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Money as a "Specific" Remedy

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MONEY AS A “SPECIFIC” REMEDY

Colleen P. Murphy*

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INTRODUCTION

A fundamental distinction in the law of remedies is the difference between specific and substitutionary relief.¹ Specific relief gives the plaintiff

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1. See, e.g., DAN B. DOBBS, LAW OF REMEDIES § 3.1, at 209 (2d ed. 1993) [hereinafter DOBBS 1993 treatise] (distinguishing between substitutionary and specific remedies); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 2, at 4 (1999) (discussing the distinction between specific and substitutionary remedies in section on “Types of Remedies”); DOUGLAS LAYCOCK, THE DEATH OF THE

the original thing to which the plaintiff is or was entitled; substitutionary relief gives the plaintiff something other than its original entitlement. The most common form of substitutionary relief is money. The typical scenario is that the defendant has violated a legal entitlement belonging to the plaintiff—such as a personal, proprietary, dignitary, or economic entitlement—and the court awards money for the resulting harm. The money is substitutionary in the sense that the defendant cannot or does not restore the plaintiff's original entitlement. Sometimes, however, a monetary remedy is specific relief. For example, if the plaintiff has not been paid for goods sold to the defendant, a court award for the amount owed gives the very thing—money—to which the plaintiff was originally entitled.

The concept that monetary remedies can afford either specific or substitutionary relief often is misunderstood or misapplied. One aspect of the problem is that the general dichotomy between specific and substitutionary relief is not fully appreciated or is confused with other concepts such as the differences between equitable and legal remedies or between prospective and retrospective remedies.² Another source of confusion is use of the term “damages,” a word often applied to monetary remedies but one that is laden with a variety of meanings. “Damages” sometimes is used in such a broad sense that it encompasses specific monetary relief, while at other times it is used in the narrow sense of substitutionary monetary relief only.³ Discerning the meaning of damages that applies in a given context often is the key to proper categorization of the monetary remedy.

The distinction between specific and substitutionary monetary relief or between specific monetary relief and damages is not solely theoretical. It has significant practical consequences when the government is a litigant. A few illustrations demonstrate the point. In suits challenging action by federal agencies, the Administrative Procedure Act (APA) permits jurisdiction in federal district courts if the plaintiff seeks “relief other than money damages.”⁴ The Supreme Court has interpreted “money damages” under the statute as covering only substitutionary relief; the term does not encompass specific monetary remedies.⁵ Under Federal Rule of Criminal Procedure 41(g), a plaintiff whose property has been seized by the government may, in appropriate circumstances, obtain return of the property.⁶ Most courts have determined that a person under the rule may not seek “damages” but may obtain “return” of specific money seized, even if the government no longer has the plaintiff's particular bills or coins.⁷ Yet another illustration involves

IRREPARABLE INJURY RULE 12-13 (1991) (“The most fundamental remedial choice is between substitutionary and specific remedies.”).

2. See *infra* part I.C.

3. See *infra* part II.A & B.

4. 5 U.S.C. § 702 (2000).

5. See *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999); *Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988). Both cases are discussed *infra* parts I.B and II.A.

6. FED. R. CRIM. P. 41(g).

7. See *infra* notes 151-154 and accompanying text.

a federal statute of limitations that applies to the government's filing of contract claims for "money damages."⁸ The courts have divided as to whether this language includes claims for specific monetary relief.⁹ Although examples offered here and throughout the article are drawn from federal cases, state courts also may confront questions about whether a particular monetary remedy is specific or substitutionary.¹⁰

Additional practical consequences result if a court confuses specific relief with equitable or prospective relief, or confuses substitutionary relief with legal or retrospective relief. If a court mistakenly assumes that a retrospective monetary remedy is necessarily "money damages" rather than specific relief, the plaintiff will be unable under the APA to pursue its claim in federal district court.¹¹ If a court erroneously characterizes a monetary remedy as equitable simply because it affords specific relief, a litigant may be denied the constitutional right to jury trial.¹² If a court deems a monetary remedy to be legal simply because it can be considered "damages," a plaintiff may be barred from relief under a statute that authorizes only equitable remedies.¹³

Notwithstanding the practical necessity of sometimes classifying monetary remedies as "specific" or "substitutionary" or "damages," little in-depth scholarly attention has been given to defining these terms and probing their application to various types of monetary remedies. This article attempts to clarify the distinctions between specific and substitutionary monetary remedies and the relationship between specific monetary relief and the various meanings of damages.

I suggest a broader conception of specific and substitutionary relief than generally has been acknowledged. I contend that injunctions, usually characterized as specific relief, sometimes are better understood as affording substitutionary relief. Thus, when a plaintiff seeks an injunction compelling the defendant to pay money, the characterization of the remedy as specific or substitutionary should depend on whether the remedy will give the plaintiff its original entitlement or something else; the mere fact that the plaintiff seeks an injunction does not itself mean that the remedy is specific. Further, I untangle the many meanings of damages and argue that, contrary to common characterizations, specific monetary relief may at times fall within the rubric of damages.

Finally, although courts and scholars have identified specific monetary relief in an ad hoc and often inconsistent fashion, I offer a set of categories into which specific monetary relief generally falls: (1) when the plaintiff

8. 28 U.S.C. § 2415(a) (2000).

9. See *infra* notes 132-138 and accompanying text.

10. See, e.g., *Country Eggs, Inc. v. Kawamura*, 28 Cal. Rptr. 3d 348, 349 (Cal. Ct. App. 2005) (discussing whether refund of agricultural assessments sought by plaintiff was specific relief or instead, "damages," with a damages claim barred by state sovereign immunity).

11. See *infra* notes 42-78 and accompanying text.

12. See *infra* notes 90, 107, and accompanying text.

13. See *infra* note 89 and accompanying text.

seeks non-fungible coins or bills; (2) when the plaintiff seeks the return of money that was transferred to, or taken by, the defendant; and (3) when the plaintiff's original entitlement was that the defendant pay money to the plaintiff. I argue that with the exception of unique coins and bills, the defendant need not possess the plaintiff's precise monetary *res* for a monetary remedy to constitute specific relief.

Part I develops the distinction between specific and substitutionary relief generally, focusing on scholarly treatments as well as Supreme Court decisions. Part I also exposes the common error made by courts of treating specific remedies as synonymous with equitable remedies, and it further argues that the dichotomy between prospective and retrospective remedies does not mirror the dichotomy between specific and substitutionary remedies. Part II articulates the many meanings of the term "damages" and clarifies how specific monetary relief may be a subset of damages or the opposite of damages, depending on which meaning of damages applies. Part III elaborates the broad categories of specific monetary relief that I have identified. This part also analyzes several difficult classification issues that have arisen in the courts, such as whether a remedy that would reimburse the plaintiff for payments made to a third person constitutes specific relief and whether remedies for unpaid employee wages and benefits are specific or substitutionary.

I. THE DICHOTOMY BETWEEN SPECIFIC AND SUBSTITUTIONARY REMEDIES

To probe how a monetary remedy may constitute specific relief, it is helpful to start with a general discussion of specific and substitutionary remedies. This part proposes a framework for distinguishing between specific and substitutionary relief, examines how the Supreme Court has defined specific relief in juxtaposition to substitutionary relief, and compares the specific/substitutionary dichotomy to other remedial dichotomies.

A. A Definitional Framework

Scholars commonly have defined specific relief as that which gives the plaintiff the original thing or condition to which it was entitled.¹⁴ Substitutionary remedies, by contrast, give the plaintiff "neither what he started with . . . nor what he was promised."¹⁵ The difference between specific and substitutionary remedies can be further understood in terms of the plaintiff's

14. See, e.g., DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1, at 135 (1973) [hereinafter DOBBS 1973 treatise] (asserting that specific remedies "attempt to give the plaintiff the very thing to which he was entitled"); FISCHER, *supra* note 1, § 2[b], at 4 ("A specific remedy is one that gives the plaintiff exactly what she would have if the legal wrong had not been committed."); LAYCOCK, *supra* note 1, at 13 ("[Specific remedies] seek to prevent harm to plaintiff, repair the harm in kind, or restore the specific thing that plaintiff lost.").

15. LAYCOCK, *supra* note 1, at 13; see also FISCHER, *supra* note 1, § 2[b], at 4 ("A substitutional remedy is just what the term suggests—something other than a specific remedy.").

rightful position—the position the plaintiff would hold if the defendant did not violate the plaintiff’s legal rights. Specific relief achieves the plaintiff’s rightful position exactly; substitutionary relief achieves only a rough approximation.

Injunctions commonly are considered specific relief.¹⁶ Consider an injunction intended to prevent ongoing or future violations of the plaintiff’s legal entitlement. To the extent that such an order compels the defendant to give the plaintiff precisely its legal entitlement or to refrain from violating the plaintiff’s legal entitlement, the order is for a specific remedy. Examples include an injunction to reinstate a plaintiff who was illegally fired or an injunction to stop dumping on the plaintiff’s property. Functionally similar to these injunctions are other remedies—such as replevin of goods, specific performance of contract obligations, ejectment from land, and mandamus—that give the original thing or condition to which the plaintiff is entitled.¹⁷

Beyond these examples of specific remedies, an award of money should be considered specific relief if the plaintiff’s original entitlement was for the payment of money.¹⁸ Examples of specific monetary relief that scholars have identified include awarding the plaintiff the price due on a contract for the sale of goods or services¹⁹ and awarding the plaintiff reimbursement under principles of indemnity.²⁰ On the other hand, a monetary remedy will be substitutionary when money is not the original thing to which the plaintiff was entitled. For example, the plaintiff who suffered personal injury had an original entitlement to be free from injury unlawfully inflicted by the

16. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (listing an “injunction either directing or restraining the defendant officer’s actions” as specific relief); LAYCOCK, *supra* note 1, at 13 (“Specific remedies include injunctions . . .”).

17. Although an order of specific performance typically will give the plaintiff the original thing or condition to which he is entitled under the contract, sometimes an order of “specific performance” will give the plaintiff a substitute. As Professor Farnsworth explained:

In framing an order of specific performance or an injunction, the court can mold it to do justice as fully as is practicable. . . . If the exact performance promised is very difficult to enforce or has become impossible, unreasonably burdensome, or unlawful, the court may order a performance that is only part of what was promised or is *otherwise not identical with what was promised*.

3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.5, at 170 (3d ed. 2004) (emphasis added). While an order of “specific performance” thus may in a particular circumstance give plaintiff something different than the plaintiff’s original entitlement, the term has such time-honored usage that it is not likely to cause confusion about what the court is actually accomplishing. The court is ordering the defendant to do or refrain from doing something that is different from the plaintiff’s original entitlement under the contract as opposed to awarding the plaintiff a monetary substitute for its contractual entitlement.

18. See, e.g., DOBBS 1993 treatise, *supra* note 1, § 3.1, at 209 (“When the plaintiff was never entitled to anything but money, the recovery of an award of money is a kind of specie award.”); FISCHER, *supra* note 1, § 2[b], at 5 (“[M]oney is often sought as a specific remedy, for example, as reimbursement under principles of indemnity for discharging another’s obligation.”). In part III of this article, I further discuss categories of monetary remedies that constitute specific relief.

19. DOBBS 1993 treatise, *supra* note 1, § 3.1, at 209 (citing a remedy for the “price due on an account or on a contract of sale” as an example of specific relief).

20. See, e.g., *id.*; FISCHER, *supra* note 1, § 2[b], at 5.

defendant. The remedy for the plaintiff is a money substitute; restoring the plaintiff to her original physical condition is impossible.²¹

Some scholars have implied that money is the only remedy that provides substitutionary relief.²² For example, Professor Laycock has written: "With substitutionary remedies, plaintiff suffers harm and receives a sum of money. . . . Substitutionary remedies include compensatory damages, attorneys' fees, restitution of the money value of defendant's gain, and punitive damages."²³ I suggest that this conception of substitutionary relief is incomplete. Although monetary awards are the most typical forms of substitutionary relief, sometimes an injunction will be substitutionary because it provides a thing or condition other than the plaintiff's original entitlement.²⁴

For example, assume that an employee would have been promoted to a particular position within a company but for illegal discrimination. The employee seeks an injunction requiring reinstatement to the position, but the position has already been filled. The court orders an injunction compelling the defendant to promote the plaintiff to a different position elsewhere in the company, a position that requires, at increased cost to the defendant, additional education and training of the employee.²⁵ In this example, the plaintiff gets substitutionary relief because she receives something other than the particular position to which she was entitled. Another example of an injunction that affords substitutionary relief would be an order compelling a prison to provide recreational facilities as a remedy for past unlawful overcrowding.²⁶

Professor Laycock has further asserted that one of the hallmarks of substitutionary relief is that "the fact finder's valuation of the loss is substituted

21. See DOBBS 1993 treatise, *supra* note 1, § 3.1, at 279 (commenting that a "damages" award, "often a substitutionary remedy . . . substitutes money for the original condition or thing to which the plaintiff was entitled"); see also DOBBS 1973 treatise, *supra* note 14, § 3.1, at 135 ("The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money."). Professor Laycock has remarked that monetary substitutionary relief "is substitutionary both in the sense that the sum of money is substituted for plaintiff's original entitlement, and in the less obvious sense that the fact finder's valuation of the loss is substituted for plaintiff's valuation." LAYCOCK, *supra* note 1, at 13.

22. See, e.g., FISCHER, *supra* note 1, § 2[b], at 4 (giving only damages as an example of substitutionary remedies); LAYCOCK, *supra* note 1, at 13; ROBERT N. LEAVELL ET AL., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 1 (7th ed. 2005) ("Substitutionary relief substitutes money for the specific relief.").

23. LAYCOCK, *supra* note 1, at 13.

24. Cf. 3 FARNSWORTH, *supra* note 17, § 12.4, at 161 n.1 ("[S]ubstitutional relief could, in theory, be in kind rather than in money.") (citing Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 378 (1955) ("If I lose the ski poles I have borrowed from a friend, I buy a new pair and return these to him.")).

25. See ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES & PERSPECTIVES* 365 (1995) (discussing injunctive remedies in Title VII cases when position has already been filled).

