ILLEGAL EXACTIONS

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Illegal exactions, or unlawful exactions, are an amorphous category of government activities with two unifying characteristics: (1) the government acts in its sovereign capacity but beyond its authority, and (2) its action enriches the government at a person's or organization's expense. The law of illegal exactions has developed through infrequent clusters of cases over 150 years, without substantial academic evaluation or discourse. The case law, thus, often lacks theoretical coherence. Lacking a single defining framework to use, courts have borrowed from torts, Fifth Amendment takings, and due process claims to define the scope of illegal exactions. Although it

is an ill-defined cause of action, illegal exactions provide rich possibilities for holding the government accountable and promoting social justice in a variety of areas of law.

This Article outlines the history of the claim and its gradual expansion in federal courts. It then identifies open questions in illegal exaction law, including whether plaintiffs' and government officials' intentions should affect the outcome of such cases and how to measure damages or payment to prevailing plaintiffs. Next, the Article argues that, contrary to the prevailing case law, courts should evaluate illegal exaction claims as federal common law claims rather than illegal takings or due process claims. Last, this Article suggests new areas in which advocates could use illegal exaction claims to hold the government accountable and make clients whole.

INTRODUCTION

An illegal exaction occurs when the government has illegally required a plaintiff to pay money or property to the government or to a third party.[1] This basic description of an illegal exaction suggests that they can be asserted in a myriad range of situations in which the government acts illegally or overreaches in its actions. But instead, illegal exaction claims are rarely asserted and practically unexplored by scholars and commentators. Indeed, over the last twenty years or so, they have become largely the province of complex financial litigation brought by large, sophisticated actors attempting to unwind government oversight and regulation.

Illegal exaction claims can be a tool for advocates seeking to advance justice in a wide range of areas, from poverty lawyers helping clients make sure they receive the full benefits they are entitled to

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1. This Article will focus on federal illegal exaction law, although states also have long histories of illegal exaction claims. *See, e.g.*, Note, *Taxation–Recovery of Illegal Exaction–Voluntary or Coercive Payments*, 38 YALE L.J. 266, 267 (1928) (summarizing cases from Mississippi, Wisconsin, Arkansas, Kentucky, Tennessee, Connecticut, Texas, and Washington). In addition, the Arkansas state constitution provides for a claim also called "illegal exactions," which permits citizen suits against improper government spending. *See* ARK. CONST. art. 16, § 13. Although those claims share the same name as the subject of this Article, they are distinct in purpose and legal elements, and will not be addressed here.

receive from the government, to civil rights and criminal justice advocates seeking to overturn excessive fees and fines, to organizations seeking to prevent poor people from having to bear the bulk of climate change's costs. Right now, however, few litigators outside the niche world of financial litigation in the Court of Federal Claims have heard about the claim, and even for them, there is little clarity about the scope and nature of a viable illegal exaction claim. This Article attempts to change that.

Because illegal exaction claims seek relief from the government, they exist against the backdrop of sovereign immunity. Since this country's founding, the federal government has always claimed it possesses "absolute discretion" in deciding whether, when, and how it may be sued.[2] Sovereign immunity thus creates technical and substantive barriers for those seeking justice in the face of wrongs perpetrated by government actors. Sovereign immunity has never been absolute, however, and the courts' notions of equity and the "essence of civil liberty"[3] have long demanded that, for certain rights at least, a remedy must exist.[4] Over time, this principle, *ubi jus, ibi remedium*,[5] led to increased access in the courts for injunctive and declaratory claims against the government.[6] The ability to seek monetary compensation, however, has always been, and remains, substantially more limited.[7] The narrow waiver of sovereign immunity for money damages creates gaps between rights and

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2. *See* Schillinger v. United States, 155 U.S. 163, 166 (1894); *see also* Lane v. Pena, 518 U.S. 187, 192 (1996) (explaining waiver of sovereign immunity must be unambiguous in statutory text and ambiguity is weighted in favor of the government).

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

4. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523–27 (2003) (providing an overview of early concepts of sovereign immunity and concluding "that 'sovereign immunity' has never been a complete immunity from litigation for the government").

5. "Where there is a right, there is a remedy." *See Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. The Administrative Procedure Act (APA) is, of course, one of the major sources of this review. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* Jonathan R. Siegel, *ACUS and Suits Against Government*, 83 GEO. WASH. L. REV. 1642, 1653–55 (2015) (discussing the adoption of revisions to the APA to permit suit even when the United States is an indispensable party, which successfully managed "to sweep away technical barriers to review that served no real purpose" (citing S. REP. NO. 94-996, at 25 (1976))). The APA, however, expressly prohibits monetary compensation for plaintiffs for the harms they have suffered. 5 U.S.C. § 702 (2018).

7. For example, the Federal Torts Claim Act (FTCA), passed in 1946, precludes punitive damages and bars claims based on specifically governmental functions or discretionary acts. 28 U.S.C. §§ 2674, 2680(a) (2018).

remedies, and has led courts to stretch to create or recognize causes of actions to fill the gaps, including through illegal exactions.

The earliest types of illegal exaction cases were tax refund cases, and courts still describe those cases as "[t]he prototypical illegal exaction claim."[8] Similarly, the few scholars who have discussed the claim at all review only the tax refund cases.[9] Although there is a conceptual simplicity in describing illegal exactions as tax refund cases, this simplicity fails to capture the full scope of the claim.

Illegal exaction claims have become a sort of catch-all for money damages claims against the federal government when no other remedy quite fits. Over the course of the twentieth century, courts have applied the concept to a wide variety of fact patterns and areas of law to the point that tax refund cases are no longer the core of illegal exaction claims or even particularly descriptive as a "prototype" of the claim. Slowly and quietly, and perhaps unintentionally, the two courts that most often handle illegal exaction cases, the Court of Federal Claims and Court of Appeals for the Federal Circuit, have expanded the definition of illegal exactions to include a wide range of government misconduct, from seizing or demanding excess taxes, to imposing illegal conditions and fees to obtain government-issued permits, to improper civil forfeitures, to improperly requiring private institutions to pay for costs that should be borne by the government, such as costs related to immigration detainment.[10]

Even with that expansion, however, illegal exaction claims remain obscure. They are rarely asserted in district courts, for example, which can only hear money claims against the federal government for claims

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8. Kipple v. United States, 102 Fed. Cl. 773, 777 (2012) (quoting Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005)); *see, e.g.*, City of Alexandria v. United States, 737 F.2d 1022, 1028 (Fed. Cir. 1984) (providing that a tax refund case is an example of "money illegally exacted"). Such tax refund cases are rare now because a mandatory administrative review process now precedes any judicial process under the Tucker Act. *See* 26 U.S.C. § 6402(a) (2018) (granting IRS authority to return overpayments); 26 U.S.C. § 6532(a)(1) (2018) (establishing a six-month waiting period after filing administrative claim before suit can be brought); 26 U.S.C. § 7422(a) (2018) (providing that no suit or proceeding may be brought prior to the filing of an administrative claim); United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 14 (2008) (holding that the administrative claim scheme for tax refunds is mandatory and preempts tax refund claims based on other statutory or constitutional grounds).

9. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 507–09 (2006) (discussing the tax refund subset of illegal exactions); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedie*s, 104 HARV. L. REV. 1731, 1753–56 (1991) (same).

10. *See infra* Part I.

of $10,000 or less.[11] Instead, most modern illegal exaction claims seek relief from the United States Court of Federal Claims, where plaintiffs are often institutional actors or large classes of investors with sophisticated representation able to analogize the small number of illegal exaction cases to new areas of the law to claim several million to tens of billions of dollars. Cases typically relate to outlier government actions in the context of highly regulated systems like banking, nuclear facility management, or public utilities. Illegal exaction claims are rarely asserted by individuals, unless other institutional plaintiffs are also suing for the same or similar government activity. This can—and should—change.

Some of the dearth of individual claimants can be explained by the fact that individuals subject to illegal payments often interact with the government in the context of statutory frameworks that provide an administrative system of review, which may be less costly to pursue or are a prerequisite to filing in federal court. Yet not all potentially illegal or unconstitutional government exactions are committed within a statutory framework that anticipates illegal actions that must or can be corrected administratively.

The low prevalence of illegal exaction claims is likely also a function of its historical rarity. Many attorneys may have never heard of or seen an illegal exaction case in the area of their subject matter expertise. But illegal exaction claims can provide a vital role in providing relief against the government when no other remedy is available or would provide incomplete relief.

This Article proceeds in four parts. Part I outlines the history of illegal exaction claims, highlighting seminal cases that expanded or changed the nature of the claim and the courts' determinations of what type of allegations fall within their jurisdiction. Part II identifies several open questions in illegal exaction jurisprudence, where there is no clear majority rule, and for which a comprehensive theoretical framework could propose answers. Part III attempts to reconcile the case law by providing a unifying theory of illegal exactions as a federal common law claim. Courts generally try to shoehorn illegal exactions into due process claims or an "illegal takings" framework, but these models do not fit the case law well and can be logically inconsistent. Part IV concludes by demonstrating that illegal exactions provide rich and untapped possibilities for holding the government accountable in a variety of areas of law, from unconstitutional fees and fines, including post-conviction fees and fines and civil forfeitures; to policing and correcting mistakes in government entitlement

11. 28 U.S.C. § 1346(a)(2) (2018).

programs; to climate change advocacy. Illegal exactions can help to better fulfill the goal of providing a *complete* remedy for every right.

I. THE HISTORY OF ILLEGAL EXACTION CLAIMS AND SOVEREIGN IMMUNITY

Modern illegal exaction cases seek to address and remedy a wide range of government overreach and abuse of power to exact property from individuals and corporations. Because illegal exactions can occur in a large variety of substantive law areas, they are hard to categorize, and few scholars have tried to do so. But illegal exactions were not always such a catch-all description of unlawful government activity taking individuals' property rights. The origin of the illegal exaction cause of action stems from a narrow waiver of sovereign immunity that the nineteenth century Supreme Court decided must occur in certain overtaxation cases. In waves over the decades, the definition of an illegal exaction slowly expanded through prominent clusters of cases arising from one type of government abuse or another. Because few courts or scholars have opined on the scope of illegal exactions, courts relied on specific phrases from only a handful of cases to define the nature and scope of an illegal exaction. Those out-of-context phrases evolved to permit courts to expand the claim to new areas of law.

A. The 1850s to 1940s: Tax Refund Cases

Under common law, the sovereign could not be sued for overtaxing or overcharging citizens without the government giving express permission to sue.[12] Through the mid-nineteenth century, a plaintiff simply could not use the judicial system to recover property improperly taken by the government. If no explicit condemnation of the property occurred within the scope of the Fifth Amendment's Takings Clause,[13] the courts characterized such exactions as

12. *See* Nichols v. United States, 74 U.S. (7 Wall.) 122, 127 (1868) ("The allowing a suit [to reclaim illegally imposed taxes] at all, was an act of beneficence on the part of the government.").

13. The ability to make a claim under the Fifth Amendment's Takings Clause also had a somewhat uncertain status in federal courts through the mid-nineteenth century, and a successful claim might only void legislation rather than provide any compensation. Now though, the Constitution's express provision of just compensation is understood to be a waiver of sovereign immunity for monetary compensation. *See* Berger, *supra* note 9, at 530 ("[T]here is good reason to think that sovereign immunity doctrine should not apply to the Takings Clause."); Robert Brauneis, *The First*

"unauthorized wrongs" outside the scope of government liability, even if done "in the discharge of official duties."[14] Rather, the only remedy was to seek payment from the official or to directly petition Congress.[15]

To alleviate this harsh system, in 1855, Congress created the Court of Claims and waived sovereign immunity so that the court could hear claims against the government "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."[16] In 1887, Congress passed the Tucker Act, which extended jurisdiction to claims based "upon the Constitution" as well.[17] Tucker Act jurisdiction has remained largely unchanged for the present-day

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Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 VAND. L. REV. 57, 60 (1999) ("The truth, however, is that for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities." (footnote omitted)).

14. Schillinger v. United States, 155 U.S. 163, 167 (1894) (quoting Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1868)); *see also id.* at 168 ("Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government." (quoting Morgan v. United States, 81 U.S. (14 Wall.) 531, 532 (1872))).

15. *See* Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 520 (1991) (describing the establishment of the Court of Claims and the Tucker Act); William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 388–94 (1968) (describing pre-Court of Claims's methods for petitioning the federal government for money claims); *see also, e.g.*, German Bank v. United States, 148 U.S. 573, 579 (1893) ("It is a well-settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 95, 98–99 (1836) (holding tax collector personally liable for incorrectly assessed taxes, with the expectation that the federal government would indemnify the defendant).

16. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. Originally, the Court of Claims did not enjoy the status of a judicial body, but instead became an advisory board for Congress to decide whether to provide relief through a private bill. *See* Fallon, Jr., *supra* note 15, at 520 (stating "the Court of Claims thus . . . became a mere advisory body" (citation omitted)). In 1863, at least in part because of the Civil War and the consequent strain on Congress, the Court of Claims became a true court that could issue final decisions requiring the Treasury to pay the judgment without individual approval by Congress. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765 (amending the Court of Claims Act of 1855 and providing for final judgment of private claims to be paid through general appropriations made by law); *see* Wiecek, *supra* note 15, at 395.

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

Court of Federal Claims.[18] With exceptions for claims for $10,000 or less, which district courts may also hear,[19] the Court of Federal Claims retains exclusive jurisdiction over such claims, and district courts must dismiss or transfer them to the Court of Federal Claims.[20]

The exact scope of the Court of Claims's jurisdiction, however, remained murky for many years, particularly for improper acts of government officials. As the Supreme Court explained in 1868 in *Gibbons v. United States*, the Court of Claims did not have the authority "for the righting . . . of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interest."[21]

As a general rule, the court could not hear claims based on tortious acts, a restriction that was eventually codified by the 1887 enactment of the Tucker Act.[22] In practice, this meant illegal government activity was often unreviewable, as the nineteenth century Supreme Court held that illegal actions by government officials, no matter the actors' intent, were usually torts. Injuries incurred from dangerous government buildings were torts, of course,[23] but so too were patent violations.[24] If the government seized property and simply refused to

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18. 28 U.S.C. § 1491(a)(1) (2018). In 1982, Congress dissolved the original Court of Claims and created the Federal Circuit and a new Claims Court (now the Court of Federal Claims). *See supra* note 76 and accompanying text. For a brief history on the Court of Federal Claims and its role in congressional waivers of sovereign immunity, see Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 606–11 (2003).

19. 28 U.S.C. § 1346(a)(2) (2018).

20. *See, e.g.*, Munns v. Kerry, 782 F.3d 402, 414–15 (9th Cir. 2015) (remanding, for transfer to the Court of Federal Claims, plaintiffs' due process claims based on an exaction theory). In addition, the Federal Circuit reviews Tucker Act appeals from both district courts and the Court of Federal Claims. *See, e.g.*, Leider v. United States, 301 F.3d 1290, 1294–95 (Fed. Cir. 2002).

21. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1868).

22. Tucker Act, ch. 359, 24 Stat. 505. That jurisdictional carveout remains in effect today. 28 U.S.C. § 1491(a)(1) (2018).

23. *E.g.*, Bigby v. United States, 188 U.S. 400, 403, 410 (1903) (denying relief for plaintiff's leg being crushed in a courthouse elevator shaft, where plaintiff attempted to recover by waiving any tort and asserting an "implied contract" of being safe on government property).

24. *E.g.*, United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552, 565–66, (1895) ("[A] mere [patent] infringement, which is only a tort, creates no cause of action cognizable in the Court of Claims." (citations omitted)); Schillinger v. United States, 155 U.S. 163, 171–72 (1894).

recognize the property as originally belonging to the plaintiff, the action was a trespass—a tort, and therefore outside the jurisdiction of any court to hear.[25] On the other hand, if the government seized property and acknowledged that it was the plaintiff's property, the court could hear the claim as based on the Takings Clause of the Fifth Amendment.[26]

The Supreme Court sometimes lamented that "[i]t is to be regretted that Congress has made no provision by any general law for ascertaining and paying . . . just compensation" in cases where government officials tortiously or otherwise illegally took property from individuals but held firm that no remedy existed within the courts.[27] Indeed, for the first three decades of Supreme Court review of the Court of Claims,[28] the higher Court expressed incredulity that the government would be held accountable for "wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."[29] In 1868, Justice Miller explained, "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."[30] In 1894, Justice Brewer asserted even more forcefully that the Court could not possibly hear every claim "founded upon the Constitution," even though that was the text of the Tucker Act.[31] Instead he retorted, "Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the court of claims?"[32] Surely not, he concluded.[33]

Seemingly then, in the late nineteenth century, courts considered illegal orders and acts of government officials as universally and

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25. *E.g.*, Hill v. United States, 149 U.S. 593, 598–99 (1893); Langford v. United States, 101 U.S. 341, 342 (1879).

