the twentieth century, it was clear that the rule barring specific performance precluded relief only in officer suits that were based solely on the claim that an officer had breached a government contract.

96. See, e.g., JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 944 (2d ed. 2d. prtg. 1986) ("For many years . . . the only avenue of relief for Government contractors was to apply to Congress for a private bill.").

97. See Act of September 29, 1789, ch. 25, § 1, 1 Stat. 95, 96 (repealed 1790) (authorizing payment to foreign officer involved "in the service of the United States"); Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128 (authorizing payment on bill of exchange drawn by military officers for supplies); see also CONG. GLOBE, 34th Cong., 1st & 2d Sess. 970 (1856) (remarks of Rep. Walker) ("From the foundation of the Government, Congress had been besieged by private claimants."); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 795 & n.114 (1994) ("[Congress in 1790,] allotted the President a \$10,000 fund for contingent charges of the government without attach-

country, and the private-bill system became more time-consuming for Congress.⁹⁸ Congress responded to the growing burden in 1855 by creating the United States Court of Claims.⁹⁹

Three nineteenth-century statutes creating and defining the jurisdiction of the Court of Claims constituted the first significant waiver of federal sovereign immunity.¹⁰⁰ In 1855, the first of these statutes authorized the court to hear claims against the United States based on any act of Congress, regulation of an executive department, or "any contract, express or implied, with the government of the United States."¹⁰¹ Originally, the court only had the authority to recommend the disposition of claims to Congress.¹⁰² An 1863 statute, however, authorized the court to enter final judgments.¹⁰³ The Tucker Act of 1887 reenacted and revised the statutes

ing any strings whatever."); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 156-57 (1986) (discussing history and shortcomings of right to petitions); Martha Maria Joynt, *Private Bills and the Legislative Process* 1, 13-22, 157-75 (1972) (unpublished Ph.D. dissertation, Columbia University) (on file with University of South Carolina School of Law library) (describing history of private bills). Early on, Congress provided for some claims against the government to be adjudicated initially in the executive branch. See 1 ANNALS OF CONGRESS 389 (Joseph Gales ed., 1789) (remarks of Rep. Madison) (observing that Comptroller of Treasury is responsible for "deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens"); 19 AMERICAN STATE PAPERS: CLAIMS 26, 263 (1834) (discussing message from Secretary of Treasury to House of Representatives reporting on contract claim referred to House); see also H.R. REP. NO. 730, at 1-2 (1838) (describing early provisions for resolution of claims against government); Fallon, *supra* note 37, at 919 (same).

98. See CONG. GLOBE, 33d Cong., 2d Sess. 70 (1854) (remarks of Sen. Broadhead) ("Population doubles in this country every twenty-three or four years. The business before Congress, and especially that of a private character, increases in the same ratio."); see also H.R. REP. NO. 498, at 1 (1848) (discussing growth of private bills).

99. See Lionel Marks Lawrence, *Patent Infringement Against the United States and Government Contractors Under 28 U.S.C. § 1498 in the United States Court of Federal Claims*, 2 J. INTELL. PROP. L. 389, 402-03 & nn.55-63 (discussing creation of United States Court of Claims).

100. See *Developments*, *supra* note 3, at 875 (noting series of statutes culminating in Tucker Act were first significant waiver of federal sovereign immunity); see also *Williams v. United States*, 289 U.S. 553, 562-65 (1933) (describing nineteenth century statutes relating to Court of Claims), *overruled by* *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

101. Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612 (current version at 28 U.S.C. § 1503 (1994)).

102. See CONG. GLOBE, 34th Cong., 1st Sess. 1244-54 (1856) (discussing whether reports from Court of Claims under 1855 statute were to be reviewed by House of Representatives as Committee of the Whole); see also William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 397 (1968) (noting effect of House of Representative vote was to refer reports to committees that would treat court's reports as merely advisory).

103. See Act of March 3, 1863, ch. 92, § 5, 12 Stat. 766 (authorizing appeal to Supreme Court of final judgments or decrees of Court of Claims), *repealed by* Act of March 17, 1866, ch. 9, § 14 Stat. 9. *But cf. id.* § 14, 12 Stat. 768. See generally Wiecek, *supra* note 102, at 396-404 (explaining that § 5 of 1863 statute authorized Court of

governing the court.¹⁰⁴ The most important revision in the Tucker Act expanded the court's jurisdiction to authorize it to hear claims against the United States based on the Constitution.¹⁰⁵

The statutes were silent regarding the types of relief the Court of Claims could grant. The Supreme Court filled this void by interpreting the 1863 statute as authorizing the Court of Claims to award only money damages and not equitable relief.¹⁰⁶ The Supreme Court reached the same conclusion in a suit under the Tucker Act for specific performance of a government contract.¹⁰⁷

The Supreme Court based these decisions primarily on the language of the statutes, although the decision construing the Tucker Act discussed policy concerns as well.¹⁰⁸ The Court's biggest concern was its belief that most suits for specific relief under the Tucker Act would involve public lands.¹⁰⁹ In construing the Tucker Act to bar such relief, the Court remarked that it would have been "somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon

Claims for first time to enter final judgments, but § 14 of 1863 statute was held to preclude appeal of those judgments to Supreme Court until § 14 was repealed in 1866).

104. Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified as amended in scattered sections of 28 U.S.C.).

105. *See id.* § 1, 24 Stat. at 505 (expanding by statute court's jurisdiction to include constitutional claims).

106. *See* *United States v. Alire*, 73 U.S. (6 Wall.) 573, 575-77 (1867) ("[T]he only judgments which the Court of Claims are authorized to render against the government . . . are judgments for money found due from the government to the [plaintiff]."); *see also* *Bonner v. United States*, 76 U.S. (9 Wall.) 156, 159 (1869) ("[T]he Court of Claims has no equitable jurisdiction given it and was not created to inquire into rights in equity set up by claimants against the United States.").

107. *See* *United States v. Jones*, 131 U.S. 1, 9, 14-18 (1889) (holding that Tucker Act did not alter prior law so as to authorize Court of Claims to grant equitable relief in addition to money damages); *see also* *United States v. Testan*, 424 U.S. 392, 397-98 (1976) (holding that Tucker Act authorizes only money claims and not specific relief); *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (*per curiam*) (same); *United States v. King*, 395 U.S. 1, 4 (1969) ("[C]ases seeking relief other than money damages from the Court of Claims have never been 'within its jurisdiction.'"). *But see* *Ackerlind v. United States*, 240 U.S. 531, 534-35 (1916) (reversing decision of Court of Claims refusing reformation of contract); *William Cramp & Sons Ship & Engine Bldg. Co. v. United States*, 239 U.S. 221, 230-33 (1915) (holding reformation available under Tucker Act, but not warranted in that case); *United States v. Milliken Imprinting Co.*, 202 U.S. 168, 173-74 (1906) (holding Tucker Act gave Court of Claims equitable power to reform government contract and to award damages for breach of contract as reformed).

108. *See* *Jones*, 131 U.S. at 16-19 (discussing previous decisions regarding money damages versus equitable relief); *Alire*, 73 U.S. at 575-76 (stating types of judgments that Court of Claims can render against government are those for money found due from government).

109. *See* *Jones*, 131 U.S. at 15 (discussing disagreement over whether Tucker Act extended jurisdiction of Court of Claims).

the courts."¹¹⁰ Thus, in holding that specific relief was not available under the Tucker Act, the Court cited the same public policy consideration that underlaid its decisions holding that specific performance was not available in officer suits: to avoid judicial interference with the "political department."¹¹¹

C. *Summary of the Law as of 1887*

Under the Tucker Act, money damages against the federal government were available on claims based on government contracts—as well as claims based on the Constitution, federal statutes or executive regulations. In addition, specific relief on the latter claims, as well as on many tort claims, was generally available in suits against federal officers. Yet, one form of specific relief, specific performance, was unavailable on one type of claim—claims based on the breach of a government contract—in suits

110. *Id.* at 19.

111. *Id.* There has been no significant alteration of the Tucker Act's substance since its enactment more than 100 years ago. It continues to allow the recovery of money damages from the federal government for claims based on the Constitution, federal statute, executive regulation and express or implied contracts with the United States.

The two major changes in handling claims under the Act have been structural. The first major change was effected by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (1994). The CDA prescribed an administrative process for initial adjudication of most government contract disputes and gave the Court of Claims exclusive original jurisdiction over those disputes. *See* 28 U.S.C. § 1346(a)(2) (1994) (stating that district courts "shall not have jurisdiction of any civil action" that is founded on government contract subject to specified provisions of CDA); *id.* § 1491(a)(2) (giving to successor of Court of Claims, Court of Federal Claims, jurisdiction over CDA disputes); *CIBINIC & NASH*, *supra* note 96, at 944-67 (discussing Court of Claims jurisdiction and changes made to Tucker Act); *see also* *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 893 n.3 (D.C. Cir. 1985) (describing changes made to Tucker Act by CDA). Because contract claims cognizable under the CDA may only be asserted in the Court of Claims, it is clear that district courts may not award specific performance on those claims under the APA. *See id.* The controversy, and the subject of this Article, is the availability of specific performance on contract claims that are *not* cognizable under the CDA.

The second major change was effected by the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 39 (1982) (codified in scattered sections of 28 U.S.C.). Before the FCIA, the Court of Claims had come to be regarded as an Article III court, and its decisions were subject to review by the Supreme Court. *See generally* *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-85 (1962) (discussing nature of pre-FCIA Court of Claims); *Wiecek*, *supra* note 102, at 387, 401-06 (same). The FCIA created an Article I entity, then called the Claims Court, to take over the trial responsibilities of the Court of Claims, and a new Article III appellate entity, the United States Court of Appeals for the Federal Circuit, to review the decisions of the Court of Claims prior to discretionary review by the Supreme Court. *See* §§ 105(a), 133(a), 96 Stat. at 27, 39-40 (codified at 28 U.S.C. § 1295(a)(3) (1994)). Unlike its predecessor, the Claims Court may grant equitable relief "on any contract claim brought before the contract is awarded." 28 U.S.C. § 1295(a)(3). Otherwise, like its predecessor, the Claims Court may not grant equitable relief, including specific performance. In 1992, the Claims Court was renamed the Court of Federal Claims. *See* Federal Courts Administration Act of 1992, 28 U.S.C. § 1491 (1994).

against either the federal government or its officers. The rule barring specific performance emerged as an anomalous mainstay of the doctrine of sovereign immunity.

III. THE UNCERTAIN CURRENT STATUS OF THE RULE BARRING SPECIFIC PERFORMANCE

In the late nineteenth century, the Supreme Court restricted the officer suit fiction.¹¹² Despite the APA's broad provision for judicial review of federal agency action, it did not relieve this restriction when it was enacted in 1946. In fact, after enactment of the APA, the Court further restricted the officer suit fiction.¹¹³ Congress responded by amending the APA in 1976.¹¹⁴ That amendment has cast doubt on the continued validity of the rule barring specific performance on contract claims against the federal government.¹¹⁵

A. *Supreme Court Restriction of the Officer Suit Fiction*

By 1887, the Supreme Court had expressly repudiated its view that the doctrine of sovereign immunity was implicated only by actions naming the government as a defendant.¹¹⁶ In addition, the Court had established that suits against officers seeking specific performance of government contracts would be deemed suits against the government.¹¹⁷ In all other contexts, however, it remained unclear when a suit against a government officer would be deemed a suit against the government.¹¹⁸ The Court employed an ad hoc test in each officer suit to determine whether the government, "though not named, is the real party against which the relief is asked, and against which the judgment will operate."¹¹⁹ Under this in-

112. For a further discussion of the Court's decisions restricting the officer suit fiction, see *infra* notes 116-32 and accompanying text.

113. For a further discussion of the Court's post-APA decisions restricting the officer suit fiction, see *infra* notes 133-56 and accompanying text.

114. See Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. § 702 (1994)). For a description of the 1976 APA amendment, see *infra* notes 133-56 and accompanying text.

115. For a further discussion of how the 1976 APA amendment has cast doubt on the rule barring orders of specific performance against the government, see *infra* notes 157-204 and accompanying text.

116. See *In re Ayers*, 123 U.S. 443, 504 (1887) (holding that officer suit requesting specific performance of state contract is, in reality, suit against state and, thus, barred by sovereign immunity).

117. See *id.*

118. See, e.g., *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962) ("[I]t is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task."); *Brooks v. Dewar*, 313 U.S. 354, 359 & n.6 (1941) ("[Q]uestions of this kind . . . 'have rarely been free from difficulty' and it is not 'an easy matter to reconcile all the decisions of the Court in this class of cases.'" (quoting *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883))).

119. *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902).

quiry, the Court directed the dismissal of many lawsuits against federal officers on the ground that they were “really” suits against the United States without its necessary consent.¹²⁰

As enacted in 1946, the APA promised, but did not deliver, relief from the Court’s restrictions on suits involving the federal government. The APA provided individuals “suffering legal wrong” or “adversely affected or aggrieved” by federal “agency action” with the right to judicial review.¹²¹ The problem was that the APA did not expressly waive sovereign immunity, and only a few courts held that it implicitly did so.¹²² Consequently, most people seeking judicial relief against the federal government continued to have to rely on the officer suit fiction. Judicial review through officer suits became known as “nonstatutory review” because it was not specifically authorized by the APA or any other statute.¹²³

After enactment of the APA, the Court further restricted the officer suit fiction.¹²⁴ In *Larson v. Domestic & Foreign Commerce Corp.*,¹²⁵ the plaintiff sued a federal officer seeking specific performance of a contract in which the government had agreed to sell surplus coal to the plaintiff.¹²⁶ The Court held that sovereign immunity barred the suit.¹²⁷ The Court could have based its holding on the principle—well-established, by then—that sovereign immunity bars specific performance in an officer suit.¹²⁸ Instead, the Court relied on a broader principle that was not limited to contract claims for specific performance:

[T]he action of an officer of the sovereign . . . can be regarded as so “illegal” as to permit a suit for specific relief against the officer

120. See Byse, *supra* note 3, at 1482 (“[The l]itigant . . . may have his action dismissed because . . . although nominally the action is against the individual . . . it is in fact against the United States.”); Cramton, *supra* note 3, at 410-11, 420-24 (analyzing when and whether suits are, in effect, suits against sovereign).