26. See *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) (upholding a district court order that Alabama prison inmates be provided reasonable recreational facilities because although such facilities are not required under the Eighth Amendment, "such facilities may play an important role in extirpating the effects of the [unconstitutional] conditions which undisputedly prevailed in these prisons at the time" of the district court's order), *rev'd in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978).

for plaintiff’s valuation.”²⁷ I suggest that this description applies not only to money but also fits the employment and prison injunctions I have posited. In issuing these injunctions, the courts essentially make a valuation of the plaintiff’s loss (“valuation” in the broad sense of estimating something’s worth, not limited to monetary values),²⁸ and then the courts attempt a substitute equal to the value of the plaintiff’s original entitlement.

I submit, however, that fact finder valuation of a plaintiff’s loss does not necessarily inhere in substitutionary relief. For example, the plaintiff may have suffered a loss that is readily calculable, such as lost wages resulting from personal injury. A monetary remedy for that loss requires not “valuation” but rather mechanical calculation of the missed pay. The monetary remedy nevertheless is appropriately considered substitutionary rather than specific because the plaintiff’s original entitlement was not for a payment of money from the defendant, but to be free from personal injury unlawfully inflicted. Thus, the dichotomy between specific and substitutionary relief cannot reliably be drawn based on whether fact finder valuation of the plaintiff’s loss is necessary.

I have argued that although injunctions commonly do afford specific relief, some injunctions are more accurately considered as affording substitutionary relief. This leads to a related question: How should we characterize an injunction or order that ultimately would oblige the defendant to pay money?²⁹ I suggest that labeling the remedy in this context as “specific” or “substitutionary” will depend on the function of the remedy.³⁰ For example, if a court orders the defendant to establish a fund from which plaintiffs may

27. LAYCOCK, *supra* note 1, at 13.

28. The Oxford English Dictionary defines “valuation” as the “worth or price as determined by deliberate estimation,” 19 OXFORD ENGLISH DICTIONARY 415 (2d ed. 1989), and in turn defines “worth” as “the relative value of a thing in respect to its qualities or of the estimation in which it is held,” 20 OXFORD ENGLISH DICTIONARY 513 (2d ed. 1989).

29. In the public law context, plaintiffs suing the government often seek injunctions that would have the result of obliging the government to pay money. See *infra* notes 30, 42-56, part III.C.2, and accompanying text. In the private law context, injunctions compelling the payment of money generally have been disfavored. See DOBBS 1993 treatise, *supra* note 1, § 8.10, at 692 (“The American legal system has frowned on the use of injunctions to compel the payment of money.”). Such injunctions do exist, however, although Professor Dobbs has commented that “[t]he typical *in personam* order to pay money is not an order to pay a ‘debt’ but an order to pay money arising from a status obligation” such as alimony or child support. *Id.* § 2.8(2), at 135.

30. Cf. *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (asserting that a party may not circumvent the Court of Federal Claims’ exclusive jurisdiction by framing a district court suit as one for declaratory relief when the thrust of the suit is for money damages); *Veda, Inc. v. U.S. Dep’t of the Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) (“This court has previously held that a party cannot circumvent the [Tucker Act’s] jurisdiction by suing solely for declaratory or injunctive relief in a case where such relief is tantamount to a judgment for money damages.”); *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997) (discussing that although a complaint does not explicitly seek money, but rather declaratory or injunctive relief, it will be treated as falling within the exclusive jurisdiction of the Court of Federal Claims if the plaintiff’s “prime objective” or “essential purpose” is to recover more than \$10,000 from the federal government); *Sibley v. Ball*, 924 F.2d 25, 29 (1st Cir. 1991) (“A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.” (quoting *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979))).

withdraw for medical diagnostic expenses,³¹ the remedy provides a monetary substitute for the original condition to which the plaintiff was entitled—to be free from the wrongful infliction of possible personal injury. The fact that an injunction is the vehicle for the payment of money does not convert the remedy into specific relief. By contrast, an injunction or other order may compel the payment of money that *would* constitute specific relief. For example, a court may grant specific performance of a contract for the sale of land, ordering the buyer to pay the contract price to the seller.³² The seller's original entitlement is for the payment of money, and the order compels that payment.

The definitional framework advanced here thus rests on the notion that specific remedies provide the original thing or condition to which the plaintiff was entitled, while substitutionary remedies provide something else. When it is necessary or useful to label a particular remedy as specific or substitutionary, the key is to focus on the function of the remedy. Under this framework, monetary remedies and injunctions can afford either specific or substitutionary relief.

B. Supreme Court Definitions

The Supreme Court occasionally has employed the concept of specific relief. In doing so, it has typically invoked as the major counterpoint the term “damages” rather than substitutionary relief. The term “damages” carries many meanings, as I will detail in part II, but in the Supreme Court cases contrasting specific relief with damages, the Court used the term in the narrow sense of substitutionary relief.³³ In my discussion of the Supreme Court cases in this section, therefore, “damages” should be understood as substitutionary monetary relief.

31. See DOBBS 1993 treatise, *supra* note 1, § 8.10, at 692 (“[I]njunctions have been used to require the defendant to create special funds for payment of periodic medical expenses . . .”); see also *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984). In *Friends*, the court granted an injunction to require the defendant to create a fund for payment of liability before final judgment. *Id.* at 835. The court also required the defendant to create a fund for payment of expenses, to be claimed by submission of vouchers. *Id.* Similar medical monitoring funds have been approved in other cases. See, e.g., *Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1476-77 (N.D. Cal. 1987); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 313-15 (N.J. 1987).

32. See, e.g., *Osborne v. Bullins*, 549 So. 2d 1337, 1340 (Miss. 1989); see also DOBBS 1993 treatise, *supra* note 1, § 12.8(2), at 808.

33. See *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (reaching the conclusion that “equitable liens by their nature constitute substitute or compensatory relief” and as such, damages); *Bowen v. Massachusetts*, 487 U.S. 879, 896-901 (1988) (interpreting the statutory language “money damages” in section 702 of the Administrative Procedure Act narrowly as substitutionary monetary relief, not meant to include specific monetary relief); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 371 (1985) (finding that monetary reimbursement to parents for education of disabled child was not damages, but rather, “expenses that [the town] should have paid all along”); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (contrasting specific relief as “the prevention or discontinuance . . . of the wrong,” to damages as “compensation for an alleged wrong”).

The Court first distinguished specific relief from damages in 1949. In *Larson v. Domestic & Foreign Commerce Corp.*,³⁴ the Supreme Court decided whether sovereign immunity barred the plaintiff from pursuing an injunction in federal district court to enforce a contract against an officer of the federal government.³⁵ While stating that a suit for damages against a government official for his personal actions would not violate sovereign immunity,³⁶ the Court distinguished a suit "for specific relief: *i.e.*, the *recovery of specific* property or *monies*, ejection from land, or injunction either directing or restraining the defendant officer's actions."³⁷ The Court added that if a specific remedy against a government official effectively would be relief against the sovereign, the remedy would be barred.³⁸ In the precise circumstances of *Larson*, the Court found that the particular injunction sought by the plaintiff was relief against the sovereign and thus prohibited by sovereign immunity.³⁹

Particularly important for our topic is how *Larson* characterized specific relief. Its examples of ejection and recovery of specific property or monies fit the definition endorsed here—that specific relief gives the original condition or thing to which the plaintiff is entitled. Its placement of an "injunction either directing or restraining the defendant officer's actions"⁴⁰ in the category of specific relief reflected the reality at the time that injunctions typically were for specific relief, although, as I have suggested, some injunctions are better understood as affording substitutionary relief. *Larson* also linked specific relief to "the prevention or discontinuance, *in rem*, of the wrong," as contrasted with "compensation for an alleged wrong."⁴¹ The Court's use of "in rem" in this context seems to connote the very thing to which the plaintiff is entitled.

After *Larson*, it was almost forty years before the Supreme Court again expressly distinguished specific monetary relief from damages. In *Bowen v. Massachusetts*,⁴² the Court contrasted recovery of "specific monies" from recovery of "money damages" for purposes of interpreting section 702 of

34. 337 U.S. 682 (1949).

35. *Id.* at 684-85. The plaintiff sought an injunction concerning a contract for the sale of surplus coal against the chief of the War Assets Administration and persons acting under his direction. *Id.* at 684-86.

36. *Id.* at 687. The Court reasoned that "[t]he judgment sought will not require action by the sovereign or disturb the sovereign's property." *Id.*

37. *Id.* at 688 (emphasis added).

38. *Id.* The Court stated that a difficult question is raised "whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign." *Id.*

39. *Id.* at 689-704. The plaintiff alleged that the War Assets Administration had sold him certain surplus coal but that the Administrator had refused to deliver it. *Id.* at 684. The plaintiff sought an injunction to prohibit the sale or delivery of the coal to any one other than the plaintiff. *Id.* Although finding the requested injunction barred by sovereign immunity, the Court noted that the plaintiff had a remedy for breach of contract in the Court of Claims. *Id.* at 703 n.27.

40. *Id.* at 688.

41. *Id.*; see also *id.* at 704 (distinguishing a method by which a citizen may be compensated for a wrong done to him by the government from "permit[ting] a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act").

42. 487 U.S. 879 (1988).

the Administrative Procedure Act (APA). The present version of section 702, enacted in 1976, is a limited waiver of sovereign immunity, permitting judicial review of federal agency action in “a court of the United States” if the plaintiff seeks “relief other than money damages.”⁴³ For purposes of this section of the APA, “court of the United States” at the trial level generally means a federal district court.⁴⁴

Beyond the waiver of federal sovereign immunity in the APA, Congress has waived sovereign immunity under a variety of statutes, the most relevant of which is the Tucker Act.⁴⁵ Enacted in 1887 and subsequently amended, the Tucker Act waives sovereign immunity for non-tort claims against the United States that are based on federal law or contract.⁴⁶ For demands of \$10,000 or less, the Act vests concurrent jurisdiction in the federal district courts and the Court of Federal Claims (previously the Court of Claims); for other demands, the Court of Federal Claims has exclusive jurisdiction.⁴⁷ The Supreme Court has interpreted the general provisions of the Tucker Act as authorizing monetary remedies, but not declaratory or injunctive relief, against the United States.⁴⁸

43. Administrative Procedure Act, 5 U.S.C. § 702 (2000). Section 702 continues that the waiver of sovereign immunity does not “confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” *Id.*

44. See *Bowen*, 487 U.S. at 891 n.16 (stating that “if review is proper under the APA, the District Court ha[s] jurisdiction under 28 U.S.C. § 1331”); *Califano v. Sanders*, 430 U.S. 99, 105-06 (1977) (holding that the waiver of sovereign immunity found in section 702 of the APA does not provide an independent grant of subject matter jurisdiction to the federal courts and referring to 1976 amendment to 28 U.S.C. § 1331 that eliminated an amount in controversy requirement as having the “obvious effect . . . to confer jurisdiction on federal courts to review agency action”). Section 1331 is the general federal question statute, which states: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. §1331 (2000). Other statutes may vest jurisdiction over suits challenging agency action in the courts of appeals. See, e.g., Federal Trade Commission Act of 1914, 15 U.S.C. § 45(c) (2000).

45. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2000). The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (2000), waives sovereign immunity for suits in District Court seeking damages for tortious wrongs by the government. For a detailed discussion of various federal statutes waiving sovereign immunity, see generally Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 606-17 (2003).

46. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (waving sovereign immunity for claims “founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”).

47. *Id.* § 1491(a)(2) (assigning jurisdiction to Court of Federal Claims over claims exceeding \$10,000); *id.* § 1346(a)(2) (vesting concurrent jurisdiction in Court of Federal Claims and federal district courts over claims for \$10,000 or less).

48. See *United States v. King*, 395 U.S. 1, 3 (1969); *United States v. Jones*, 131 U.S. 1, 14-18 (1889); see also Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 520-21 (1991) (“[O]utside of expressed, statutory exceptions, money damages are the only remedy available under the Tucker Act.”); *id.* at 521 n.24 (stating that “[a]lthough not mandated by the language of the statute, judicial interpretations are clear on this point,” and citing *King* and *Jones*); Sisk, *supra* note 45, at 611 (“[T]he Tucker Act from its inception in 1887 has been understood as authorizing only the award of monetary relief against the United States.”); *id.* at 628-29. There are two exceptions to the general rule that the Tucker Act authorizes only monetary remedies against the federal government. In 1972, Congress amended the Tucker Act to permit courts, as “incident of and collateral to” a money judgment, to order certain types of equitable relief, such as reinstatement of a federal employee to a position or correction of employee records. Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2) (2000)). In 1996, Congress amended the Tucker Act to grant the Court of Federal

In *Bowen*, Massachusetts sought reimbursement from the federal government for expenditures that the state had made under the Medicaid program.⁴⁹ The Department of Health and Human Services (HHS) disallowed certain of these expenditures as not covered by the Medicaid statute or regulations.⁵⁰ The HHS Grant Appeals Board affirmed the disallowances.⁵¹ Massachusetts sought review of the Board's action in federal district court, requesting that the court set aside the Board's order and enjoin HHS from not reimbursing the state.⁵² The federal government asserted that the district court did not have jurisdiction under the APA; instead, the government argued, the Tucker Act applied and vested jurisdiction in the then-Claims Court.⁵³

The question under section 702 of the APA was whether the claims by Massachusetts were for "relief other than money damages."⁵⁴ In answering this question, the Supreme Court first employed a formalistic response, stating: "insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages."⁵⁵ As I suggested in the previous section, the function of the remedy should determine whether the remedy is regarded as specific or substitutionary. That the complaint ostensibly seeks an injunction does not necessarily mean that the requested relief is "specific." In *Bowen*, the ultimate goal of the declaratory and injunctive relief sought by Massachusetts was to obtain money. The Supreme Court in *Bowen* apparently recognized the formalism of its first line of argument, for it continued: "more importantly, . . . the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in the law."⁵⁶

Claims jurisdiction over protests arising from solicitations of bids for government contracts and specified that the court could issue declaratory and injunctive relief as well as monetary remedies. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874-76 (codified at 28 U.S.C. § 1491(b) (2000)).

49. 487 U.S. at 882.

50. *Id.* at 886.

51. *Id.* at 887.

52. *Id.* Massachusetts requested in its complaint that the court "[e]njoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Commonwealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded" and "[s]et aside the Board's Decision." *Id.* at n.10.

53. *Id.* at 888-91. At the time of the *Bowen* decision, the Tucker Act conferred exclusive jurisdiction on the Claims Court to hear claims exceeding \$10,000 against the United States "founded either upon . . . any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). Congress subsequently renamed the Claims Court to be the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

54. *Bowen*, 487 U.S. at 892 (quoting 5 U.S.C. § 702).