26. *See* United States v. Great Falls Mfg. Co., 112 U.S. 645, 656–57 (1884). The Court originally viewed claims under the Takings Clause as a form of implied contract claim. *Id.*

27. *Langford*, 101 U.S. at 343–44.

28. For the first decade of its existence, the Court of Claims's decisions were not appealable and were only final when accepted by Congress. *See* Fallon, Jr., *supra* note 15, at 520. Congress gave the Supreme Court authority to review appeals from the court in 1866. *See* Act of Mar. 17, 1866, ch. 19, 14 Stat. 9.

29. *Langford*, 101 U.S. at 345.

30. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868).

31. Schillinger v. United States, 155 U.S. 163, 168 (1894).

32. *Id.*

33. *Id.*

necessarily tortious. Plaintiffs simply lacked a remedy against the government.[34]

Yet during the same period, the Supreme Court carved out an exception to this bar to recovery: the illegal exaction. In the context of illegal seizures of money based on the government's erroneous interpretation or application of law, the Supreme Court first recognized such a claim in 1881,[35] even though just two years earlier the Court had determined that the Court of Claims could not, as a general rule, review claims seeking recompense for "wrongs committed by [government] officers or agents, under a mistaken zeal."[36] In *Swift Co. v. United States*, the Court reviewed a dispute on appeal from the Court of Claims between a match factory and the Commissioner of Internal Revenue over the rate of discount provided to companies that purchased proprietary revenue stamps.[37] Both parties apparently agreed, and the Court concluded, that the plain terms of the statute provided that companies purchasing over $500 worth of proprietary stamps would receive a 10% commission back on

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34. Indeed, the government continued to assert this premise for another century, even in illegal exaction cases. *See, e.g.*, Aerolineas Argentinas v. United States, 77 F.3d 1564, 1579 (Fed. Cir. 1996) (Nies, J., concurring) ("The government asserts that if the order to pay was beyond the statute, the claim *ipso facto* must be one sounding in tort. This argument is untenable.").

35. Swift Co. v. United States, 105 U.S. 691 (1881). There is one earlier tax overpayment case that could arguably be classified as an illegal exaction case, but it is fundamentally distinct because all parties agreed that the taxes previously paid were not illegal, but simply due back at the end of the year because the business, a brewer, had not sold as much as anticipated. United States v. Kaufman, 96 U.S. 567, 568 (1877). The Supreme Court held that the brewer could enforce and obtain that payment through the Court of Claims solely because "[t]he claim ha[d] been presented to and allowed by the proper officer," and therefore all parties agreed that some payment was due. *Kaufman*, 96 U.S. at 569. The Court, however, made pains to explain that jurisdiction existed *only* because the duties were not illegally assessed in the first instance, and that the commissioner agreed that overpayment was due. *Id.* at 569 (distinguishing *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868)).

36. Langford v. United States, 101 U.S. 341, 345 (1879).

37. *Swift Co.*, 105 U.S. at 691–92. Revenue stamps are labels purchased from the government as a method for collecting taxes or fees on goods, documents, licenses, registrations, and the like. The business buys the stamp and affixes it to the product to show it has paid the relevant taxes. *See Revenue Stamps*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a revenue stamp as "[a] stamp used as evidence that a tax has been paid"). In 1862, to help pay for the Civil War, the government enacted a law permitting the Commissioner of Internal Revenue to sell stamps made from dies and designs created by companies expressly for their own proprietary articles. Act of July 1, 1862, ch. 119, § 102, 12 Stat. 432, 477; *Swift Co.*, 105 U.S. at 693.

the value of the stamps.[38] The Commissioner of Internal Revenue, however, consistently required purchasers to pay for the full value of the stamps requested and then "paid" the commissions in additional stamps, rather than a cash payment back to the company.[39] The Court of Claims held that the practice had developed the "force of law" because the government had uniformly established that practice since the statute was enacted and because Swift Company and other companies had uniformly accepted payments in stamps rather than cash.[40] The Supreme Court reversed, holding that regardless of the agency's interpretation of the law and the industry's acceptance, the unambiguous meaning of the statute must prevail.[41] When the case made its way to the Court again on a theory that the case should be dismissed because the manufacturers had not submitted a formal protest when making the payment, the Court "repeat[ed] the conclusion" of the former case, held that the transaction was not truly voluntary because "[t]he only alternative was to submit to an illegal exaction or discontinue its business," and calculated the exact amount to be paid back to the appellant.[42] This case laid the foundation of the Court of Claims' illegal exaction jurisdiction for several decades.

By 1915, the Supreme Court held that wrongfully collected taxes should be recovered through a suit against the United States, rather than seeking them from the tax collector individually, concluding,

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38. *Swift Co.*, 105 U.S. at 693–94.

39. *Id.* at 694–95.

40. *See id.*

41. *Id.* at 695–96. This method of analysis is analogous to the modern test for agency interpretation of statutes under *Chevron* but is based in common law. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The Court had long held that it must give "very great respect" to contemporaneous interpretations of an ambiguous statute by "those who were called upon to act under the law." Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); *see also* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 304 (1803) (relying on contemporaneous practice to interpret an ambiguous constitutional provision). However, *Swift Co.* was an early case in which the Court expressly incorporated the corollary from English common law courts, namely, that an unambiguous statutory or constitutional provision would not yield to the government actor's contemporaneous interpretation or practice. *See Swift Co.*, 105 U.S. at 695 ("The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt." (citations omitted)); *see also* Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 558–64 (2001) (outlining the history of the requirement that relying on common opinion or customary law and practice to interpret a statute required first that the statute be ambiguous).

42. Swift Co. v. United States (*Swift II*), 111 U.S. 22, 24, 29, 31 (1884).

"[h]owever gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are 'founded upon' the revenue law" and therefore are within the scope of the Tucker Act's waiver of sovereign immunity.[43]

It was now clearly established that the Court of Claims could hear cases founded upon government officials illegally demanding or taking money from people and businesses, but only in the context of refunds for illegally imposed taxes or customs duties.[44] When claimants sought to recover payments by alleging the government had imposed illegal costs or fines based on improper interpretation of other statutes, the courts still rejected them as torts and outside the Tucker Act waiver of sovereign immunity.[45]

This limitation on illegal exactions remained until the mid-twentieth century.

B. The 1950s and 1960s: Post-War Expansion of Illegal Exactions Through Mallow *and the Shipping Cases*

After establishing its jurisdiction over illegal exactions generally, the Court of Claims issued very few illegal exaction opinions from the 1920s to 1940s. Although the case law is murky and uneven, it appears that the tax refund cases waned, perhaps because starting in 1921, changes to the Treasury regulations were no longer retroactive.[46] Then, in the 1950s and 1960s, the Court of Claims' illegal exaction docket suddenly expanded to new areas of government activity beyond taxes and duties. A few of those cases were single, outlier cases based on illegal governmental actions related to the war efforts, but did not seem to jumpstart or encourage any similar

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43. United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915) (citations omitted).

44. *See*, *e.g.*, Dooley v. United States, 182 U.S. 222, 222 (1901) (regarding customs duties); Carriso, Inc. v. United States, 106 F.2d 707, 709 (9th Cir. 1939) (regarding customs fees).

45. *E.g.*, United States v. Nederlandsch-Amerikaansche Stoomvart Maatschappij (*Holland-America Line*), 254 U.S. 148, 155 (1920) (holding that the government illegally required the steamer ship company to pay for detainment and medical care of passengers who arrived in the United States with certain illnesses sounded in tort).

46. Revenue Act of 1921, ch. 136, § 1314, 42 Stat. 227, 314 (current version codified at 26 U.S.C. § 7805(b)). *See generally* Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1709–12 (2014) (discussing changing tax regulation in 1920s and 1930s).

litigation based on similar claims or theories, at least not for several more decades.

One such case was *Mallow v. United States*.[47] Nathan Mallow was a civilian clerk working for the U.S. Army in Tokyo, Japan, from 1953 to 1954.[48] While there, he bought a car from New York, had it shipped to Japan, and signed a customs form stating that the car was for his personal use.[49] However, he had already decided to sell the car rather than keep it for personal use and had executed a sale contract with a Japanese citizen.[50] Although he was a civilian employee and not a service member, the Army tried Mr. Mallow by a special court martial under the Uniform Code of Military Justice for falsely signing a document and for selling his personal car to a foreign national.[51] Mr. Mallow was found guilty, sentenced to confinement at hard labor, and charged a fine of $2000.[52]

Several years later, in a series of cases unrelated to Mr. Mallow, the Supreme Court held that trying civilian employees through the military justice system in a time of peace was unconstitutional.[53] Mr. Mallow thus filed two complaints at the Court of Claims, one for back pay under the civil service statutes in effect at the time,[54] and another seeking restitution of the fine through an illegal exaction claim.[55] The court determined that it possessed jurisdiction to entertain the claim that the fine was illegal because it was imposed pursuant to an unconstitutional law, opining that the illegal statute itself constituted a "claim against the United States founded . . . upon . . . [an] Act of Congress" as required by the Tucker Act.[56] However, the court also went a step further, and explained that the unconstitutional trial, conviction, and fine by a court martial with no jurisdiction over Mr. Mallow meant that the fine deprived him of his property "without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution."[57] That claim for recovery of money

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47. Mallow v. United States (*Mallow II*), 161 Ct. Cl. 446 (1963).
48. *Id.* at 448.
49. Mallow v. United States (*Mallow I*), 161 Ct. Cl. 207, 209–10 (1963).
50. *Id.* at 209.
51. *Id.* at 210.
52. *Id.*
53. *Mallow II*, 161 Ct. Cl. at 449–50 (citing Reid v. Covert, 354 U.S. 1 (1957)).
54. *Mallow I*, 161 Ct. Cl. at 213.
55. *Mallow II*, 161 Ct. Cl. at 453–54.
56. *Id.* at 453–54 (quoting 28 U.S.C. § 1491(a)(1) (2018)).
57. *Id.* at 454. When *Mallow II* was decided, the courts still applied constitutional decisions retroactively, at least in most cases. *See, e.g.*, John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 891 (2014). In

taken in violation of due process, the court explained, was a claim founded upon the Constitution, and was itself sufficient for Tucker Act jurisdiction.[58] Although *Mallow II* is the earliest known case to opine that an illegal exaction could be based solely on a violation of constitutional due process, the case did not herald a new wave of cases seeking damages due to due process violations for several decades. Indeed, the case remained uncited in illegal exaction opinions until the 1990s.[59]

Apart from *Mallow II* and a few other, largely unsuccessful cases,[60] most illegal exaction claims in the mid-twentieth century arose out of a similar fact pattern, which went as follows.[61] In the early 1950s, various U.S. businesses wanted to sell their ships, some of which they had acquired from the U.S. Navy as surplus after World War II.[62] They had trouble finding buyers and eventually attempted to sell them to foreign corporations.[63] Under the Shipping Act of 1916, however, the Shipping Board (becoming the U.S. Maritime Commission) had to approve ship sales to foreign corporations.[64] The Shipping Act gave the Board discretion to approve or reject sale applications based on foreign policy and whether the sale would harm national defense or adversely affect the United States's foreign commerce.[65] In 1949, the Maritime Commission began requiring payments as "consideration" for permitting sales, even when it

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subsequent years, the Supreme Court developed a doctrine of non-retroactivity in all but rare cases. *See, e.g.*, Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) (establishing the standard for when state review must allow retroactive application).

58. *Mallow II*, 161 Ct. Cl. at 454 (citing § 1491).

59. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996) (citing *Mallow II*, 161 Ct. Cl. at 450). The case was also cited in a later-vacated decision by the D.C. Circuit in 1983 as support for Tucker Act jurisdiction over takings claims for actions beyond statutory authority, even as it affirmed dismissal because the claim sought more than $10,000 and was thus outside the district court's jurisdiction. *See* Ramirez de Arellano v. Weinberger, 724 F.2d 143, 152–53 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500, 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113, 1113 (1985).

60. *E.g.*, Camillia Apartments, Inc. v. United States, 334 F.2d 667, 669 (Ct. Cl. 1964).

61. *See generally* Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967); Seatrade Corp. v. United States, 285 F.2d 448 (Ct. Cl. 1961); Suwannee S.S. Co. v. United States, 279 F.2d 874 (Ct. Cl. 1960); Clapp v. United States, 117 F. Supp. 576 (Ct. Cl. 1954).

62. *See, e.g.*, *Seatrade*, 285 F.2d at 448.

63. *See, e.g.*, *id.*

64. Shipping Act, ch. 451, § 9, 39 Stat. 728, 730–31 (1916).

65. *See id.* at § 15; *see also Clapp*, 117 F. Supp. at 581 (discussing the policy considerations).

determined the other statutory conditions were met—that is, the sale was consistent with foreign policy and would not harm the national defense or foreign commerce.[66]

In a series of cases, the ship owners sued for having to pay these fees.[67] The Court of Claims determined that the Shipping Act required that the Maritime Commission approve or deny the sale based only on the policy considerations listed in the statute and could not impose payments as an additional condition for an approval.[68] In the cases in which the ship owner had paid the illegal sum to obtain the permit, the court required the sum returned.[69]

The cases' reasoning hewed closely to the traditional tax refund context: the relevant agency had misinterpreted its statutory authority and required or demanded money that it was not entitled to acquire, and the money simply had to be returned.[70] However, these cases laid the groundwork for two major developments in illegal exaction law. The first was the simple idea that illegal exactions encompassed more than only tax and duty disputes.[71] That is, property owners could recover money that the government improperly demanded based on a wide range of regulatory regimes.

The second development stemmed not from the holdings of these cases, but rather from a single clause in the decision of one of the last of these shipping cases, *Eastport S.S. Corp. v. United States*.[72] The *Eastport* court analyzed the jurisdiction of the Court of Claims in such a sweeping manner that it became a seminal description of the court's jurisdiction for fifty years, not only in illegal exaction cases but across the court's whole docket.[73] The court explained that, for non-

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66. *See Eastport*, 372 F.2d at 1006.

67. *See* cases cited *supra* note 61.

68. *See Clapp*, 117 F. Supp. at 581.

69. Suwannee S.S. Co. v. United States, 279 F.2d 874, 877 (Ct. Cl. 1960); *Clapp*, 117 F. Supp. at 582. The court would not, however, permit claims for damages based on delay in the Maritime Commission's approval or asserting that the Maritime Commission had abused its discretion in refusing to consent to sales prior to 1949, because the agencies had the discretion to grant or withhold consent to any sale and the several-month delay was not particularly long. *Eastport*, 372 F.2d at 1013; *see also* Seatrade Corp. v. United States, 285 F.2d 448, 450 (Ct. Cl. 1961) (holding that a claim for damages for delay in consenting to sale was "not well founded").

70. *See* cases cited *supra* note 61.

71. *See* cases cited *supra* note 61.

72. 372 F.2d 1002 (Ct. Cl. 1967).

73. *See id.*; *see, e.g.*, Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 786 (1st Cir. 1987) (describing *Eastport*'s discussion of Tucker Act jurisdiction as "[t]he classic explication"); Speed v. United States, 97 Fed. Cl. 58, 66 (2011) (describing

contractual claims, the court's jurisdiction "can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" and "those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury."[74] The first category is illegal exactions; the second is everything else the court hears, from takings cases, to back pay, to statutorily prescribed flood damages.[75]

The clause "directly or in effect"—perhaps instinctively added as a lawyerly hedge—proved vital to the further expansion of illegal exactions to cases where the government did not *directly* take or demand *money* from a plaintiff. The full promise of that phrase, "directly or in effect," came to fruition in the 1980s and 1990s.

C. The 1980s and 1990s: Forfeiture Cases and Aerolineas Argentinas

From the 1970s until the mid-1980s, illegal exaction law again largely fell dormant. Then, in 1982, Congress dissolved the Court of Claims and created the Federal Circuit and a new Claims Court (now the Court of Federal Claims).[76] Shortly thereafter, the Claims Court began entertaining illegal exaction claims unlike the traditional claims for a simple refund of various kinds of overpayments.[77]

Eastport as "venerable precedent" addressing the jurisdictional requirements under the Tucker Act).

74. *Eastport*, 372 F.2d at 1007.

75. *Id.* at 1008.

76. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105(a), 96 Stat. 25, 26–28 (codified as amended in scattered sections of 28 U.S.C.); *see also* 7A FED. PROC., L. ED. § 19:1 (discussing Court of Federal Claims).