121. Administrative Procedure Act, ch. 324, § 10(a), 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 702 (1994)).

122. See *Kingsbrook Jewish Med. Ctr. v. Richardson*, 486 F.2d 663, 668 (2d Cir. 1973) (holding that APA implicitly waived sovereign immunity); *Scanwell Lab. v. Shaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970) (holding that APA serves as waiver of sovereign immunity where applicable); *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961) (same).

123. See *1976 Senate Hearings*, *supra* note 25, at 231 (testimony of Richard Berg) (defining “so-called non-statutory review”); Byse, *supra* note 3, at 1480-81 & n.3 (same); Cramton, *supra* note 3, at 394-395 (same).

124. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949) (holding that plaintiff had to show that officer’s conduct exceeded statutory powers or was unconstitutional).

125. 337 U.S. 682 (1949).

126. *Id.* at 684.

127. See *id.* at 705.

128. See *Malone v. Bowdoin*, 369 U.S. 643, 650 (1962) (Douglas, J., dissenting) (“The *Larson* case was a suit for specific performance of a contract to sell coal, a matter that courts had long left to damage suits.”); Cramton, *supra* note 3, at 405 (discussing how court in *Larson* could have relied on rule barring specific performance).

as an individual *only* if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.¹²⁹

The Court added that an officer's conduct does not exceed the officer's statutory powers merely because it is "wrongful under the general law," such as the common law of torts.¹³⁰ As a result, plaintiffs could no longer avoid sovereign immunity merely by proving that an officer had done something for which a private person would be personally liable, because that would simply be something "wrongful under the general law."¹³¹ After *Larson*, plaintiffs had to show that an officer's conduct was ultra vires or unconstitutional to recover.¹³²

B. *The 1976 Amendment of the APA*

In 1976, Congress amended the APA to overrule, at least in part, *Larson* and later Court decisions that deemed many officer suits to be suits against the United States.¹³³ The amendment does not expressly exclude

129. *Larson*, 337 U.S. at 701-02 (emphasis added).

130. *Id.* at 701-02 & n.24 (disapproving of *Goltra v. Weeks*, 271 U.S. 536, 543-47 (1926), to extent it authorized specific relief for federal official's tort without constitutional violation); *see also* *Wells v. Roper*, 246 U.S. 335, 337-38 (1918) (noting fact that officer's conduct constituted breach of governmental contract did not render conduct ultra vires so as to provide basis for officer liability in officer suit).

131. *Larson*, 337 U.S. at 701.

132. *See* *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (adhering to restrictive view of officer suits adopted in *Larson* and holding suit against federal officer seeking conveyance of land owned by federal government was barred by sovereign immunity); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (holding that sovereign immunity barred specific relief against officers even if their actions were characterized as trespasses); *Malone*, 369 U.S. at 643-48 (holding that ejection action against officer was barred by sovereign immunity in absence of allegation that officer was exceeding his statutory authority or that his conduct was unconstitutional).

133. *See* Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. § 702 (1994)). *Compare* *Larson*, 337 U.S. at 682-702 (discussing analysis of sovereign immunity), *with* *United States v. Murdock Mach. & Eng'r Co.*, 81 F.3d 922, 930 (10th Cir. 1996) (stating that *Larson* was superseded in part by 5 U.S.C. § 702), *and* *Armstrong v. Wilson*, 942 F. Supp 1252, 1253 (N.D. Cal. 1996) (same), *aff'd*, 124 F.3d 1019 (9th Cir. 1997). The amendment provides:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or any officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other

contract claims for specific performance against the government.¹³⁴ On the contrary, it permits any claim based on any act or failure to act "in an official capacity or under color of legal authority."¹³⁵ Moreover, it expressly authorizes specific relief on such claims.¹³⁶ Indeed, by permitting only actions "seeking relief *other than money damages*," the amendment makes specific relief the exclusive remedy available under the APA.¹³⁷ Thus, the amendment appears to create a logical division between claims as to which the APA waives sovereign immunity and claims as to which the Tucker Act waives sovereign immunity. Claims for specific relief are authorized under the APA, and claims for money damages are authorized under the Tucker Act.¹³⁸ That would be true regardless whether the claims were based on the Constitution, a federal statute or regulation, or a government contract.¹³⁹

Doubt is cast upon this conclusion, however, by the second clause of the last sentence of the 1976 amendment.¹⁴⁰ Under that clause, the APA does not authorize relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."¹⁴¹ The Tucker Act is, of course, a statute "that grants consent to suit."¹⁴² It is true that Tucker Act does not expressly forbid specific relief against the government.¹⁴³ By 1976, however, the Tucker Act had been construed not to

statute that grants consent to suit expressly or impliedly forbids the relief sought.

§ 1, 90 Stat. at 2721.

134. *See* § 1, 90 Stat. at 2721.

135. *Id.*

136. *See id.*

137. *Id.* (emphasis added).

138. *See* H.R. REP. NO. 94-1656, at 4, 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6125 (stating that bill enacted as 1976 amendment "withdraw[s] the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus . . . [and that] the recovery of money damages contained in the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected").

139. *See* 28 U.S.C. § 1346(a)(2) (1994) (waiving immunity "in cases not sounding in tort"). The Tucker Act did not waive federal sovereign immunity from tort claims. *See id.* As the legislative history noted, however, sovereign immunity from tort liability was partially waived in the Federal Tort Claims Act of 1946 (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1994). *See* H.R. REP. NO. 94-1656, at 4.

140. *See* 5 U.S.C. § 702(2) (1994) (refusing to authorize relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"). The first clause of the 1976 APA amendment did not involve the doctrine of sovereign immunity. *See* S. REP. NO. 94-996, at 11 (1976); *see also* H.R. REP. NO. 94-1656, at 4. It preserved "other limitations on judicial review" of suits for specific relief against the government, such as administrative exhaustion and ripeness. *See id.*

141. 5 U.S.C. § 702(2).

142. *See* Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.) (authorizing United States Court of Claims to hear claims against the United States based on Constitution).

143. *See id.*

authorize specific relief, including specific performance on a contract claim.¹⁴⁴ The question thus arises: Does the Tucker Act's failure to authorize specific relief "impliedly forbid" an award of specific performance on a contract claim under the APA?

The text of the two statutes strongly suggests that the answer is no. The Tucker Act does not distinguish between claims based on contract and claims based on the Constitution or a federal statute or regulation.¹⁴⁵ It does not authorize specific relief on *any* of these types of claims.¹⁴⁶ In light of the Tucker Act's uniform treatment of all of these types of claims, one cannot readily conclude from its text that it impliedly forbids specific relief on a *contract* claim under the APA without concluding that it also impliedly forbids specific relief under the APA on the *other* types of claims for which the Tucker Act authorizes money damages.¹⁴⁷

Yet, if the Tucker Act precludes specific relief on all of the types of claims for which money damages are available under that act, the 1976 APA amendment would be largely superfluous.¹⁴⁸ That is because the amendment authorizes only relief "other than money damages" (specific relief).¹⁴⁹ If the amendment does not authorize specific relief on any claim based on the Constitution, a federal statute or regulation or an express or implied contract with the government, there would be very few, if any, types of claims that would be cognizable under the APA.¹⁵⁰

In short, the relevant statutory text logically compels the conclusion that the Tucker Act does *not* impliedly forbid any type of specific relief under the APA. That conclusion would hold true regardless of the basis of the claim, including a contract claim for specific performance. Consequently, the text of the 1976 amendment clearly appears to abrogate the long-standing rule barring specific performance on contract claims against the federal government.

The legislative history of the 1976 amendment, however, even more clearly evinces Congress' intent to retain the rule.¹⁵¹ The amendment was based on a legislative proposal by the Administrative Conference of the

144. See *United States v. Alire*, 73 U.S. (6 Wall.) 573, 575 (1867) (noting that only judgments that Court of Claims was authorized to render against government were money damages).

145. See § 1, 24 Stat. at 505 (listing types of claims over which Court of Claims "shall have jurisdiction").

146. See *id.*

147. *Id.*

148. See *North Side Lumber Co. v. Block*, 474 U.S. 931, 932 n.2 (1985) (White, J., dissenting) (stating that such interpretation would render 1976 amendment "a dead letter").

149. § 1, 24 Stat. at 505.

150. See *id.* The only major category of claims left would be tort claims. See *id.* It could be argued, however, that specific relief for tort claims under the APA is impliedly precluded by the FTCA, which authorizes only money damages for such claims. See 28 U.S.C. § 1346(b) (1994).

151. See S. Rep. No. 94-996, at 3 (1976) (debating merits of amendment to APA); see also H.R. REP. NO. 94-1656, at 4 (1976), reprinted in 1976 U.S.C.A.N.

United States (ACUS).¹⁵² In describing the ACUS proposal, one commentator said that it would not authorize specific performance of government contracts, because that form of relief was “impliedly forbid[den]” by the Tucker Act.¹⁵³ This view was repeated almost verbatim in the committee reports to the 1976 amendment:

Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, “impliedly forbids” relief other than the remedy provided by the Act.¹⁵⁴

6121, 6124-25 (noting that Administrative Conference of the United States (ACUS) submitted proposal to amend APA).

152. *See* H.R. REP. NO. 94-1656, at 4. The actual legislation differed from ACUS’s legislative proposal only in that the actual legislation included the text emphasized below:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or any officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.* Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought.

5 U.S.C. § 702 (1994) (emphasis added). *Compare* H.R. REP. NO. 94-1656, at 23-24 (discussing and reproducing ACUS recommendation to amend APA), *with* 5 U.S.C. § 702 (providing final version of amendment to APA enacted by Congress).

153. Cramton, *supra* note 3, at 435. Professor Cramton (later Chairman of ACUS and Dean of Cornell Law School) stated:

The proviso [5 U.S.C. § 702(2)] is concerned with situations in which Congress has consented to suit but in which the remedy provided is intended to be the exclusive one. The Tucker Act provides an apt illustration. When Congress created a damage remedy for contract claims, . . . it intended to foreclose specific performance of government contracts. In terms of the proviso, a statute granting consent to suit, in this case, the Tucker Act, “impliedly forbids” relief other than the remedy provided by the Tucker Act.

Id.

154. S. REP. NO. 94-996, at 11-12 (1976) (footnote omitted); *see* H.R. REP. NO. 94-1656, at 12-13 (footnote omitted). In this passage, the committee report refers to the statute authorizing money damages on contract claims initially as the Court of Claims Act and then as the Tucker Act. *See* H.R. REP. NO. 94-1656, at 12-13. As discussed, however, the Court of Claims Act of 1855, ch. 122, 10 Stat. 612 (re-

The committee reports further provide that an earlier bill had omitted the "impliedly forbids" language found in the ACUS proposal, but that this language had been reinserted at the urging of the Department of Justice (DOJ).¹⁵⁵ The DOJ informed Congress that the "impliedly forbids" language reflected the probability that "in most if not all cases where statutory remedies already exist, these remedies will be exclusive."¹⁵⁶

C. *Case Law Construing the 1976 Amendment of the Administrative Procedure Act*

In light of the conflict between the text of the 1976 APA amendment and its legislative history, it is not surprising that the lower federal courts disagree on whether the Tucker Act impliedly forbids specific performance on a contract claim under the APA.¹⁵⁷ The United States Court of Appeals for the Tenth Circuit has upheld specific performance on such a claim, finding support in Supreme Court dicta.¹⁵⁸ Other circuits have held that the Tucker Act implicitly precludes such relief.¹⁵⁹

The Tenth Circuit upheld specific performance under the APA in *Hamilton Stores, Inc. v. Hodel*.¹⁶⁰ Hamilton Stores had a contract with the Secretary of the Interior to provide concession services in Yellowstone National Park.¹⁶¹ The contract gave Hamilton Stores a preferential right to

pealed 1887), authorized the court only to recommend the disposition of claims to Congress, and not to enter final judgments. Technically, therefore, the committee report errs in initially citing the 1855 statute as creating a damage remedy. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1553 n.4 (D.C. Cir. 1984) (Scalia, J., dissenting) (stating that report probably was meant to refer to Tucker Act in both instances).

155. See H.R. REP. NO. 94-1656, at 13 (noting that clause was removed at request of Department of Justice (DOJ)); S. REP. NO. 94-996, at 12.

156. H.R. REP. NO. 94-1656, at 28.

157. See *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1278-79 (10th Cir. 1991) (holding that when "essential purpose" of claim is not recovery of money damages, Tucker Act does not preclude district court jurisdiction under APA). But see *North Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994) ("We hold that the APA does not waive sovereign immunity for North Star's contractually based claim for equitable relief."); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("[W]e decline to overrule this court's very specific holdings that the APA does not waive sovereign immunity for contract claims seeking specific relief.").

158. See *Hamilton Stores*, 925 F.2d at 1279 ("The Supreme Court has indicated the importance of district court review of agency action in preference to Claims Court Tucker Act jurisdiction." (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988))).

159. See, e.g., *North Star Alaska*, 14 F.3d at 38 (holding that APA does not waive sovereign immunity for contractually based claim for equitable relief); *Transohio*, 967 F.2d at 613 (declining to overrule holdings that APA does not waive sovereign immunity for contract claims for specific relief); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) ("We are unaware of any waiver of sovereign immunity by the United States as to specific performance for breach of contract.").

160. 925 F.2d 1272 (10th Cir. 1991).

161. See *id.* at 1274 (stating that Hamilton Stores' contract authorized it to sell

bid on certain additional concession services that the Secretary might decide to offer in the park.¹⁶² The case arose after the Secretary contracted with a separate company to provide additional concession services in the park without first allowing Hamilton Stores to submit a bid.¹⁶³ Hamilton Stores sued the Secretary under the APA, seeking a writ of mandamus directing the Secretary to rescind the contract with the other company and allow Hamilton Stores to bid for provision of the new concession services; thus, the suit sought specific performance.¹⁶⁴

The government contended that the suit was not cognizable under the APA.¹⁶⁵ In support of that contention, the government did not argue that the Tucker Act impliedly forbade specific performance under the APA.¹⁶⁶ Instead, it argued that the suit was “essentially a disguised action for [money] damages.”¹⁶⁷ Recall that the APA waives sovereign immunity only as to claims seeking “relief other than money damages.”¹⁶⁸

Nonetheless, in upholding Hamilton Stores’ claim, the Tenth Circuit authoritatively addressed the implied-preclusion issue.¹⁶⁹ The court first determined that, contrary to the government’s argument, Hamilton Stores was seeking “relief other than money damages.”¹⁷⁰ The court then determined that such relief was not precluded by the fact that Hamilton Stores could have sought money damages for breach of contract in the Claims Court under the Tucker Act.¹⁷¹ As to the latter determination, the court stated: “Even if money damages for a given claim are only available in the Claims Court, the Tucker Act does not preclude the same claimant from seeking nonmonetary relief in a district court.”¹⁷² That statement was not mere dicta. It was essential to holding that the district court had jurisdiction of Hamilton Stores’ contract claim for specific performance under

food, beverages and other items, establish automobile service stations and various other activities).