55. *Id.* at 893. Justice Scalia in dissent criticized this formalism:

It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.

Id. at 915-16 (Scalia, J., dissenting). See also Fallon, *supra* note 48, at 525 (asserting that *Bowen*'s reliance on the fact that Massachusetts requested declaratory and injunctive relief "seems too broad a basis to provide persuasive support for the Court's holding [and that] [e]very claim for damages could be styled as a request for an injunction ordering the defendant to pay money").

56. 487 U.S. at 893.

The Court interpreted the statutory language “money damages” narrowly, asserting that Congress did not mean the term to include specific monetary relief.⁵⁷ In making this assertion, the Court examined the legislative history of the statutory language, and it relied on the distinction drawn by Professor Dobbs in his 1973 remedies treatise between damages that substitute for a suffered loss and specific remedies, which “‘are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.’”⁵⁸ The Court also referred to the *Larson* language that contrasted damages with specific relief, and it emphasized that *Larson* had identified specific “monies” as a type of specific relief.⁵⁹

Having decided that the term “money damages” in section 702 does not encompass specific monetary relief, the Court explained why the money requested by Massachusetts constituted specific relief:

The State’s suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary “shall pay” certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.⁶⁰

In other words, money was the “original thing” to which Massachusetts was entitled under the statutory program.

This, however, did not end the Supreme Court’s inquiry in *Bowen* as to whether jurisdiction in the federal district court was proper under the APA. Another provision of the APA, section 704, permits review of agency action in the federal district courts only when “there is no other adequate remedy in a court.”⁶¹ The Supreme Court on the facts of *Bowen* determined that a Tucker Act remedy in the Claims Court would be inadequate because, among other reasons, the Claims Court would be unable to grant prospective injunctive relief forcing the government to modify its future practices.⁶² Moreover, the Supreme Court characterized the Claims Court, headquartered in Washington, D.C., as less suited than a local district court to resolve

57. *Id.* at 893-901. The Supreme Court asserted that both the “plain language” of the statute and the legislative history indicated that Congress did not mean for “money damages” to include specific monetary relief. *Id.* The Court noted that the “Committee Reports repeatedly used the term ‘money damages’; the phrase ‘monetary relief’ was used in each Report once, and only in intentional juxtaposition and distinction to ‘specific relief,’ indicating that the drafters had in mind the time-honored distinction between damages and specific relief.” *Id.* at 897 (footnote omitted).

58. *Id.* at 895 (quoting DOBBS 1973 treatise, *supra* note 14, at 135).

59. *Id.* at 893.

60. *Id.* at 900; *see also id.* at 910 (stating that the district court’s orders were “for specific relief (they undo the Secretary’s refusal to reimburse the State) rather than for money damages (they do not provide relief that substitutes for that which ought to have been done”).

61. 5 U.S.C. § 704 (2000) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

62. 487 U.S. at 904-05.

complex questions of federal-state interaction.⁶³ In sum, the majority determined that jurisdiction in the district court was proper because the two conditions under the APA were satisfied: (1) the remedy was not "money damages" under section 702, and (2) the plaintiff did not have an adequate remedy in a different court under section 704.⁶⁴

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissented, criticizing the majority for its narrow interpretation of "money damages" in section 702 and for its analysis under section 704 that a Tucker Act remedy in the Claims Court was inadequate.⁶⁵ Scholars also have criticized *Bowen*, both in terms of its reasoning and for the consequences of the decision on the allocation of cases between district courts and the Court of Federal Claims.⁶⁶

My purpose here is not to question whether the Supreme Court in *Bowen* interpreted the APA correctly with respect to district court jurisdiction over challenges to agency action. Rather, my focus is on the remedial distinction that *Bowen* drew between "money damages" and specific monetary relief—a distinction that is now part of the law and whose application must be accurately understood.

The Supreme Court returned to the distinction between specific monetary relief and "money damages" under section 702 in the 1999 case, *Department of the Army v. Blue Fox, Inc.*⁶⁷ In doing so, the Court refined the *Bowen* interpretation. In *Blue Fox*, the plaintiff subcontractor was owed money by an insolvent prime contractor on a government construction project.⁶⁸ The subcontractor sued the government in federal district court, asserting that the Army had violated federal law by not requiring, before the awarding of the government contract, that the prime contractor post payment bonds for the protection of subcontractors.⁶⁹ The subcontractor sought

63. *Id.* at 905-08.

64. *Id.* at 901. *Bowen* acknowledged that some claims for specific monetary relief could fall within the jurisdiction of Claims Court, rather than the federal district courts:

There are, of course, many statutory actions over which the Claims Court has jurisdiction that enforce a statutory mandate for the payment of money rather than obtain compensation for the Government's failure to so pay. The jurisdiction of the Claims Court, however, is not expressly limited to actions for "money damages," whereas that term does define the limits of the exception to § 702. . . . Thus, to the extent that suits to enforce these statutes can be considered suits for specific relief, suits under the Tucker Act in the Claims Court offer precisely the sort of "special and adequate review procedures" that § 704 requires to direct litigation away from the district courts.

Id. at 900-01 n.31 (citations omitted).

65. *Id.* at 913-21 (Scalia, J., dissenting).

66. See, e.g., Cynthia Grant Bowman, *Bowen v. Massachusetts: The "Money Damages Exception" to the Administrative Procedure Act and Grant-in-Aid Litigation*, 21 URB. LAW. 557 (1989); Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After Bowen v. Massachusetts*, 40 CATH. U. L. REV. 571, 587-97 (1991); Sisk, *supra* note 45, at 618-37; David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 732-37 (1988).

67. 525 U.S. 255 (1999).

68. *Id.* at 257.

69. *Id.* at 256-58. Under the Miller Act, 40 U.S.C. § 270a(a)-(d) (2000), a contractor who performs "construction, alteration, or repair of any public building or public work of the United States" usually needs to post two types of bonds: a "performance bond . . . for the protection of the United States"

from the government the balance due on the subcontractor's contract with the prime contractor.⁷⁰ Attempting to establish jurisdiction in the district court under section 702 of the APA, the plaintiff styled its claim as one for an equitable lien⁷¹ over funds that the United States owed the prime contractor.

In a unanimous decision, the Supreme Court in *Blue Fox* held that the plaintiff sought damages rather than specific relief and that the district court accordingly lacked jurisdiction over the case.⁷² Emphasizing that *Bowen* distinguished “between specific relief and compensatory, or substitute, relief,”⁷³ *Blue Fox* reasoned that the function of the equitable lien sought in the case was “to seize or attach money in the hands of the Government as compensation for the loss resulting from the default of the prime contractor.”⁷⁴ In reaching this conclusion, the Court asserted that “equitable liens by their nature constitute substitute or compensatory relief rather than specific relief”⁷⁵ because they do not “give the plaintiff the very thing to which he was entitled”⁷⁶ but rather “a security interest in the property, which [the plaintiff] can then use to satisfy a money claim.”⁷⁷

The Court's explanation in *Blue Fox* is consistent with the approach that I have suggested—when it is necessary to label a particular remedy as specific or substitutionary, the function of the remedy is determinative. The “original thing” to which the plaintiff was entitled in *Blue Fox* was payment from the prime contractor on amounts due under the contract. The plaintiff may also have been entitled to have the government require the prime contractor to post surety bonds. But the plaintiff's requested remedy in *Blue Fox* did not seek either of those specific things or conditions. It was too late to enforce the government's statutory duty to require the surety bonds, and it was too late to get money from the prime contractor because the prime contractor was insolvent. Instead, in demanding payment for its financial losses from the government, the plaintiff sought a substitute for its original entitlements.⁷⁸

against contractual default and a “payment bond . . . for the protection of all persons supplying labor and material.” *Id.* § 270a(a).

70. *Blue Fox*, 525 U.S. at 258.

71. *Id.* An equitable lien is a “security interest in another's property; it gives the holder of the lien the right to sell the property and have the proceeds applied to his claim.” DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 779 (3d ed. 2002).

72. 525 U.S. at 263.

73. *Id.* at 261.

74. *Id.* at 263.

75. *Id.* at 262.

76. *Id.* at 262-63. (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)).

77. *Id.* at 263 (quoting DOBBS 1993 treatise, *supra* note 1, § 4.3(3), at 601). The Court added that “[c]ommentators have warned not to view equitable liens as anything more than substitute relief.” *Id.* (citing 1 JOHN NORTON POMEROY, A TREATY ON EQUITY JURISPRUDENCE §112, at 148 (5th ed. 1941) and DOBBS 1993 treatise, *supra* note 1, § 4.3(3), at 601).

78. See *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 831 (D.C. Cir. 2000) (characterizing *Blue Fox* as holding that “since the subcontractor's claim for specific relief was against the defaulting prime contractor, an equitable lien represented compensatory or substitute relief, thus money damages”).

The Supreme Court explicitly used the phrase “specific relief” in *Larson, Bowen, and Blue Fox*. In another case, without using that phrase, the Supreme Court also distinguished between damages that substitute for the plaintiff’s loss and monetary remedies that give the plaintiff the original thing to which it was entitled. In *School Committee of Burlington, Massachusetts v. Department of Education*,⁷⁹ a case involving an attempt by parents to obtain reimbursement for private school expenses for their learning-disabled son, the Supreme Court commented: “[T]he Town repeatedly characterizes reimbursement as ‘damages,’ but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper [individualized educational program].”⁸⁰ With this language, the Supreme Court used the term “damages” to connote substitutionary relief. Although the Court did not use the term “specific relief,” the reimbursement the parents sought fits this concept. The parents’ payment of tuition to the private school, if a court ultimately determined private placement to have been warranted, would in essence trigger a right to indemnification. The parents performed the obligation of the school district to pay for private education, and upon fulfilling the school district’s obligation, the very thing to which the plaintiffs were legally entitled from the school district was money.⁸¹

The distinction that the Supreme Court has drawn between specific and substitutionary relief was tangentially implicated in a 2002 decision, *Great-West Life & Annuity Insurance Co. v. Knudson*.⁸² The case involved whether money allegedly due under reimbursement provisions of a contract was “equitable relief” within section 502(a)(3) of the Employee Retirement Income Security Act (ERISA).⁸³ In a five-to-four decision, with Justice Scalia as the author of the majority opinion, the Court concluded that the plaintiff’s requested remedy was not equitable relief because the plaintiff sought “to impose personal liability . . . for a contractual obligation to pay money—relief that was not typically available in equity.”⁸⁴ Justice Scalia quoted from his dissent in *Bowen* that “[a]lmost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for “money damages” . . . since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.”⁸⁵ He also

79. 471 U.S. 359 (1985).

80. *Id.* at 370-71. The federal law involved was the Education of the Handicapped Act, 20 U.S.C. §1415 (2000). *Sch. Comm. of Burlington*, 471 U.S. at 361.

81. For further discussion of indemnification as a specific remedy, see *infra* part III.C.1.

82. 534 U.S. 204 (2002). For further discussion of *Great-West* and its problematic treatment of restitution, see Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1616-23 (2002), and Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1071-86 (2003).

83. *Great-West*, 534 U.S. at 206-08.

84. *Id.* at 210.

85. *Id.* at 210 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)).

drew from his *Bowen* dissent to argue that specific performance or injunctive relief to compel the payment of money past due under a contract was generally unavailable in equity.⁸⁶ Despite its citations to *Bowen*, *Great-West* turned on whether the remedy was equitable or legal, not on whether the remedy was specific or substitutionary.⁸⁷ Thus, *Great-West* should not be read as altering the dichotomy the Court has recognized between specific and substitutionary relief.

In sum, the Supreme Court has repeatedly recognized a distinction between specific and substitutionary relief. This distinction, used by both scholars and the Court, should not be confused with other remedial dichotomies, a point that I elaborate in the following section.

C. The Specific/Substitutionary Dichotomy Distinguished from Other Remedial Dichotomies

Specific relief often takes the form of what have historically been considered “equitable” remedies, such as injunctions and orders of specific performance. Substitutionary relief typically takes the form of the quintessential “legal” remedy—compensatory damages. Specific relief often operates prospectively, while substitutionary relief often operates retrospectively. But the specific/substitutionary dichotomy is not the same as the equitable/legal dichotomy, nor is it the same as the prospective/retrospective dichotomy. Courts, however, often have erroneously conflated the concepts.⁸⁸ In this section, I develop the distinctions amongst the various types of relief.

1. Equitable v. Legal Remedies

Courts sometimes must decide whether a requested remedy is “equitable” or “legal.” Examples include when a statute authorizes only “equitable” relief⁸⁹ or when a litigant demands a civil jury trial and the constitutional or statutory entitlement to jury trial depends on whether the plaintiff seeks a “legal” remedy.⁹⁰ Whether a remedy is legal or equitable often is evaluated by whether the remedy historically was available in courts of law or courts

86. *Id.* at 210-11.

87. Indeed, the majority opinion in *Great-West* distinguished *Bowen* on this basis. *Id.* at 212. Moreover, it distinguished *Bowen* as involving prospective relief, while the plaintiff in *Great-West* sought money for a past due sum. *Id.* Although it is arguable whether *Bowen* required that the monetary remedy be both specific and prospective to fall outside the category of “money damages” under section 702, it is important to recognize that specific relief and prospective relief are not synonymous. *See infra* part I.C.2.

88. *See infra* notes 94, 101-106, 115, and accompanying text.

89. *See, e.g.*, Employment Retiree Income Security Act (ERISA) § 502(a)(3), 29 U.S.C. § 1132(a)(3)(B) (2000) (authorizing “appropriate equitable relief”).