77. It is, of course, difficult, if not impossible, to determine if the newly constituted court and its new judges caused or hastened the evolution of illegal exaction claims. Suffice it to say, when the Federal Circuit was created, the judges of the appellate division of the Court of Claims became circuit judges, and new judges were appointed to the Claims Court. It was new Claims Court judges without backgrounds litigating before the former Court of Claims who began evaluating illegal exactions in a new and broader light. For example, Judge Randall Rader, appointed to the Claims Court in 1988 after working as counsel to the Senate Committee on the Judiciary, wrote the opinion in a forfeiture illegal exaction case that was one of the earliest cases to evaluate illegal exactions largely as a corollary to Fifth Amendment takings claims. Noel v. United States, 16 Cl. Ct. 166 (1989); *see also* Montego Bay Imports, Ltd. v. United States, 10 Cl. Ct. 806, 809 (1986) (creating a similar analogy to takings cases and written by Judge Lawrence Margolis, who was nominated to the

First, the court began asserting jurisdiction over claims that the government had improperly, illegally, or unconstitutionally seized their personal property based on criminal or civil forfeiture statutes.[78] Many of these cases came on the heels of *Austin v. United States*, which held that the Eighth Amendment's Excessive Fines Clause applied to civil forfeitures.[79] In theory, that could have opened the door to judgments against the federal government under the Tucker Act by analogizing to the due process violation providing for damages in *Mallow II*, particularly because claimants likely could have successfully argued that, as in *Mallow II*, if an exaction was deemed unconstitutional for one person's claim, that should result in retroactive relief for similarly situated claimants.[80] Indeed, the Supreme Court in the 1990s confirmed that the non-retroactivity doctrine does not fully apply to illegal exactions, instead permitting a "pay now and litigate later" approach.[81] However, the decisions from this period seem to have forgotten *Mallow II*, and both the Court of Federal Claims and Federal Circuit uniformly denied such claims, explaining simply that the forfeiture statutes were a valid exercise of police power.[82] For the most part, these cases held that the Court of Federal Claims could only review the procedural propriety, rather than substantive validity, of a forfeiture.[83]

Nonetheless, in the forfeiture cases, the courts made certain crucial statements in dicta that illegal exactions could be based on exactions of property other than money, and that improper actions violating due process could form the basis for a meritorious illegal exaction claim. For example, in *Bowman v. United States*, the plaintiff argued that the forfeiture of his real property and two aircrafts under

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court in 1982 after serving as a magistrate judge for the U.S. District Court for the District of Columbia).

78. *E.g.*, Bernaugh v. United States, 38 Fed. Cl. 538, 540 (1997), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998); Crocker v. United States, 37 Fed. Cl. 191, 194 (1997); Bowman v. United States, 35 Fed. Cl. 397, 398–99 (1996) (pro se forfeiture case); *Noel*, 16 Cl. Ct. at 167–68 (forfeiture case where plaintiff was represented by counsel). *But see Montego Bay Imports*, 10 Cl. Ct. at 809–10 (holding that allegation that the government illegally destroyed plaintiff's fishing vessel after failing to implement a forfeiture proceeding was a tort claim, rather than a taking or an illegal exaction).

79. 509 U.S. 602, 604 (1993).

80. *See supra* Section I.B.

81. *See* Fallon & Meltzer, *supra* note 9, at 1824–25 (discussing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and the unique nature of tax refund cases in the context of non-retroactivity and new law doctrines).

82. *See, e.g.*, Litzenberger v. United States, 89 F.3d 818, 820 (Fed. Cir. 1996).

83. *See, e.g.*, *id.*

the Controlled Substances Act was unconstitutional.[84] In examining its jurisdiction, the Court of Federal Claims cited *Eastport*'s conclusion that an illegal exaction can occur when the government has "in effect" taken someone's money.[85] The *Bowman* court thus determined that the illegal exaction framework applied to non-monetary exactions.[86] The Second Circuit stated the right of action even more forcefully, explaining that a plaintiff claiming an improper forfeiture "has presented a claim for deprivation of property without due process, as well as a claim for abuse of agency discretion under its own regulations," all of which constituted a valid illegal exaction claim under the Tucker Act.[87] Although the forfeiture cases nonetheless dismissed the claims in most cases, and the Federal Circuit later determined that the Court of Federal Claims lacked jurisdiction to review forfeiture claims as illegal exactions because "the relevant statutes provide for a comprehensive administrative and judicial system to review" such forfeitures,[88] future litigants and courts would rely on these cases to establish that illegal exactions need not confine

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84. 35 Fed. Cl. 397, 398 (1996).

85. *Id.* at 401.

86. *Id.* The court still assumed that an exaction must *relate* to money, but extrapolated that, because the government sold the property for cash, *Eastport* encompassed such claims. *Id.* ("Although the Government actually took property from Plaintiff, it proceeded to sell this property and received money in return. Hence, in effect, the Government exacted money from Plaintiff."); *see also Litzenberger*, 89 F.3d at 820 (reviewing the seizure of a car under Controlled Substances Act, stating that jurisdiction would exist if claimant asserted that the forfeiture procedures had violated due process) (analogizing to *Trayco, Inc. v. United States*, 994 F.2d 832, 835 (Fed. Cir. 1993), in which the court had held that the Little Tucker Act provided jurisdiction to hear claims alleging that a penalty was illegally exacted under customs law).

87. Onwubiko v. United States, 969 F.2d 1392, 1398–99 (2d Cir. 1992) (The court also claimed jurisdiction under the Tucker Act by analogizing to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a claim of intentional deprivation of property without due process of law); *see also* Polanco v. U.S. Drug Enf't Admin., 158 F.3d 647, 651 (2d Cir. 1998) ("A district court has jurisdiction to consider a claim that one's property has been taken 'accidentally, fraudulently, or improperly' by an agency of the United States. A claim that property was seized without proper notice, and therefore improperly, falls within this category." (quoting *Onwubiko*, 969 F.2d at 1398)); United States v. Ten Thousand Dollars in U.S. Currency, 860 F.2d 1511, 1514 (9th Cir. 1988) (discussing jurisdiction under the Act); United States v. Rapp, 539 F.2d 1156, 1161 (8th Cir. 1976) (same); Glup v. United States, 523 F.2d 557, 559 n.3 (8th Cir. 1975) (same); Menkarell v. Bureau of Narcotics, 463 F.2d 88, 90 (3d Cir. 1972) (same); LaChance v. U.S. Drug Enf't Admin., 672 F. Supp. 76, 80–81 (E.D.N.Y. 1987) (same).

88. Vereda, Ltda. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001).

themselves solely to seeking restitution of money or money equivalents paid to the government.[89]

In the forfeiture cases, the Court of Federal Claims also began providing a new framework for evaluating illegal exaction claims in general. For the previous 100 years, courts evaluating illegal exactions had primarily analogized or distinguished the claims to torts.[90] With the forfeiture cases, the courts began to treat illegal exactions claims as, in effect, "illegal takings," often analyzing both takings and illegal exaction claims in the alternative.[91] The court appears to have largely provided this framework for plaintiffs, particularly when a *pro se* plaintiff claimed illegal or improper government actions but failed to articulate an illegal exaction claim.[92]

The 1990s also brought a second leap in illegal exaction law: that the government did not need to *directly* take or exact the plaintiff's property for an illegal exaction to occur, and that the government need not end up with the plaintiff's property in its possession. In *Aerolineas Argentinas v. United States*, an Argentinian airline and a Pakistani airline each filed suit because the Immigration and Naturalization Service (INS) required them to detain certain political asylum seekers who came to the United States on flights provided by their airlines.[93] From 1952 to 1986, the Immigration and Nationality Act had required that airlines and shipping companies pay the cost of detaining all travelers who did not have proper entry documentation pending a decision on their eligibility to enter the United States.[94] In 1986,

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89. Starr Int'l Co. v. United States (*Starr I*), 106 Fed. Cl. 50, 70 n.17 (2012) (citing *Bowman v. United States*, 35 Fed. Cl. 397, 397 (1996), for the proposition that a plaintiff could seek damages for non-money property in an illegal exactions case), *vacated in part on other grounds*, 856 F.3d 953 (Fed. Cir. 2017); Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 145 (2000) ("Several cases hold that, under the illegal exaction doctrine, a plaintiff may seek the return of the monetary value of property seized or otherwise obtained by the government." (citations omitted)), *aff'd*, 291 F.3d 1356 (Fed. Cir. 2002).

90. *See supra* Section I.A.

91. *See, e.g.*, Bowman v. United States, 35 Fed. Cl. 397, 400–06 (1996).

92. *See, e.g.*, Crocker v. United States, 37 Fed. Cl. 191, 197 (1997) (dismissing for lack of jurisdiction or failure to state a pro se takings claim, unreasonable search and seizure, and due process claims, but sua sponte evaluating jurisdiction under illegal exaction framework, even though it was "not directly raised in the complaint"); *Bowman*, 35 Fed. Cl. at 400 ("As Plaintiff seeks the return of the monetary value of his forfeited property, asserting that it was taken in violation of the Double Jeopardy Clause, his claim may qualify as one of illegal exaction under the Tucker Act.").

93. 77 F.3d 1564, 1569 (Fed. Cir. 1996).

94. *Id.* at 1570; *see also* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, § 223, 66 Stat. 163, 194–95.

however, Congress repealed that section of the law.[95] Nevertheless, for asylum seekers who traveled on airplanes as stowaways or requested asylum during a layover in the United States, INS still required airlines to provide and pay for the travelers' detention, including "hotel rooms, meals, twenty-four hour security guards, and medical and other expenses" for extended periods while the asylum seekers awaited decisions on their cases.[96] The airlines claimed that the government's disregard for the 1986 statutory repeal and "its persistence in ordering the airlines to pay detention and maintenance costs" of asylum seekers constituted an illegal exaction.[97] The Federal Circuit agreed, and held that INS's regulations were contrary to law.[98] If the government wanted to detain the asylum seekers, it was required to assume the costs of that detention.[99]

Although the immigration-related facts and law in *Aerolineas Argentinas* are outliers among illegal exaction cases (though not unique),[100] the Federal Circuit's opinion established a crucial new understanding of Tucker Act jurisdiction over illegal exactions. The Court of Federal Claims had dismissed the case as failing to state an illegal exaction claim because the agency did not require the airlines to pay money *to the government*.[101] The government, the trial court reasoned, had therefore not "exacted" anything.[102] The Federal Circuit disagreed. Quoting *Eastport*, it explained that illegal exactions occur when "the government require[s] payment to it 'directly or in effect,'" and that if the airlines "made payments that by law the Service was obliged to make, the government has 'in its pocket' money corresponding to the payments that were the government's statutory obligation."[103] Therefore, the court possessed Tucker Act jurisdiction,

95. *Aerolineas Argentinas*, 77 F.3d at 1571.

96. *Id.* at 1569–70.

97. *Id.* at 1571–72.

98. *Id.* at 1578.

99. *Id.*

100. In 1953, Pan Am had asserted a similar illegal exaction claim under an earlier provision of the Immigration Act based on INS charging airlines for detention of passengers who INS eventually determined were U.S. citizens. Pan Am World Airways v. United States, 122 F. Supp. 682 (Ct. Cl. 1954). The Court of Claims determined that the charges were lawful and granted judgment for the government. *Id.* at 686; *cf.* United States v. Holland-America Line, 254 U.S. 148, 150, 155 (1920) (also alleging an illegal exaction based on immigration officials illegally requiring a transportation company to pay for detention of passengers, which the court denied as sounding in tort).

101. *Aerolineas Argentinas*, 77 F.3d at 1578.

102. *Id.* at 1573.

103. *Id.*

and the circuit remanded for the Court of Federal Claims to determine the exact sum the INS was required to pay back to the airlines.[104] This was the first time a federal court had ever, as part of its holding, concluded that an illegal exaction could occur when the government did not receive any payment at all from the plaintiff, but had instead required or imposed costs on the plaintiff that it should not have had to bear.[105]

The idea that a government-imposed obligation to pay money to a third party, rather than the government taking the money itself, could constitute an illegal exaction proved a turning point in illegal exaction law. Starting in the 2000s, litigants began to assert, with uneven success, illegal exactions related to a wide variety of governmental regulatory schemes that imposed costs on claimants.

D. The 2000s to the Present: Post-Financial Crisis Cases and the Rise of Illegal Exactions Asserted by Large Institutional Plaintiffs

The two main developments of the 1980s and 1990s—that illegal exactions could relate to property other than money, and the underlying government action could include something other than a direct payment to the government—opened the door for an ever-expanding list of complaints against the government based on a theory of illegal exaction. The past twenty years have seen a wider variety of government activity challenged through an illegal exaction claim than ever before. However, that expansion is somewhat tempered by the narrow range of litigants who choose to frame their cases as illegal exactions. Most of the time, the plaintiff who thinks to assert an illegal exaction is a large institutional actor.[106]

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104. *Id.* at 1578. The trial court did not ultimately make this determination, as the parties settled. The case therefore left open the question of how to determine the proper compensation due, whether a fair market or just compensation model, or pure restitution of whatever the airlines had paid.

105. One earlier case had concluded that the court could hear an illegal exaction claim based on allegations that the government illegally required plaintiffs to make payments to private mortgage companies, but had ultimately concluded that the government regulation was legal and dismissed the complaint. Camillia Apartments, Inc. v. United States, 334 F.2d 667 (Ct. Cl. 1964). Neither the Court of Claims nor its successor courts again cited the concept that payments made to third parties could form the basis of an illegal exaction until *Aerolineas Argentinas*.

106. *E.g.*, Honeywell Int'l, Inc. v. United States, 142 Fed. Cl. 91, 93 (2019); N. Cal. Power Agency v. United States, 139 Fed. Cl. 74, 76 (2018); Piszel v. United States, 121 Fed. Cl. 793, 797 (2015) (alleged by the former Chief Financial Officer of the Federal Home Loan Mortgage Corporation (Freddie Mac)); *Starr I*, 106 Fed. Cl. 50, 54 (2012);

In the twentieth century, most illegal exaction claims succeeded only if the reviewing court found a clear and obvious violation of law. For example, the court martial underlying *Mallow II* had already been deemed unconstitutional by the Supreme Court, and the repealed law in *Aerolineas* made Congress's intent for INS to be responsible for all detentions quite obvious.[107] Most unsuccessful illegal exactions failed either for jurisdictional reasons, or because the complained-of action was either clearly legal or had been affirmed by another federal court.[108] Over the past twenty years, however, more illegal exaction claims are based on an allegation that an action was illegal, but no court has yet ruled whether it was or not. The reviewing court therefore must decide in the first instance if the government action was outside the bounds of the agency's or officer's authority.

In the early 2000s, most illegal exaction decisions dealt with the implications of *Aerolineas Argentinas*, and how to delineate between injuries incurred by an illegal action by the government, and downstream costs to third parties too attenuated from the allegedly illegal act for the government to be liable.[109] Ultimately, the courts adopted a two-pronged approach. First, the court adopted a test from takings law which requires that, when a third party actually took or received the plaintiff's property, "the government's actions on the intermediate third party ha[d] a 'direct and substantial' impact on the plaintiff."[110] Second, the exaction of property must have occurred "*as a direct result of* the" allegedly illegal government act or improper application of law; downstream costs or effects could not support an illegal exaction claim.[111]

Then, in 2008, the financial crisis hit, bringing a new wave of illegal exaction claims. The first illegal exaction case adjudicated by the Court of Federal Claims arising from the financial crisis was *Starr*

Norman v. United States, 429 F.3d 1081, 1084 (Fed. Cir. 2005); Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 139 (2000).

107. *See Aerolineas Argentinas*, 77 F.3d at 1571–78; *Mallow II*, 161 Ct. Cl. 446, 449–50 (1963).

108. *See, e.g.*, Bernaugh v. United States, 38 Fed. Cl. 538, 543 (1997) (holding that plaintiff failed to state a claim because "plaintiff cannot establish that the property was improperly forfeited while two valid forfeiture judgments are extant," and because res judicata prevented review of those judgments).

109. *See generally Norman*, 429 F.3d at 1081; Ont. Power Generation, Inc. v. United States, 369 F.3d 1298 (Fed. Cir. 2004); *Casa de Cambio*, 48 Fed. Cl. at 137.

110. Casa de Cambio Comdiv S.A. de C.V. v. United States, 291 F.3d 1356, 1361 (Fed. Cir. 2002).

111. *Norman*, 429 F.3d at 1096.