162. *See id.* at 1274 n.3 (describing “preferential right” as other than “exclusive or monopolistic right”).

163. *See id.* at 1275 (stating that Hamilton Stores believed contract was awarded to another company in violation of government regulations).

164. *See id.* at 1275-76.

165. *See id.* at 1276 (noting government’s argument that district court lacked subject matter jurisdiction because APA waiver of sovereign immunity was inapplicable to Hamilton Store’s claim).

166. *See id.*

167. *Id.*

168. 5 U.S.C. § 702 (1994).

169. *See Hamilton Stores*, 925 F.2d at 1278.

170. *See id.* (holding that under “prime objective,” or “essential purpose” test, Hamilton Store’s claim was not action seeking money damages within meaning of Tucker Act).

171. *See id.* at 1279 n.13 (noting that Hamilton Store’s decision not to bring action for damages in Claims Court).

172. *Id.* at 1278 n.11 (citing *Bowen v. Massachusetts* 487 U.S. 879 (1988)); *see id.* at 1278 n.12 (citing *Bowen* again).

the APA.¹⁷³

In deciding that the Tucker Act did not bar a contract claim for specific performance under the APA, the Tenth Circuit relied on dicta in a Supreme Court decision.¹⁷⁴ In *Bowen v. Massachusetts*,¹⁷⁵ Massachusetts sued the Secretary of the United States Department of Health and Human Services in federal district court under the APA.¹⁷⁶ Massachusetts sought reimbursement from the federal government under the federal Medicaid statute for services that the state had provided to the mentally retarded.¹⁷⁷ Similar to *Hamilton Stores*, the federal government in *Bowen* argued that the action was barred because it sought money damages.¹⁷⁸ The Court rejected that argument, determining that Massachusetts was seeking specific relief that merely happened to require the payment of money.¹⁷⁹ Moreover, the Court determined that specific relief under the APA was not barred by the possible availability of monetary relief on the same claim under the Tucker Act.¹⁸⁰ The Court explained:

If . . . § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional “money damages”—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court.¹⁸¹

The Court cited, as an example of a claim for specific relief that would be cognizable in a district court under the APA, an “equitable action[] for monetary relief under a contract.”¹⁸² This indicates that the Tucker Act

173. *See id.* at 1279 (focusing on “primary purpose and essential objective” of claim and concluding that “the complaint sought to require the defendant . . . to offer plaintiff the opportunity to provide new and additional accommodations . . . and not to require payment of compensatory damages”). The Tenth Circuit rejected *Hamilton Stores*’ claim on the merits, holding that the Secretary had not violated the contract with *Hamilton Stores*. *See id.* at 1280-82 (affirming district court finding that there was no genuine issue of material fact).

174. *See id.* at 1277-78 nn.11-12 (citing *Bowen*, 487 U.S. at 891).

175. 487 U.S. 879 (1988).

176. *Id.* at 887 (“[The] complaint invoked federal jurisdiction . . . and alleged that the United States had waived its sovereign immunity.”).

177. *See id.* at 885-86 (noting that services included “such matters as ‘training in the activities of daily living (such as dressing and feeding oneself)’” (quoting *Massachusetts v. Heckler*, 616 F. Supp. 687, 691 (D. Mass. 1985))).

178. *See id.* at 896 (noting that government’s argument would require Court “to substitute the words ‘monetary relief’ for the words ‘money damages’”).

179. *See id.* at 900 (“The State’s suit . . . is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.”).

180. *See id.* at 910-11.

181. *Id.* at 910-11 n.48.

182. *Id.* at 895.

does not preclude an “equitable action” (an action for specific relief) under the APA based on a contract claim against the government.¹⁸³ Thus, *Bowen* appeared to support contract claims for specific performance under the APA.¹⁸⁴

Like the Tenth Circuit, the United States Courts of Appeals for the First, Ninth and D.C. Circuits have recognized that *Bowen* supports the availability of specific relief on a contract claim under the APA.¹⁸⁵ Unlike the Tenth Circuit, however, these circuits have nonetheless denied that relief.¹⁸⁶ This position is illustrated by the D.C. Circuit’s decision in *Transohio Savings Bank v. Director, Office of Thrift Supervision*.¹⁸⁷

Transohio arose from the savings and loan (or “thrift”) crisis of the 1980s.¹⁸⁸ During that crisis, federal banking agencies encouraged solvent

183. *See id.* at 893. The Court in *Bowen* used the term “equitable action” to refer to “an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for ‘the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer’s actions.’” *Id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)).

184. *Id.* at 895 (finding that relief sought was “specific relief, not relief in the form of damages”). In referring to an “equitable action[] for *monetary relief* under a contract,” the Court had in mind suits for restitution of specific sums of money, which was the type of relief Massachusetts was seeking. *Id.* (emphasis added); *see id.* at 893 (noting that relief sought by Massachusetts was called “restitution” in Medicaid statute). Restitution of specific sums of money, like specific performance, is a type of specific relief. *See id.* (“The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’”). The Court’s statement did not mean that the APA authorizes only specific relief that entails a monetary award. *See id.* Indeed, as the dissent in *Bowen* demonstrates, suits for specific relief that take the form of a monetary award are especially problematic because they can be difficult to distinguish from actions for money damages, which are expressly forbidden under the APA. *See id.* at 917-21 (Scalia, J., dissenting) (arguing that Massachusetts sought money damages within meaning of APA). Thus, the APA’s authorization of contract-based claims for specific relief that does *not* entail a monetary award—an award of specific performance—would follow *a fortiori* from the majority’s statement that the APA authorizes contract-based claims for specific relief that *does* entail a monetary award. *See id.* at 893.

185. *See North Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994) (noting that “*Bowen* could be interpreted as taking a more expansive view of district court jurisdiction under the APA than . . . previously recognized”); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 612 (D.C. Cir. 1992) (finding strong case that Tucker Act should not be read to impliedly forbid contract actions for specific relief); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 4-5 (1st Cir. 1989) (rejecting “last ditch argument” relying on language in *Bowen*).

186. *See North Star Alaska*, 14 F.3d at 38 (denying specific performance relief on contract claim despite recognizing that *Bowen* supports availability of such relief); *Transohio*, 967 F.2d at 612 (same); *Diamond*, 884 F.2d at 5 (same); *cf.* *Mark Dunning Indus. v. Cheney*, 934 F.2d 266, 269 (11th Cir. 1991) (holding that district court lacked jurisdiction over claim by contractor that Army improperly terminated its contract). The Eleventh Circuit reached the same conclusion in a post-*Bowen* decision that did not discuss *Bowen*. *See id.*

187. 967 F.2d 598 (D.C. Cir. 1992).

188. *Id.* at 600.

companies to merge with ailing thrifts.¹⁸⁹ As an inducement, the agencies often entered into "forbearance agreements" with the solvent companies.¹⁹⁰ The agreements promised that the merged entities could use certain liberal accounting methods in return for the solvent company's assumption of a failed thrift's portfolio.¹⁹¹ The promise was usually essential to the ability of the merged entities to satisfy regulations requiring thrifts to maintain a minimum amount of capital.¹⁹² After many forbearance agreements had been made, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA),¹⁹³ which prohibited the lax accounting methods permitted under the forbearance agreements.¹⁹⁴

After FIRREA was enacted, federal banking agencies refused to honor the forbearance agreement they had entered into with Transohio.¹⁹⁵ Transohio sued the agencies in federal district court under the APA.¹⁹⁶ It argued that FIRREA should be construed not to apply to thrifts with forbearance agreements and that, if FIRREA did apply to such thrifts, its application breached the agreements and constituted a taking of property without due process.¹⁹⁷ Transohio sought specific performance or rescission of the forbearance agreement.¹⁹⁸

The D.C. Circuit held that the APA waived sovereign immunity from Transohio's statutory and due process claims, but not from its breach of contract claim.¹⁹⁹ The court relied on prior decisions in which it had held

189. *See id.* (noting federal board "encouraged a number of healthy thrifts to acquire failing ones").

190. *See id.* ("The government agencies provided financial assistance to the acquiring thrifts, and they promised favorable accounting treatment.")

191. *See* *Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir. 1982) (describing mechanics of purchase and assumption transactions). *See generally* Marie T. Reilly, *The FDIC as Holder in Due Course: Some Law and Economics*, 1992 COLUM. BUS. L. REV. 165, 170-76 (summarizing actions after enactment of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 2, 5, 12, 15, 18, 26, 28, 31, 40, 42 and 44 U.S.C.), by Federal Deposit Insurance Corporation against failed thrifts).

192. *See Transohio*, 967 F.3d at 600.

193. Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 2, 5, 12, 15, 18, 26, 28, 31, 40, 42 and 44 U.S.C.).

194. *See Transohio*, 967 F.2d at 600 ("As a result of the new rules, some of the thrifts . . . found themselves dangerously near, or even below, minimum capital requirements.")

195. *See id.*

196. *See id.*

197. *See id.* at 605 (stating that Transohio argued it had "contractual right to count goodwill as capital").

198. *See id.* at 608 (noting that specific performance is "the classic example of specific relief").

199. *See id.* at 607-13 (discussing holding with regard to each of Transohio's contractual claims); *cf.* *Tucson Airport Auth. v. General Dynamics Corp.*, 1998 WL 54674 (9th Cir. Feb. 12, 1998), at *7 (holding that Tucker Act impliedly precluded constitutional claim in district court because that claim was based on government

that the Tucker Act impliedly forbids specific relief on contract claims under the APA.²⁰⁰ The court recognized that *Bowen* provided “a strong case” for a contrary result.²⁰¹ The court recognized, as well, that “[n]othing in the language of either the Tucker Act or the APA requires special treatment for contract claims.”²⁰² The court, however, was bound by its precedent, because *Bowen* neither involved a contract claim nor addressed the “impliedly forbids” language of the APA.²⁰³ Despite this disagreement among the circuits and the fact that this disagreement is attributable in part to the Supreme Court’s dicta in *Bowen*, the Court has yet to address the question whether the Tucker Act impliedly forbids specific relief on a contract claim under the APA.²⁰⁴

contract and declining to follow *Transohio* decision upholding district court jurisdiction over similar constitutional claim).

200. *See id.* at 609-11.

201. *Id.* at 612.

202. *Id.*

203. *See id.* at 613 (concluding that “although *Bowen* invites us to reject our prior holdings, it does not compel us to do so”). The Ninth Circuit has taken a similar approach. *See North Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994); *North Star Alaska v. United States*, 9 F.3d 1430, 1439 (9th Cir. 1993) (en banc). In *North Star Alaska*, a company that had leased land from the United States Army sought reformation of the lease under the APA. *North Star Alaska*, 9 F.3d at 1431 (noting that lease was originally for “sole purpose of constructing, operating and leasing 400 units of residential housing”). The Ninth Circuit held that the action was barred by sovereign immunity. *See North Star Alaska*, 14 F.3d at 38. It relied on its precedent that the Tucker Act impliedly forbids specific relief under the APA on a contract claim. *Id.* The court recognized that *Bowen* “suggests that contract actions seeking equitable relief could be heard in district court under the APA.” *Id.* The court nonetheless declined to follow that suggestion, observing as the U.S. Court of Appeals for the District of Columbia Circuit did in *Transohio* that *Bowen* “did not involve a contract and it did not address the ‘impliedly forbids’ limitation on the APA’s waiver of sovereign immunity.” *Id.*; *see Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 4-5 (1st Cir. 1989) (holding that district court lacked jurisdiction to issue writ of mandamus enforcing certain terms of government conveyance of land to plaintiff). The court added that *Bowen*, “although alluring,” did not apply because suit before court was not brought under the APA, and more importantly *Bowen* did not involve a contract claim. *See North Star Alaska*, 14 F.3d at 38.

204. *See North Side Lumber Co. v. Block*, 474 U.S. 931 (1985) (denying certiorari on this issue). The denial of certiorari was arguably justified in *North Side* for two reasons. First, there was no circuit conflict on the issue at that time as *Hamilton Stores* was not decided until 1991. *See id.* at 932 (White, J., dissenting) (expressing doubts about Ninth Circuit decision’s consistency with *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983)). *But see* Michael J. Broyde, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White’s Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. Rev. 610, 630-31 (1987) (explaining why two cases cited by Justice White did not conflict). Second, a reversal of the Ninth Circuit’s holding on the implied preclusion issue would not have changed the judgment below. *See North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 (9th Cir. 1984), *cert. denied*, 474 U.S. 931 (1985). In dismissing a government contractor’s APA suit, the Ninth Circuit did not rely solely on the ground that the suit was impliedly precluded by the Tucker Act. *See id.* Alternatively, the court held that the suit was not cognizable under the APA because the government contractor had identified “no claim of an official action or failure to act within the

IV. THE VALIDITY OF THE RULE BARRING SPECIFIC PERFORMANCE AS A
MATTER OF STATUTORY INTERPRETATION

The statutes and case law present an issue of statutory interpretation: whether the Tucker Act, within the meaning of 5 U.S.C. § 702(2), impliedly forbids an award of specific performance on a contract claim under the APA. The relevant statutory text may support the conclusion that it does not, but only when the text is considered in isolation. When one considers the history of the Tucker Act together with the 1976 APA amendment, it is clear that the Tucker Act *does* implicitly preclude specific performance on a contract claim under the APA.

The most cogent argument against preclusion is that the Tucker Act does not treat contract claims differently from the other types of claims as to which it authorizes money damages.²⁰⁵ For that reason, the text of the Tucker Act cannot, standing alone, sensibly be read to preclude specific relief on only contract claims. Yet, if the Tucker Act is read to preclude specific relief for *all* of the types of claims for which it authorizes money damages, the 1976 APA amendment becomes virtually meaningless. As between a reading that accords *no* preclusive effect to the Tucker Act and one that accords it *total* preclusive effect, the former is plainly more reasonable. That reading would permit awards of specific performance on contract claims under the APA.