90. In cases in federal courts, the Seventh Amendment provides a right to jury trial “[i]n Suits at common law.” U.S. CONST. amend. VII. The Supreme Court has stated that this right to jury trial depends in part on whether the plaintiff seeks a legal remedy, rather than an equitable remedy. *See, e.g.*, *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Tull v. United States*, 481 U.S. 412, 417 (1987); *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

of equity.⁹¹ The most common remedy in the courts of law was money; the most common remedy in the courts of equity was the personal order to do something or refrain from doing something, such as with an injunction or order of specific performance. Beyond awarding money, courts of law could grant other remedies such as ejectment from land, replevin of goods, writs of mandamus, and writs of habeas corpus.⁹² Beyond issuing injunctions or orders of specific performance, courts of equity sometimes awarded monetary relief—examples include money awarded as incidental to injunctive relief or money obtained through the court's imposition of a constructive trust.⁹³

Modern courts often mistakenly assume that with respect to remedies, the labels "specific" and "equitable" are synonymous.⁹⁴ Historical practice, however, makes it apparent that differences between specific and substitutionary remedies are not equivalent to differences between equitable and legal remedies. Law courts awarded some forms of specific relief. With ejectment and replevin, the plaintiff got back the very thing to which he was entitled—land or goods.⁹⁵ With mandamus, prohibition, or habeas corpus, the plaintiff could obtain the very condition to which he was entitled.⁹⁶ With money judgments awarded by courts of law, the money could be a substitute for the very thing or condition to which the plaintiff was entitled (e.g., money for damage to property) or the money could be the specific thing to which the plaintiff was entitled (e.g., the price due on a contract for sale of goods).

91. For purposes of the constitutional right to civil jury trial, the Supreme Court has said that whether a remedy is legal or equitable should be judged by reference to court practices in 18th-century England. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998). For purposes of interpreting a statutory authorization of equitable, but not legal, relief, the Supreme Court decided that Congress meant "equitable" relief to be tied to historical practice. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (determining that Congress chose the phrase "equitable relief" in section 502(a)(3) of ERISA to connote "those categories of relief that were typically available in equity"). Aside from reference to historical practice or congressional intent, Justice Rehnquist has suggested that the level of discretion inherent in the fashioning of a remedy may affect whether the remedy should be treated as legal or equitable. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring) (asserting that to the extent a district court retained substantial discretion to award backpay after finding a violation of the then-version of Title VII of the Civil Rights Act of 1964, the remedy was equitable, but adding that "[t]o the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character").

92. *See* DOBBS 1993 treatise, *supra* note 1, § 4.2(1), at 383-84, § 2.9(1), at 162-65; LAYCOCK, *supra* note 1, at 13.

93. *See* Murphy, *supra* note 82, at 1604-06, 1629.

94. For example, some courts purporting to follow *Bowen's* interpretation of section 702 have contrasted "equitable" rather than "specific" monetary relief with "money damages." *See, e.g., Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 831 (D.C. Cir. 2000) (characterizing plaintiff's "claim for monetary relief [as] equitable, like the claims in *Bowen* . . . , not compensatory, like the claim in *Blue Fox*"); *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1266 (3d Cir. 1994) ("[T]his court has . . . determined that a monetary award can in some instances constitute equitable relief rather than money damages for purposes of § 702.") (citing *Zellous v. Broadhead Assocs.*, 906 F.2d 94 (3d Cir. 1990)).

95. *See* DOBBS 1993 treatise, *supra* note 1, § 4.2, at 383-91.

96. *See id.* § 2.9(1), at 165.

While courts of law awarded some forms of specific relief, equity courts awarded some forms of substitutionary relief. For example, equity courts awarded money for breach of fiduciary duties.⁹⁷ Thus, as Professor Laycock has observed: “Most legal remedies are substitutionary, and most equitable remedies are specific, but there are important exceptions in both directions. The law/equity distinction is not a proxy for the substitutionary/specific distinction.”⁹⁸

The Supreme Court has at times made clear that the specific/substitutionary dichotomy is not the same as the equitable/legal dichotomy. In *Larson*, having identified both the legal remedy of ejectment and the equitable remedy of an injunction as specific remedies, the Court made explicit that the sovereign immunity question involving specific relief “does not arise because of any distinction between law and equity.”⁹⁹ In *Blue Fox*, the Court stressed that “*Bowen*’s interpretation of § 702 . . . hinged on the distinction between specific relief and substitute relief, not between equitable and nonequitable categories of remedies.”¹⁰⁰

Nonetheless, *Bowen* contained inaccurate language giving the impression that the equitable/legal dichotomy is the same as the specific/substitutionary dichotomy. The majority stated: “Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief—which may include . . . ‘the recovery of specific property *or monies*, [or] ejectment from land”¹⁰¹ This statement quoted *Larson*, a case which expressly denied that it was referring to a distinction between law and equity.¹⁰² The statement was also sloppy in prefacing “action for specific relief” with the adjective “equitable,”¹⁰³ because some actions for specific relief have been available at law.¹⁰⁴ Further, the statement was inaccurate in suggesting that the *Larson* illustration of ejectment from land—a legal remedy—fell into the category of equitable relief.¹⁰⁵ Because of the misleading language in *Bowen*, it is perhaps under-

97. See FISCHER, *supra* note 1, § 2[b], at 4.

98. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 7 (3d ed. 2002); see also LEAVELL ET AL., *supra* note 22, at 280 (“[O]ne cannot simply say that legal relief is substitutionary, while equitable relief is specific.”).

99. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). The quoted material was part of a lengthier discussion: “In each such case [of specific relief] the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. . . . [T]his question does not arise because of any distinction between law and equity.” *Id.*

100. *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999). *Blue Fox* further asserted that “*Bowen*’s analysis of § 702 . . . did not turn on distinctions between ‘equitable’ actions and other actions [T]he crucial question under § 702 is not whether a particular claim for relief is ‘equitable’ . . . but rather what Congress meant by ‘other than money damages’” *Id.* at 261.

101. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (quoting *Larson*, 337 U.S. at 688).

102. See *Larson*, 337 U.S. at 688 (“As indicated, this question does not arise because of any distinction between law and equity.”).

103. *Bowen*, 487 U.S. at 893.

104. See *id.*

105. In addition, the majority in *Bowen* quoted sources that conflated equitable and specific relief. See *id.* at 899-900. The *Bowen* majority quoted extensively from a lower court decision authored by Judge Bork, *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1447-48 (D.C. Cir. 1985), which in turn quoted from House and Senate Reports on the

standable that many courts after *Bowen* have wrongly equated specific relief to equitable relief.¹⁰⁶

Conflating the concepts of equitable and specific relief can have practical consequences beyond the context of APA. Mistakenly labeling a monetary remedy as equitable simply because it affords specific relief can result in a denial of the constitutional right to a jury trial.¹⁰⁷ Characterizing a monetary relief as legal simply because it is substitutionary can mean that the plaintiff is barred from relief under a statute that authorizes only equitable remedies. Thus, beyond the need for theoretical clarity, it is important that courts and scholars recognize that although specific relief sometimes overlaps with equitable relief, and substitutionary relief sometimes overlaps with legal relief, the categories are distinct.

2. Prospective v. Retrospective Remedies

Another remedial dichotomy drawn by courts is that between prospective and retrospective relief. The dichotomy has practical consequences when the plaintiff seeks relief against the sovereign or an official of the sovereign; absent a waiver of immunity, retrospective relief generally is not available, while prospective relief may be allowed.¹⁰⁸ Although the terms "prospective" and "retrospective" relief are susceptible to varying interpretations and applications,¹⁰⁹ I will here use the term "prospective" relief to refer to remedies that prevent wrongful conduct or that prevent the post-judgment accrual of harms flowing from the defendant's pre-judgment conduct.¹¹⁰ I will use the term "retrospective" relief to refer to remedies for harms that have accrued up to the date of judgment.

waiver of sovereign immunity contained in the 1976 amendment to section 702. *Bowen*, 487 U.S. at 899-900. The reports stated that "'the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Md. Dep't Human Res.*, 763 F.3d at 1447 (quoting H.R. REP. NO. 94-1656, at 9 (1976), as reprinted in 1976 U.S.C.C.A.N. 6121, 6129 and S. REP. NO. 94-996, at 8 (1976)). Judge Bork asserted that this language "strongly suggest[ed] that Congress intended to authorize equitable suits for specific monetary relief." *Md. Dep't of Human Res.*, 763 F.2d at 1447.

106. See cases cited note 94.

107. See *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990).

108. A leading case is *Edelman v. Jordan*, in which the Supreme Court stated that "a federal court's remedial power [against state officials], consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury." 415 U.S. 651, 677 (1974) (citations omitted). Accordingly, the Court upheld an injunction ordering state defendants to comply with federal regulations in the future but invalidated "the retroactive portion" of the trial court's order, which required that the state officials pay welfare benefits that had been unlawfully withheld. *Id.* at 669. The Court acknowledged that prospective injunctive relief might result in fiscal consequences to state treasuries, but this is permissible as long as the monetary consequences are "the necessary result of compliance" with the injunction. *Id.* at 667-68; see also LAYCOCK, *supra* note 98, at 482 ("[P]rospective remedies [under *Edelman*] are generally permitted and retrospective remedies are generally forbidden. Quite similar distinctions appear in the immunity of the United States, and in the law of most states' immunity from state-law claims.").

109. See LAYCOCK, *supra* note 98, at 483 ("The line between prospective and retrospective remedies is neither self-evident nor self-executing.").

110. For an example of a court considering a remedy to be prospective when the remedy would, in the court's view, prevent the accrual of harms flowing from the defendant's unlawful pre-judgment

Remedies that operate prospectively typically will fall into the category of specific relief. The quintessential prospective remedy is the injunction or order that enjoins the defendant from violating the plaintiff's legal entitlement, by either mandating or prohibiting specified conduct by the defendant. In preventing violation of the plaintiff's legal entitlement, the prospective remedy affords the plaintiff the original thing to which it is entitled. By contrast, remedies that operate retrospectively typically will fall into the category of substitutionary relief. A common retrospective remedy is the award of money for physical harm caused to person or property.¹¹¹

It does not follow, however, that specific remedies always operate prospectively or that substitutionary remedies always operate retrospectively. A specific remedy can be retrospective, such as an order to clean up property or an order to pay money that is past due under a contract or statute.¹¹² The *School Committee of Burlington* case—involving the award of money to indemnify parents for their past expenditures—presents a further example of specific relief that is retrospective.¹¹³

Similarly, a substitutionary remedy might operate prospectively. Earlier, in asserting that some injunctions afford substitutionary relief, I gave the example of an order to instate an employee to a different position than the

conduct, see *Milliken v. Bradley*, 433 U.S. 267 (1977). The case involved desegregation of the Detroit school system. *Id.* at 269. The Supreme Court upheld an order against state officials to spend \$6 million on remedial education. *Id.* at 290. The Court held that the remedy was prospective relief allowed under *Edelman*: "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." *Id.*

111. My definition of retroactive relief as that which redresses harm that has accrued to the date of judgment is arguably incomplete because it does not seem to include remedies for plaintiff's loss of future earning capacity or for future pain and suffering. I suggest, however, that money for these losses is retrospective in the sense that the defendant's conduct has already caused physical or emotional harm, and post-judgment loss of earning capacity and pain and suffering *cannot be prevented*. A remedy for these harms that will accrue in the future thus fits better (albeit awkwardly) under the retrospective than the prospective label because prospective relief under my definition is that which seeks to prevent further harm. Moreover, monetary relief for economic harm that will be incurred in the future typically is discounted to present value, underscoring that the defendant's obligation to the plaintiff for those future harms terminates upon satisfaction of the court's judgment.

112. In part III.C.2, I will elaborate on why money for a sum past due under a contract or statute is specific relief. A Ninth Circuit decision further illustrates the concept that a specific remedy is not necessarily the same as a prospective remedy. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir. 1994). In this case involving whether the plaintiff could seek in federal court a monetary remedy against a state official in his governmental capacity, the court invoked the Eleventh Amendment doctrine under *Edelman v. Jordan* that only suits for prospective relief are permitted. *Id.* at 1511-12; see also *supra* note 108. The court held that a remedy for the \$611 allegedly past due to the plaintiff under a state funding program was not prospective relief. *Id.* at 1512. The court reasoned:

In requesting an order requiring the Commissioner to perform his "legal duty" to disburse the funds to Noatak, Noatak essentially seeks an injunction directing the state to pay damages in the amount that Noatak alleges the state previously improperly withheld. This is precisely the type of retroactive relief that the Supreme Court refused to allow in *Edelman*.

Id. The court's analysis was correct. Although the remedy sought was specific relief—to give the plaintiff the very money to which it was allegedly entitled under the funding program—the remedy was not prospective. The plaintiff requested a past due sum of money; an award of money would be retroactive in effect because it would repair the harm—the missed payment—that had already occurred.

113. See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (characterizing the money the parents sought as "retroactive reimbursement"); *supra* notes 79-81 and accompanying text.

one to which she was legally entitled.¹¹⁴ Instatement to a different position requiring additional training and education not only affords a substitute for the plaintiff’s original entitlement, it also operates prospectively. The order specifies the future conduct of the defendant, and it prevents the accrual of further harm resulting from the past illegal employment action.

The specific/substitutionary dichotomy is sometimes conflated with the prospective/retrospective dichotomy. For example, the Claims Court after *Bowen* reasoned that a request for money due on a completed project was a request for “money damages” under APA section 702, rather than for specific relief, because the remedy was retroactive in nature.¹¹⁵ The previous discussion has demonstrated, however, that the temporal concepts of prospective and retrospective relief are distinct from the functional concepts of specific and substitutionary relief.

I have argued that in those circumstances in which it is necessary to classify a remedy as either specific or substitutionary, we should make the choice based on the function of the remedy, rather than use other labels such as legal or equitable or prospective or retrospective to make the classification. The inquiry should be whether the function of the remedy is to give the plaintiff the original thing or condition to which it was entitled or, instead, to give a substitute. With such a definitional framework, it becomes apparent that both monetary remedies and injunctions can afford either specific or substitutionary relief. At the case level, however, classifying an injunction as either specific or substitutionary relief will rarely be necessary. It is with monetary remedies that the classification issue typically arises, a topic discussed in greater detail in parts II and III.

II. THE RELATIONSHIP BETWEEN “DAMAGES” AND SPECIFIC MONETARY RELIEF

The term “damages” carries many connotations in the remedial context.¹¹⁶ Depending on its meaning, “damages” may either include or exclude specific monetary relief. Courts often miss this nuance in discussing monetary remedies. In this part, I identify the many meanings of “damages” and explore the relationship between damages and specific monetary relief.

114. See *supra* part I.A.

115. *City of Wheeling v. United States*, 20 Cl. Ct. 659, 664 (1990); *aff’d* 928 F.2d 410 (Fed. Cir. 1991).

116. The term “damages” is also used colloquially in the context of liability to include the specific harm the plaintiff suffered, such as injury to person or property.