International Co., Inc. v. United States.[112] The case's origins began on September 15, 2008, when in the midst of the burgeoning financial crisis, the three largest credit rating agencies all downgraded American International Group (AIG) by two or three steps on their scales.[113] The international insurance company had become integral to the country's financial system, and, facing a disorderly collapse as soon as the next day, AIG sought help from the Federal Reserve Bank of New York (FRBNY).[114] Exercising its authority under section 13(3) of the Federal Reserve Act, which permitted secured loans in "unusual and exigent circumstances" to non-bank corporations if no other banking institutions would provide credit to the company, the Board of Governors of the Federal Reserve approved FRBNY to provide an $85 billion line of credit to AIG at an approximately 11% interest rate.[115] In exchange, AIG promised to provide FRBNY with shares equivalent to 79.9% of AIG's equity.[116]

After the company had stabilized, in 2011, one of the largest AIG shareholders, Starr International Company, Inc., filed a class action on behalf of all AIG shareholders against the United States, claiming that the equity term of the loan was not permitted by section 13(3) and therefore constituted either an uncompensated taking or an illegal exaction.[117] Unlike most earlier successful illegal exaction

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112. *Starr I*, 106 Fed. Cl. 50, 55 (2012). As a disclaimer, I served on the litigation team at the Department of Justice that defended the government in the Court of Federal Claims proceedings in this case and other pending illegal exaction cases arising out of the financial crisis. As with the rest of this Article, this Section describes my own opinions and does not reflect any current or former positions of the United States.

113. *Rating Agencies Downgrade AIG, More Cuts Possible*, REUTERS (Sept. 15, 2008, 10:32 PM), https://www.reuters.com/article/aig-downgrade-idUSHKG1540020080916 (describing Moody's Investors Service's cut as "a two-notch downgrade"; Standard & Poor's Ratings Services' cut as "a three-peg reduction"; and Fitch Rating's cut as a "two notch cut").

114. SIGTARP, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES, SIGTARP-10-003, at 2–5 (2009), https://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf.

115. *Id.* at 2 n.4, 11. Eventually, between FRBNY and the Department of Treasury under legislation passed at the end of 2008, the federal government committed approximately $182 billion in loans and lines of credit to AIG. SIGTARP, QUARTERLY REPORT TO CONGRESS 45 (2013), https://www.sigtarp.gov/Quarterly%20Reports/January_30_2013_Report_to_Congress.pdf.

116. SIGTARP, *supra* note 114, at 11.

117. *Starr I*, 106 Fed. Cl. at 57.

cases, however, the government's legal authority was colorable,[118] and the Court of Federal Claims entertained extensive evidence about the agency's understanding of its own authority.[119] After trial, the court held that the equity term was not authorized by section 13(3) and did not appear to give deference to the agency's interpretation of the statute.[120]

Although the plaintiffs ultimately failed to obtain any damages because the court found that, without the rescue, AIG shares would have been worthless,[121] and although the trial court's illegal exaction holding was vacated on appeal,[122] the *Starr* litigation heralded a revived interest in illegal exaction claims at the Court of Federal Claims. A new dominant type of illegal exaction claimant emerged: financial companies and their investors.[123] Spanning from 2013 to 2018, scores of individual and institutional investors in the Federal National Mortgage Association (known as Fannie Mae) and Federal Home Loan Mortgage Company (known as Freddie Mac) filed lawsuits claiming either takings or illegal exactions based on how the Federal Housing Finance Agency, acting as Fannie Mae and Freddie Mac's conservator, renegotiated certain stock purchase agreements with the Department of Treasury. At least over ten cases, many with multiple plaintiffs, remain pending before the Court of Federal Claims.[124] In

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118. The only other successful illegal exaction cases with arguably as ambiguous statutory authority are the shipping cases. *See generally* Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967); Suwannee S.S. Co. v. United States, 279 F.2d 874 (Ct. Cl. 1960).

119. *See generally* Starr Int'l Co. v. United States (*Starr II*), 121 Fed. Cl. 428 (2015).

120. *Id.* at 434; *cf. supra* note 41 and accompanying text (discussing *Swift* and early doctrines of statutory interpretation and deference).

121. *Starr II*, 121 Fed. Cl. at 436.

122. Starr Int'l Co. v. United States (*Starr III*), 856 F.3d 953, 975 (Fed. Cir. 2017).

123. Financial institutions' expanded interest in illegal exaction claims was not limited, being plaintiffs. By the time the trial had rolled around in *Starr I*, the plaintiffs had raised funding to pay for the multi-million-dollar legal costs by promising a cut of any judgment to investors. The investors were well-heeled Wall Street financers with a history of distrusting government regulations and regulators. *See* Ben Protess & Aaron M. Kessler, *Wall St. Bankrolls Ex-Executive as He Sues over A.I.G. Bailout*, N.Y. TIMES (Sept. 23, 2014, 10:01 PM), https://dealbook.nytimes.com/2014/09/23/as-ex-chief-of-a-i-g-sues-u-s-wall-st-is-happy-to-pay-the-tab/.

124. *See* Mason Capital L.P. v. United States, No. 18-529 (Fed. Cl. filed Apr. 11, 2018); CSS, LLC v. United States, No. 18-371 (Fed. Cl. filed Mar. 18, 2018); Appaloosa Inv. Ltd. P'Ship I v. United States, No. 18-370 (Fed. Cl. filed Mar. 8 2018); Akanthos Opportunity Master Fund L.P. v. United States, No. 18-369 (Fed. Cl. filed Mar. 8, 2018); Owl Creek Asia I, L.P. v. United States, No. 18-281 (Fed. Cl. filed Feb. 23, 2018);

2014, the former chief financial officer of Freddie Mac, Anthony Piszel, filed a claim of either a taking or illegal exaction because the enterprise did not pay him certain severance compensation (known as "golden parachute" payments) after the Federal Housing Finance Agency promulgated regulations restricting the availability of such payments at Freddie Mac and then, acting as conservator, ordered Freddie Mac to terminate Mr. Piszel.[125]

Separate from litigation directly related to the financial crisis, the Court of Federal Claims has also seen a flurry of complex illegal exaction claims asserted by other sophisticated actors. In 2014, a California electric utility and three cities filed suit alleging that the Department of Interior had unlawfully exacted payments under a provision of the Central Valley Project Improvement Act related to allocation of mitigation and restoration payments for fish and habitat protections.[126] The court rejected the claim by determining that the statute had not been violated.[127] In 2018, a nuclear facility operator, Honeywell International, Inc., filed a complaint claiming that the Nuclear Regulatory Commission (NRC) was misapplying its own regulation by requiring Honeywell to reimburse millions of dollars of agency costs related to NRC enforcing an order that Honeywell correct a variety of regulatory violations at its nuclear facility in Illinois.[128] The Court of Federal Claims agreed with Honeywell that 10 C.F.R. § 170.31, which generally permits the NRC to assess fees to individual companies for services the agency provides, did not permit these fees because they were related to civil penalties, and granted summary judgment for the plaintiff.[129] In sum, a variety of other illegal exaction claims are now filed regularly, mostly in the Court of Federal Claims, mostly by sophisticated companies and organizations operating in highly-regulated sectors.

Rafter v. United States, No. 14-740C (Fed. Cl. filed Aug. 14, 2014); Reid v. United States, No. 14-152 (Fed. Cl. Filed Feb. 26, 2014); Fisher v. United States, No. 13-608C (Fed. Cl. filed Aug. 26, 2013); Cacciapalle v. United States, No. 13-466 (Fed. Cl. filed July 10, 2013); Fairholme Funds, Inc. v. United States, No. 13-465 (Fed. Cl. filed July 9, 2013); Washington Fed. v. United States, No. 13-385C (Fed. Cl. filed June 10, 2013). Another, *Arrowood Indemnity Co. v. United States*, was recently dismissed on standing and other grounds. No. 13-698C, 2020 WL 2510452 (Fed. Cl. May 15, 2020).

125. Piszel v. United States, 121 Fed. Cl. 793, 797 (2015).

126. N. Cal. Power Agency v. United States, 139 Fed. Cl. 74, 76 (2018).

127. *Id.* at 83.

128. Honeywell Int'l Inc. v. United States, 142 Fed. Cl. 91, 95–98 (2019).

129. *Id.* at 93.

II. OPEN QUESTIONS IN ILLEGAL EXACTIONS

As described above, the history of illegal exactions has unfolded in fits and starts. Even today, they remain a relatively rare claim. Because of the scant number of cases, several key substantive areas of illegal exactions remain open questions. This Section outlines three such open questions: (1) voluntariness: whether the property owner must refuse to voluntarily pay or provide the demanded property; (2) government intent: whether the government actor must believe they are acting within the scope of their authority; and (3) damages: how damages should be calculated for non-money exactions.

A. Voluntariness

Early illegal exaction claims tended to require that the property owner part with their property under duress or involuntarily.[130] This is because the voluntary payment doctrine dictates that when someone voluntarily pays another (whether a private party or the government), they cannot sue for the recovery of that payment.[131] Even so, the Supreme Court did not often require a plaintiff to establish involuntariness by filing a formal protest when succumbing to the government's demand for money, as it did in early cases like *Edmonston*. Instead, it inferred involuntariness if the property owner "had no choice" because "[t]he only alternative was to submit to an illegal exaction or discontinue its business."[132]

Over the past several decades, the Court of Federal Claims has eschewed this constructive involuntariness, instead simply holding that any government action made under color of law—even an agency advisory opinion that did not demand or request any payment at all—is essentially coercive.[133] Some trial courts have flatly rejected that voluntary acceptance could defeat an illegal exaction claim, stating

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130. United States v. Edmonston, 181 U.S. 500, 510–11 (1901); Elliot v. Swartwout, 35 U.S. (10 Pet.) 137, 143 (1836).

131. *See supra* cases cited note 130.

132. *Swift II*, 111 U.S. 22, 28–29 (1884).

133. *See* Fireman v. United States, 44 Fed. Cl. 528, 536–37 (1999) (Federal Election Commission advisory opinion, suggesting that campaigns could remit illegal campaign contributions to the U.S. Treasury rather than return them to the donor, had "coercive quality" and therefore could form the basis of an illegal exaction claim).

that illegality is a separate exception to the voluntary payment doctrine.[134]

Yet the Court of Federal Claims cases that reject voluntariness as a defense to illegal exaction claims are not binding on future cases. Other courts have made no such decree. Indeed, the Federal Circuit's precedent suggests the opposite: in a line of tax refund cases spanning several decades through the 1990s, the Federal Circuit relied on a series of tests to distinguish voluntary "payments" from a "deposit" of taxes made under protest.[135] Thus, what little binding authority exists on the issue painstakingly defines illegal exactions as coercive or involuntary, and generally avoids deciding whether a plaintiff could recoup a payment voluntarily made but illegally demanded.

To be sure, in the twentieth century, trial courts that dismissed illegal exaction claims because the plaintiff voluntarily made an illegal payment are the outliers,[136] and most modern courts either waive away the requirement or ignore it altogether. In the absence of a definitive rule from the federal appellate courts, however, the question remains unsettled, and remains a colorable defense against an otherwise illegally requested payment.

B. Government Intent

If the courts have not fully decided whether the property owner's voluntariness and intent matters, they are even less definitive when reviewing the government's intent. In keeping with the common-law presumption of regularity,[137] most cases assume that government

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134. Silver Buckle Mines, Inc. v. United States, 132 Fed. Cl. 77, 85 (2017) ("[T]he voluntary payment doctrine is inapplicable when the payment . . . is made in contravention of a statute intended to benefit the payer."); *Starr II*, 121 Fed. Cl. 428, 435 (2015) ("Voluntary acceptance, however, is not a defense to an illegal exaction claim.").

135. *See* N.Y. Life Ins. Co. v. United States, 118 F.3d 1553, 1556–57, 1559 (Fed. Cir. 1997) (discussing cases and determining that the amount at issue in the case was a deposit, not a payment, and thus could be subject to a valid illegal exaction claim), *superseded in part by* American Jobs Creation Act of 2004, Pub. L. No. 108–357, § 842, 118 Stat. 1418, 1598.

136. *E.g.*, Olympic S.S. Co. v. United States, 165 F. Supp. 627, 629–31 (W.D. Wash. 1958) (noting the Court of Claims's shipping cases counseled in favor of finding an exaction regardless of voluntariness, but nonetheless granting judgment for the United States because *Edmonston* "leave[s] little room for doubt that the general rule that voluntary payment is not recoverable").

137. *See* MCCORMICK ON EVIDENCE § 343 (Kenneth S. Broun ed., 7th ed. 2014) (describing recognized presumptions, including the presumption of regularity); Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV.

officials act under a good faith understanding of both the facts and the law, and under a belief that their actions are authorized by law. Cases from the nineteenth century seem largely indifferent to governmental actors' motives, lumping together "nonfeasances or misfeasances or negligence" as all outside the purview of the courts.[138] And yet, most early illegal exaction cases that granted relief assumed that the government actor had acted within the scope of the government's understanding of the statute at issue; if a court assigned bad motives or carelessness to government actors, it generally held that the claim sounded in tort.[139] In effect, malfeasance seems to break the chain of causality that permits holding the government accountable for the officer's actions, as the action is no longer governmental in nature, but tortious or even criminal.

The case law, however, does not evaluate whether this presumption of good faith is a necessary prerequisite to establish an illegal exaction.[140] Given the high evidentiary standard required to establish bad faith,[141] it is certainly better for property owners seeking recompense through an illegal exaction that the claim does not require a showing a bad faith. But there are circumstances in which a party may for other claims seek to establish an improper motive or reason for a governmental interpretation of its authority. For example, in the context of Administrative Procedure Act (APA)

L. REV. 2431, 2434 (2018); *see also, e.g.*, Brown v. Plata, 563 U.S. 493, 575 (2011) (Alito, J., dissenting) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." (citations omitted)).

138. German Bank v. United States, 148 U.S. 573, 579 (1893) (collecting cases).

139. *Compare, e.g.*, United States v. Holland-America Line., 254 U.S. 148, 152–53, 155 (1920) (describing government officials' acts as "coercing the claimant" and "threats," and holding that the exaction claim sounded in tort), *with Swift II*, 111 U.S. 22, 28 (1884) (holding that plaintiffs were entitled to record, and describing government illegal action as merely the internal revenue board's "construction of the law upon which it acted through its successive commissioners").

140. This would be analogous to the requirement that plaintiffs concede the valid authority of the government to take property to assert a valid takings claim. *See* United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) ("In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."); Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("A compensable taking arises only if the government action in question is authorized." (citations omitted)).

141. *See* Rice Sys., Inc. v. United States, 62 Fed. Cl. 608, 620–21 (2004) ("strong presumption that government officials exercise their duties in good faith" can be overcome only with "well-nigh irrefragable proof") (citations omitted) (quoting Am–Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002))).

review seeking to overturn an agency decision, it may be necessary to establish that the reason given for a decision is pretextual.[142] If a litigant seeks both to vacate a decision under the APA and be compensated for damages caused by the agency decision under an illegal exaction theory,[143] litigants should know whether proving an improper motive would undermine their illegal exaction claim. But precedent lends no useful guidance.

C. Damages

Once an illegal exaction is established, almost no cases discuss how to calculate damages. For 100 years of illegal exaction claims, this was not a particularly urgent or complicated problem, as claimants could only ever establish claims based on exactions of money. In that context, it was presumably easy (or at least easier) for parties to establish and agree what sum of money the government should pay in damages: courts simply required that the government pay back the illegal sum.[144] But ever since the forfeiture cases and *Aerolineas Argentinas* established that claimants could be entitled to the loss of non-money property or payments made to third parties, the issue of damages calculations has loomed over the illegal exaction landscape.[145] *Aerolineas Argentinas*, for example, did not address whether the airlines should be reimbursed what they actually paid to third party hotels and security companies, or what the government would have paid to such entities.[146] The parties settled, and so the trial court never had to decide the question on remand.[147]

Even in the circumstance of money paid directly to the government, where there is no dispute about the amount the plaintiff paid to the government, several related questions of damages can arise. For example, are plaintiffs entitled to prejudgment interest on their money, so that they can be made whole for the time waiting for

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142. *See, e.g.*, Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019).

143. For example, several of the Fannie Mae and Freddie Mac plaintiffs with illegal exaction claims asserted parallel APA claims in district court. *See, e.g.*, Perry Capital LLC v. Mnuchin, 848 F.3d 1072 (D.C. Cir. 2017); Perry Capital LLC v. Mnuchin, 864 F.3d 591 (D.C. Cir. 2017); Perry Capital LLC v. Lew, 70 F. Supp. 3d 208 (D.D.C. 2014).

144. *See supra* Section I.B.

145. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996).

146. *See generally id.*

147. This is exhibited by the fact that there is no subsequent judgment or opinion from the district court after remand.

restitution of the illegally exacted sum? The current state of the law suggests no,[148] but perhaps yes, if the government actually earned interest on the illegally-exacted money or calculated the interest against the plaintiff.[149]

Courts have not had to answer a fundamental question about illegal exaction damages: should the courts provide restitution to plaintiffs, or disgorge the government's ill-gotten gains? As a result, the courts have not provided clear answers on how to calculate damages. Nor have they decided whether a plaintiff can receive damages for the value of lost rents or depreciation in the exacted property.[150] Or how to calculate the value of the property exacted to define what damages are actually due.[151]

III. UNIFYING THEORIES OF ILLEGAL EXACTION

How, then, to answer these unanswered questions? And, more to the point, what exactly are the boundaries of illegal exaction claims, and can we predict new areas of illegal government activity for which illegal exaction claims may provide relief? Illegal exactions can be a tool to provide more just and more comprehensive relief when seeking to hold government actors responsible for the damage they cause to others, but only if the legal community can identify how they can and should apply to new types of claims.