The textual argument is not dispositive, however, because under the 1976 amendment to the APA, specific relief may be impliedly precluded by the Tucker Act.²⁰⁶ Congress' use of the word "impliedly" justifies consideration of the legal context in which the Tucker Act and the 1976 APA amendment were enacted. Such consideration shows that, although the text of the Tucker Act does not accord contract claims special treatment, the legal landscape in which it was enacted had already established such

meaning of 5 U.S.C. § 702." *Id.* See generally ROBERT STERN ET AL., SUPREME COURT PRACTICE 196-202 (6th ed. 1986) (stating that Court does not often grant review in absence of conflict, and even when there is conflict, Court may decline review if resolution of issue that is subject of conflict would not change result in particular case as to which certiorari is sought).

205. 28 U.S.C. § 1346(a)(2) (1994). Section 1346(a)(2) grants original jurisdiction to federal district courts

concurrent with the United States Court of Federal Claims . . . [of] any other civil action or claim against the United States (not seeking recovery of federal income tax or penalties), not exceeding \$10,000 in amount, 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 which are subject to sections 8(g)(1) and 10(a)(1) of the Contracts Dispute Act of 1978.

Id.

206. See 5 U.S.C. § 702 (1994) ("Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.").

special treatment.²⁰⁷

Congress first empowered the Court of Claims to enter final judgments on claims based on federal statutes, executive regulations and contracts in 1863.²⁰⁸ By then, the Court had made clear that judicial relief on federal contract claims was not otherwise available.²⁰⁹ It was not available in a suit directly against the federal government because—as the Court had held in 1846—sovereign immunity barred *any* action against the federal government to which it had not consented.²¹⁰ Nor was relief on contract claims available in a suit against a federal officer, because—as the Court had held in 1803 in *Hodgson v. Dexter*—an officer is not liable for the breach of a government contract.²¹¹

207. *See id.* The Supreme Court often considers the legal context in which a statute was enacted to determine whether it impliedly provides a private cause of action or impliedly precludes judicial relief under another law. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-82 (1982) (examining congressional intent to find implied cause of action); *Brown v. General Serv. Admin.*, 425 U.S. 820, 828 (1976) (discussing implied preclusion). The Court also considers a statute's legal background to resolve other issues of statutory interpretation. *See id.* Even Justice Scalia, arguably the strictest textualist on the Court, treats the legal background against which a statute was enacted as a key determinant of a statute's meaning. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating that statute's meaning must be "in accord with context and ordinary usage" and "compatible with the surrounding body of law"); *see also* *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in judgment) ("Judicial inference of a zone-of-interests requirement like judicial inference of a proximate-cause requirement, is a background practice against which Congress legislates."). *See generally* Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 406-14 (1994) (analyzing Justice Scalia's textualist approach to statutory interpretation).

208. *See* Act of March 3, 1863, ch. 92, § 5, 12 Stat. 766 (authorizing appeal to Supreme Court of final judgments or decrees of Court of Claims), *repealed by* Act of March 17, 1866, ch. 9, 14 Stat. 9.

209. *See* *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (concluding that decree or judgment cannot be entered against government).

210. *See id.* Dicta in an earlier case also set forth the Court's view of sovereign immunity. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States.").

211. *Hodgson v. Dexter*, 5 U.S. (2 Cranch) 345, 363-65 (1803) (holding that officer was not liable because contract was entered into on government's behalf). Dicta in subsequent cases also reflects this position. *See Garland v. Davis*, 45 U.S. (4 How.) 131, 148-49 (1846) ("[I]f now rendering a final judgment, we should probably . . . be obliged to decide against the original plaintiff on the merits, because public agents are not usually liable or mere contracts on promises made in behalf of their principals."); *Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56 n.a (1817) ("[I]f an agent of the government contract for their benefit . . . he is held not to be personally responsible."); *cf. Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) (rejecting contract action against French Consul General). Apart from the Supreme Court decisions, Congress presumably knew that officers could not be sued on contract claims because of the barrage of petitions by contract claimants for alternative relief through private bills. For example, after the Supreme Court in *Hodgson v. Dexter* rejected Mr. Hodgson's contract claim against Secretary of War Dexter, Hodgson eventually obtained relief in a private act passed by Congress. *See*

The situation in 1863 was different for *noncontract* claims. Both specific relief and money damages were available in suits against officers for those claims.²¹² The Court had announced the availability of specific relief on noncontract claims in *Marbury v. Madison*.²¹³ Moreover, in many cases decided after *Marbury*, but prior to 1863, the Court had upheld awards of specific relief and money damages on noncontract claims against officers.²¹⁴

By March 1887, when Congress enacted the Tucker Act, the distinction between contract claims and claims based on "other rights of person and property" was even more "obvious."²¹⁵ The Court had held twice that sovereign immunity barred an award of specific performance of a government contract.²¹⁶ In contrast, the Court had continued to award specific

Act of May 7, 1822, ch. 92, 6 Stat. 273 (authorizing payment of \$6000 to Hodgson for destruction of building leased by Dexter for government use). It is unclear whether Congress indemnified Secretary Dexter for the costs of defending Hodgson's suit. Cf. AMERICAN STATE PAPERS: CLAIMS, *supra* note 97, at 250 (discussing committee report recommending indemnification of Dexter).

212. For a further discussion of Supreme Court decisions on such claims, see *supra* notes 42-56 and accompanying text. Congress undoubtedly knew that judicial relief was available against federal officers on noncontract claims because it regularly enacted private acts indemnifying those officers. See Act of July 29, 1854, ch. 166, 10 Stat. 804 (authorizing payment to federal officer of expenses of defending two suits for his arrest and detention of ship suspected of illegal slave trading); Act of March 11, 1852, ch. 14, 10 Stat. 727 (directing Attorney General to represent federal officer in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852), and authorizing payment of any judgment against him); Act of March 3, 1851, ch. 30, 9 Stat. 812 (indemnifying person for defending "a suit to recover money which he had procured for the use of the government"); Act of August 10, 1846, ch. 185, 9 Stat. 677, 678 (paying balance of judgment and interest against federal collector of duties); Act of March 3, 1843, ch. 121, 6 Stat. 892 (indemnifying federal surveyor of port for judgment based upon his unlawful seizure of goods); Act of July 27, 1842, ch. 70, 6 Stat. 837 (indemnifying defendants for trespass committed while acting under military orders); Act of July 9, 1842, ch. 60, 6 Stat. 835, 836 (same); Act of March 2, 1839, ch. 49, 6 Stat. 754 (indemnifying defendant for judgment entered against him based on arrest of plaintiff under orders from Postmaster General); see also Act of February 1, 1849, ch. 38, 9 Stat. 757, 758 (authorizing settlement payment for breach of contract by federal surveyor general). These instances did not include private acts authorizing payment of specific sums to the sureties of federal officers. See, e.g., Act of March 3, 1849, ch. 147, 9 Stat. 780 (authorizing payment of \$462.10 to defendant). Many of these payments, however, may have reflected judgments entered in suits against the officer for whom the payee was surety.

213. 5 U.S. (1 Cranch) 137 (1803).

214. For a further discussion of such cases decided after *Marbury*, see *supra* notes 42-56 and accompanying text.

215. *In re Ayers*, 123 U.S. 443, 503 (1887).

216. See *Hagood v. Southern*, 117 U.S. 52, 71 (1886) (relying on sovereign immunity to reject two officer suits for specific performance of state contract); *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1882) (holding that state bondholders could not sue state officers to require them to honor bonds). The Court held that sovereign immunity barred an award of specific performance of a government contract for a third time in *Ayers*. *Ayers*, 123 U.S. at 503.

relief against officers on noncontract claims.²¹⁷ Most notably, in 1882, the Court in *Lee* had upheld the eviction of federal officers from Arlington Cemetery for an unconstitutional trespass.²¹⁸

This distinctive treatment of contract claims justifies drawing a distinctive inference from Congress' authorization of money damages on such claims in 1863 and 1887. By authorizing only money damages at a time when it was well-settled that specific relief was not available, Congress evinced an intention that specific relief should remain unavailable on contract claims. No similar inference can be drawn for noncontract claims, because specific relief on those claims *was* available in officer suits.²¹⁹ Indeed, by authorizing money damages on those claims, without disturbing the existing availability of specific relief, Congress arguably evinced an intention that specific relief should continue to be available on noncontract claims.²²⁰

217. See *United States v. Lee*, 106 U.S. 196, 223 (1882). Moreover, during the period between 1863 and 1887, Congress had continued to enact private bills indemnifying officers sued on noncontract claims. See Act of August 4, 1882, ch. 403, 22 Stat. 728 (authorizing Secretary of War to reimburse superintendent of national cemetery in North Carolina for judgment against him for trespass "committed while in discharge of his duty as said superintendent"); see also Act of February 26, 1885, ch. 167, 23 Stat. 639 (empowering Court of Claims to make findings on liability of federal officers for closing business and seizing its property under internal revenue laws).

218. *Lee*, 106 U.S. at 223. Congress undoubtedly knew about *Lee* when the Tucker Act was under consideration. After the *Lee* decision, Congress was forced to appropriate \$150,000 to buy Arlington Cemetery from the Lee estate. See Act of March 3, 1883, ch. 141, 22 Stat. 584 (authorizing Arlington cemetery); see also 14 CONG. REC. 35 (1882) (instructing Senate Judiciary Committee to determine whether legislation is required to obtain title to Arlington Cemetery). Moreover, *Lee* is cited in a committee report on the Tucker Act. See H.R. REP. NO. 49-1077, at 2 (1886).

219. See *Lee*, 106 U.S. at 223 (permitting ejectment action against federal officials).

220. There is nothing in the congressional debates or the printed committee reports on bills concerning claims against the United States for the periods of 1848 to 1863 and 1882 to 1887 addressing whether legislation authorizing money damages for contract claims against the United States was meant to preclude awards of specific performance on such claims. The material indicates, instead, that Congress was concerned exclusively with claims for monetary relief. See CONG. GLOBE, 37th Cong., 3d Sess. 304 (1863) (statement of Sen. Fessenden) (stating that bill allowing Court of Claims to enter final judgments will "lay the United States Treasury at the feet of a court outside"); *id.* at 422 (stating that Senate amendment of bill requiring Secretary of Treasury to "make estimate for" appropriation needed to pay awards of Court of Claims); see also H.R. Misc. Doc. No. 50, at 2-9 (1867) (listing awards by Court of Claims since March 3, 1863, all of which were money judgments except case reversed by Supreme Court in *United States v. Alire*, 73 U.S. 573 (1867)); *cf.* 18 CONG. REC. 623 (1887) (discussing House Report 6974, which included language, later deleted in final legislation (the Tucker Act) giving circuit courts and district courts concurrent jurisdiction over claims of less than \$10,000 "in money value").

There are probably several reasons for that focus. The private bills from the periods cited above relating to contract claims suggest that most, if not all, contract claimants sought monetary relief rather than specific performance. *Cf.* H.R. REP.

Nonetheless, one might argue that Congress' intentions in 1887 and 1863 do not matter, because they were not expressed in the text of the Tucker Act or its 1863 predecessor. After all, courts generally cannot give effect to legislative intent that lacks any mooring in the statutory text.²²¹ If the intention of the earlier Congresses is irrelevant, then the intention of the Congress that amended the APA in 1976 becomes determinative. The relevant question is what did Congress intend in 1976 by including the phrase "impliedly forbids" in the APA amendment?

The answer is clear. Congress intended to preclude specific performance on contract claims against the federal government. That intention is explicit in the legislative history endorsing one commentator's analysis of the Tucker Act's preclusive effect.²²² Moreover, the same conclusion follows even if one refuses to credit the legislative history. By 1976, three federal circuits had held that the Tucker Act impliedly bars specific performance under the APA; none had held to the contrary.²²³ Under a well-

No. 498, at 1 (1848) (expressing concern over "claims, annually presented to Congress, to the amounts of millions of dollars"). Moreover, opponents of legislation authorizing the Court of Claims argued that it would undermine Congress's control over appropriations. See CONG. GLOBE, 37th Cong., 3d Sess. 304 (1863) (statement of Sen. Fessenden) (stating that bill allowing Court of Claims to enter final judgments will "lay the United States Treasury at the feet of a court outside"); see also CONG. GLOBE, 36th Cong., 1st Sess. 985-88 (1860) (debating amendment proposed by Senator Hale to require separate appropriation for each claim allowed by Court of Claims); CONG. GLOBE, 33d Cong., 2d Sess. 110-14 (1854) (statements of Sens. Brown, Stuart and Pratt) (discussing appropriation power). That argument kept the debate tightly focused upon monetary claims against the government.

221. See *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (refusing to interpret statute to encompass category specified in legislative history, but not in text of statute); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) ("[J]udges cannot create [rules] out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided.").

222. For a discussion of Dean Cramton's analysis, see *supra* notes 151-56 and accompanying text.

223. See *Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225-30 (5th Cir. 1976) (finding sovereign immunity barred government contractor's suit for injunction preventing rescission of contract); *International Eng'g Co. v. Richardson*, 512 F.2d 573, 577-81 (D.C. Cir. 1975) (holding that APA did not waive sovereign immunity from suit by government contractor to prevent release of proprietary information supplied under contract); *Warner v. Cox*, 487 F.2d 1301, 1304-06 (5th Cir. 1974) (concluding that APA did not waive sovereign immunity for contractor's claim for injunction requiring government pay under contract). Although the APA, as enacted in 1946, did not expressly waive sovereign immunity, three circuits held that it implicitly did. See *Naylor*, 530 F.2d at 1227. Two of those circuits further held that the APA's implicit waiver did not encompass contract claims for specific performance primarily because of the availability of money damages on such claims under the Tucker Act. See *id.* Another circuit came to the same conclusion, without addressing whether the APA implicitly waived sovereign immunity from other types of claims. See *White v. Administrator of Gen. Serv. Admin.*, 343 F.2d 444, 445-47 (9th Cir. 1965) (relating to conveyance of public lands under, among other statutes, 5 U.S.C. § 1009(a), based on alleged contract with United States).

settled canon of statutory construction, it should be presumed that Congress was aware of that case law.²²⁴

The view that the Tucker Act impliedly precludes specific performance has been challenged.²²⁵ Because the influence of this view on the 1976 Congress was clear, however, its accuracy is irrelevant. As the Supreme Court has said in analogous settings, whether Congress' understanding of the state of the law "was in some ultimate sense incorrect is not what is important in determining the legislative intent" expressed in a statute.²²⁶ The relevant inquiry "is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."²²⁷

In sum, when the Supreme Court does interpret the 1976 amendment to the APA, it should hold that the Tucker Act impliedly forbids specific performance on a contract claim under the APA.²²⁸ That holding

224. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (applying maxim in determining whether statute implied private cause of action); *United States v. Gillis*, 95 U.S. 407, 416 (1877) (applying maxim in construing limitation on Court of Claims jurisdiction); *see also* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment) (referring to "benign fiction" that Congress is presumed to be aware of background law against which it enacts statutes).