A. *The Many Meanings of “Damages”*

In its broadest usage, “damages” means any type of monetary award.¹¹⁷ This usage is unfortunate because it divests the term of any distinctive meaning. More helpfully, “damages” can be preceded by adjectives such as “compensatory,” “punitive,” “nominal,” or “statutory,” adjectives that denote the type of remedy involved—“compensatory damages” to remedy the plaintiff’s loss;¹¹⁸ “punitive damages” to punish the defendant; “nominal damages” to remedy violations that cause no measurable harm; “statutory damages” to serve legislative purposes.¹¹⁹

When “damages” is used without any defining adjective, the meaning of the term must be gleaned from context. In addition to connoting any type of monetary award, the bare term “damages” sometimes is used in juxtaposition to “restitution,” with the former term ideally reserved for remedies measured by the plaintiff’s loss and the latter term reserved for remedies measured by the defendant’s gain.¹²⁰ “Damages” also is used to connote a monetary remedy that a court considers to be legal, rather than equitable.¹²¹

Thus far, I have described how the term “damages” is used variously to mean: (1) any type of monetary award, (2) a remedy for the plaintiff’s loss rather than the defendant’s gain, or (3) a legal, rather than an equitable,

117. See DOUG RENDLEMAN, *CASES AND MATERIALS ON REMEDIES* 316 (6th ed. 1999) (“The word ‘damages’ is often used in a general sense to include all money recovery . . .”). This broadest use of “damages” can cause significant confusion. For example, in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990), the Court asserted: “[W]e have characterized damages as equitable where they are restitutionary . . .” With this language, the *Terry* Court used “damages” in the broadest sense of any type of monetary award. This is confusing because the issue before the court was whether a right to jury trial existed, a right dependent in part on whether the plaintiff sought a legal, as opposed to an equitable, remedy. See *id.* at 564. “Damages” sometimes carries the meaning of a legal remedy, so the Court’s assertion in the case that damages can be equitable muddied the waters substantially. The Court also erred in suggesting that restitution is exclusively equitable. Compare *id.* at 570, with *Murphy*, *supra* note 82, at 1627. And, in calling damages “restitutionary,” the *Terry* Court obscured the distinction between damages as a remedy for plaintiff’s loss and restitution as a remedy for defendant’s gain. See also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002) (“The restitution sought here by Great-West is . . . a freestanding claim for money damages.”).

118. “Compensatory damages” sometimes is used in a more narrow sense to connote only a substitutionary remedy for the plaintiff’s loss. See *infra* note 124 and accompanying text.

119. See, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998) (involving statutory damages under the Copyright Act of 1976, 17 U.S.C. § 504(c)(1) (2000), which are to be awarded within the statutory range in an amount “the court considers just” (quoting 17 U.S.C. § 504(c)(1) (2000) (internal quotation marks omitted)).

120. See, e.g., Peter Birks, *Misnomer*, in *RESTITUTION: PAST, PRESENT & FUTURE: ESSAYS IN HONOUR OF GARETH JONES* 1, 11 (W.R. Cornish et al. eds., 1998) (“We have the word ‘compensation’ for loss-based awards. We need ‘restitution’ for gain-based awards.”); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1282-83 (1989) (“[R]estitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, ‘restitution’ loses all utility as a means of distinguishing one body of law from another.”); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1226 (1995) (“The simplest possible account of the law of restitution, consistent with the case law, will describe it as the branch of civil liability that is based on and measured by the unjust enrichment of the defendant at the expense of the plaintiff.”); *Murphy*, *supra* note 82, at 1597 (“As many scholars and courts have suggested, the terms ‘damages’ or ‘compensation’ should be reserved for loss-based awards and ‘restitution’ used for remedies based on the defendant’s gain.”).

121. See, e.g., *Feltner*, 523 U.S. at 347-54 (explaining that because law courts historically awarded “damages,” modern statutory damages are “legal” and thus trigger an entitlement to jury trial).

remedy. With any of these meanings, “damages” could be either a specific or a substitutionary remedy. The money could be the very thing to which the plaintiff originally was entitled, or the money could be a substitute. Specific monetary relief thus is a subset of “damages” when one of these meanings of damages applies. Likewise, the term “compensatory damages,” when used broadly as a monetary remedy for the plaintiff’s loss or as a legal remedy, may encompass specific monetary relief.

Understanding the many meanings of damages helps explain the Supreme Court’s conclusion in *Great-West* that reimbursement of money due under a contract was not “equitable relief” within the applicable statutory language.¹²² The plaintiff, I suggest, sought a specific remedy because money was the original thing to which the plaintiff was entitled under the contract. But this same remedy could simultaneously be considered “damages” in the sense of a legal, rather than an equitable, remedy; claims for money due under a contract traditionally have been considered legal.¹²³

As we have seen in several Supreme Court decisions, “damages” is sometimes used in the narrow sense of a remedy that substitutes for the thing or condition to which the plaintiff was entitled. With this usage, “damages” is the opposite of specific monetary relief. Moreover, the term “compensatory damages” sometimes is used as a synonym for substitutionary monetary relief; employed in this fashion, “compensatory damages” would not encompass specific monetary remedies.¹²⁴

The taxonomy of monetary remedies would, of course, be simpler if “damages” and “compensatory damages” had single, stable meanings. Although desirable in theory, reforming use of these terms is unlikely to be achieved in practice. Courts and scholars have used the terms in a variety of ways for too long. Nonetheless, courts and scholars should be clear about which meaning of “damages” or “compensatory damages” they are employing. The next section will address the problem of determining which meaning applies in a given context.

122. 534 U.S. at 206-07. *See supra* notes 82-87 and accompanying text.

123. *See* FARNSWORTH, *supra* note 17, § 12.2, at 156 (“The principal legal remedy to enforce a promise is a judgment awarding a sum of money. . . . [The sum of money may] be specific, as when the sum is an amount due under the contract.”); *id.* § 12.4, at 160 (noting that the typical form of relief at common law for breach of contract was a money judgment and that “if the promise was simply to pay a sum of money, the effect of such a judgment was to give the plaintiff specific relief”).

124. *See, e.g.,* Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999) (“[E]quitable liens by their nature constitute substitute or compensatory relief”); *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (“The term “money damages,” we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss”) (quoting *Md. Dep’t of Human Res. v. Dep’t of Health & Human Serv.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)); *id.* at 900 (juxtaposing “money in *compensation* for the damage sustained” with specific monetary relief). Professor Dobbs, in a section titled “Damages as Compensation” in his 1973 remedies treatise, states: “The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation” DOBBS 1973 treatise, *supra* note 14, at 135.

B. Discerning the Applicable Meaning of “Damages”

The characterization of a monetary remedy as specific relief will not itself answer whether the remedy can also be characterized as damages. The applicable meaning of “damages” in a particular context will control whether the term encompasses the specific monetary remedy sought.

For example, consider the different meanings that the majority and dissenting opinions in *Bowen* gave to the term “damages.”¹²⁵ While the majority construed “damages” in section 702 of the APA to connote substitutionary monetary relief,¹²⁶ Justice Scalia gave “damages” the meaning of a legal remedy.¹²⁷ He acknowledged that the request by Massachusetts for money was in some sense a request for specific relief because it would give “the very thing (money) to which [Massachusetts] was legally entitled,” but he argued that a remedy for a past due sum of money traditionally would have been obtained in a suit for damages (a legal remedy) rather than in a suit for specific performance (an equitable remedy).¹²⁸ He stated:

[T]he terms “damages” and “specific relief” . . . have meanings well established by tradition. Part of that tradition was that a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff’s loss is a suit for damages, not specific relief; a successful plaintiff thus obtains not a decree of specific performance requiring the defendant to pay the sum due on threat of punishment for contempt, but rather a money judgment¹²⁹

This statement makes a point only about damages versus equitable relief; the statement does not address directly the specific-substitutionary distinction. The majority and dissenting opinions essentially were at cross-purposes in their discussions of the relationship between specific monetary relief and damages.

A related matter is that courts and scholars often refer to “money damages” as the heart of Tucker Act jurisdiction in the Court of Federal Claims.¹³⁰ This usage seems to connote the broad usage of “damages” as any type of monetary relief, which would include specific monetary relief. Thus, a particular monetary remedy against the federal government might be considered specific relief available in a federal district court under section 702 of the APA but also be considered damages available in the Court

125. See *Bowen*, 487 U.S. at 895, 918.

126. See *id.* at 895.

127. See *id.* at 918 (Scalia, J., dissenting).

128. *Id.*

129. *Id.*

130. See, e.g., *United States v. King*, 395 U.S. 1, 4 (1969) (referring to cases seeking “money damages” as within the jurisdiction of the Court of Claims); Fallon, *supra* note 48, at 520-21 (stating that “outside of expressed, statutory exceptions, money damages are the only remedy available under the Tucker Act”).

of Federal Claims under the Tucker Act. As one commentator has asserted: “[T]he Supreme Court in *Bowen* opened the door to the possibility that a case might involve a claim for money damages for purposes of Claims Court jurisdiction, even if it would be deemed a claim for non-damages relief if it were filed in federal district court.”¹³¹

Consider another federal statute—28 U.S.C. § 2415(a)—which provides a six-year limitations period for “every action for money damages” brought by the federal government that is founded on contract.¹³² Judges have debated whether “money damages” in this statute of limitations means: (1) compensatory damages in the narrow sense of substitutionary relief, (2) a remedy at law as opposed to an equitable remedy, or (3) any monetary remedy for breach of contract.¹³³ One recurring context in which the meaning of money damages under section 2415(a) has been tested has been suits by the United States for unpaid royalty payments on oil and gas leases.¹³⁴

A remedy that causes a defendant to pay royalties due under contract should be considered specific relief because it gives the plaintiff the very money to which it is entitled under the contract. Whether this remedy also is “money damages” under section 2415(a) depends on the definition the court gives the term. The Tenth Circuit defined “money damages” broadly to encompass the “common form of relief for breach of contract,” and thus held that a remedy for unpaid royalties constituted money damages.¹³⁵ With the court defining “money damages” as any monetary remedy for breach of contract, the government’s claim for royalties was barred as untimely filed under section 2415(a). By contrast, the Fifth Circuit read “money damages” to mean compensatory damages in the narrow sense of substitutionary relief. It concluded that a remedy for unpaid royalties was not “money damages” under the statute, and thus the government’s claim was not barred.¹³⁶

131. Fallon, *supra* note 48, at 528.

132. 28 U.S.C. § 2415(a) (2000).

133. For example, in *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001 (10th Cir. 2001), the majority asserted that “money damages” in § 2415(a) encompassed a remedy for “royalty payment obligations,” stating that “[a]n award of damages is the common form of relief for breach of contract.” *Id.* at 1008. The dissent in *OXY USA* quoted *Bowen* for the proposition that money damages “‘normally refers to a sum of money used as compensatory relief . . . given to [a] plaintiff to substitute for a suffered loss,’” *id.* at 1010 (Briscoe, J., dissenting) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)), and asserted that the statute “‘indisputably refers to lawsuits brought by the federal government seeking compensatory relief for losses suffered by the government.’” *Id.* The Fifth Circuit apparently also read “money damages” as not including remedies for missed royalty payments; the government brief in *OXY USA* quoted an unpublished Fifth Circuit opinion that such remedies are “‘not barred by the limitations period of § 2415.’” *Id.* at 1007 (quoting Brief for Appellant at 28-29, *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001, No. 98-5222 (10th Cir. Oct. 10, 2001) (quoting *Phillips Petroleum Co. v. Johnson*, No. 93-1377, 1994 WL 484506, at *1 (5th Cir. Sept. 7, 1994))). In *Marathon Oil Co. v. Babbitt*, 938 F. Supp. 575 (D. Alaska 1996), the court misread *Bowen* as depending on distinctions between actions at law and actions in equity and between actions for damages and actions for restitution. *See id.* at 578. *Marathon Oil* thus read “money damages” under § 2415 to mean a remedy different from “equitable actions for restitution.” *Id.*

134. *See, e.g., OXY USA*, 268 F.3d at 1007-08 (rejecting the government’s narrow interpretation of “money damages”).

135. *Id.* at 1008.

136. *Phillips Petroleum*, 1994 WL 484506, at *1.

A federal district court interpreted “money damages” to mean “legal” as opposed to “equitable” monetary remedies and concluded that a remedy for royalty payments was more analogous to a remedy at law for damages than a remedy in equity.¹³⁷ The government’s claim was therefore barred as untimely under the statute of limitations.¹³⁸

In highlighting these various interpretations of “money damages” under section 2415, my aim is not to argue the correct interpretation of the statutory language but rather to underscore that a monetary remedy that affords specific relief may or may not also be accurately considered “damages.” The determining factor in any particular context—be it cases under section 702 of the APA, the Tucker Act, 28 U.S.C. § 2415(a), or some other setting—is which meaning of damages applies.

This part has shown how specific monetary relief in a given context may be a subset of “damages” or it may be the opposite of “damages.” When a monetary remedy must be classified exclusively as specific relief or damages—one or the other—it is necessary to have an understanding of what makes a monetary remedy specific rather than substitutionary. This leads to the next line of inquiry—identifying some categories of remedies that qualify as specific monetary relief.

III. CATEGORIES OF SPECIFIC MONETARY RELIEF

Based on a definition of specific relief as giving the plaintiff the original thing to which the plaintiff is or was entitled, monetary remedies are specific relief in at least three broad categories: (1) when the plaintiff asserts a claim to non-fungible currency—i.e., unique coins and bills; (2) when the plaintiff seeks the return of money taken by, or transferred to, the defendant; and (3) when the plaintiff’s original entitlement under the substantive law is that the defendant pay money to the plaintiff.

In articulating these categories of specific monetary relief, I am not making any judgment about whether claims against the federal government for these types of specific monetary remedies fall within the jurisdiction of the federal district courts under the APA or, instead, within the jurisdiction of another court under other statutes.¹³⁹ Even if a monetary remedy is con-

137. *Marathon Oil Co.*, 938 F. Supp. at 578 (stating that “efforts by the government to collect royalties . . . are more analogous to actions at law for damages than to actions in equity for restitution”); see *supra* note 133.

138. *Marathon Oil Co.*, 938 F. Supp. at 578.