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148. *See* U.S. Shoe Corp. v. United States, 296 F.3d 1378, 1381 (Fed. Cir. 2002) ("Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution." (citations omitted)); *see also* Library of Cong. v. Shaw, 478 U.S. 310, 317 (1986) (holding that pre-judgment interest cannot be recovered); Bowman v. United States, 35 Fed. Cl. 397, 401 (1996) (citing *Shaw*, 478 U.S. at 317) (same).

149. *See* United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995); Am. Airlines v. United States, 77 Fed. Cl. 672, 682–85 (2007) (citing *$277,000 U.S. Currency*, 69 F.3d at 1492).

150. *See* Seay v. United States, 61 Fed. Cl. 32, 37 (2004) (agreeing with government that if plaintiff's "property was legally seized and returned," no illegal exaction claim exists, and "because the plaintiff's property was held in storage and not sold, there is no profit to disgorge"); *Bowman*, 35 Fed. Cl. at 401 ("It is unclear whether [plaintiff] could recover the value of lost rents or depreciation." (citations omitted)).

151. *E.g.*, *Starr II*, 121 Fed. Cl. 435–36 (2015) (holding no damages necessary because, although illegal, the exaction did not harm plaintiffs). *Bowman* suggests damages could be whatever the government received for sale of forfeited property, but this is dicta from a court with no precedential authority. *Bowman*, 35 Fed. Cl. at 401. *Starr II* went the other way and looked to the impact on plaintiffs rather than what the government received when it sold AIG's stock on the market. *Starr II*, 121 Fed. Cl. at 435–36.

Almost no scholarship exists discussing the contours or theoretical underpinnings of illegal exactions. Most judges naturally do not concern themselves with first principles about the nature of the claim. Without identifying a robust theoretical framework, however, illegal exactions are likely to remain a vestigial oddity of Tucker Act jurisdiction that only well-heeled plaintiffs can afford to assert.

These days, illegal exaction cases tend to define the claim as arising under the Fifth Amendment Due Process Clause, but the case law simply does not fit this framework. Rather, the most comprehensive and unifying theory of illegal exactions is that they are federal common law claims. This Section, therefore, proposes that illegal exactions are best understood as federal common law claims. That framework best encompasses the case law, is the most internally coherent as a theoretical matter, and provides the strongest tool to apply illegal exactions in new contexts and to promote better remedies for those injured by illegal government actions.

A. The Current Dominant Model: Due Process Plus

Modern courts typically describe illegal exactions as founded upon the Fifth Amendment Due Process Clause, but also require a statutory violation. I call this "due process plus." This is how the argument goes: illegal exactions arise under the Fifth Amendment Due Process Clause, but the Tucker Act does not provide jurisdiction to hear due process claims. Therefore, courts also generally, but not always, explicitly require a "money-mandating" statutory or regulatory provision that provides the requisite Tucker Act jurisdiction.[152] In the past decade, this framework is almost universal among the courts that categorize the claim at all.[153]

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152. *See, e.g.*, Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (identifying an illegal exaction as "a deprivation of property without due process of law, in violation of the Due Process Clause" but also requiring that "a claimant must demonstrate that the statute or provision causing the exaction" is money-mandating); Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1363–64 (Fed. Cir. 2002) ("Our cases have established that there is no jurisdiction under the Tucker Act over a Due Process claim unless it constitutes an illegal exaction." (citations omitted)). *But see* Virgin Is. Port Auth. v. United States, 136 Fed. Cl. 7, 14 (2018) ("Plaintiff need not point to a money-mandating provision . . . ." (citations omitted)).

153. *See, e.g.*, Munns v. Kerry, 782 F.3d 402, 414–15 (9th Cir. 2015) (citing *Norman* and transferring due process claim to the Court of Federal Claims); Ecco Plains, LLC v. United States, 728 F.3d 1190, 1201 (10th Cir. 2013) (citing *Norman*, 429 F.3d at 1095); *Starr III*, 856 F.3d 953, 977 (Fed. Cir. 2017) (Wallach, J., concurring) ("Both illegal exaction and taking claims derive from the Fifth Amendment."); Elliott

As an initial matter, this description of illegal exactions is ahistorical. Until the mid-twentieth century, few courts appeared to believe that the Due Process Clause gives rise to the cause of action.[154] To the extent courts analyzed any questions about the nature of the claim, most cases focused their analytic efforts on how the claim did not sound in tort.[155] Not until *Mallow II* in 1963 did a court recognize a pure due process claim as the basis of a successful illegal exaction claim.[156]

Defining illegal exactions as due process claims also presents a jurisdictional problem, as the courts recognize. The Tucker Act waiver of sovereign immunity does not generally extend to due process claims. The courts have consistently held that the Tucker Act only permits claims for money based on "money-mandating" constitutional, statutory, or regulatory provisions, and that the Due Process Clause is not such a provision.[157] Although it is not explicitly stated in the text of the Tucker Act, that statute only provides

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v. United States, 96 Fed. Cl. 666, 668 (2011) (citing *Norman*, 429 F.3d at 1081, 1095). This approach is not universally agreed-upon, however, particularly among those who practice before the Court of Federal Claims. One notable dissenting voice is Matthew Solomson, the author of one treatise on the Court of Federal Claims and newly appointed judge on the Court of Federal Claims. *See* MATTHEW H. SOLOMSON, COURT OF FEDERAL CLAIMS: JURISDICTION, PRACTICE, & PROCEDURE 5–10 (2016); *PN455—Matthew H. Solomson—The Judiciary*, CONGRESS.GOV, https://www.congress.gov/nomination/116th-congress/455 (last visited May 20, 2020).

154. The due process argument was permitted in illegal customs duty cases brought under admiralty law, but not in illegal exactions cases. *See, e.g.*, United States v. Seven Packages of Tea, 126 F. 224, 224–25 (E.D.N.Y. 1903) (holding, in a customs case, that a claimant could argue that a statute was unconstitutional and that his property was taken "without due process of law").

155. *See, e.g.*, Carriso, Inc. v. United States, 106 F.2d 707, 712 (9th Cir. 1939) (rejecting argument that claim to recover shipping entrance fees at the San Francisco-Oakland Port after the relevant statute had been repealed was a tort claim). This separation of illegal exactions from tort was crucial to distinguish them from the nineteenth century cases that had rejected Tucker Act jurisdiction for government employees' illegal demands for payments on the basis that if such payments were made under duress, the officer committed a tort and was the only person liable. *See* Gibbons v. United States, 75 U.S. (8 Wall.) 269, 273 (1868); *see also* Dooley v. United States, 182 U.S. 222, 227–28 (1901) (discussing cases concerning damages for illegal government actions in which the Supreme Court had held the claims were based in tort).

156. *Mallow II*, 161 Ct. Cl. 446, 454 (1963).

157. *See* Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995) ("[T]he due process clause does not obligate the government to pay money damages." (citations omitted) (citing Federal Circuit, Court of Claims, and United States Supreme Court cases spanning from 1977 to 1989)).

jurisdiction for claims for money.[158] Over time, that requirement morphed into settled law that Tucker Act claims must rely on a "money-mandating" source of law to provide jurisdiction.[159] To be "money-mandating," a legal provision must be able to "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[160] For example, the Military Pay Act is money-mandating because it explains the conditions under which

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158. In 1867, the Supreme Court held that "the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner." United States v. Alire, 73 U.S. (6 Wall.) 573, 575 (1867). This is because the term "judgment" meant the claim could be for money only, even though the Court admitted that "the subject-matter over which jurisdiction is conferred . . . would admit of a much more extended cognizance of cases . . . ." *Id.* at 575–76. In 1887, a new act revised the jurisdiction of the Court of Claims and added the concurrent jurisdiction for lower-value claims with district courts. *See* United States v. Jones, 131 U.S. 1, 14 (1889). Although the Act of 1887 provided that non-tort claims that could be brought in a court of law, equity, or admiralty were now within the Court of Claims's jurisdiction, the Supreme Court concluded that the older law had not been repealed and therefore the revision did not permit non-money claims like those available in a court of equity. *Id.* at 17–19. Although this restriction was far from evident from the text of the statute, the money-only restriction on Tucker Act jurisdiction has remained in force to this day. *See, e.g.*, United States v. King, 395 U.S. 1, 2–3, 5 (1969) ("Throughout its entire history up until the time that this case was filed, [the Court of Claims and its successor courts'] jurisdiction has been limited to money claims against the United States Government.") (overturning the Court of Claims's decision that the Declaratory Judgment Act had expanded the court's jurisdiction); Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) ("[A] plaintiff must identify a separate source of substantive law that creates the right to money damages." (citations omitted)); s*ee also Jones*, 131 U.S. at 20 (Miller, J., dissenting) (explaining the purpose of the Tucker Act).

159. For example, the First, Fourth, Sixth, and Eighth Amendments are not money-mandating. *See* Trafny v. United States, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (Eighth Amendment); United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983) (First Amendment); Gable v. United States, 106 Fed. Cl. 294, 298 (2012) (Sixth Amendment); LaChance v. United States, 15 Cl. Ct. 127, 130 (1988) (Fourth Amendment). Nor is the Thirteenth Amendment. *See* Johnson v. United States, 79 Fed. Cl. 769, 774 (2007) (Thirteenth Amendment). By contrast, the Takings Clause of the Fifth Amendment, with its reference to "just compensation," is money-mandating. *See* Jan's Helicopter Serv., Inc. v. FAA, 525 F.3d 1299, 1309 (Fed. Cir. 2008). Statutes providing entitlements, such as those related to military pay and retired pay, are also money-mandating. *See* Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967).

160. United States v. Testan, 424 U.S. 392, 400 (1976) (quoting *Eastport*, 372 F.2d at 1009). The Supreme Court has tempered its original statements regarding the money-mandating requirement somewhat, but the Federal Circuit and Court of Federal Claims have not demonstrably lowered or changed the requirement in response. *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 473 (2003) (stating that when interpreting a statute to determine whether a money-mandating requirement exists, "a fair inference will do").

service members "are entitled to the basic pay" of their assigned paygrade.[161] Therefore, under the Tucker Act's waiver of sovereign immunity, a service member can sue in federal court to obtain the money they are owed under the Military Pay Act if the military does not pay them correctly in the first instance.

Most constitutional and statutory provisions, however, including the Due Process Clause, are not money-mandating.[162] The Due Process Clause is not money-mandating because it lacks "language in the clause itself [that] requires the payment of money damages for its violation."[163] Therefore, the Federal Circuit routinely states that due process claims cannot give rise to Tucker Act jurisdiction, and the Court of Federal Claims may not hear them.[164] But illegal exactions *do* fall within the Court of Federal Claims jurisdiction, which the courts have resolved by creating an impossible paradox in their jurisdiction: sometimes the Due Process Clause is money-mandating, but sometimes it is not.[165]

This is why courts generally insist on a second source of money-mandating law *in addition* to the Due Process Clause for any illegal exaction claim. That is, although courts say that the Due Process Clause provides the basis for an illegal exaction claim, claimants must

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161. *See* 37 U.S.C. § 204(a) (2018).

162. *See* Adair v. United States, 497 F.3d 1244, 1250 (Fed. Cir. 2007) (stating that most statutes are not money-mandating); *see also In re* United States, 463 F.3d 1328, 1335 n.5 (Fed. Cir. 2006) ("[B]ecause the Due Process Clause is not money-mandating, it may not provide the basis for jurisdiction under the Tucker Act.").

163. Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987) (citing Inupiat Cmty. of the Arctic Slope v. United States, 680 F.2d 122, 132 (Ct. Cl. 1982)).

164. *See, e.g.*, *Starr III*, 856 F.3d 953, 978 (Fed. Cir. 2017) (Wallach, J., concurring) ("Although the Takings Clause provides that 'private property [shall not] be taken for public use[] *without just compensation*,' the Due Process Clause does not similarly contemplate money damages." (emphasis added) (citations omitted) (quoting U.S. CONST. amend. V)); Blodgett v. United States, No. 96-5067, 1996 WL 640238, at *1 (Fed. Cir. Oct. 22, 1996) ("Because Blodgett's third count rests on an alleged violation of due process, it cannot encompass a claim for monetary relief and, as such, is not a 'claim' that falls within the jurisdiction of the Court of Federal Claims." (citing United States v. King, 395 U.S. 2–3 (1969); *Murray*, 817 F.2d at 1583)); *Murray*, 817 F.2d at 1583 ("Although the Fifth Amendment's due process clause provides that no person shall be deprived of property without due process of law, no language in the clause itself requires the payment of money damages for its violation." (citations omitted))

165. *See* White v. United States, No. 11-357C, 2012 WL 252008, at *2 n.2 (Fed. Cl. Jan. 9, 2012) ("The Due Process Clause is money-mandating only when the theory of recovery is an illegal exaction." (citations omitted)); McCoy v. United States, No. 05-120L, 05-167L, 2005 WL 6124815, at *3 n.3 (Fed. Cl. June 29, 2005) ("To be precise, the Due Process Clause *is* money-mandating when the theory of recovery is an illegal exaction." (citations omitted)).

provide an additional jurisdictional hook in the form of a money-mandating statutory provision.[166] In practice this means that plaintiffs must argue both a due process violation and a statutory violation by claiming that the statutory provision at issue does not authorize the action taken by the government. As one judge has put it, this turns illegal exactions into "statutory claims in a negative sense"[167]—unlike Tucker Act claims in which a person alleges a statute entitles them to money from the government, an illegal exaction is where a person alleges a statute did not entitle the government to take money from them.

This requirement for a second, statutory money-mandating source of jurisdiction eviscerates illegal exactions as due process claims as a practical matter.[168] Typically, if a statute is money-mandating, then its violation requires money damages as a remedy, without the need to frame the claim as an illegal exaction. But where no statutory language proscribes the government's conduct or implies a monetary damages claim, plaintiffs are left with no effective means or claiming damages against the government. The status quo—that illegal exactions are due process claims but cannot be based solely on due process—defies logic, ignores *Mallow II*, and undermines any advantage there may be in permitting due process-based illegal exactions to proceed under the Tucker Act.

B. A Better Model: Illegal Exactions as Common Law Claims

The dominant framework, then, should be rejected as incompatible with the case law and logic. Rather, courts should return to older illegal exaction discussions to unify illegal exactions under one cohesive theory: illegal exactions are a federal common law claim against any illegal government action directly causing damages not sounding in tort. While relying on discussions in the original tax refund suits, this model would reinforce the availability of the claim beyond a narrow class of financial cases or tax refund suits. Rather, it permits claims for damages based on any type of action, whether done in the name of a statute or otherwise, that the government lacked

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166. *See Starr III*, 856 F.3d at 977–78 (Wallach, J., concurring); Norman v. United States, 429 F.3d 1081, 1095–96 (Fed. Cir. 2005).

167. Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 535 (1999).

168. *See* Sartori v. United States, 58 Fed. Cl. 358, 362 (2003) ("While a claim for improper exaction under the Fifth Amendment may provide the court with jurisdiction, a claim of the due process violation alone is not sufficient to render jurisdiction." (citing Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995))).

specific authority to do. A common law framework has several advantages, both in terms of logical rigor of analyzing the claims and in terms of making illegal exaction claims a more powerful tool for government accountability.

This framework might initially make some commentators and judges uncomfortable. Federal common law is disfavored as a general rule.[169] But federal common law does exist, and in fact is a viable and useful tool, in cases that concern "the rights and obligations of the United States,"[170] as all illegal exaction claims do. It also upends at least fifteen years of circuit court decisions analyzing illegal exactions as "due process plus."[171] But the due-process-plus analysis lacks internal consistency, and courts should not cling to it simply because it has recently become the dominant model.

The common law framework fits the case law. Let us start with the "prototypical" tax refund case: the power that provides the government with the authority both to impose illegal taxes and to prevent protest prior to payment means that such illegal taxes assessments are not truly tortious in nature, as no private actor can make an equivalent illegal demand for money. Thus, the claim does not sound in tort—it lies within the Tucker Act waiver of sovereign immunity, and it does not require a claim against the tax collector in his or her individual capacity. The same analysis would apply to regulatory requirements or required fees, which have no parallel in tort law because no non-government actor can successfully demand illegal payments from another without coercive or contractual suasion. But appropriation of property through trespass, for example, could still sound in tort and not fit within the illegal exaction common law claim.

In addition, as a matter of theoretical cohesiveness, divorcing illegal exaction claims from requiring either a money-mandating statute or constitutional provision would also hew more closely to the natural reading of the Tucker Act waiver of sovereign immunity, which lists three categories of claims that can be brought against the United States, namely claims "[1] founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or [2] upon any express or implied contract with the

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169. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (providing that "[t]here is no federal general common law").

170. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (citing United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943)).

171. *See, e.g.*, *Norman*, 429 F.3d at 1095.

United States, or [3] for liquidated or unliquidated damages in cases not sounding in tort."[172] Although modern courts put illegal exactions under the first category, this lacks intellectual rigor. As *Eastport* explains, the first category relates to the so-called money-mandating requirement, where a claimant is entitled to money based on a straightforward interpretation of a constitutional, statutory, or regulatory provision.[173] To force illegal exactions to that category because they are founded upon a *lack* of legal authority makes little grammatical or other sense. Senior Judge Eric Bruggink has recognized this conceptual tension and acknowledges that the current requirement that illegal exaction claims be "statutory claims in a negative sense" is, at the very least, confusing.[174] Illegal exactions make far more sense in the third category: any claim not founded on constitutional, statutory, or regulatory provisions, not founded on a contract, and not sounding in tort. This category is basically a null set in modern Tucker Act jurisdiction, which violates the statutory interpretation canon that every clause should have meaning.[175]

As a descriptive matter, the common law framework fits the range of permitted illegal exactions better than the current model, or the other potential models described in more detail below. Unlike under a due process theory, describing illegal exactions as a class of common law claim permits confining illegal exactions to their traditional scope without normative or descriptive difficulties. Illegal exactions become simply a restitution remedy available when the government unlawfully requires or demands money or property, regardless of the basis for that illegality. Unlike "illegal takings," a common law theory fits the tax refund cases: all that matters is that the government lacks the authority to demand more money than the tax code permits, and the fact that the property in question is money does not matter.[176] There is no troubling elevation of property rights over other fundamental rights because illegal exactions are simply one distinct type of claim related to property, rather than a category of due process violation that prioritizes property rights over liberty rights. A common law framework would also sidestep the problem created by calling

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172. 28 U.S.C. § 1491(a)(1) (2018) (numbering added).

173. Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1008 (Ct. Cl. 1967).

174. Bruggink, *supra* note 167, at 531, 535 (Senior Judge Bruggink sits on the Court of Federal Claims).

175. *See* United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute . . . .'" (quoting Inhabitants of Montclair Twp. v. Ramsdell, 107 U.S. 147, 152 (1883))).

176. *See supra* Section I.B.

illegal exactions due process claims that must still be "based on" abuses of statutory power in addition to the alleged constitutional violation.

A common law framework would also sidestep the problems of needing to identify a provision of law on which the claim is based, given that the whole point of the claim is that there is no provision of law permitting the governmental action. Where the government has claimed to act in the name of a statute, an *ultra vires* action could be outside the bounds of legal authority either because a statute is violated (as in tax refund cases, when taxes are assessed beyond the statutory authority) because the statute on which the action is based is itself unconstitutional (as in *Mallow II*). Or it could be based on simply exacting property without needing to point to the government's purported statutory basis, just as plaintiffs asserting takings claims often are not required to identify the public purpose of the taking to demand just compensation. Thus, illegal exactions could also exist if no statutory authority is identified when the government makes its action—the government could assert that authority as a defense, but the plaintiff would not be required to identify a source of law, money-mandating or otherwise, to state a claim.

If a common law framework is to be used, the natural next question is: what type of common law claim? On its face, an illegal exaction looks much like unjust enrichment.[177] The federal government, however, is immune from such quasi-contract claims.[178] Illegal exactions, therefore, must fit within its own category of

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177. Unjust enrichment is generally defined by state common law, and the Restatement (Third) of Restitution and Unjust Enrichment resists providing any elements or definition of unjust enrichment. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2011) (providing no definition for "unjust enrichment"). Therefore, there is no one overarching definition, but one common framework defines it as when "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." Univ. of Colo. Found., Inc. v. Am. Cyanamid Co., 196 F.3d 1366, 1371 (Fed. Cir. 1999) (quoting DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115, 119–20 (Colo. 1998)); *see also In re* APA Assessment Fee Litig., 766 F.3d 39, 45–46 (D.C. Cir. 2014) (similar definition). Courts also generally envision unjust enrichment claims as quasi-contract claims, or implied-in-law contracts. *E.g.*, *In re APA Assessment Fee Litig.*, 766 F.3d at 46; Goodbye Vanilla, LLC v. Aimia Proprietary Loyalty U.S. Inc., 304 F. Supp. 3d 815, 826 (D. Minn. 2018).

178. *See* Lumbermens Mut. Cas. Co. v. United States, 654 F.3d 1305, 1316 (Fed. Cir. 2011).

wrongdoing: a uniquely sovereign act that illegally disgorges property for the government's benefit.[179]

It is true that a distinct common law claim not based in another substantive common law claim would provide little direct guidance on the questions of voluntariness, government intent, and damages. Courts, however, could devise their own answers, without necessarily relying on how those questions are answered in takings, due process, or common law unjust enrichment or tort claims.[180]

This framework has other drawbacks, too. Since the earliest days of illegal exactions, courts have been wary of freewheeling damages claims against any improper government action.[181] Segregating illegal exactions from any money-mandating constitutional, statutory, or regulatory provision raises the specter of expanding illegal exactions to cover any complaint of harm against the federal government, which could make courts skittish.

Courts, however, should not be greatly concerned. Illegal exactions are not a new claim, and restrictions on their scope already exist. First, courts generally see illegal exactions as a claim of last resort; they may only be brought if the plaintiff possesses no other administrative or other right to reclaim their property.[182] Limiting

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179. The current Restatement (Third) of Restitution and Unjust Enrichment seems to adopt this concept of an illegal exaction as distinct from all other categories of claims, although, as with other scholarship, it addresses only the concept of illegal taxes. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19 cmt. a (AM. LAW INST. 2011) (stating that "the claim in restitution to recover payments of taxes has usually been treated as sui generis" and omitting an analysis of illegally imposed taxes, as opposed to mistakenly paid taxes, because they raise issues of constitutional law outside the scope of the Restatement).

180. Of course, this is not necessarily a bad thing, as long as it does more than encourage artful pleading to obtain the remedy or forum desired. Distinct violations *should* have remedies tailored to the harm caused. *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262, 280–82 (2000) (arguing that rules determining damages for constitutional violations should vary with the constitutional violation at issue).

181. *See supra* Section I.A.

182. This assumption, though, may be open to change. Although illegal exactions should not be mistaken for illegal takings, the Supreme Court's robust protection of property rights through its takings jurisprudence can serve a useful purpose here. Until recently, most courts had long required inverse condemnation proceedings in court to be a last resort as well. The Supreme Court changed that in *Knick v. Township of Scott*, in which the Court held that claimants need not exhaust other opportunities for compensation before filing a § 1983 claim based on the takings clause. Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019). So, too, here, plaintiffs could argue that they should not have to pursue administrative remedies to vindicate their property rights prior to filing an illegal exaction claim.

illegal exactions to claims where no other remedy also comports with general understanding that federal common law claims, as this would be, are both "unusual" and easily displaced whenever a statutory provision "'speaks directly to the question' at issue."[183] In addition, though, courts may be wary of adopting a full range of compensatory damages in illegal exaction claims. The claim already functions as one for restitution, and defining the claim that way would remain well within the historical scope of illegal exactions, from tax refunds to modern cases concerned about whether the damages alleged are truly *due to* the illegal act.[184] This means that illegal exactions would still be tied to claims for deprivation of money or property, but would permit indirect exactions such as in *Aerolineas*.[185]

Perhaps the most important argument for this framework, however, does not rely simply on how it resolves conflicts and paradoxes that exist in the current due process and illegal takings analyses. Rather, a common law framework is appealing because helps fulfill the principle that "where there is a right, there is a remedy." That is, this framework does real work to close the disturbing and ever-widening gap created by expanding immunity for individual actors without narrowing sovereign immunity.[186] In the earliest illegal exaction cases, many claims were rejected as torts for which a plaintiff could seek a remedy from the government official personally.[187] But it meant that if a government agent acted even with a well-intended but erroneous understanding of the law, they could be held liable. The expansive scope of modern qualified immunity doctrine has chipped away at the ability of this remedy. Illegal exactions should be a way to help close that gap, not by making the individual actor personally liable but by holding the United States as a whole, as a defendant, responsible. As a particular advantage, the limited deference courts seem to pay to government explanations of its actions during litigation in illegal exaction cases means that, where the government has not provided an explanation of its decision

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183. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423–24 (2011) (alterations removed) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

184. *See, e.g.*, Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005); Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 145 (2000).

185. Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573–74 (Fed. Cir. 1996).

186. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1487 (1987) ("[C]ourts since the mid-nineteenth century have opened up a wide remedial gap by creating expansive official immunities without correspondingly relaxing government immunity." (citations omitted)).

187. *See supra* Section I.A.

through rulemaking or other similar procedures, courts can evaluate allegations of erroneous interpretations of law *de novo*.

Common law illegal exaction claims would fill a useful gap-filling role, therefore, by providing damages where no tort remedy is available under the Federal Torts Claim Act (FTCA) or under a constitutional tort theory. If a state-law tort describes the action complained of, then it would be subject to the FTCA.[188] However, not every violation of a statute resulting in damages is a tort because some governmental actions are so exclusively a sovereign action that no tort remedy can exist.[189] For a narrow range of sovereign actions sounding in tort based on constitutional violations, a remedy against the individual officer would be available under *Bivens*.[190] But many sovereign acts resulting in damages do not fall within the *Bivens* doctrine, or a remedy against an individual officer is insufficient.[191] Once again, the paradigmatic tax refund illegal exaction case proves instructive. Imposing a tax is an exclusively governmental action—no individual can levy taxes against another—and improperly taxing has no private-actor equivalent in tort law or otherwise. Therefore, describing illegal exactions as a specifically governmental wrong under common law invigorates illegal exaction claims in new areas of law where the government acts in its sovereign role but still circumscribes a workable boundary for illegal exaction claims.

Recognizing illegal exactions as a common law wrong may be used to fill gaps created by court decisions in other areas of law as well. For example, in *Feres*, the Supreme Court created a large carveout of the FTCA for service members injured in the course of their military

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188. 28 U.S.C. § 2674 (2018).

189. *Id.* (limiting FTCA liability to "the same manner and to the same extent as a private individual under like circumstances"); *see also, e.g.*, Feres v. United States, 340 U.S. 135, 146 (1950) (holding that injuries to service members arising from or incident to their military service had no parallel to state tort law because of the unique nature of the "relationship of military personnel to the Government," and thus claims based on such injuries lay outside the FTCA); Nat'l Mfg. Co. v. United States, 210 F.2d 263, 277 (8th Cir. 1954) ("If the activity is purely governmental there can be no liability under the Act which by its terms is conditioned on the liability of a private individual in like circumstances.").

190. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action for Fourth Amendment violations. The *Bivens* doctrine thus permits damages claims for constitutional torts, but only against individual federal officers. *See generally* STUART M. SPEISER ET AL., 5 AMERICAN LAW OF TORTS § 17:18 (2020).

191. For example, *Bivens* actions cannot include suit against officials under a *respondeat superior* theory, thus only allowing suits against the most direct actors causing direct damages. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (government officials cannot be liable for unconstitutional conduct of their subordinates).

service, saying that there is no private actor who could commit a parallel tortious act because the relationship between the military and its employees is so unique.[192] Scholars and advocates have argued against this interpretation, but the *Feres* doctrine remains in full force.[193] Illegal exactions could fill the gap created by *Feres* because the Supreme Court based its decision on the theory that the injury does not sound in tort.[194] Therefore, then, an improper exaction or taking of a service member's property or property rights that are incident to their service may fall within a valid illegal exaction claim. When the government action is so governmental in nature that it lacks a corollary in tort law—such as exactions based on the government's assertion of taxation authority, or requiring action based on regulatory power in *Aerolineas Argentinas*[195]—the courts should recognize an illegal exaction claim.

C. Other Models Are Not as Effective or Comprehensive as a Common Law Framework

The common law framework, of course, is not the only possible theoretical alternative to the current unwieldy "due process plus" model. Two other obvious possibilities that have some grounding in the case law are pure due process and "illegal takings" models. It is worth describing the theory behind these frameworks and explaining why they ultimately do not work as well as the common law approach.

1. Illegal Exactions as Pure Due Process Violations

One might argue that illegal exactions should be described as purely constitutional due process claims, for which no statutory money-mandating hook should be required. Unlawfully taking property without providing an administrative or other way to recover

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192. *Feres*, 340 U.S. at 146.

193. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713 (2019) (denying petition for writ for certiorari to reconsider *Feres*); United States v. Johnson, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." (citation omitted)); Jonathan Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 71–72 (2003) ("It is safe to say that no doctrine has generated more open contempt or confusion among courts and commentators as the *Feres* doctrine.").

194. *See Feres*, 340 U.S. at 144–46.

195. Aerolineas Argentinas v. United States, 77 F.3d 1564, 1579 (Fed. Cir. 1996) (Nies, J., concurring) ("Certainly this case is not a tort case.").

it does indeed sound like a violation of due process.[196] Due process is, therefore, an attractive theoretical basis for illegal exactions: no other single constitutional, statutory, or regulatory provision provides an umbrella for the full variety of alleged government impropriety that may give rise to an illegal exaction claim. The only overlap is that the government injured the plaintiff by acting without due authorization of law and without the process required of a duly enacted law or a rational and non-arbitrary agency procedure before encroaching on an individual's property interests.

As a matter of first principles, depriving someone of their property without any legal authority violates due process of law for the simple reason that the law does not permit it. By simply stating that illegal exactions describe the subset of all due process claims that are claims for money damages would seemingly fit the text of the Tucker Act waiver of sovereign immunity and the meaning of due process, and unifies the disparate violated statutes in illegal exaction case law under a cleaner (if not necessarily simpler) rubric of a single constitutional violation.

Describing illegal exactions as truly due process claims would also provide some clarity to answer the three unanswered questions described above.[197] First, as to voluntariness, although one can waive due process rights, the waiver must be explicit.[198] Acquiescence or apparent agreement to submit to an illegal exaction would not constitute a waiver, and the government could not rely on it as a defense. Second, the government's intent would be of limited relevance: the government actor would have to intend the exaction, but it would not matter if the government believed the action to be legal or intended to deprive the claimant of due process.[199] Last, a due

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196. And, by contrast, if there is an administrative procedure, there is no due process violation, and no illegal exaction claim. *See* Litzenberger v. United States, 89 F.3d 818, 819–20 (Fed. Cir. 1996).

197. *See* supra Part II (detailing the following questions: (1) voluntariness: whether the property owner must refuse to voluntarily pay or provide the demanded property; (2) government intent: whether the government actor must believe they are acting within the scope of their authority; and (3) damages: how damages should be calculated for non-money exactions).

198. *See* Walls v. Cent. Contra Costa Transit Auth., 653 F.3d 963, 969 (9th Cir. 2011) ("[F]ederal courts 'indulge every reasonable presumption against waiver of fundamental constitutional rights' and 'do not presume acquiescence in the loss of fundamental rights.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

199. *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472–73 (2015) (providing that in the context of constitutional violations under 42 U.S.C. § 1983 alleging violation of the Fourteenth Amendment's Due Process Clause, "the defendant must possess a

process framework would suggest a tort-like compensatory damages-only model, attempting to make the plaintiff whole but not necessary disgorging any public benefit or benefit to the government. The predominant source of damages awards for pure due process violations come from Fourteenth Amendment due process cases brought under § 1983, which provides tort-like liability.[200] On the other hand, some may argue that § 1983 jurisprudence provides a poor source of principled thoughts on what damages should be available for different types of constitutionally-based claims.[201] Because torts claims are excluded from Tucker Act jurisdiction, it may be that illegal exaction claims should not borrow from tort to determine damages.

A pure due process framework would likely also expand illegal exactions to new areas of law. Combining the holding of *Aerolineas Argentinas* permitting recovery of payments "in effect" with the theory that no separate money-mandating source of law is required would permit claimants to expand their damages to some kinds of indirect costs of violations of due process.[202] Although it would likely be impossible to recover generic downstream costs,[203] claimants could recover damages whenever agencies violate procedures and assess improper fees or fines. It would permit people to go straight to court to recover damages rather than get lost in months or years of labyrinthine administrative requests, requests that must go to the agency that violated its procedures or substantive law in the first place. A pure due process claim might also permit damages claims in cases of undue delay in administrative processes related to a plaintiff's property interests, particularly in cases of recoupment or when the agency has already adjudicated that a person is owed money but fails to provide it in a timely manner.

All of these advantages to a due process framework are tempting. It already maps onto current court statements that illegal exactions

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purposeful, a knowing, or possibly a reckless state of mind" to commit the act, but proper interpretation of the action is objective).