225. *See* *Webster*, *supra* note 4, at 738-39 (challenging Dean Cramton's view).

226. *Brown v. General Serv. Admin.*, 425 U.S. 820, 828 (1976).

227. *Id.*; *see* *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 790 (1985) (holding that statute governing review of administrative determinations should be interpreted in light of contemporaneous case law, even if that case law was erroneous); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-82 (1982) (holding that implied cause of action was available for violations of statute, based largely on fact that Congress significantly amended statute without changing provisions of statute that lower courts had held, perhaps erroneously, created implied cause of action); *id.* at 401 (Powell, J., dissenting) (arguing that, under majority's analysis, it is "irrelevant" that case law at time of statutory revision was wrong); *cf.* *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734 (1989) (holding that 42 U.S.C. § 1983 is exclusive remedy for violations of 42 U.S.C. § 1981 by state officers, based partly on Congress' view, when enacting § 1983, that § 1981 itself had not created cause of action for violations of its terms); *Cannon*, 441 U.S. at 709 (holding that statute implicitly created private cause of action, primarily because it was modeled on prior statute that lower courts, applying analysis that Court later repudiated, had held created private cause of action); *Gillis*, 95 U.S. at 417 (concluding that Congress intended to adopt prevailing view that claims against United States could not be assigned).

228. Because Congress' intention is clear using other traditional tools of statutory interpretation, the Supreme Court would not have to resort to the maxim that waivers of sovereign immunity must be construed narrowly. *See, e.g.*, *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (holding that Congress did not waive sovereign immunity from money damages for violations of section 504(a) of Rehabilitation Act, 29 U.S.C. § 794 (1994)); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 628 (1992) (finding that Congress did not waive sovereign immunity of federal facilities from civil penalties of state environmental laws); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) (holding that Congress did not waive federal sovereign immunity from monetary relief in bankruptcy proceedings). The application of this maxim would support the interpretation advanced in this Article.

is dictated by the legal context in which the amendment, the Tucker Act and its 1863 predecessor were enacted.²²⁹

V. THE PROPRIETY OF THE RULE BARRING SPECIFIC PERFORMANCE AS A MATTER OF POLICY

Congress could presumably confirm or abolish the rule barring specific performance on contract claims against the government by amending the APA or the Tucker Act.²³⁰ As the Supreme Court made clear in fashioning the rule, however, the rule prevents undue judicial interference with the discretionary decisions of officials in the political branches.²³¹ The rule thereby preserves the separation of powers.²³² At the same time, the rule does not undermine the rule of law because (1) it does not apply at all in cases involving official action that violates the Constitution, a federal statute or a federal regulation and (2) when an official's action constitutes nothing more than a breach of a government contract, the rule merely limits the type of relief that a court may grant. The rule does pre-

229. *But see* Webster, *supra* note 4, at 738-39 (arguing that “[t]he Tucker Act . . . does not preclude nondamage relief in contract actions.”). Professor Webster criticized the argument endorsed by this author and Dean Cramton as resting on “a negative inference from the existence of a Tucker Act damage provision.” *Id.* at 739. The analysis offered by this Article, however, does not rest on the mere availability of a damages remedy for breach of contract under the Tucker Act. Instead, it rests on the fact that, when Congress made only money damages available on contract claims, it was well-established that neither money damages nor specific relief on such claims was available. Under that circumstance, Congress’ allowance of only one type of relief powerfully suggests an intention that the other type of relief should remain unavailable. Furthermore, the analysis here also considers the legal backdrop against which Congress amended the APA in 1976. Professor Webster recognizes but attaches no weight to Congress’ clear intention in 1976 not to authorize specific performance. Instead, he appears to ignore this in the belief that Congress was wrong about the Tucker Act’s preclusive effect. This author believes that Dean Cramton and Congress were correct. In any event, it is irrelevant whether Congress misconceived the state of the law.

230. *See* CIBINIC & NASH, *supra* note 96, at 944 (noting that Congress has amended Tucker Act in manner that clearly bars awards of specific performance on claims that are cognizable under Contract Disputes Act).

231. For a discussion of the Supreme Court’s fashioning of the rule barring specific performance on contract claims against the government, see *supra* notes 57-95 and accompanying text.

232. *See* Krent, *supra* note 4, at 1566-67 (stating that separation of powers concerns support doctrine allowing government to terminate contracts “for convenience” without liability and corollary doctrine barring specific performance); *see also* Block, *supra* note 32, at 1061 (stating that only explanation for sovereign immunity “worthy of consideration” is that “it is possible that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property”); Cramton, *supra* note 3, at 397 (“The only rationale for the doctrine [of sovereign immunity] that is now regarded as respectable by courts and commentators alike is that official actions of the Government must be protected from undue judicial interference.”); Webster, *supra* note 4, at 727 (noting that “[m]ore modern theorists take a separation-of-powers approach” to justifying sovereign immunity).

vent an adequate remedy in cases in which money damages are inadequate to remedy the breach of a government contract. One can only speculate, however, about how many such cases arise. Congress could reasonably decide that the number of such cases is sufficiently low that it does not justify abandoning or revising the rule, in light of its benefits.

A. *Examples of Cases Applying the Rule*

1. *Description of Illustrative Cases*

To decide whether Congress should retain the rule barring specific performance, one must understand how it operates. The rule's application to the government's sale of services is best illustrated by *Transohio*, in which the D.C. Circuit held that sovereign immunity barred the specific performance or rescission of forbearance agreements.²³³ The rule's application to the government's sale of goods and to the government's purchase of goods and services is best illustrated by *United States ex rel. Goldberg v. Daniels*²³⁴ and *Wells v. Roper*.²³⁵

In *Goldberg*, the Secretary of the Navy advertised a surplus ship for sale.²³⁶ Goldberg submitted the highest bid on the ship, accompanied by a certified check for the amount bid.²³⁷ Instead of selling the ship, the Secretary of the Navy lent it to Oregon for use by that state's naval militia.²³⁸ Goldberg petitioned for a writ of mandamus directing the Secretary of the Navy to deliver the ship to him.²³⁹ Goldberg did not allege that the Secretary's alternate disposition violated the Constitution or any statute or regulation. Instead, he relied solely on his rights under the contract that was allegedly formed when the Secretary received Goldberg's check.²⁴⁰ The Supreme Court held that mandamus was barred because the United States was an indispensable party that could not be sued.²⁴¹

Wells concerned a contract under which Wells supplied vehicles and drivers to deliver mail in the District of Columbia.²⁴² The First Assistant Postmaster General canceled the contract so that he could try an experimental delivery system in the District of Columbia.²⁴³ Wells sued him for

233. For a discussion of *Transohio*, see *supra* notes 187-204 and accompanying text.

234. 231 U.S. 218 (1913).

235. 246 U.S. 335 (1918).

236. *Goldberg*, 246 U.S. at 221.

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.* at 221-22 ("The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail.")

242. *Wells v. Roper*, 246 U.S. 335, 336 (1918).

243. *See id.* at 336-37.

an injunction to void the cancellation and to continue the contract.²⁴⁴ The Court held that the suit was barred by sovereign immunity.²⁴⁵

2. *Effects of Applying the Rule*

Wells and *Goldberg* illustrate the dynamics of applying the rule barring specific performance in contract actions against the government.²⁴⁶ The rule prevents judicial interference with the discretion of officials in the political branches. In particular, the rule gives officials flexibility to get out of contracts that, they determine, no longer serve the public interest. At the same time, the rule does not prevent courts from determining whether such an official has violated the Constitution, a statute or a regulation. The rule does prevent, however, an adequate remedy in cases in which money damages would be inadequate to compensate the non-breaching party for the damages resulting from the government's breach.

An award of specific performance in *Transohio*, *Goldberg* or *Wells* would have directly interfered with discretionary governmental functions carried out in the political branches.²⁴⁷ In *Transohio*, such an award would have interfered with Congress' effort to revive a suffering industry.²⁴⁸ In *Goldberg*, such an award would have interfered with the executive branch's effort to help a state.²⁴⁹ And in *Wells*, such an award would have interfered with the executive branch's effort to improve a public service.²⁵⁰ In all three cases, the government's breach was discretionary in the sense that it did not violate the Constitution or any federal statute or regulation.²⁵¹

244. *See id.* at 335.

245. *See id.* at 337-38 (noting that duty of Postmaster General was "executive in character").

246. For now, this Article identifies the effects of applying the rule without judging whether they are, on balance, desirable. That is the subject of later discussion in this Article.

247. It remains to be considered whether an award of specific relief interferes with official discretion more than does an award of money damages.

248. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 607 (D.C. Cir. 1992) (finding that APA waived sovereign immunity from *Transohio's* statutory and due process claims, but not from its breach of contract claim); *see also* *Hagood v. Southern*, 117 U.S. 52, 71 (1886) (holding that "the State cannot be sued without its consent" even though claims were predicated on officer's actions); *Louisiana v. Jumel*, 107 U.S. 711, 720-21 (1882) (finding that officer's actions constituting breach of contract were taken pursuant to state constitutional amendment). *Transohio* and *Jumel* illustrate that the rule barring specific performance applies whether the government's breach of a contract results from a legislative or an executive action. *Jumel*, 107 U.S. at 720 (barring specific performance with regard to executive action); *Transohio*, 967 F.2d at 607 (barring specific performance with regard to legislative action).

249. *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221 (1913) (discussing how government sought to aid Oregon by lending surplus ship for its naval militia).

250. *Wells*, 246 U.S. at 337-38.

251. *See Berkovitz v. United States*, 486 U.S. 531, 534 (1988) (noting that "employees of [federal] regulatory agencies have no discretion to violate the command of federal statutes or regulations").

In all three cases, moreover, the government's conduct was not only discretionary in the narrow sense—it did not violate the Constitution or any federal statute or regulation—but also presumably based on considerations of public policy.²⁵² That will not be true of all cases in which the rule against specific performance applies. It may be true, however, in a significant proportion of cases in which the government breaches a contract deliberately.²⁵³ The government will do so when it decides that the services that it has contracted to sell should not be provided;²⁵⁴ that the goods it has contracted to sell should be put to a different use;²⁵⁵ or that the goods or services that it has contracted to buy are no longer needed.²⁵⁶ Many such decisions reflect judgments about regulatory policy or the allocation of public resources.²⁵⁷

252. *See id.* at 537 (construing discretionary function exception to Federal Tort Claims Act to protect “only governmental actions and decisions based on considerations of public policy”); *see also* *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 820 (1984) (“Judicial intervention in such decision making through private tort suits would require the courts to ‘second-guess’ the political, social, and economic judgments of an agency exercising its regulatory function.”). Consistent with these cases, this Article uses “considerations of public policy” to mean social, economic and political factors. Because “public policy,” so defined, includes economic factors, a governmental breach of contract may be said to be based on “public policy” even though it would be considered economic opportunism by a private party. For example, the government would be acting on the basis of public policy if it breached a contract to sell goods to A in order to sell those goods to B for a higher price. One may question whether that is *wise* public policy, because such conduct may make people unwilling to deal with the government. That question is beyond the scope of this Article. This Article argues that, in accordance with the separation of powers doctrine, decisions as to the wisdom of such a breach should be made by the political branches, not the courts, as long as the breach does not violate the Constitution or any federal statute or regulation.

253. *See* YORIO, *supra* note 5, § 23.2.2, at 524 (discussing inadvertent breaches). Inadvertent breaches are distinguishable from deliberate breaches. *See id.* For example, the government's failure, because of a postal strike, to make payment by the contractually specified deadline would be an inadvertent breach. *See id.* Courts sometimes award less than normal expectancy damages for inadvertent breaches. *See id.*

254. *See* *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 614-17 (D.C. Cir. 1992) (finding that federal legislation superseded forbearance agreements).

255. *See, e.g.,* *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221 (1913) (offering surplus ship at auction and subsequently loaning ship to Oregon instead).

256. *See, e.g.,* *Wells v. Roper*, 246 U.S. 335, 337 (1918) (dismissing injunction against Assistant Postmaster General requiring “continued performance of the plaintiff's contract and thus prevent[ing] the inauguration of the experimental service contemplated”); *cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949) (Douglas, J., concurring) (advocating that principles of case “should govern the selling of government property,” because “[l]ess strict application of those principles would cause intolerable interference with public administration”).

257. *Cf. CIBINIC & NASH, supra* note 96, at 773 (noting that “termination for convenience” clauses allow government to terminate contracts when it is in govern-

The rule barring specific performance reflects a judgment that specific relief leads to greater over deterrence in the setting of the government's mere breach of a contract than it does in the setting of the government's violation of the law. It suggests, at least, a willingness to allow the government, for a price (the price of contract damages), to get out of contracts that are deemed no longer to be in the public interest. Yet the rule, by its limited nature, reflects no similar tolerance of governmental violations of the Constitution, federal statutes or regulations.