139. In addition to the Tucker Act, other statutes waive federal sovereign immunity and provide jurisdiction in courts other than the federal district courts. See generally Sisk, *supra* note 45, at 606-15, 637-38. For example, for certain claims by government contractors, the contractor may seek review of action taken by a government agency contracting officer in either the Court of Federal Claims or the Board of Contract Appeals for a particular agency. Tucker Act, 28 U.S.C. § 1491(a)(2) (2000); Contract Disputes Act of 1978, 41 U.S.C. § 609(a)(3) (2000); Sisk, *supra* note 45, at 606. Appellate review is in the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3), (a)(10), (b) (2000). Also, the Civil Service Reform Act provides that persons within most categories of civilian employment may complain about an adverse employment action by lodging a claim with the Merit Systems Protection Board and then obtaining judicial review in the Federal Circuit. 5 U.S.C. §§ 7701-03 (2000).

sidered specific relief so as to fall within section 702 of the APA, there remains the separate question under section 704 of the APA whether district court jurisdiction is precluded because an adequate remedy is available elsewhere.¹⁴⁰ Indeed, courts often decide the section 704 question first; if an adequate remedy exists in a court other than the district court, there remains no need to determine whether the plaintiff sought "relief other than money damages" under section 702.¹⁴¹

Two points bear reiterating. First, the mere fact that the plaintiff seeks an order or injunction for the payment of money does not make the remedy specific relief.¹⁴² Rather, characterizing the remedy as specific or substitutionary should be guided by whether the function of the order is to grant money as the plaintiff's original entitlement or as a substitute for the original entitlement. Second, the fact that a plaintiff seeks retrospective relief does not control whether the remedy is specific or substitutionary.¹⁴³ If money is the original thing to which the plaintiff is entitled, then the remedy is specific, even if the remedy is for a payment that is past due.

I will elaborate each of the categories of specific monetary relief in turn and discuss how courts have handled issues arising within the categories. In the relevant cases, it is clear from the context that the courts used the terms "damages" or "compensatory damages" in the sense of substitutionary relief. Thus, for clarity, I will often employ the term "substitutionary damages" even though the courts may have used other terminology.

140. See *supra* notes 61-64 and accompanying text. A court may find that the plaintiff seeks specific monetary relief against a federal agency and that an adequate remedy does not exist outside the federal district court. This was the finding of *Bowen* on its facts. See, e.g., *Tex. Health Choice, L.C. v. U.S. Office of Pers. Mgmt.*, No. 9:03CV14, 2004 U.S. Dist. LEXIS 28392, at *19-*20 (E.D. Tex. Feb. 10, 2004) (finding that plaintiff's claim that it was underpaid money due under a federal statute was a claim for specific relief and that the Court of Federal Claims could not provide an adequate remedy because it could not grant a declaratory judgment as to the validity of the relevant regulation).

141. See, e.g., *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349-50 (Fed. Cir. 2005) (declining to address whether requested injunction or declaration that would ultimately produce a refund was specific relief and asserting that an adequate remedy existed in the Court of Federal Claims and that any ruling there would have future effect), *cert. denied*, 126 S. Ct. 1021 (2006); *Consol. Edison Co. v. U.S. Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001) ("[T]his court need not address the § 702 limitation in this case because" there is an adequate remedy in the Court of Federal Claims.); *Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 786-87 (Fed. Cir. 1998) ("Because . . . the Court of Federal Claims provides an 'adequate remedy' for Brazos's claim, district court jurisdiction under the APA is barred by section 704. Accordingly, we need not address the potential impediment of the waiver of sovereign immunity under section 702."); *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) ("[T]o determine whether Plaintiff's suit is cognizable under the APA, the court must first examine whether he has an available remedy under the Tucker Act.")

142. As I suggested in part I, an injunction or order to pay money does not, by itself, convert the remedy into "specific relief." Rather, one must examine whether the payment of money so ordered would give the plaintiff the original thing to which it is entitled or a substitute. See *supra* notes 29-32 and accompanying text.

143. See *supra* part I.C.2.

A. Plaintiff Seeks Non-Fungible Currency

Perhaps the most obvious example of specific monetary relief is the award of non-fungible currency. When a plaintiff asserts a claim to rare or unique bills or coins, remedies such as replevin, detinue, injunctive relief, or specific performance are available to give the plaintiff the specific currency she seeks.¹⁴⁴ This category is non-controversial; even the dissenters in *Bowen* acknowledged that specific relief is available to obtain particular currency.¹⁴⁵

B. Plaintiff Seeks the Return of Money

If the plaintiff asserts a preexisting ownership interest in money that has been taken by, or transferred to, the defendant, then the plaintiff's claim for the money should be considered specific relief. The money could have been involuntarily relinquished by the plaintiff, such as with government seizure of currency. Or, the money could have been transferred to the defendant because the plaintiff made a mistake or because the defendant charged the plaintiff illegally or excessively. Whether the return of money in these circumstances would constitute specific relief rather than substitutionary damages has arisen in contexts as disparate as Federal Rule of Criminal Procedure 41(g) and section 702 of the APA.¹⁴⁶

Let us begin with Federal Rule of Criminal Procedure 41(g), which provides an avenue for seeking the return of money seized by the government.¹⁴⁷ The rule provides in part: "A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move [the district court] for the property's return."¹⁴⁸ The remedy available under

144. See DOBBS 1993 treatise, *supra* note 1, § 5.17, at 583-87 (discussing specific recovery of chattels); *id.* § 6.1(1), at 597-98 (asserting that replevin of non-fungible money is not available but that replevin may be had of money that is distinguishable from other monies).

145. *Bowen v. Massachusetts*, 487 U.S. 879, 919 n.3 (Scalia, J., dissenting) ("Suit for a sum of money is to be distinguished from suit for *specific* currency or coins in which the plaintiff claims a present possessory interest. Specific relief is available for that, through a suit at law for replevin or detinue or through a suit in equity for injunctive relief, if the currency or coins in question (for example, a collection of rare coins) are 'unique' or have an incalculable value.") (citations omitted).

146. 5 U.S.C. § 702 (2000).

147. See generally JIMMY GURULÉ ET AL., *THE LAW OF ASSET FORFEITURE* § 3.2, at 98-141 (2d ed. 2004).

148. FED. R. CRIM. P. 41(g). Although Rule 41(g) technically applies only in criminal proceedings, courts have determined that they have the power to entertain Rule 41(g) motions even when criminal proceedings either are not pending or have concluded. See, e.g., *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992), *overruled on other grounds by Adeleke v. United States*, 355 F.3d 144 (2d Cir. 2004) (stating that when "no criminal proceedings against the movant are pending or have transpired, a motion for the return of property is 'treated as [a] civil equitable proceeding[] even if styled as being pursuant to FED. R. CRIM. P. 41(e)' [now Rule 41(g)]" (quoting *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987))); *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) ("The position of this court is that a claim under Rule 41(g) may be brought after the defendant's conviction, as well as before, as an ancillary proceeding to the criminal case."). Sometimes, the movant is a person who has not been charged with criminal conduct. See, e.g., *Gatex Corp. v. United States*, No. 04 Civ. 3729 (PKC), 2005 U.S. Dist. LEXIS 5954, at *1-*2 (S.D.N.Y. April 7, 2005) (discussing motion by owners of bank accounts that were seized in connection with the arrest and criminal prosecution of a bank employee), *aff'd*

Rule 41(g) is akin to replevin—the plaintiff gets back its specific property.¹⁴⁹ Courts applying Rule 41(g) and its predecessor, Rule 41(e),¹⁵⁰ have recognized that “property” includes money that the government has seized.¹⁵¹

However, cases under the rule have questioned whether the government must have the precise currency taken from the plaintiff. Courts generally have interpreted the “return of property” language in Rule 41(g) as not waiving sovereign immunity to permit substitutionary damages for tangible property that was lost, damaged, or destroyed.¹⁵² With respect to currency,

sub nom. DeAlmeida v. United States, 459 F.3d 377 (2d Cir. 2006). The movant may be entitled to recover the property because the property allegedly was procured through an unlawful search and seizure (as expressly provided in Rule 41(g)) or because the property is no longer needed as evidence. *See, e.g.,* Lavin v. United States, 299 F.3d 123, 127 (2d Cir. 2002); *see generally* GURULÉ ET AL., *supra* note 147, § 3-2(a), at 98-100 (discussing Rule 41(g)).

149. *Okoro*, 324 F.3d at 490.

150. Rule 41(g) is a revised version of former Rule 41(e), which also permitted a motion for return of property. FED. R. CRIM. P. 41(e), 18 U.S.C. app. RULE 41(e) (2000) (“A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property.”). *See* FED. R. CRIM. P. 41 advisory committee’s note to the 2002 amendments.

151. *See, e.g.,* Adeleke v. United States, 355 F.3d 144, 148 (2d Cir. 2004) (noting that federal government had returned \$1,000 in cash pursuant to Adeleke’s Rule 41(g) motion); *United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) (“Even though Minor seeks return of currency, we can see no persuasive reason to treat his [Rule 41(e)] motion differently than an action in equity for the return of a tangible item of personal property.”); *United States v. White*, 660 F.2d 1178, 1184 (7th Cir. 1981) (reversing return of money under Rule 41(e) to person whose flight bag filled with cash had been taken during a seizure). In a similar vein, a request for return of seized money has been considered a request for “specific relief” and thus within the district court’s jurisdiction under section 702 of the APA. *Sterling v. United States*, 749 F. Supp. 1202, 1207 (E.D.N.Y. 1990).

152. The vast majority of the circuit courts have found that Rule 41(g) (or its predecessor, Rule 41(e)) does not waive sovereign immunity with respect to actions for damages relating to property taken by the United States that was damaged, destroyed, or stolen. *E.g., Adeleke*, 355 F.3d at 151 (citing other appellate court decisions and ruling that “Rule 41(g), which simply provides for the return of seized property, does not waive the sovereign immunity of the United States with respect to actions for money damages relating to such property”); *Okoro*, 324 F.3d at 491 (“No one supposes that Rule 41(g) was intended to waive the sovereign immunity of the federal government.”); *United States v. Hall*, 269 F.3d 940, 943 (8th Cir. 2001) (“Rule 41(e) contains no such waiver, and we may not use general equitable principles to fill the gap. . . . Accordingly, the district court exceeded its Rule 41(e) jurisdiction in awarding monetary relief.”); *United States v. Potes Ramirez*, 260 F.3d 1310, 1316 (11th Cir. 2001) (asserting that “sovereign immunity protects the government from money damages sought under Rule 41(e)”); *United States v. Bein*, 214 F.3d 408, 413 (3d Cir. 2000) (addressing Rule 41(e) and stating: “[W]e conclude that a Federal Rule of Criminal Procedure that does not expressly provide for an award of monetary damages does not waive sovereign immunity.”); *United States v. Jones*, 225 F.3d 468, 470 (4th Cir. 2000) (“Rule 41(e) does not contain a waiver of sovereign immunity. . . . Accordingly, . . . [district courts] lacked jurisdiction to award damages under Rule 41(e).”); *Pena v. United States*, 157 F.3d 984, 986 (5th Cir. 1998) (“Rule 41(e) makes no provision for monetary damages, and we will not read into the statute a waiver of the federal government’s immunity from such damages.”); *see also* GURULÉ ET AL., *supra* note 147, § 3-2(a), at 99 (“Rule 41(g) provides for the return of seized property and does not waive the sovereign immunity of the United States with respect to actions for money damages relating to such property.”). The Ninth Circuit suggested that damages might be available under the federal rule when the government destroys property in *United States v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987), but it has not expressly addressed whether the Rule waives sovereign immunity in an action for damages. The Ninth Circuit, however, interpreted Federal Rule of Criminal Procedure 16(d)(2)—authorizing courts to “prescribe such terms and conditions as are just” to remedy discovery violations—as not constituting an “express waiver of sovereign immunity” for a monetary claim against the United States. *United States v. Woodley*, 9 F.3d 774, 782 (9th Cir. 1993) (quoting FED. R. CRIM. P.

courts have split as to whether, if the government no longer has the plaintiff's bills and coins, the plaintiff's claim for money should be treated as a claim for property permitted under the rule or as a claim for substitutionary damages barred by sovereign immunity. The majority view is that a plaintiff under Rule 41(g) is entitled to "return" of the money, even though the government no longer has the plaintiff's specific currency.¹⁵³ Other courts have decided that if the plaintiff's money has been transferred or deposited by the government, the plaintiff may not seek return of the money under Rule 41(g).¹⁵⁴

If currency seized by the government was lost or destroyed, then a plausible argument could be made that the money sought under Rule 41(g) would constitute impermissible substitutionary damages. The seized money arguably is equivalent to tangible property that has been lost or destroyed,

16(d)(2)).

Although Rule 41(g) and its predecessor have been read not to waive sovereign immunity for damages claims for lost, damaged, or destroyed property, the complainant may, in appropriate circumstances, be able to seek damages in a *Bivens* action in federal district court or to pursue a damages claim under the Tucker Act. *See, e.g.,* *Arredondo v. United States*, No. Civ. 3:03-CV-2356-14, 2004 WL 1171203, at *3 (N.D. Tex. May 25, 2004) (denying Rule 41(g) motion when plaintiff sought damages for destroyed property but noting that "a petitioner must be given an opportunity to amend his or her complaint to state a claim for monetary damages pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)"); *Seay v. United States*, No. NA 00-47-C H/H, 2002 U.S. Dist. LEXIS 4560, at *17-*18 (S.D. Ind. Mar. 5, 2002) (finding that the plaintiff's claim against the United States for damage to his property was a claim for "damages" falling within the jurisdiction of the Court of Federal Claims under the Tucker Act).

153. *See, e.g., In re Search of 2847 East Higgins Road*, 390 F.3d 964, 965 (7th Cir. 2004) (when movant's cash had been deposited by government into bank account, movant's "Rule 41(g) motion should have been granted as soon as the government realized that the currency had no evidentiary value and was not the fruit of a crime"); *United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) ("Even though Minor seeks return of currency, we can see no persuasive reason to treat his motion differently than an action in equity for the return of a tangible item of personal property."); *United States v. Frank*, 763 F.2d 551, 552 (3d Cir. 1985) (ruling that district court could entertain Rule 41(e) motion for money when movant's check had been "converted" to "cash proceeds" deposited into the U.S. Treasury because "the evidential character of the check may be traced through to its proceeds" and thus "the district court had jurisdiction . . . to order the proceeds returned to the court for a determination as to entitlement to the proceeds"). In *Minor*, the plaintiff sought return of the money that was seized by the government nine years before. 228 F.3d at 354. The Fourth Circuit cited *Bowen* and reasoned that the plaintiff's monetary claim was not for damages because the plaintiff sought return of "'the very thing' to which he claim[ed] an entitlement, not damages in substitution for a loss." *Id.* at 355 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)).