200. *See* Susanah M. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 1–2 (1986) (citing Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

201. Jeffries, Jr., *supra* note 180, at 262, 276–77 (2000) (arguing that constitutional tort law improperly fails to "differentiate among constitutional violations or to calibrate specific remedies" and arguing that a failure to limit damages remedies in constitutional claims was a precipitating factor in the expansion of qualified immunity and other doctrines limiting constitutional tort claims).

202. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996).

203. *See* Norman v. United States, 429 F.3d 1081, 1095–96 (Fed. Cir. 2005).

are a type of due process claim (though it pushes the courts to sweep away the underbrush of the requirement of a money-mandating statutory violation). It would provide clarity in several areas of illegal exaction law. It would provide more and better relief to claimants whose rights have been violated.

Yet a due process framework comes with drawbacks, including an expansive view of a pure constitutional claim that has little support in the case law and requires fighting against the long-standing law that a due process violation cannot give rise to a non-tort remedy or a claim for damages. Moreover, there would be little way to distinguish an illegal exaction claim for damages from any other claim for money damages from the United States for constitutional violations, returning the courts to the dilemma the nineteenth century Supreme Court faced when determining the scope of the Court of Claims's jurisdiction: it was not the intent of the Tucker Act to create a cause of action for damages for every wrong.[204] Although the due process framework may be appealing from a civil rights perspective—Why *not* open the doors for damages claims for all sorts of unconstitutional violations, particularly given the hard road for claims under constitutional tort and qualified immunity doctrines?—the courts would certainly be wary of anything that looks like an attempt to circumvent 150 years of judicial interpretation of the narrow scope of the Tucker Act's waiver of sovereign immunity.

In addition, treating illegal exactions as pure due process claims would likely retain the puzzling problem that the same due process clause would compel money damages for exacted property but not for violations to life and liberty interests.[205] Or, if *any* due process violation would not constitute an illegal exaction claim for damages under the Tucker Act, what would make some constitutional violations subject to damages claims but not other constitutional violations? That is, if all constitutional and statutory provisions could be subject to money damages claims, how could a claim for damages for a violation of the First Amendment, or the Eighth Amendment, be any less a "claim for money" under the Tucker Act than a violation of the Fifth Amendment? If the courts refuse to extend money damages

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204. *See supra* Section I.A.

205. *See* White v. United States, No. 11-357C, 2012 WL 252008, at *2 n.2 (Fed. Cl. Jan. 9, 2012) ("The Due Process Clause is money-mandating only when the theory of recovery is an illegal exaction." (citations omitted)); McCoy v. United States, No. 05-120L, 05-167L, 2005 WL 6124815, at *3 n.3 (Fed. Cl. June 29, 2005) ("To be precise, the Due Process Clause *is* money-mandating when the theory of recovery is an illegal exaction." (citations omitted)).

claims to those types of violations, how might they justify providing primacy to property rights over other fundamental rights?

This concern is not simply the vestige of the nineteenth century Supreme Court. The Court to this day has made very clear "that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards,"[206] and the Tucker Act has never provided a blanket waiver of sovereign immunity for all claims. Thus, the federal courts, and the Federal Circuit in particular, continue to maintain that damages claims under an illegal exaction theory should not become a way to circumvent sovereign immunity for "any Government violation of a constitutional provision, statute, or regulation."[207] Courts view illegal exactions as an exception to the normal rule that the government is immune from compensatory damages claims unless Congress or the Constitution has specifically permitted otherwise, such as through the FTCA or through providing for "just compensation" in the takings clause. Viewing illegal exactions as first and foremost a type of due process claim would create an exception that swallows that rule. The due process framework cannot provide a principled distinction between types of constitutional claims, and thus both likely would, and should, fail.

2. Illegal Exactions as Illegal Takings

Many modern cases evaluate illegal exactions as basically the mirror of Fifth Amendment takings, turning illegal exactions into "illegal takings." What little modern scholarship touches on illegal exactions tends to do the same.[208] This symmetry has some logic: a takings claim cannot be founded upon an illegal government action, which leaves an uncomfortable gap in takings jurisprudence that an "illegal exactions as illegal takings" framework would neatly fill.

Fifth Amendment takings cases require that the property owner acknowledge that the government action was authorized.[209]

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206. Lane v. Pena, 518 U.S. 187, 196 (1996).

207. *Starr III*, 856 F.3d 953, 978 (Fed. Cir. 2017) (Wallach, J., concurring).

208. *See, e.g.,* Berger, *supra* note 9, at 507 (describing tax refund illegal exaction cases as "roughly analogous to takings cases"); Fallon & Meltzer, *supra* note 9, at 1826 (discussing remedies for illegal exactions from state taxes and asking "why does the Constitution mandate a damages remedy against the government for unlawful exactions of taxes (and for takings) but not for other constitutional violations?" (internal citation omitted)).

209. *See* Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000) (citing Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995) ("a taking claim must be

Therefore, if the government takes a person's property in an unauthorized, illegal act, that cannot form the basis of a takings claim. Because of this gap in takings law, if a person believes that the government's action was illegal, but the illegality is not clearly established, they may decide to allege both an illegal exaction and, in the alternative if the government did not act illegally, a Fifth Amendment taking.

This approach, both in pleadings-in-the-alternative and in the courts' analysis of illegal exactions as illegal takings, has become the dominant discourse about illegal exactions over the last two to three decades. In the 1990s, the Court of Federal Claims and Federal Circuit began evaluating illegal exaction claims under a rubric parallel to takings claims, starting mostly in the forfeiture cases.[210] By 2000 and continuing to the present, plaintiffs challenging government action have learned to allege both takings and illegal exactions in the alternative.[211] At the same time, both the Court of Federal Claims and Federal Circuit started to borrow from the more established law of takings to answer new questions of law related to illegal exactions. For example, the courts have imported from takings law the requirement that, when property is actually acquired or taken by a third party rather than the government itself, the government's involvement must be "direct and substantial" to impute the third party's actions to the government.[212]

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premised upon a government action that is either expressly or impliedly authorized by a valid enactment of Congress"); Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

210. *See* Bernaugh v. United States, 38 Fed. Cl. 538, 540 (1997); Bowman v. United States, 35 Fed. Cl. 397, 398, 400 (1996) (*pro se* civil forfeiture case); *see also* Noel v. United States, 16 Cl. Ct. 166, 167 (1989) (forfeiture case alleging both an illegal exaction and takings claim, in which plaintiff was represented by counsel). The court appears to have largely provided this framework for plaintiffs, relying on a 1986 case in which the court determined that the owner of a fishing vessel could not claim either a taking or an illegal exaction based on an allegation that the government illegally destroyed its ship after finding marijuana on it but without instituting a forfeiture proceeding. *See* Montego Bay Imports, Ltd. v. United States, 10 Cl. Ct. 806, 809–10 (1986); *see also Bernaugh*, 38 Fed. Cl. at 542.

211. *See Starr III*, 856 F.3d at 960, 963, 972 (plaintiff was one of the largest shareholders of American International Group); Piszel v. United States, 121 Fed. Cl. 793, 796–99 (2015) (plaintiff was former CFO of Freddie Mac); Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29, 37–42 (2000) (electric utility case), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001); Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 139–40 (2000) (plaintiff was an international currency exchange company).

212. *See, e.g.*, *Casa de Cambio*, 48 Fed. Cl. at 141.

Understanding illegal exactions as illegal takings does have some practical and theoretical appeal. For one thing, it fills in an otherwise perverse gap in takings jurisprudence: that a proper government action may require compensation, but an improper government taking is effectively non-justiciable.[213] In addition, making the elements of both types of claims parallel prevents plaintiffs from reframing takings claims as illegal exactions, or vice versa, simply because one claim is more favorable to the facts of the case.[214] Illegal exactions as illegal takings is also a tempting framework to adopt because takings law has long-established an extensive case law on how to determine the proper amount of compensation for property other than easy-to-calculate overpayments or illegal fees. Although the standards are somewhat difficult to apply, at least there *are* standards for determining just compensation under the Takings Clause, and these tests could help resolve that open question for illegal exactions. The illegal takings framework would also help resolve two of the other three open questions outlined above:[215] voluntariness is a defense to takings except in the context of unconstitutional conditions on land-use exactions; and the government's intent does not matter as long as the interaction is governmental rather than commercial or without a public purpose.

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213. A plaintiff might be able to claim a tort under the Federal Torts Claim Act for certain illegal takings-type claims, such as governmental destruction of property. But many illegal exaction claims are for actions so uniquely governmental in nature—such as a regulatory permitting scheme that demands payment rather than physically appropriating or destroying property—that no applicable tort for private citizens may exist, effectively barring the availability of the FTCA. *See* 28 U.S.C. § 2674 (2018); Feres v. United States, 340 U.S. 135, 146 (1950) (holding that injuries to service members arising from or incident to their military service had no parallel to state tort law because of the unique nature of their relationship to the government, and thus claims based on such injuries lay outside the FTCA); Wood v. United States, 961 F.2d 195, 198–99 (Fed. Cir. 1992) (violation of federal laws gives rise to a tort claim only if state law provides basis for liability).

214. The *Casa de Cambio* court explicitly relied on this rationale when it decided to look to takings law for how to evaluate third party actions in illegal exactions, stating:

> Were this court to hold that a similar requirement did not apply in the context of an illegal exaction, plaintiffs, in the future, would simply recast their takings claims in illegal exaction terms and thereby avoid the jurisdictional hurdles imposed by the established case law. This court refuses the opportunity to create such a serious incongruity between takings and illegal exaction jurisprudence.

48 Fed. Cl. at 146.

215. *See supra* note 197.

Unfortunately, however, an illegal taking framework does not fit the majority of existing illegal exaction cases. Several types of takings claims, such as regulatory takings that affect the value of property where no appropriation has occurred, have no parallel in illegal exactions. Similarly, takings law would not permit several categories of illegal exactions that historically have existed. For example, regulatory takings law allows significant interference with property, particularly in highly regulated fields, and can require people and organizations to pay to participate in those fields. Takings law also requires courts to look at the entire transaction between property owner and government to determine whether a taking has occurred. Except for unconstitutional conditions placed on land-use permits, if the property owner has agreed to compensation or is better off overall after a regulatory taking, no additional compensation is due. Illegal exaction cases, however, do not unwind whole transactions or government courses of conduct as a rule, and instead only evaluate the allegedly illegal action.[216] In *Suwannee*, for example, it did not matter that the ship owners were better off for paying an illegal fee to obtain the permit.[217] Rather, all that mattered was that the law did not allow charging that fee.[218] An illegal takings framework would not produce the same result, and thus does not fit the existing case law.

The illegal takings framework also does not incorporate circumstances in which a statutory or regulatory regime illegally imposes costs on a plaintiff by requiring payment to an unrelated third party. When the courts have tried to view illegal exactions as a corollary to takings law, it has required that payments through or to non-governmental parties meet the "direct and substantial" test for third parties in takings cases, but that test attempts to define when the government acts *through* the third party, as an agent of the government.[219] Although the Court of Federal Claims and Federal Circuit have adopted the direct-and-substantial test for certain illegal exaction claims, the test cannot be reconciled with cases like *Aerolineas Argentinas*.[220] There, the third parties who received the airlines' money were simply market actors providing a good or service,

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216. *See* Suwannee S.S. v. United States, 279 F.2d 874, 877 (Ct. Cl. 1960); *see also supra* Section I.B.

217. *See Suwannee*, 279 F.2d at 877.

218. *See id.*

219. Casa de Cambio Comdiv S.A. de C.V. v. United States, 291 F.3d 1356, 1361 (Fed. Cir. 2002).

220. *See, e.g.*, *id.*; Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573–76 (Fed. Cir. 1996).

namely lodging, food, and private security.[221] The government required the plaintiffs to buy those services as a general matter, but the service providers were not third-party agents of the government's illegal taking, and the direct-and-substantial test would not have permitted a finding of an illegal exaction.[222] Although *Casa de Cambio* imposed the direct-and-substantial takings test, the better test is simply that the payment to a third party must be the "direct result" of the government's application of a statute or regulation.[223] This, however, is not the same as the third party acting essentially as a government agent, as required in takings. The one should not be confused for the other.

In addition, most illegal exaction cases are about the government requiring money to be paid, which takings law has traditionally eschewed as fundamentally outside the bounds of the Takings Clause's protection.[224] In the case of illegal taxes or fees, there simply is no parallel tax-as-takings claim to compare or contrast. Therefore, a whole category of illegal exaction claim—one of the most fundamental and "prototypical"—cannot be described by the illegal takings rubric.

Finally, understanding illegal exactions as simply illegal takings fails to satisfy normative expectations. Describing illegal exactions as a right specially designed to prevent any gap in takings law would prioritize property rights over other types of rights, guaranteeing a remedy for government encroachment on property while other rights do not enjoy such robust protections. The Constitution should not afford more protection for violations of property than violations in liberty, life, and other personal rights afforded by the Constitution.[225] Ultimately, then, even though the "illegal takings" theory provides a robust area of law to borrow and seems convenient and workable for

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221. *Aerolineas Argentinas*, 77 F.3d at 1569–70.

222. *Id.* at 1569–72.

223. *See* Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 141 (2000).

224. *See* Meriden Tr. & Safe Deposit Co. v. FDIC, 62 F.3d 449, 455, 455 n.2 (2d Cir. 1995) (finding per se takings analysis inapplicable to statutory scheme resulting in monetary loss); Commercial Builders v. Sacramento, 941 F.2d 872, 876 (9th Cir. 1991) (financial exaction does not constitute a taking); Atlas Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property." (citing United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989))); Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29, 41 (2000) (concluding that "a government-imposed payment of money cannot result in a compensable taking" and collecting cases).

225. *See* Fallon & Meltzer, *supra* note 9, at 1827.

courts to apply, it proves unsatisfactory both theoretically and normatively.

IV. THE FUTURE OF ILLEGAL EXACTIONS

As described above, in recent years, most illegal exaction claims are asserted by large corporate actors subject to complex regulatory schemes.[226] But they can also be a tool for public interest lawyers seeking to make their clients whole retrospectively from illegal actions by the government. APA claims only provide injunctive relief, and other damages claims under the FTCA or *Bivens* actions do not apply in situations where illegal exactions could apply. Moreover, because illegal exaction litigation is such a narrow and unexamined area of the law, courts appear susceptible to evolving the nature of the claim based on clusters of cases alleging similar types of claims and similar bases for relief. A concerted effort to raise claims for individuals may inspire courts to enable an even broader array of government accountability.

When an agency regulates beyond its authority to require individuals to pay money to be part of a system, individuals should reach for an illegal exaction claim as a way to challenge that regulation not simply for prospective relief as under the APA, but to receive compensation to make them whole. As illegal exactions become more prevalent as a tool for large institutional actors arguing against regulation, I hope that illegal exactions also become more useful to remedy injury to less powerful claimants. Illegal exactions should be a remedy not just for when large financial companies believe they have been over-regulated, but when individuals are forced to pay fines or fees to access participation in government programs, or when individuals, particularly poor people and people of color, bear the brunt of the costs of government policies that the government, not individuals, should pay.

Below I set forth three examples of substantive areas in which more illegal exaction litigation can advance public interest advocacy goals. First, some illegal exaction claims already fit easily under the existing case law, but nevertheless plaintiffs rarely bring those claims. Second, some potential claims suffer from the lack of clarity surrounding the theoretical framework of illegal exactions. Developing a cohesive and coherent common law framework for illegal exaction claims will help make the claim more useful to people who have been subject to illegal government activity where no money-

226. *See supra* Section I.D.

mandating statute forms the basis of the claim. Last, some potential claims may be difficult to establish even under a common law framework, but are worth developing.

A. Poverty Law and Government Entitlements

Given how few advocates may have even heard of illegal exactions, there are many currently viable illegal exaction claims never asserted. Simply put, the government makes mistakes. Illegal exaction claims can force agencies to correct errors in their administration of benefits and other payments. For example, the Defense Finance and Accounting Service (DFAS) pays salaries to military members and retirement and pensions, and disabled retirement pay former service members.[227] In fiscal year 2018, DFAS reported $289 million in improper overpayments due to data entry and processing errors.[228] The Social Security Administration reported $184 million in overpayments for the same period cause by similar administrative errors in administrating Supplemental Security Income for aged, blind, or disabled adults and children with limited resources.[229] USDA reported $1.527 billion in processing error overpayments of the Supplemental Nutrition Assistance Program.[230] The agencies did not report improper *under*payments for the year, but they, of course, must happen and presumably occur at similar rates of overpayments. Data processing errors occur in both directions, resulting in both under- and over-payments.[231] Sometimes improper underpayments may even

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227. *About DFAS*, DEF. FIN. & ACCT. SERV., https://www.dfas.mil/pressroom/aboutdfas.html (last visited May 20, 2020).