Application of the rule does not leave a party remediless, but it may prevent a fully adequate remedy. Indeed, the rule actually causes specific performance to be denied only in those cases in which it would otherwise be granted. Courts have traditionally granted specific performance only if money damages are inadequate.²⁵⁸ In this context, "inadequate" usually means that the contracted for goods or services cannot readily be obtained or disposed of in the market or that expectation damages are difficult to measure.²⁵⁹

For example, in many of the cases discussed in this Article, the victims

ment's interest and "limit[] the contractor's recovery to costs incurred, profit on work done and the costs of preparing the termination settlement proposal"); *cf.* *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 323 (1875) (holding that federal official had authority to terminate contract for goods no longer needed after Civil War ended). Termination for convenience clauses are included, by statute or regulation, in most government contracts. *See* CIBINIC & NASH, *supra* note 96, at 773. These clauses restrict relief more severely than the rule barring specific performance. *See id.* They not only implicitly preclude specific performance (the government cannot be forced to perform a contract that it has terminated for convenience), but also prevent recovery of expectation damages. *See id.*

258. *See* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) (stating that proof of inadequacy of expectation damages is necessary to get specific performance); *see also* JAEGER, *supra* note 3, § 1418, at 651 (same); *cf.* CORBIN, *supra* note 3, § 1136, at 95-96 (stating that, although historically specific performance was not available unless legal remedies were inadequate, modern courts often grant specific performance without regard to adequacy of legal remedies). *But cf.* Laycock, *supra* note 3, at 691 (arguing that, contrary to commonly held belief, "our law embodies a preference for specific relief if plaintiff wants it"). Scholars of law and economics argue that, in private disputes, the rules for choosing between money damages and specific performance should be designed to promote economically efficient breaches of contract. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.8, at 117-26 (4th ed. 1992) (describing economic analysis of breach of contract). They disagree, however, about precisely what rules would do so. *See* YORIO, *supra* note 5, § 23.3, at 533-55 (surveying law and economics arguments); Laycock, *supra* note 3, at 689 (noting that among law and economics scholars there has been "vigorous debate over the economic wisdom" of specific performance).

259. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981) (listing factors for determining whether money damages are inadequate); *see also* YORIO, *supra* note 5, § 2.4, at 35-38 (noting that specific performance is usually unavailable in transactions involving fungible goods because of availability of substitutes on market and ability to assess damages with reasonable certainty). Expectation damages are designed to put the victim of a breach "in the same position as if the other party had performed the contract." *Id.* § 1.2.1, at 5. For example, suppose that *A* breaches a contract to give *B* an exclusive franchise to sell some item in a particular area for one year. *See id.* § 12.3, at 9-10. Also suppose that *B* can prove that he

of the government's breach of contract may have had a plausible argument that money damages were inadequate. The regulatory concessions that Transohio received under its forbearance agreement could not be obtained in the open market, and Transohio's expectation damages, therefore, might have been hard to gauge.²⁶⁰ Goldberg might not have easily found a ship comparable to the one that he wanted to buy from the Navy in the open market or even placed a value on the ship.²⁶¹ Similarly, Wells might have had trouble selling or valuing the vehicles that he had equipped for delivering mail.²⁶²

One should not underestimate the ability of courts to make sophisticated damages calculations.²⁶³ Nor, however, can one underestimate the expense to the parties of adducing proof on that issue in complex cases. In any event, the very existence of specific performance reflects the premise that, in some cases, money damages are inadequate to remedy a breach of contract. Because the rule barring specific performance contradicts that premise, those who defend it bear the burden of proving that it is justified even though it results in an inadequate remedy in some cases.

In sum, the rule barring specific performance prevents judicial interference with political officials' discretionary acts, some of which will reflect public policy considerations. At the same time, it does not undermine the rule of law, for it applies only when official conduct comports with the Constitution, federal statutes and regulations. The terms of a government contract arguably constitute rules of law with which the government must comply.²⁶⁴ The rule, however, does not immunize the government from liability for violations of contractual rules; it merely limits the remedy for such violations. That limit does, however, preclude adequate relief when money damages are inadequate.

B. *The Rule's Preservation of the Separation of Powers*

By preventing courts from using specific relief to control discretionary conduct by actors in the political branches, the rule barring specific

would have made \$100,000 profit from the franchise. *See id.* That anticipated profit would represent *B's* expectation damages. *See id.*

260. *See* Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 614-17 (D.C. Cir. 1992) (finding that federal legislation superseded forbearance agreements).

261. *See* United States *ex rel.* Goldberg v. Daniels, 231 U.S. 218, 221 (1913) (offering surplus ship at auction and subsequently loaning ship to Oregon instead).

262. *See* Wells v. Roper, 246 U.S. 335, 337 (1918) (dismissing injunction against Assistant Postmaster General requiring continued performance of the plaintiff's contract, which was preventing beginning of experimental service).

263. *Cf.* DOBBS, *supra* note 5, § 3.3, at 150-53 (discussing principle that plaintiffs need only prove damages with "reasonable certainty").

264. *But cf.* Wells v. Roper, 246 U.S. 335, 337-38 (1918) (stating that fact that officer's conduct constituted breach of governmental contract did not render that conduct *ultra vires*).

performance preserves the separation of powers.²⁶⁵ In the absence of the rule, separation of powers concerns would arise for two reasons. First, control of the discretionary conduct of political actors lies outside the core role of the federal courts. Second, an award of specific relief interferes with official discretion more than an award of money damages does.

The role of the federal courts in the federal government was established in *Marbury v. Madison*.²⁶⁶ *Marbury* gave the federal courts a central role, relative to the other branches, in interpreting the Constitution.²⁶⁷ In particular, the *Marbury* Court held that a federal court can refuse to give effect to a federal statute that the court finds unconstitutional.²⁶⁸ The Court also asserted the power of federal courts, under certain circumstances, to order federal executive officials to comply with statutory du-

265. See *Clinton v. Jones*, 117 S. Ct. 1636, 1647 (1997) (discussing importance of separation of powers); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (discussing Framers' intent to divide "the delegated powers of the new Federal Government into three defined categories"); see also THE FEDERALIST No. 47, at 300 (James Madison) (Henry Cabot Lodge ed., 1988) (stating that concentration of legislative, executive and judicial powers in same hands is "the very definition of tyranny"). But cf. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 493-97 (1996) (arguing that separation of powers does not depend primarily on separated functions). The separation of powers doctrine holds that each branch of the federal government has equal, but distinct, powers that must be exercised as prescribed by the Constitution. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (stating that Congress cannot retain absolute right to remove executive officer). The doctrine prohibits any branch (1) from exercising powers that belong exclusively to another branch; (2) from exercising its own powers in a way that unduly interferes with the powers of another branch; or (3) from exercising its own powers in some way other than that prescribed by the Constitution. See *Chadha*, 462 U.S. at 951 (stating that Congress cannot take legislative action that does not meet bicameralism and presentment requirements). The adjudication of claims against the government is a responsibility that does not rest exclusively with any one of the three branches. See *Williams v. United States*, 289 U.S. 553, 580-81 (1933) (stating that because power to adjudicate claims against government does not reside exclusively in judicial power of Article III, Congress may vest it in non-Article III entities). This Article does not argue that the mere adjudication of such claims by an Article III court raises separation of powers concerns. Rather, the Article argues that judicial awards of specific performance on breach of contract claims unduly interfere with the powers of the political branches. Cf. *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

266. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

267. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); see *id.* at 180 (stating that Constitution's requirement for judges to take oath to support Constitution "applies, in an especial manner, to their conduct in their official character"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 36-37 (1997) ("[*Marbury*] established the authority for the judiciary to review the constitutionality of executive and legislative acts.").

268. *Marbury*, 5 U.S. at 176-80 (holding that Court would not entertain petition for writ of mandamus, even though statute purported to authorize it to do so, because statute was unconstitutional).

ties.²⁶⁹ Thus, the key roles for the federal courts identified in *Marbury* were to ensure fidelity by (1) the political branches to the legal rules in the Constitution and (2) the executive branch to valid commands of the legislative branch.²⁷⁰

Marbury was not just about federal court primacy in interpreting federal law. The Court in *Marbury* formally announced that the federal courts have no power to control executive discretion.²⁷¹ The Court did not define “executive discretion.” It did make clear, however, that this discretion does not exist when Congress imposes specific duties on an executive official and the rights of individuals depend on the performance of those duties.²⁷² In that situation, the Court said, Congress has created vested rights that federal courts are bound to protect.²⁷³

Marbury thus created an inherent tension in the role of federal courts. The tension springs from their limited power to control executive discretion, on the one hand, and their duty to protect vested rights, on the other.²⁷⁴ In *Marbury*, the executive official’s conduct violated a ministerial statutory duty.²⁷⁵ It was, therefore, not discretionary. Vested rights can

269. See *id.* at 168-73 (holding that mandamus would be appropriate to compel Secretary of State to deliver commission to person entitled to it by federal statute); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (finding that use of mandamus to enforce executive compliance with statutory duties is necessary to prevent “clothing the President with a power entirely to control the legislation of congress”).

270. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (noting that “[Chief Justice] Marshall’s grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation,” but instead extended to “judicial authority to enforce the specific statutory duties of administrative officials” and was integral to separation of powers doctrine); cf. *id.* at 7 (stating that federal courts’ role, both in interpreting Constitution and requiring administrative compliance with specific statutory duties, serves to “vindicat[e] the values of limited government”).

271. *Marbury*, 5 U.S. at 166 (“[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.”); see *Kendall*, 37 U.S. at 610 (finding that, although performance by executive officials of official duties is not subject to control by mandamus, duties imposed on such officials by Congress are subject to mandamus when they are “ministerial”); CHEMERINSKY, *supra* note 267, at 118 (stating that *Marbury* was first Supreme Court decision to speak of political questions).

272. See *Marbury*, 5 U.S. at 166 (“[W]here a specific duty is assigned by law, and individual rights depend on the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws . . .”); see also *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176-77 (1893) (holding that Secretary of Interior had no discretion to revoke right of way after entitlement to it had vested in plaintiff by operation of federal statute).

273. See *Marbury*, 5 U.S. at 162-66 (discussing principle that courts may remedy “the violation of a vested right”).

274. Cf. Monaghan, *supra* note 270, at 18 (noting that “[t]he tension between the demands of public administration and the judicial protection of private rights” underlies case law on extent to which non-Article III entities may adjudicate cases that otherwise could be adjudicated by Article III entities).

275. *Marbury*, 5 U.S. at 154-68 (holding that *Marbury*’s vested right “originate[d] in an act of Congress” that Court construed to require Secretary of State to

also be impaired, however, by discretionary conduct. That is because vested rights may arise from sources—such as government contracts—other than the Constitution, federal statutes and regulations.²⁷⁶ In protecting such rights, however, federal courts would not be compelling political-branch obedience to the Constitution or executive-branch obedience to valid commands of the legislative branch. They would, therefore, be acting outside of their key roles as articulated in *Marbury*.²⁷⁷

Most of the time this tension is resolved in terms of justiciability.²⁷⁸ In particular, *Marbury* gave rise to the political question doctrine, which prevents federal courts from enforcing certain constitutional provisions.²⁷⁹ That doctrine holds that such provisions do not furnish rules of law that the federal courts may use to constrain the discretion of the political branches.²⁸⁰ Other justiciability doctrines, such as that of standing, similarly are applied to avoid judicial interference with discretionary conduct by officials in the political branches.²⁸¹

Another way to reduce the tension is to limit the type of relief that federal courts may grant against discretionary official conduct that injures

deliver *Marbury's* commission). The examples of vested rights cited in *Marbury* were rights that originated in federal statutes that imposed nondiscretionary duties on executive officials. *Id.* at 164-65.

276. See *Lynch v. United States*, 292 U.S. 571, 577 (1934) (stating that insurance policies issued under federal statute “being contracts, are property and create vested rights”); see also *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests [protected by due process] . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”).

277. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 11 (1969) (“[*Marbury*] indicates that there are discretionary decisions and political questions for the executive which are not reviewable in the courts even assuming that they adversely affect private interests.”).

278. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“Justiciability is itself a concept of uncertain meaning and scope.”). The Court further explained: “[N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.” *Id.*

279. See, e.g., *Nixon v. United States*, 506 U.S. 224, 229-38 (1993) (citing reasons why judiciary was not chosen to have any role in impeachments, finding textual limitation on its power and stating that allowing judicial review “would place final reviewing authority . . . in the hands of the same body that the impeachment process is meant to regulate”).

280. See *id.* at 229 (holding that word “try” in Article I, Section 3, Clause 6 of United States Constitution does not provide judicially manageable standards that courts can apply to review Senate’s impeachment procedures). See generally FALLON ET AL., *supra* note 36, at 270-93 (discussing political question doctrine).

281. See *Allen v. Wright*, 468 U.S. 737, 761 (1984) (invoking separation of powers doctrine to justify denial of taxpayer’s standing to challenge Internal Revenue Service’s program for enforcing tax code provision); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-74 (1982) (calling on separation of powers to justify denial of standing to Establishment Clause challenge to disposition of federal surplus property).

vested rights. This approach recognizes that judicial interference with such conduct is caused not only by the process of judicial review—the process of compelling an officer to account to a judge for his or her official actions—but also by any ensuing award of judicial relief. At the same time, this approach comes at less cost to vested rights than do justiciability doctrines, which ordinarily deny judicial relief altogether.²⁸²

The question remains whether this rationale supports the rule barring a specific performance remedy in contract actions against the federal government. That depends on whether an award of specific performance interferes with official discretion more than an award of money damages does.²⁸³

The Supreme Court clearly thinks so. The Court relied on the greater intrusiveness of specific relief in *Larson* to reject the argument that “sovereign immunity is an archaic hangover [that] . . . should be limited wherever possible.”²⁸⁴ The Court noted that argument

is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. . . . The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.²⁸⁵

Similar reasoning underlaid the Court’s earlier decisions refusing to allow

282. See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 1998 WL 88044 (U.S. Mar. 4, 1998), at *11-15 (holding that environmental organization lacked standing to sue for a wide variety of types of relief); cf. *City of L.A. v. Lyons*, 461 U.S. 95, 105-12 (1983) (declaring that plaintiff had no standing to seek injunctive relief against alleged choke-hold policy of police department, but did have standing to recover money damages).

283. Because of the Appropriations Clause, an award of money damages by a federal court implicates the doctrine of separation of powers. See U.S. CONST. art. I, § 7, cl. 1; *Reese v. Walker*, 52 U.S. (11 How.) 272, 290 (1850) (holding that Constitution forbids money judgments against U.S. Treasury except in accordance with congressional appropriation). The question remains whether such an award interferes with discretionary conduct by the political branches and their officials to a greater extent than does an award of specific performance.

284. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

285. *Id.*; see FALLON ET AL., *supra* note 36, at 999 (“Suits for specific relief against federal official action often raise sensitive questions of separation of powers and judicial role”); cf. *Gilligan v. Morgan*, 413 U.S. 1, 5-10 (1973) (holding that case was nonjusticiable, partly because plaintiffs sought equitable relief, rather than money damages); *Developments*, *supra* note 3, at 855 (“[E]ven though Congress is not anxious for the Government to incur liability or for its officers tortiously to deprive citizens of their property, it may still wish to have its officers free from injunctive interference in order to facilitate the operation of the governmental functions entrusted to them.”).

specific performance of government contracts.²⁸⁶ The reasoning is straightforward. Specific relief is more intrusive because it prevents officials from doing what they want to do, whereas an award of money damages allows them to do what they want to do, as long as they pay for it later.²⁸⁷

The less intrusive nature of money damages determined two key issues in *United States v. Winstar Corp.*²⁸⁸ In *Winstar*, as in *Transohio*, thrifts claimed that the government breached forbearance agreements by applying FIRREA to them.²⁸⁹ Unlike *Transohio*, the thrifts in *Winstar* sought only money damages for the breach.²⁹⁰ In resisting liability, the government relied on, among other doctrines, the unmistakability doctrine and the reserved powers doctrine.²⁹¹ Under the first, the government argued that the forbearance agreements did not "unmistakably" promise that no future legislation would prevent government performance of those agreements, as was required for the government's promise to restrict its legislative discretion to be enforceable.²⁹² Under the second, the government (somewhat inconsistently) argued that, even if such a promise were unmistakably made, it was not binding because the government cannot contract away its power to legislate.²⁹³ The Court rejected both arguments. A plu-

286. For a discussion of the Supreme Court's decision in *Jumel, Hagood and Ayers* refusing to grant specific performance against the government, see *supra* notes 70-95. The notion that specific relief interferes with official discretion more than does compensatory relief may seem at odds with *Edelman v. Jordan*, 415 U.S. 651 (1974). There, the Court held that the Eleventh Amendment bars suits against state officials that seek retrospective monetary relief, as distinguished from prospective injunctive or declaratory relief. See *id.* at 663-71. The Court did not base that holding, however, on the notion that monetary relief is more intrusive on state sovereignty than injunctive relief. To the contrary, the Court later explained that prospective injunctive or declaratory relief is more effective than retrospective monetary relief in preventing continuing violations of the Constitution or federal law by a State. See *Green v. Mansour*, 474 U.S. 64, 68 (1985). The Court stated:

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief . . . gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Id.

287. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (distinguishing property rules, which penalize third party appropriation of entitlement, from liability rules, which merely require compensation for third party appropriation of entitlement and arguing that differences in transaction costs account for rules).

288. 116 S. Ct. 2432 (1996).

289. *Id.* at 2447.

290. *Id.* at 2447, 2453.

291. See *id.* at 2448, 2453-58 (summarizing government's arguments and discussing doctrines of unmistakability and reserved powers).

292. See *id.* at 2453.

293. See *id.* at 2461-62.

rality held that the unmistakability doctrine did not apply because the thrifts were seeking only money damages.²⁹⁴ The plurality explained that money damages ordinarily do not cause the sort of interference with legislative discretion upon which the unmistakability doctrine is based.²⁹⁵ A majority rejected the reserved powers argument on the same ground.²⁹⁶

One may question the Court's view that specific relief is more intrusive than money damages. After all, the threat of a money judgment may be as effective as the threat of specific relief in deterring an official's breach of a government contract. There are nonetheless reasons to believe that the breaching official will perceive the risk of money damages as less threatening. For one thing, the money judgment will not be paid out of the official's pocket, nor, in most instances, out of the budget of his or her agency.²⁹⁷ In contrast, an award of specific relief will usually run directly against the agency or the breaching official, accompanied by the threat of contempt sanctions.²⁹⁸

Furthermore, the usual timing of suits for specific performance and suits for money damages is likely to cause a breaching official to fear the first more than the second. The plaintiff who wants specific performance presumably has decided that money damages are inadequate. The longer that plaintiff waits to file a lawsuit, the less likely it is that specific performance will be available or will provide a fully adequate remedy.²⁹⁹ For example, if the plaintiff has contracted to buy goods from the government and the government decides to sell the goods to someone else, the plaintiff should act before the actual sale to the third party occurs. The plaintiff who wants or can get only money damages has no similar incentive to file a

294. *See id.* at 2457, 2461 (Souter, J., plurality opinion) (holding that application of unmistakability doctrine "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power" and in forbearance agreement, government "agreed to do something that did not implicate its sovereign powers at all, that is, to indemnify its contracting partners against financial losses arising from regulatory change").

295. *See id.* at 2458 (Souter, J., plurality opinion) (rejecting government's unmistakability argument "for the complementary reasons that the contracts have not been construed as binding the government's exercise of authority to modify banking regulation or of any other sovereign power, and there has been no demonstration that awarding damages for breach would be tantamount to any such limitation").

296. *See id.* at 2461 (Souter, J., plurality opinion) (rejecting reserved powers argument for same reasons that unmistakability argument was rejected); *id.* at 2478 (Scalia, J., concurring) (arguing reserved powers argument has "no force where, as here, the private party to the contract does not seek to stay the exercise of sovereign authority, but merely requests damages for breach of contract").

297. *See* 31 U.S.C. § 1304 (1994) (creating separate judgment fund for payment of money awards against government).

298. *See* 5 U.S.C. § 702 (1994) ("[A]ny mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.").

299. *See* ROBERT J. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 272 (1983) (stating that passage of time may prevent specific performance from being adequate remedy).

lawsuit as soon as possible. On the contrary, that plaintiff might be better off waiting to file a lawsuit until the damages of the breach become sufficiently clear in order to determine whether a lawsuit is worthwhile. By then, the breaching official may have left office. In any event, the official is likely at the time of the breach to regard the risk of a suit for money damages as more distant and, hence, less threatening than the risk of a suit for specific performance.

Distinct from the deterrent effect of contract suits is the effect of the actual award of relief in such suits. Once a court awards money damages, its job is ordinarily finished. That is not always the case when a court awards specific performance. To the contrary, the court in some cases would have to monitor the government's performance of the contract. Debate may arise concerning the frequency, extent and cost of judicial supervision of specific performance.³⁰⁰ There is no doubt, however, that such supervision represents a component of judicial interference that almost never attends awards of money damages.

In sum, the separation of powers doctrine holds that the federal courts have limited power to control conduct by the political branches and their officials that, although impairing vested rights, does not violate the Constitution or any federal statute or regulation. The rule barring specific performance furthers the doctrine by requiring courts to exercise such control through the less intrusive measure of awarding money damages rather than specific relief.³⁰¹

300. See YORIO, *supra* note 5, § 3.3.1, at 57 ("Many contractual promises do not require the cooperation of the promisor for their fulfillment Because promises of this type are virtually 'self-enforcing' difficulty of enforcement or supervision will rarely be an objection"). Many contractual obligations can be specifically enforced without ongoing judicial supervision. For example, the government's contractual promise to sell property could be enforced simply by an order requiring transfer of title.

301. For a discussion of how the Court has applied the rule barring specific performance when the government's breach of a contract was caused by legislative and executive acts, see *supra* notes 24-111 and accompanying text. The "sovereign acts" doctrine governs disputes when government contracts are breached by legislation (or, perhaps, by regulations having the force and effect of law). That doctrine is distinct from the rule barring specific performance. In contrast to the rule barring specific performance, the sovereign acts doctrine altogether excuses the government's breach of contract. The doctrine applies to breaches "resulting from [the government's] public and general acts as a sovereign." *Horovitz v. United States*, 267 U.S. 458, 461 (1925). The scope of the doctrine is unclear after *Winstar*, because none of the opinions discussing it commanded a majority. See *Winstar*, 116 S. Ct. at 2463-65 (Souter, J., plurality opinion). Although the rule barring specific performance and the sovereign acts doctrine both involve governmental breaches of contract, whether the latter is justified by separation of powers or other concerns is beyond the scope of this Article. Cf. *Krent, supra* note 4, at 1568-72 ("In the absence of immunity, public policy might be threatened if Congress compensated all those contractually injured by public policy [T]he sovereign act doctrine . . . makes it harder for one administration to bind another.").

C. *The Rule's Congruence with Just Compensation Jurisprudence*

Thus, the rule barring specific performance accommodates the limits on the federal courts' power to control political discretion with their duty to protect vested rights. This Article now argues that the same accommodation underlies the Just Compensation Clause.³⁰² That congruence supports the propriety of the rule.

The Just Compensation Clause does more than impose conditions on the government's taking of private property. It also implicitly recognizes the government's power to take private property when those conditions are met.³⁰³ Both the states and the federal government have this power.³⁰⁴ In the case of the federal government, the taking power resides in the legislative branch and executive officials authorized by legislation to take private property.³⁰⁵ Thus, the federal taking power is reserved to the political branches.³⁰⁶

Consequently, federal courts lack the power under the Just Compen-

302. U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation.").

303. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 437 (5th ed. 1995) (discussing public use and just compensation as limitation on exercise of eminent domain); see also *United States v. Carmack*, 329 U.S. 230, 241 (1946) (stating that Just Compensation Clause implicitly recognizes government's power to take private property for public use); *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 689 (1897) ("The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation."); *Kohl v. United States*, 91 U.S. 367, 371 (1875) (holding that federal government's power "to appropriate lands or other property . . . for its own uses . . . is essential to its independent existence and perpetuity" and that Just Compensation Clause is "implied recognition" of that power).

304. See, e.g., *Kohl*, 91 U.S. at 371-73 (finding power of eminent domain inherent in states and federal government); see also *West River Bridge Co. v. Dix*, 47 U.S. (6 Otto) 507, 531-32 (1848) (ruling power of eminent domain "inheres" in "every political sovereign community").

305. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974) (mandating that taking of property for public use by executive official must be statutorily authorized "expressly or by necessary implication"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-33 (1952) (Douglas, J., concurring) (arguing that Congress has exclusive authority to take property, but may delegate it to executive branch); *United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546, 551-52 (1946) ("We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."); *Kohl*, 91 U.S. at 374-75 (discussing statute that authorized Secretary of Treasury to condemn land for post office); see also *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 321 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function . . ."); cf. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851) (holding that military officer may lawfully take private property for public use to avert immediate and impending danger).

306. See *Welch*, 327 U.S. at 551. The States are free to empower their courts to review exercises of the taking power by state officials. See, e.g., *Southern Dev. Land & Golf Co., Ltd. v. South Carolina Pub. Serv. Auth.*, 426 S.E.2d 748, 750-51 (1993)

sation Clause to enjoin a federal taking of private property, if the taking is for a public use and comports with other applicable constitutional provisions, statutes and regulations—if the taking is discretionary in the sense used here.³⁰⁷ Under those circumstances, all the courts can do is award just compensation after the taking occurs.³⁰⁸ Thus, the Just Compensation Clause both guarantees a judicial remedy for governmental takings and limits the form that the remedy may take. It thereby protects both the discretionary power of the political branches to take private property and the vested rights of private property owners.

The rule barring specific performance operates essentially the same way and reflects the same concerns as does the Just Compensation Clause. Under the Just Compensation Clause, courts lack power to enjoin a discretionary taking. Under the rule, courts lack power to enjoin a discretionary breach of contract. In either case, however, they may award compensation. Indeed, the no injunction rule of Just Compensation Clause jurisprudence converges with the rule barring specific performance when, as is sometimes the case, the government's breach of a contract constitutes a taking of "private property for public use."³⁰⁹

(reviewing governmental taking by state for abuse of discretion and in light of estoppel principles).

307. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984))); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 683, 697 n.18 (1949) ("Where the action against which specific relief is sought is a taking or holding of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment.").

308. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." (quoting *Monsanto*, 467 U.S. at 1018 n.21); see also *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (stating that United States may acquire private land summarily by taking physical possession and ousting owner).

309. See, e.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934) (holding that Fifth Amendment commands that property, including valid contracts, be protected through Just Compensation Clause); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690 (1897) (holding that city could take company's franchise to provide water, because "[a] contract is property, and, like any other property, may be taken under condemnation proceedings for public use"); *Tucson Airport Auth. v. General Dynamics Corp.*, 1998 WL 54674 (9th Cir. Feb. 12, 1998), at *6-7 (holding that Tucker Act impliedly precluded district court's jurisdiction of just compensation claim based on breach of government contract). The compensation for a breach of contract does not necessarily constitute "just compensation." For example, the Court has held that "just compensation" ordinarily includes payment of interest from the time of the taking. See *Albrecht v. United States*, 329 U.S. 599, 602 (1947) ("Thus, 'just compensation' . . . [is the] fair market value at the time of the taking plus 'interest' from that date to the date of payment."). Otherwise, sovereign immunity bars awards of interest on money judgments against the government, unless a statute specifically authorizes interest. See *Library*

The rule barring specific performance operates only when specific performance otherwise would be available, which, as discussed, is when money damages are inadequate. One might argue that, when money damages are inadequate, just compensation is impossible to achieve.³¹⁰ That argument is flawed. The flaw becomes clear when one considers that the paradigm of governmental taking involves real property³¹¹ and that real property is also involved in the paradigm case for an award of specific performance.³¹² Courts justify specific performance of contracts involving real property on the ground that each parcel is unique and, relatedly, difficult to value.³¹³ Those considerations do not, however, justify enjoining

of *Congress v. Shaw*, 478 U.S. 310, 317 (1986) ("In creating the Court of Claims, Congress retained the Government's immunity from awards of interest, permitting it only where expressly agreed to under contract or statute.").

310. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1524 (D.C. Cir. 1984) (stating that government taking may be enjoined if compensatory relief would be inadequate); Webster, *supra* note 4, at 740 (same).

311. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 & n.5 (1982) (stating that Court has invariably found government's physical occupation of real property constitutes taking).

312. *See, e.g., YORIO, supra* note 5, § 10.1, at 259-60 ("Real Estate has traditionally occupied a unique position with respect to the availability of specific performance."); Laycock, *supra* note 3, at 703 ("The classic example of a loss that cannot be replaced is land. Thus, contracts to sell real estate are specifically enforceable.").