154. For example, in a district court case in which the plaintiff sought return of tangible property as well as \$30,000 in currency, the court treated the claim as one for substitutionary damages. *Elford v. United States*, No. 03-CV 3769 (SJ), 2004 U.S. Dist. LEXIS 26935, at *5-*7 (E.D.N.Y. Nov. 24, 2004), *aff'd in part, vacated in part*, 161 Fed. App'x 150 (2d Cir. 2006). It noted that "[t]he seized items all have been destroyed, sold, or transferred and, evidently, are no longer available for return" and that the federal agents had "transferred or deposited the currency." *Id.* at *3 & n.3. Without differentiating between the tangible property that had been destroyed or sold and the currency that had been "transferred or deposited," the court stated that it did not have the authority under Rule 41(g) to "order the United States to pay money damages when, for whatever reason, property is not available for . . . return." *Id.* at *6 (quoting *Adeleke v. United States*, 355 F.3d 144, 151 (2d Cir. 2004)) (emphasis added). With cases under Rule 41(g) holding that the Rule waives the federal government's sovereign immunity only for the return of "property" and not for "damages," the district court apparently assumed that a movant under Rule 41(g) may obtain the return of its money only if the government still possesses the movant's specific coins and bills. The court in *Elford* also found that jurisdiction over the plaintiff's claim in federal district court was not available under section 702 of the APA because it characterized the plaintiff's requested remedy as "money damages." *Id.* at *9-*10.

and under the limitation of Rule 41(g) to “property,” there would be no “property” for the movant to recover. Even though it is accurate to characterize the plaintiff’s claim for money as a claim for specific relief—money is the “original thing” to which the plaintiff is entitled—the plaintiff is not making a claim for the “return” of “property” as specified under Rule 41(g).

If, however, the seized currency was not lost or destroyed but instead deposited by the government into an account, the movant’s claim should be treated as one for “property” returnable under Rule 41(g) rather than substitutionary damages.¹⁵⁵ The key here is that money, aside from rare coins and bills, is fungible. Allowing the plaintiff to recover money for cash taken by the government is functionally indistinguishable from allowing the plaintiff to recover account funds in a bank account that the government seized. A bank account does not have specific coins and cash in it, but a plaintiff would be able to recover the funds in the account as property under Rule 41(g).¹⁵⁶ In other words, even though the government no longer has the actual coins and bills that were seized, it should be treated nonetheless as having the plaintiff’s property—that is, the plaintiff’s specific money.¹⁵⁷

Having suggested that the return to the plaintiff of money seized by the defendant constitutes specific relief (regardless of whether the plaintiff would get back the specific bills and coins or instead would get fungible money), I now examine the return of money that the plaintiff voluntarily transferred to the defendant. Among other possibilities, the plaintiff may seek return of the money because of its own mistake,¹⁵⁸ because of an illegal or excessive charge by the defendant,¹⁵⁹ or because it paid the money under a contract it now seeks to have rescinded.¹⁶⁰ Litigation under section 702 of

155. Cf. *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 88-89 (1992) (holding that in a drug forfeiture action brought by the federal government, appellate court was not divested of in rem jurisdiction because government, after prevailing at trial, transferred sale proceeds of the forfeited property from the district court to the assets forfeiture fund of the United States Treasury); 9 U.S. ATTORNEY’S MANUAL: CRIMINAL RESOURCE MANUAL § 2228 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02228.htm (“The co-mingling of cash seized by the government . . . will not deprive the court of jurisdiction over the res. . . . [C]ash is a fungible item. Its character is not changed merely by depositing it with other cash.”).

156. See *United States v. Ebert*, 39 Fed. App’x 889, 889-90 (4th Cir. 2002) (involving convicted defendant’s successful motion under Rule 41(e) for return of account funds seized by the government); cf. *Gatex Corp. v. United States*, No. 04 Civ. 3729 (PKC), 2005 U.S. Dist. LEXIS 5954, at *10-*11 (S.D.N.Y. Apr. 7, 2005) (deciding that plaintiffs’ claim under Rule 41(g) to recover funds from bank accounts seized by federal government should be dismissed due to related proceedings in a different federal district court), *aff’d sub nom. DeAlmeida v. United States*, 459 F.3d 377 (2d Cir. 2006).

157. This approach is similar to a variety of tracing fictions, which allow a plaintiff whose money has been misappropriated and mingled with others’ funds to identify as hers money held by the wrongdoer. See generally 2 DOBBS 1993 treatise, *supra* note 1, § 6.1(3), (4) (discussing tracing of misappropriated money in commingled funds).

158. See, e.g., *Moses v. MacFerlan*, (1760) 97 Eng. Rep. 676, 681 (K.B.) (recognizing a cause of action “for money paid by mistake”).

159. See, e.g., *Am.’s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829-30 (D.C. Cir. 2000); *Holly Sugar Corp. v. Veneman*, 355 F. Supp. 2d 181, 183-85 (D.D.C. 2005), *rev’d sub nom. Holly Sugar Corp. v. Johanns*, 437 F.3d 1210 (D.C. Cir. 2006). Tax litigation often involves claims by taxpayers that they paid too much to the federal government. Congress has provided specific procedures and jurisdictional grants for pursuing such claims of overpayment. See 26 U.S.C. §§ 7422, 6511, 1346(a) (2000).

160. See LAYCOCK, *supra* note 1, at 13 (discussing how cancellation of a contract under which plain-

the APA has often raised the question whether a refund in any of these circumstances constitutes specific relief or “money damages.”¹⁶¹

I contend that a remedy that returns money previously transferred to the defendant fits the definition of specific relief. The plaintiff gets back the money to which she was originally entitled. The courts, however, have been inconsistent in how they have characterized refunds. For example, in the particular context of government overcharges, most courts have treated refunds from the government as specific relief,¹⁶² while at least one appellate court has considered refunds of overcharges instead to be “money damages.”¹⁶³ In arguing that a refund of money previously transferred to the defendant constitutes specific relief, I am not suggesting that federal district courts necessarily have jurisdiction over suits seeking refunds from the federal government. Although the requested refund is not “money damages” under section 702 of the APA, there arguably is an adequate remedy in the Court of Federal Claims under section 704 because of the retrospective nature of the remedy.¹⁶⁴

tiff paid money for goods will give plaintiff a specific remedy—refund of the price—in exchange for returning the goods).

161. See, e.g., *Rashid v. United States*, 170 F. Supp. 2d 642, 647 (S.D. W. Va. 2001) (characterizing plaintiff’s request for return of money he paid under a settlement agreement with the federal government “not as money damages” barred under section 702 of the APA but as a request for “the return of the consideration he provided”), *aff’d*, 48 Fed. App’x 892 (4th Cir. 2002) (unpublished); *BP Exploration & Oil, Inc. v. U.S. Dep’t of Transp.*, 44 F. Supp. 2d 34, 36-37 (D.D.C. 1999) (finding plaintiff’s request for refund of penalty collected by Coast Guard is request for specific relief and thus section 702 of the APA authorizes jurisdiction in district court).

162. See, e.g., *Am.’s Cmty. Bankers*, 200 F.3d at 831; *Holly Sugar Corp.*, 355 F. Supp. 2d at 192-93 (finding request that Secretary of Agriculture refund money paid by plaintiffs for illegal interest rate assessment on sugar loans was a request for specific relief). The D.C. Circuit in *America’s Community Bankers* offered a careful opinion on why the requested refund was specific relief. A trade association of banks and savings institutions sought a declaration that its members were entitled to refunds from the FDIC for payments made pursuant to unlawful demands from the FDIC. *Am.’s Cmty. Bankers*, 200 F.3d at 824-26. Characterizing the requested remedy as specific relief rather than substitutionary damages, the court reasoned: “[T]his case questions whether the government can retain funds which originally belonged to [plaintiff’s] members. . . . [The plaintiff] is not seeking compensation for economic losses suffered by the government’s alleged wrongdoing; [it] wants the FDIC to return that which rightfully belonged to [its] member institutions in the first place.” *Id.* at 830 (emphasis added). Of note is that the court did not rest its conclusion on the fact that the plaintiff ostensibly sought a declaratory judgment; rather, it appropriately characterized the money that the plaintiff would receive. *Id.* at 829-30.

163. See, e.g., *Amerada Hess Corp. v. Dep’t of Interior*, 170 F.3d 1032 (10th Cir. 1999). In this case, involving a plaintiff’s request for a declaration that it was entitled to refunds of royalty overpayments that it had made to the Department of Interior, the Tenth Circuit characterized the requested remedy as one for a “past due sum of money” and thus for money damages under section 702 of the APA. *Id.* at 1035 n.5. The court admitted that the plaintiff’s claims “might appear to be for specific relief, insofar as [the plaintiff] requests a monetary award representing royalty overpayments that the government has refused to refund.” *Id.* It nonetheless determined the remedy to be “money damages” and thus not cognizable in district court under section 702, relying solely on Justice Scalia’s dissent in *Bowen*. *Id.* The Tenth Circuit wrote: “Traditionally, . . . ‘a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff’s loss is a suit for damages, not specific relief.’” *Id.* (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918 (1988) (Scalia, J., dissenting)).

164. The Tucker Act for several decades has been interpreted to waive immunity when “the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.” *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967), *overruled by* *Claude E. Atkins Enters., Inc. v. United States*, 15 Cl. Ct. 644 (1988). This “illegal exaction” doctrine was recently reaffirmed by the Federal Circuit. See *Consol. Edison Co. v. U.S. Dep’t of Energy*,

A separate question with respect to claims for refunds under section 702 of the APA is whether the government must have the plaintiff's monetary *res* for the plaintiff to obtain a return of money. That is, when a plaintiff seeks funds it paid pursuant to a mistake or a government overcharge, must the government defendant be in possession of the plaintiff's funds for the requested remedy to constitute specific relief rather than money damages? I contend that the answer is "no."

Unlike Federal Rule of Criminal Procedure 41(g), which requires the existence of "property" that is capable of return, section 702, under the interpretation given it in *Bowen*, depends on whether the plaintiff seeks "specific monetary relief." Thus, an even stronger argument can be made under section 702 than under Rule 41(g) that the defendant need not possess the monetary *res*. A refund of an overcharge gives the plaintiff the original thing to which it is entitled and thus satisfies the definition of specific monetary relief, irrespective of whether the defendant still has the plaintiff's funds.¹⁶⁵

Thus far, I have discussed remedies seeking return of money previously transferred to defendants. Sometimes, however, a plaintiff may seek a "refund" from the defendant of money that the plaintiff paid to a third party. The plaintiff implicitly may be seeking indemnification, a specific remedy that I address elsewhere in this article.¹⁶⁶ Another context in which a plaintiff may seek a refund for money paid to a third party is when the government compelled the plaintiff to make a payment to the third party, and the plaintiff believes that the government acted unlawfully in compelling the payment. Courts have differed as to whether the requested remedy in this circumstance is substitutionary or specific relief. At least part of the difference in the cases seems to depend on the degree to which the third party was independent of the governmental defendant.¹⁶⁷

247 F.3d 1378, 1384 (Fed. Cir. 2001).

165. A decision by the D.C. Circuit is consistent with the proposition that a refund remedy is specific relief even though the defendant does not have the plaintiff's precise funds. In *America's Community Bankers*, 200 F.3d 822, a trade association of banks and savings institutions sought a declaration that its members were entitled to refunds from the FDIC for payments made pursuant to unlawful demands from the FDIC. The FDIC had, as required by federal law, immediately transferred the funds to another governmental agency. *Id.* at 826. The FDIC argued that because it no longer had the "specific *res* from which a refund could be paid," a remedy against it for the overpayments constituted money damages under section 702. *Id.* at 829. The D.C. Circuit rejected this argument, saying: "The FDIC cannot eliminate the entitlement of [the plaintiff's] member institutions to reimbursement by distributing the improperly collected funds elsewhere." *Id.* at 830. This outcome is correct, for the plaintiff's original entitlement was to be free of wrongful overcharges; its request for the amount of the overcharge thus constituted specific relief.

166. See *supra* notes 79-81 and accompanying text; *infra* part III.C.1.

167. See, e.g., *Wileman Bros. & Elliott Inc. v. Espy*, 58 F.3d 1367, 1385-86 (9th Cir. 1995) (fruit handlers' request for return of payments made pursuant to unconstitutional assessments imposed by Department of Agriculture to an agency established under order of the Department of Agriculture is a request for specific relief and thus not barred by sovereign immunity), *rev'd sub nom.* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *Cal-Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874, 878 (9th Cir. 1995) (finding almond handlers' request that federal government reimburse them for payments they made to the California Almond Board for advertising, when those payments were compelled under an unconstitutional order of the federal Department of Agriculture, is a request for "damages"

I have asserted that a refund of money taken by the government is specific relief, even if the government does not still possess the plaintiff's monetary "res." Similarly, a monetary remedy from the government for money the government compelled the plaintiff to pay to a third person should be considered specific relief. Although the government did not itself receive payment from the plaintiff, the plaintiff had an original entitlement to retain the money, free from any illegal government order.¹⁶⁸

C. Plaintiff's Original Entitlement Is That Defendant Pay Money

While the prior section focused on the return of plaintiff's money that was transferred to, or taken by, the defendant, this section addresses a plaintiff's original entitlement under substantive law to a payment of money from the defendant. Unlike the situation in which the defendant has money originally possessed by the plaintiff, here the defendant is withholding money that the plaintiff never had but to which the plaintiff is entitled. When a plaintiff demands that the defendant fulfill its original obligation under law to pay money, the remedy should be considered specific relief because money is the very thing to which the plaintiff is entitled.