228. PAYMENT ACCURACY, GOAL: GETTING PAYMENTS RIGHT 1 (2019), https://paymentaccuracy.gov/wp-content/uploads/2019/07/Military-Pay-Getting-Payments-Right-Scorecard-FY-2019-Q2.pdf.

229. PAYMENT ACCURACY, GOAL: GETTING PAYMENTS RIGHT 1 (2019), https://paymentaccuracy.gov/wp-content/uploads/2019/07/Supplemental-Security-Income-Getting-Payments-Right-Scorecard-FY-2019-Q2.pdf (SSA Supplemental Security Income). The total amount of overpayments, including those for other, more substantive reasons, was around $4 billion.

230. PAYMENT ACCURACY, GOAL: GETTING PAYMENTS RIGHT 1 (2019), https://paymentaccuracy.gov/wp-content/uploads/2019/07/Supplemental-Nutrition-Assistance-Program-Getting-Payments-Right-Scorecard-FY-2019-Q2.pdf (USDA Supplemental Nutrition Assistance Program).

231. Indeed, the previously cited Payment Accuracy reports agree. For example, the summary of USDA SNAP improper payments explains that an improper payment from administrative errors "occurs when a participating household is certified for too much or *too few* benefits." *See id.* (emphasis added).

occur when an agency attempts to correct an overpayment, by recouping the same overpayment multiple times.[232]

Improper recoupments and withholdings of already-earned entitlements and pay are classic illegal exactions.[233] When the government does not dispute someone's entitlement to a payment or participation in a government program but improperly keeps or recoups some of the payment due, that error fits squarely within illegal exaction law all the way back to *Swift*.[234] Although federal litigation to recover that illegal exacted money may be burdensome, particularly for indigent plaintiffs who are most in need of the payment, it may sometimes be better than the alternative of attempting to convince the agency that it erred and should correct the error quickly. If the agency fails to correct its error after being notified, federal litigation is a useful tool to prompt the agency to finally make the correction rather than defend itself in court.

B. Excessive Fees and Fines: Illegally High Fees, Civil and Criminal Forfeitures, and Post-Conviction Fees

A second area of illegal exaction claims that advocates can develop is in the area of excessive fees and fines. For this class of claims, using the common law framework for illegal exaction claims would help clarify which claims are valid, and which still lie outside the Tucker Act's jurisdictional waiver of sovereign immunity. This is because the common law framework would clarify that a money-mandating provision is not required to assert a claim, and revive *Mallow II*'s promise that basis of an illegal exaction claim can rely on due process claims alone, or any other legal provision that establishes illegality, regardless of whether that provision is money-mandating.

Unlike tax overpayments or benefit underpayments that constitute the classic illegal exaction cases in which the parties generally agree about the law but not whether a particular plaintiff deserves money, this class of claims requires demonstrating that the government's interpretation of its authority is unlawful. For example, public interest advocates and media organizations recently filed suit in federal court claiming that the government charges too much for

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232. Summaries of requests for consultation from veterans' advocates regarding incorrect DFAS recoupments are on file with author.

233. Disputes about whether and to what extent someone is owed money through an entitlement program would not be an illegal exaction because *eligibility* for benefits is generally not considered a property right yet.

234. *See supra* Section I.A.

fees to access court documents through PACER, the electronic filing system used by almost all federal courts.[235] Plaintiffs in that case argue that the law permits charging people enough to cover the costs of administering the electronic access system, but that the current government's $0.10 per page fee is excessive and therefore unlawful.[236] The plaintiffs successfully moved for summary judgment on the basis that the fees are excessive, but the case is currently on appeal to the Federal Circuit,[237] and one of the issues is whether plaintiffs were required to identify a statute that provides a damages remedy for PACER users.[238] Establishing that illegal exaction claims are a class of common law claims would provide a clear answer to this question: no money-mandating provision is required.

Establishing when a fee is excessive can also look to the Constitution's Excessive Fines Clause of the Eighth Amendment, without reference to a statute being violated. Post-conviction fees and fines, in which the state or federal government requires people to pay fines as a condition of release or to pay for certain costs of their parole or supervised release, require people released from prison to pay amounts that exacerbate poverty of the formerly incarcerated and their dependents, undermine reentry, and further destabilize communities with high incidence rates of incarceration.[239] Civil and criminal forfeiture statutes, in which the government can, as an exercise of its police power, seize property prior to any conviction, are extremely unpopular,[240] and there is considerable advocacy seeking to

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235. Nat'l Veterans Legal Servs. Program v. United States, 235 F. Supp. 3d 32, 35 (D.D.C. 2017).

236. *Id.* at 35–36.

237. Fed. Cir. Nos. 2019-1081 & 2019-1083. The case was argued February 3, 2020; no opinion has issued as of the date of this writing. Nat'l Veterans Legal Servs. Program v. United States, Fed. Cir. Nos. 2019-1081 & 2019-1083, ECF No. 87 (Dec. 17, 2019). The Federal Circuit is hearing the case because it has exclusive jurisdiction over all cases involving the Tucker Act.

238. *See* Reply Brief for the Cross-Appellees at 7–12, Nat'l Veterans Legal Servs. Program v. United States, Fed. Cir. Nos. 2019-1081 & 2019-1083, ECF No. 65 (Sept. 4, 2019); Corrected Response & Reply Brief of Plaintiffs-Appellants at 21–26, Nat'l Veterans Legal Servs. Program v. United States, Nos. 19-1081(L) & 19-1083 (July 22, 2019).

239. *See generally* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR, at xix (2016) (analyzing the disproportionate impact monetary sanctions by the court system has on the poor).

240. *See, e.g.*, CATO INST./YOUGOV, CATO INSTITUTE POLICING IN AMERICA SURVEY 7 (2016), https://www.cato.org/sites/cato.org/files/survey-reports/topline/policing-in-america-survey-toplines_0.pdf (question 64, with 84% of respondents opposed to pre-conviction forfeitures).

overturn forfeiture statutes. Both are ripe targets for illegal exaction cases based on allegations that the government violated the Excessive Fines clause.

In both forfeitures and post-conviction fees, statutes permit the government to take property of those accused or convicted of crimes.[241] As established in *Mallow II*, just because the government imposes a fine pursuant to a statute cannot be the end of the inquiry.[242] If the statute itself is unconstitutional, for any reason, the government should be required to disgorge the unconstitutional fine, even if the unconstitutionality is established after the fine was imposed.

Post-conviction fees take several forms in both federal and state systems. For example, people may be required to pay private companies for their electronic monitoring, which can impose post-release fees far beyond what the defendant can pay.[243] This practice is particularly pervasive in state systems, but the federal system also can require defendants on probation or supervised release to pay for the costs of the program of their release. The payment of these program fees are separate from any fines, special assessments or restitution related to the crime committed that are specifically authorized by law,[244] and the probation and supervised release statutes do not specifically discuss fees, instead just authorizing "such other conditions that the court may impose."[245] Requiring defendants pay some or all of their release program costs, though, is common and expected by the court system.[246]

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241. *See Civil Asset Forfeiture*, CATO INST., https://www.cato.org/policing-in-america/chapter-4/civil-asset-forfeiture (last visited May 20, 2020); *see infra* notes 243–44.

242. *Mallow II*, 161 Ct. Cl. 446, 454 (1963).

243. *See, e.g.*, Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt.

244. *E.g.*, 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3013–14 (special assessments), 3663, 3663A, 3664 (2018) (restitution).

245. 18 U.S.C. § 3563(b)(22) (2018) (probation); *see also* 18 U.S.C. § 3583(d) (2018) (supervised release permitting courts to impose "any condition set forth as a discretionary condition of probation in section 3563(b)" so long as it remains consistent with other sentencing provisions).

246. *See e.g.*, *Chapter 3: Location Monitoring (Probation and Supervised Release Conditions)*, U.S. CTS., https://www.uscourts.gov/services-forms/location-monitoring-probation-supervised-release-conditions (providing as sample language "[[You must pay the costs of the program.] [You must pay [$___ per ___ (e.g., week, month)] or [___ % of the costs of the program.]]") (last visited May 20, 2020).

Using an illegal exaction theory, criminal defendants could argue that that these practices force them to pay money that is the responsibility of the government to pay, just as the plaintiffs in *Aerolineas* should not have had to pay for the detention of asylum seekers.[247] Relatedly, one could also argue that imposing these fees as a precondition of release has the same effect of imprisoning defendants for an inability to pay other statutory fines, a practice long established as unconstitutional. Under a *Mallow II* theory of seeking restitution for fines that another case has already established as unconstitutional,[248] a criminal defendant could argue that the government alone can be required to pay these costs.[249]

As for forfeitures, the illegal exaction claims in the 1990s were unsuccessful, of course.[250] In the almost thirty years since the Supreme Court established that the Excessive Fines Clause applied to *in rem* civil forfeitures,[251] forfeitures have rarely been invalidated. But there is reason to return to these claims wrath renewed hope of their success. The Supreme Court recently unanimously held that the excessive fees clause applies to the states.[252] If state court litigation proves successful, federal illegal exaction claims may become viable, too, by relying on invalidations in other fora as persuasive authority.

C. Climate Change

Last, creative public interest advocates may be able to advance illegal exaction theories in many other areas of law. For example, both globally and in the United States, it is the poor who will, and already

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247. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1578 (Fed. Cir. 1996).

248. *See generally Mallow II*, 161 Ct. Cl. 446 (1963).

249. It may be that rich defendants, not poor ones, would initially take advantage of this argument, after being allowed highly specialized probation conditions on the expectation that they would pay for the individualized program—basically getting the special house arrest with private security or similar conditions, and then trying to get the government to pay for it after the fact and after the probation has ended. If successful, poverty and social justice advocates might initially see this as frustrating. However, the government may change its polices going forward if the government must pay for release programs. Thus, it could induce the government to impose more fair and equal conditions for all, rather than creating a de factor two-tiered system, in which the rich can avoid the most unpleasant conditions of confinement.

250. *See supra* Section I.C.

251. *See* Austin v. United States, 509 U.S. 602, 604 (1993).

252. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

do, bear the brunt of climate change impacts.[253] Illegal exactions may help compensate the losses the poor and others have suffered or will suffer, and compensate state and local governments for having to step in to protect public health and welfare where the federal government has preempted other regulation but failed to actually regulate. This may also potentially help instigate policy changes going forward.[254]

Seeking damages through illegal exactions is primarily retrospective by compensating for already realized losses. Perhaps because most climate change advocacy is attempting to stave off the worst future effects, advocates have not commonly sought damages through litigation. Recently, though, a spate of environmental organizations, states, and local governments have filed lawsuits against fossil fuel companies for tort damages related to climate change.[255] These cases are similar to litigation against cigarette

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253. *See* Luber et al., *Human Health*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 220, 228–30 (2014), http://nca2014.globalchange.gov/report/sectors/human-health (explaining that vulnerable populations, including the poor, will be most at risk for increased illness and death related to climate change); Mendelsohn et al., *The Distributional Impact of Climate Change on Rich and Poor Countries*, 11 ENV'T & DEV. ECON. 159, 161, 173 (2006) (poor countries will suffer the bulk of climate change damages, regardless of technological advances, due in large part to the geographic regions where poor countries are located).

254. There is some skepticism among legal scholars and policymakers that the government reacts to monetary incentives. *E.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."). This may be true as it relates to broad-based policy decisions, and illegal exactions certainly are unlikely to be sufficient on their own to affect national and international policy. But governments do consider costs when they decide policy. Moreover, even if the government does not change its actions due to litigation risk, if the cost of climate change is largely borne by the poor, the government should pay that cost, rather than shift those externalities to those least able to pay.

255. *E.g.*, Complaint at 76–90, Pac. Coast Fed'n of Fisherman's Ass'n v. Chevron Corp., No. CGC-18-571285 (Cal. Super. Ct. filed Nov. 11, 2018) (seeking damages for closed crab fisheries caused by climate change from fossil fuel products); Complaint at 117–30, Mayor of Balt. v. BP P.L.C., No. 24-C-18-004219 (Cir. Ct. filed July 20, 2018) (complaint seeking damages based on state nuisance and tort law for failure to warn and design defects of fossil fuel products, and for trespass on Maryland through flooding and other damages to real property caused by climate change); Plaintiff's Complaint at 115–140, Rhode Island v. Chevron Corp., D.R.I. No. 18-cv-00395 (Super. Ct. filed July 2, 2018). Complete dockets and summaries for these and other cases have been helpfully compiled by Columbia Law School's Sabin Center for Climate Change

companies, alleging that the companies knew about the dangers of their products for decades, but misled the public with bad faith "science" and continued to endanger public health.[256] Early signs about the success of these cases, however, are mixed at best. Many of the cases are caught in removal proceedings, in which the fossil fuel companies argue that federal regulatory schemes preempt any state tort law. And one early decision agreed with the companies, dismissing the claims and stating that, given the national and international scope of fossil fuel emissions, federal regulations and federal common law preempted any attempt to recover from the companies.[257] Indeed, most suits seeking monetary damages have sought to remain in state court, to avoid the preemption issues as much as possible.[258]

But it is not just fossil fuel companies who have responsibility to the public. Congress has tasked federal agencies such as the Environmental Protection Agency with protecting the environment and, by extension, public health affected by pollution and climate change. If private companies can avoid damages based on federal statutes that give federal agencies the responsibility to police fossil fuel emissions and other climate change causes, it is the federal government that should be held responsible. Illegal exactions may be a way to do that because regulating or failing to regulate is distinctly governmental action, not tortious in nature. By failing to mitigate climate change and imposing damages on communities through climate-change-related events, from Hurricane Katrina and Hurricane Maria to rising sea levels displacing communities, the government has potentially violated the law by failing to implement

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Law. *See Climate Change Litigation Databases*, SABINE CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com (last visited May 20, 2020).

256. *See generally* David Heath, *Contesting the Science of Smoking*, ATLANTIC (May 4, 2016), https://www.theatlantic.com/politics/archive/2016/05/low-tar-cigarettes/481116/.

257. *See* New York v. BP, P.L.C., 325 F. Supp. 3d 466, 472, 474 (S.D.N.Y. 2018) (dismissing for lack of jurisdiction and failure to state a claim the city's claims for injuries due to rising sea levels caused by greenhouse gases, holding that tort and nuisance claims were federal claims and preempted by Clean Air Act).

258. *See U.S. Climate Change Litigation*, SABINE CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/us-climate-change-litigation/ (last visited May 20, 2020); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011) (raising the Clean Air Act preemption of federal common law nuisance claims issue).

Congress's delegation of environmental regulation,[259] or violated equal protection or other rights that should be vindicated. As *Aerolineas* teaches, it does not matter that the government is not taking the communities' property or money directly, as long as claimants can show that the costs should be paid by the government and are *directly* caused by the government's illegal actions.[260] Claimants can argue that the agencies' actions, even if nominally within the scope of their discretionary authority, have violated the law by failing to implement the law, or have violated equal protection or due process by imposing regulatory frameworks that push the costs of climate change not onto those who caused it but on the poor and most vulnerable.

Of course, this litigation would contain difficulties: *Norman* and *Casa de Cambio* both explain that downstream mitigation efforts voluntarily taken do not constitute illegal exactions.[261] Similarly, courts are likely wary of interpreting equal protection claims as money-mandating illegal exaction claims. But the case law contains the necessary kernel: when the government acts illegally and imposes costs on an individual that should be borne by the government, the individual should have a right to recovery.

CONCLUSION

Our judicial system has always struggled to balance sovereign immunity with the goal that every right should have a remedy. In the mid-twentieth century, Congress vastly expanded the ability to obtain remedies for rights, from the FTCA to the APA, and the courts determined that certain constitutional violations should also provide relief under *Bivens*. But those remedies were never complete, and in recent years qualified immunity and other barriers to relief have expanded. But illegal exactions did not see that widespread increased use in the twentieth century. Instead, its growth has come in fits and starts, with little attention. That lack of attention means that it is ripe for increased use as a way to vindicate the rights where other remedies are insufficient.

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259. Failure to regulate claims are, of course, difficult for plaintiffs to win. This would not necessarily be easier in the illegal exaction context, except in areas where there is evidence of governmental abdication of its legal responsibilities.

260. *See, e.g.*, Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996).

261. Norman v. United States, 429 F.3d 1081, 1094–96 (Fed. Cir. 2005); Casa de Cambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 147 (2000).

This Article has attempted to outline the history and nature of this obscure claim for the benefit of future advocates and scholars. The possible future areas of case law this Article describes are just a sample of what may be possible: illegal exaction cases can help make plaintiffs whole and encourage the government to change any action that improperly enriches the government at individuals' expense. Time will tell if advocates begin to use illegal exaction claims as more than illegal takings for highly regulated actors. But the case law is there, as is a viable theoretical framework based in common law that would cohere the body of existing law and permit powerful developments in the future.