313. *See CORBIN, supra* note 3, § 1143, at 126-27 (characterizing land as unique species of property justifying specific performance); JAEGER, *supra* note 3, § 1418A, at 664 ("Partly because a specific piece of land is in its nature different from every other piece . . . a contract to convey land is specifically enforceable by the purchaser."). Scholars of law and economics generally reject the notion that specific performance is justified by the uniqueness of real property. *See, e.g.,* Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 373 (1984) ("[E]conomically speaking, there is nothing unique about parcels of realty."); *see also* YORIO, *supra* note 5, § 10.1, at 260-64 (discussing rationales for general allowance of specific performance of contracts involving real property and concluding that they no longer obtain). Some of these scholars argue that the government's power under the Just Compensation Clause is justified by the high transaction costs attending a voluntary bargaining scheme. *See* POSNER, *supra* note 258, at 56-57. These scholars reason that these costs would otherwise prevent assets from moving to their higher valued use. *See id.* (describing Just Compensation as "a case of competing claims rather than competing uses" and discussing economic implications between claims). Some law and economics scholars would predict that the transaction costs in a breach of contract setting, unlike the transaction costs attending a governmental taking, tend to be relatively low. Those costs would therefore not greatly impede the government from paying off a defendant who has been awarded specific performance. *See* Ulen, *supra*, at 369 ("[I]f the parties did not provide for some form of relief in the event of breach, the costs to them of dealing with the contingency . . . should be low. This is a strong *prima facie* reason for making specific performance, rather than damages, the routine contract remedy."). This Article does not take a position in the debate over the economic justifications for Just Compensation jurisprudence and for specific performance. Because both debates appear to revolve primarily around the nature and extent of transaction costs, they are not readily adaptable to the government contracting context. *See, e.g.,* POSNER, *supra* note 258, at 57, 130-32 (discussing implications of Just Compensation Clause and why money damages are arguably preferable over specific performance award). That is because

a governmental taking of real property.³¹⁴ They are outweighed by the need to prevent judicial interference with the exercise of discretion by the political branches. The same is true of the rule barring specific performance.

D. *Alternatives to the Rule*

The no injunction rule applicable in the Just Compensation Clause context differs in one important way from the rule barring specific performance in contract actions. Under the Just Compensation Clause, the government can take private property without judicial interference only "for public use." That means, roughly speaking, that the government must take the property for a public purpose.³¹⁵ In contrast, under the rule barring specific performance, the purpose for the government's breach does not matter. Symmetry suggests that the latter rule should be modified to bar specific performance only when the government breaches a contract for a public purpose.

Such a modification would appear to have the chief virtue of the current rule without its chief vice. It would prevent judicial interference in cases such as *Transohio*, *Goldberg* and *Wells*, if as presumed, the government's decision to breach in those cases reflected public policy considerations.³¹⁶ The modification might thus avoid the separation of powers concerns.³¹⁷ In cases in which the government did not act with a public purpose and the plaintiff met the usual requirements for specific performance, the modification would allow fully adequate relief. The modification is nevertheless inferior to the current rule, regardless of whether the modification uses a subjective or an objective test for determining the purpose of the government's breach.

the transaction costs attending contracts between private parties may well be quite different from those attending government contracts. For example, once a contracting official has a judgment entered against him or her, negotiations with the plaintiffs normally will involve not that official and others from the same agency, but also lawyers with the Department of Justice. That additional set of players can make negotiations quite complicated.

314. *Cf.* *United States v. 564.54 Acres of Land*, 441 U.S. 506, 514 (1979) (stating that although just compensation is typically measured by fair market value, such award does not necessarily compensate for all value that owner derives from property, including "nontransferable value arising from the owner's unique need for the property").

315. *See, e.g.,* *Ruchelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-15 (1984) (holding that statutory taking of property was justified for public use within meaning of Just Compensation Clause because it served public purpose); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (finding that courts must uphold legislative determination that property has been taken for public use if taking "is rationally related to a conceivable public purpose").

316. For a discussion of public policy considerations, see *supra* note 252 and accompanying text.

317. For a discussion of the separation of powers concerns, see *supra* notes 265-301 and accompanying text.

If the modification required proof of the actual purpose behind the government's breach, it would raise separation of powers concerns distinct from those already discussed.³¹⁸ For one thing, it might require courts to probe the decision-making process of contract officials to discern the purpose of the government's breach. The Supreme Court has recognized that such judicial probing presents clear separation of powers concerns.³¹⁹ Furthermore, a court would have to determine whether the actual purpose for the breach was a "public" purpose. The federal courts lack competence to make that determination. The Supreme Court has recognized as much by repeatedly holding that, under the Just Compensation Clause, the government's determination that property has been taken for a public purpose is subject to only "extremely narrow" judicial review.³²⁰

The modification would avoid the need to probe the mental processes of contracting officials if it required a purely objective inquiry—for example, an inquiry into whether a decision to breach was "susceptible to" public policy considerations. Courts use a similar inquiry in applying the "discretionary function" exception of the Federal Tort Claims Act (FTCA).³²¹ The Supreme Court has construed that exception to bar tort claims based upon official conduct that (1) is discretionary and (2) is susceptible to public policy considerations.³²² The rule barring specific performance implicitly reflects the first condition, because it applies only to

318. For a further discussion of the separation of powers concerns justifying the current rule against specific performance, see *supra* notes 265-301 and accompanying text.

319. See Daniel Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L.J. 237, 267-87 (1978) (outlining general review procedures of agency action); see also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating that, when court cannot evaluate agency's action on record before it, court should "except in rare circumstances," remand case to agency for additional investigation or explanation); *United States v. Morgan*, 313 U.S. 409, 422 (1941) (stating that federal courts, in reviewing administrative actions, generally may not "'probe the mental processes'" of high-level federal officials (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938))).

320. See *Monsanto*, 467 U.S. at 1014 (stating that judicial review of public use determination is "extremely narrow"); *Midkiff*, 467 U.S. at 244 ("Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."); see also *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs . . .").

321. 28 U.S.C. §§ 1346(b), 2671-2680 (1994) (authorizing federal district courts to adjudicate certain tort claims against federal government).

322. See, e.g., *United States v. Gaubert*, 499 U.S. 315, 322-25 (1991) (stating that exception protects only discretionary acts that are "susceptible to policy analysis"). As the Court has defined "public policy," most discretionary conduct will be "susceptible to" public policy considerations. See Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 705-06 (1997) (discussing Supreme Court's view that only discretionary decisions involving public policy are protected and that public policy includes social, economic and political considerations).

breaches that are discretionary. The modification now under discussion would restrict the rule so that it would apply only when the second condition obtains as well.

A modification modeled on the FTCA's discretionary function exception is doctrinally consistent. Both the discretionary function exception and the rule against specific performance reflect separation of powers concerns.³²³ Thus, the modification would make the approach for determining whether to award specific performance congruent not only with Just Compensation Clause principles, but also with the approach for determining whether tort liability would unduly interfere with the discretionary conduct of officials in the political branches. This doctrinal alignment appears attractive in theory.

Nonetheless, a modification that used an objective standard would still require courts to determine what a "public purpose" is, a determination for which they are ill-suited.

An even greater problem with the modification is that it would breed uncertainty and litigation, as has been the case with the discretionary function exception.³²⁴ The doctrine of sovereign immunity does not need changes that increase its indeterminacy.³²⁵ Moreover, it bears emphasis that the modification concerns whether a particular kind of judicial remedy is available for the government's breach of a contract. This remedial issue is incidental to the issue of liability, which is what the discretionary function exception addresses. Although the cumbersome ad hoc approach for determining liability under the discretionary function exception may be justified, it does not follow that a similarly cumbersome approach should be used for determining what type of contract remedy should be granted.

Additionally, an ad hoc approach is less justified for contract claims than for tort claims, for two reasons. First, contract claims usually involve only economic injury, whereas tort claims often involve physical injury. The greater importance of remedying physical injuries justifies an expenditure of judicial resources that is not necessarily justified for remedying economic injuries.³²⁶ Second, contract claims, unlike tort claims, arise

323. See *Gaubert*, 499 U.S. at 323 (stating that purpose of discretionary function exception is to prevent courts in tort actions from "second-guessing" discretionary decisions by executive officials); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988) (same); Krent, *supra* note 4, at 1529, 1545-51 (describing separation of powers justification for exception); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 121-23 (1968) (discussing justifications and necessity of discretionary official immunity).

324. See, e.g., *Payton v. United States*, 679 F.2d 475, 479 (5th Cir. 1982) (en banc) (remarking on how courts have struggled with exception since soon after its enactment); see also Seamon, *supra* note 322, at 705 (same).

325. See, e.g., *Brooks v. Dewar*, 313 U.S. 354, 359 (1941) (reiterating that it is "not an easy matter to reconcile all the decisions of the court" concerning sovereign immunity (quoting *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883))).

326. The FTCA itself arguably reflects a judgment that compensating physical

out of a voluntary relationship between the plaintiff and the defendant. In theory, therefore, unlike tort plaintiffs, contract plaintiffs can take precautionary measures to minimize the risk of an inadequate remedy for damages caused by the defendant. That includes a government contractor who knows that it cannot get specific performance in the event of the government's breach. Such a contractor might, for example, negotiate for liquidated damages or for more favorable price terms to reflect the unavailability of specific performance.³²⁷ If contract claimants can anticipate and, therefore, protect themselves more effectively against injurious government conduct than can tort claimants, they have less need for protective but cumbersome judicial rules such as the modification would require. Put another way, contract claimants may be better able than tort claimants to adapt to a rule categorically restricting judicial relief. That possibility, standing alone, may not justify the rule barring specific performance. It does, however, justify caution in replacing the rule with an ad hoc approach.³²⁸

Thus, it is possible to modify the rule barring specific performance to apply only when the government breaches a contract for a public purpose. That modification would decrease the number of cases in which plaintiffs were denied a fully adequate remedy. The benefits of such a modification, however, are occasioned by a variety of costs. The modification would require courts to determine whether a government breach served the public interest, causing clear separation of powers conflicts, and it would breed

injuries is more important than compensating economic injuries. Many of its exceptions, in addition to the discretionary function exception, bar tort claims for economic injuries. See 28 U.S.C. § 2680(b) (1994) (excluding certain claims arising out of carriage of the mail); *id.* § 2680(c) (excluding certain claims arising out of collection of taxes or customs); *id.* § 2680(f) (excluding certain claims arising out of government quarantines); *id.* § 2680(i) (excluding certain claims arising from fiscal operations of Treasury or regulation of the monetary system); *id.* § 2680(n) (excluding claims arising from operations of certain federal banks).

327. See Krent, *supra* note 4, at 1567 n.150 ("In turn, although the private contractor may not receive full contract damages, it generally will anticipate that possibility by raising its bid accordingly."). This author does not intend to overstate the ability of government contractors to negotiate for liquidated damages and other favorable provisions. As Professor Krent has observed, their ability to obtain liquidated damage provisions is restricted by the government's power, in most cases, to terminate a contract "for convenience." *Id.* That doctrine and numerous other powers unique to the government make it difficult to dicker with.

328. This applies to any modification that would require a case-by-case approach to determining the appropriateness of specific performance against the government. In addition to the modifications discussed, a third possible modification could be based on the principles for granting specific performance in contract actions between private parties. It is well-settled that courts in such suits may consider the public interest. See, e.g., YORIO, *supra* note 5, § 5.6, at 114-16 (outlining examples of when public policy and specific performance are applicable). In suits against the government, this principle would permit case-by-case consideration of whether specific performance unduly interfered with the discretion of officials in the political branches. This approach, however, like those discussed in the text, would inject courts into determinations of public policy and generate confusion and litigation.

litigation and uncertainty causing the public and government contractors to incur increased costs.

E. *Weighing the Costs and Benefits of the Rule and Its Alternatives*

It is clear that a strong case can be made that the rule barring specific performance serves the separation of powers doctrine more effectively than the alternatives to the rule.³²⁹ This Article thus argues that, in determining whether to retain or abolish the rule, Congress should consider its value in preserving the separation of powers. This is not the only consideration that Congress should take into account; although a complete exploration of the relevant considerations is beyond the scope of this Article, some of them should be apparent by now.

The rule barring specific performance has one notable feature besides its role in preserving the separation of powers. It avoids litigation over the propriety of awarding specific performance. That issue clearly has the potential to consume enormous litigation resources, as evidenced by the amount of legal commentary on the principles governing specific performance.³³⁰ Yet it is possible that, by virtue of the rule barring specific performance, a similar amount of litigation resources must be devoted to litigation over the proper amount of damages. In any event, before Congress changes the status quo, it should consider the impact of any change on the costs of litigation.

The premise underlying the availability of specific performance in private contract actions—that sometimes money damages cannot adequately compensate the victim of a contract breach—has strong commonsense appeal. Without empirical research, however, one can only speculate about the number of cases in which money damages will be inadequate. Such research should be done—and is well within Congress' ability to undertake—before it modifies or abandons the long-standing rule barring specific performance.

V. CONCLUSION

Although the federal government has long been liable for money damages in contract actions, it has never been subject to awards of specific performance in such actions. This state of affairs arose from the confluence of the doctrines of sovereign immunity and officer liability. For most of the nineteenth century, one could obtain specific relief, as well as money damages, against a federal officer for most governmental wrongs, but not for an officer's breach of a government contract. The Supreme Court specifically rejected officer suits seeking specific performance, rea-

329. For a further discussion of the separation of powers concern behind the rule barring specific performance and the alternatives to that rule, see *supra* notes 265-301 and accompanying text.

330. See YORIO, *supra* note 5, § 23.1, at 518-19 & nn.1, 4 & 7 (citing commentary on issue); Laycock, *supra* note 3, at 689-90 nn.7-8 (same).

soning that such relief would unduly interfere with the political branches of government. The Court's increasing restriction on the permissible scope of officer suits led to an amendment of the APA in 1976 that cast doubt on the continued validity of the rule barring the specific performance remedy for contract breaches by the federal government. Properly read, however, the 1976 amendment does not eliminate the rule.

Furthermore, a future Congress could reasonably determine that the rule barring specific performance should be retained. The rule is in accord with the separation of powers doctrine. That doctrine establishes that federal courts have limited power to control discretionary conduct by officials in the political branches of the federal government. The rule barring specific performance recognizes that limitation by precluding a form of judicial relief that interferes with discretionary conduct in the political branches to a greater extent than does an award of money damages. That benefit of the rule may well outweigh its costs, chief among which is its effect of denying a fully adequate remedy for the government's breach of contract in some cases.