A plaintiff's original entitlement to a payment of money from the defendant is distinguishable from a plaintiff's right to have the defendant meet other duties owed the plaintiff (duties such as delivering goods under a contract, refraining from harming the plaintiff's property, or acting as required by statute). Money as a remedy for the defendant's failure to meet its original obligation to pay money is specific relief; money as a remedy for the defendant's failure to meet other duties is substitutionary relief. *Bowen* and *Blue Fox* exemplify this distinction. In *Bowen*, the plaintiff had an original entitlement under statute that the government pay money, and the Supreme Court correctly decided that the monetary remedy the plaintiff sought was specific relief.¹⁶⁹ In *Blue Fox*, the plaintiff had an original entitlement under statute that the government require prime contractors to post security bonds, and the Court correctly decided that the monetary relief the plaintiff sought from the government was substitutionary relief.¹⁷⁰

rather than specific relief), *vacated*, 521 U.S. 1113 (1997); *Country Eggs, Inc., v. Kawamura*, 28 Cal. Rptr. 3d 348, 349 (Cal. Ct. App. 2005) (finding plaintiff's request for money from the state was a request for damages rather than specific monetary relief because plaintiff's payments were made to the California Egg Commission, an independent agency, rather than the state).

168. This scenario is distinguishable from that in *Blue Fox*. Recall that the prime contractor—the third person in that case—had failed to pay the plaintiff subcontractor for work performed. The plaintiff sought money from the government for the loss, and the Supreme Court appropriately characterized the requested remedy from the government as substitutionary. *See supra* notes 67-78. *Blue Fox* thus did not implicate the context at hand—a plaintiff with a preexisting ownership in money seeking a refund from the government because the government illegally compelled a payment to the third person. The monetary remedy for such a plaintiff is specific relief.

169. *Bowen*, 487 U.S. at 910.

170. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999); *see also Franklin Sav. Corp. v. United States*, 970 F. Supp. 855, 863 (D. Kan. 1997) (involving a claim that government had negligently

I now turn to three settings—indemnification, rights under statute or regulation, and rights under contract—to illustrate how a plaintiff might have an original entitlement to the payment of money.

1. Indemnification

Scholars previously have identified the remedy of indemnification as specific relief.¹⁷¹ Professor Dobbs has explained that the predicate for indemnification is that “the plaintiff is forced to pay an obligation for which the defendant is primarily liable.”¹⁷² This payment, that should have been made in the first instance by the defendant, triggers a right to receive from the defendant “a money payment equal to the plaintiff’s money loss.”¹⁷³ In other words, upon paying an obligation owed by the defendant, money is the very thing to which the plaintiff is entitled from the defendant. As discussed earlier, the *School Committee of Burlington* case exemplifies this scenario.¹⁷⁴

2. Statutory or Regulatory Entitlements

To the extent that a statutory or regulatory scheme obligates the defendant to pay money upon a specified action by, or status of, the plaintiff, then the plaintiff’s request that the defendant pay that money should be treated as a request for specific relief. The plaintiff asks for the original thing to which the statute or regulation entitles it—money.

Bowen is the leading illustration of a case in which a statutory entitlement for the payment of money gives rise to a claim for specific monetary relief. While *Bowen* involved a federal subsidy to the states, lower courts have characterized suits under other types of government spending programs as suits for specific relief.¹⁷⁵ For example, in cases in which plaintiffs

managed savings association and characterizing plaintiff’s request for “the return of the money and money equivalents of [plaintiff’s] business” as a claim for money damages rather than specific relief), *aff’d*, 180 F.3d 1124 (10th Cir. 1999).

171. See, e.g., DOBBS 1993 treatise, *supra* note 1, § 3.1, at 209; FISCHER, *supra* note 1, § 2[b], at 5.

172. DOBBS 1993 treatise, *supra* note 1, § 3.1, at 209.

173. *Id.*

174. See *supra* notes 79-81 and accompanying text. See also *Aetna Cas. & Sur. Co. v. United States*, 71 F.3d 475, 478-79 (2d Cir. 1995) (determining that the plaintiff insurance company’s claim that the government failed to pay over funds which the plaintiff acquired by rights of subrogation was a claim for specific relief rather than “money damages” under section 702 of the APA); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 98 (3d Cir. 1990) (holding that reimbursement requested by plaintiffs was specific relief rather than money damages under section 702 of the APA). In *Zellous*, tenants whose rent was subsidized in part under federal law sought “reimbursement” from the government of “excess rent they were forced to pay” the property owner because the government allegedly miscalculated the subsidy. *Id.* This fits the indemnification framework because the tenants paid money in the form of excess rents that the government allegedly was obligated to pay the property owner under the federal subsidy regime. Indeed, *Zellous* quoted the portion that *Bowen* quoted from *School Committee of Burlington*. *Id.* at 98-99.

175. See, e.g., *Nat’l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199-200 (Fed. Cir. 1997) (finding that plaintiff’s demand for the release of appropriated funds for scientific research and development was not a demand for “money damages” under section 702 of the APA); *Esch v. Yeutter*, 876

argued that they were wrongfully suspended from federal farm subsidy payments, the courts appropriately characterized their requests for missed subsidy payments to be in the nature of specific relief rather than substitutionary damages.¹⁷⁶

An important issue is whether the federal government must still have the funds that were appropriated for the plaintiff's entitlement. If the appropriation has lapsed, or if the funds have been allocated elsewhere, the plaintiff's claim will be considered moot under the Appropriations Clause of the Constitution.¹⁷⁷ Aside from the barrier posed by the Appropriations Clause, we might ask whether a plaintiff's demand for its monetary entitlement, when the government no longer has the appropriated funds, is a request for specific or substitutionary relief. The D.C. Circuit has said that when the government no longer has the appropriated funds, the plaintiff's claim not only is barred by the Appropriations Clause, but it is also one for "money damages" rather than "specific relief."¹⁷⁸ The court asserted that a monetary award constitutes specific relief only "when a court orders a defendant to pay a sum owed out of a specific *res*. An award of monetary relief from any source of funds other than the [particular congressional appropriation] would constitute money damages rather than specific relief"¹⁷⁹ As I

F.2d 976, 983-85 (D.C. Cir. 1989) (finding that farmers' claims to enforce federal subsidy did not seek "money damages" under section 702); *Peterson Farms I v. Madigan*, 782 F. Supp. 1, 3 (D.D.C. 1991) (finding that farmers' claims for withheld subsidy payments were cognizable in federal district court under section 702); *United States v. Goode*, 781 F. Supp. 704, 708-10 (D. Kan. 1991) (finding that farmer's requested injunction to enforce subsidy payments was not a claim for money damages under section 702). *But see* *City of Wheeling v. United States*, 20 Cl. Ct. 659, 662-65 (1990) (explaining that where claim for grant money is retroactive in nature and relationship with the government is not continuous, the relief sought is money damages), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991); *Ky. ex rel Cabinet for Human Res. v. United States*, 16 Cl. Ct. 755, 761-62 (1989) (explaining that when prime effect of claim is to obtain money from the government, jurisdiction of the Claims Court cannot be avoided by drafting complaint that appears to seek injunctive relief only).

176. *See, e.g., Peterson Farms I*, 782 F. Supp. at 4 ("[P]laintiffs are not seeking money in compensation for losses that they may have suffered, or are suffering, by virtue of the withholding of the 1987 payments. Rather, they are seeking a declaration of entitlement to reimbursement of the withheld funds. And while such relief may ultimately be characterized as 'monetary relief,' it cannot be characterized as 'money damages' [under section 702 of the APA]."); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 677 (D. Kan. 1991) (characterizing plaintiffs' requested remedy as asking for specific relief through the enforcement of a statutory mandate on the Secretary of Agriculture to make payments to the producer); *cf. McBride Cotton & Cattle Corp. v. Veneman*, 116 Fed. App'x 89, 90-91 (9th Cir. 2004) (holding that adequate relief existed in the Court of Federal Claims for plaintiff's claim "that payments due to them under various agricultural program contracts were wrongfully reduced through unauthorized administrative offsets" and noting that the plaintiff's claims were "not expressed as claims for money damages").

177. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). *See City of Houston v. HUD*, 24 F.3d 1421, 1424-25 (D.C. Cir. 1994), where Houston claimed an entitlement to a grant from HUD, but the congressional appropriation covering the disputed grant had expired. The D.C. Circuit decided that Houston's claims were moot under the Appropriations Clause. *Id.* at 1427-28. The court explained: "It is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation." *Id.*; *see also Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 509-10 (D.C. Cir. 2000) (citing *City of Houston* in finding that plaintiff's claim was not moot because funds were available to satisfy the claim).

178. *City of Houston*, 24 F.3d at 1424-28.

179. *Id.* at 1428 (citation omitted).

suggested earlier, a definition of specific relief as dependent on the defendant having the plaintiff's *res* makes sense only in the context of tangible property; it does not make sense when the original thing to which the plaintiff is entitled is fungible money.¹⁸⁰ Thus, although the result in the case is properly explained by Appropriations Clause limitations, the court erred in defining specific relief as available only when the defendant has a *res* belonging to the plaintiff.

Beyond government entitlement or spending programs, employment-related claims raise difficult questions about whether an award for pay or benefits should be considered specific or substitutionary relief.¹⁸¹ In the federal government, employment pay and benefits are governed by statutes and regulations.¹⁸² In the private sector, pay and benefits are governed predominantly by contract.¹⁸³ Although in this subsection I will be discussing pay and benefits specified by statutory or regulatory provisions, the classification issues about whether the monetary remedy is specific or substitutionary would apply in the contractual context as well.

Classifying a remedy for wages or benefits as specific or substitutionary should depend on whether the plaintiff was employed by the defendant in the relevant job during the period of time for which the plaintiff seeks money. If the plaintiff was either: (1) an unsuccessful applicant for the job, (2) employed by the defendant in the position but then terminated, (3) demoted from the position, or (4) not promoted to the position, then any claim for wages or benefits should be treated as a claim for substitutionary damages rather than for specific relief. The original thing to which the plaintiff allegedly was entitled was the particular job; the plaintiff had no independent entitlement to wages or benefits. Only upon working for the defendant in the relevant job would the plaintiff have an original entitlement that the defendant pay money. Of course, the plaintiff suffered pecuniary losses during the time she was not employed in the relevant job, but those losses give rise to a claim for substitutionary, rather than specific, relief.¹⁸⁴ The majority view in the courts is consistent with this analysis. The courts generally have held that a request for money for the period of time in which the

180. See *supra* notes 155-157 and accompanying text.

181. In this discussion, I focus on the plaintiff's asserted right to a monetary remedy, distinct from any right to reinstatement or reinstatement to employment.

182. See generally URBAN A. LESTER & MICHAEL F. NOONE, LITIGATION WITH THE FEDERAL GOVERNMENT §§ 8.113-.117, at 231-40 (3d ed. 1994); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT §§ 4.05-.06, at 261-79 (4th ed. 2006).

183. See SISK, *supra* note 182, at 478.

184. This analysis is consistent with the leading case on a backpay request by a disappointed applicant for a federal job, *Hubbard v. Adm'r, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc). The D.C. Circuit, sitting en banc, determined that the backpay request was one for money damages under section 702, reasoning that a backpay award "essentially pays the plaintiff for the economic losses suffered as a result of the employer's wrong; it does not return to the plaintiff anything which was rightfully his in the first place." *Id.* at 534. Although agreeing for the most part with *Hubbard's* reasoning, I would stress that specific relief does not depend on the "return" to the plaintiff of something—rather, it is a remedy that gives to the plaintiff the very thing to which it is entitled, which may be money that the plaintiff never has had.

plaintiff was not employed in the relevant job is a request for substitutionary damages, not specific relief.¹⁸⁵

When the plaintiff *has* worked in the relevant job for which the plaintiff seeks pay or benefits that are provided under the law, the plaintiff's request for money should be treated as a request for specific relief. An employee who was not paid or who received incorrect pay would not be seeking a substitute for some loss but rather the original money to which she was entitled for services rendered.¹⁸⁶

A related issue involves the plaintiff's attempt to obtain a change in status, stemming from past employment or military service that would affect disability or retirement benefits. The courts are split over whether a request involving disability or retirement benefits is a request for specific relief or for substitutionary damages.¹⁸⁷ A plaintiff seeking a change in disability or retirement benefits stemming from past work should be treated as seeking specific relief. The benefits are not substitutes for a loss suffered by the

185. See, e.g., *Ward v. Brown*, 22 F.3d 516, 520-21 (2d Cir. 1994) (finding claim for backpay by discharged federal employee is claim for money damages under section 702); *Hubbard*, 982 F.2d at 533-38 (finding claim for backpay by disappointed applicant for federal employment was claim for money damages under section 702); *Sibley v. Ball*, 924 F.2d 25, 29 (1st Cir. 1991) (request for backpay for period since discharge is money damages under section 702); *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 128-30 (D.D.C. 2004) (finding request for constructive credit that would boost starting salary and for retirement credits by chaplains who were denied commissions in the Navy constituted request for money damages under section 702); *Leveris v. England*, 249 F. Supp. 2d 1, 2-3 (D. Me. 2003) (finding claim by discharged member of the military for backpay was claim for money damages under section 702); *Leistiko v. Sec. of Army*, 922 F. Supp. 66, 70-72 (N.D. Ohio 1996) (finding claim for discharged member of the National Guard for lost wages and benefits was claim for money damages), *aff'd on other grounds*, 134 F.3d 817 (6th Cir. 1998); *Taydus v. Cisneros*, 902 F. Supp. 278, 284 (D. Mass. 1995) (finding claim for backpay by disappointed applicant for federal employment is money damages under section 702); *Klaskala v. U.S. Dep't of Health & Human Servs.*, 889 F. Supp. 480, 486 n.6 (S.D. Fla. 1995) (same). *But see, e.g., DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1381 n.3 (10th Cir. 1990) (stating that "money damages" under section 702 "does not include equitable backpay, which is a form of equitable relief, not monetary damages"); *Poole v. Rourke*, 779 F. Supp. 1546, 1556 (E.D. Cal. 1991) (suggesting that "[b]ack wages and retirement pay resulting from constructive reinstatement" constitute specific relief).

186. See, for example, *Hubbard*, 982 F.2d at 533 n.4, in which the D.C. Circuit suggested that backpay for work rendered might constitute specific relief:

We do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief. If Hubbard had been hired by the EPA and worked for the agency for a year without being paid, his legal claim might well be viewed differently. In that case, the money that Hubbard had a right to receive in exchange for his labor might well be the very thing that was taken from him.

Id.

187. Compare *Ulmet v. United States*, 888 F.2d 1028, 1029-31 (4th Cir. 1989) (determining that Army officer who sought to have period of service in the Reserve classified as active duty service for purposes of retired pay was requesting specific monetary relief in his claim for back retirement salary and benefits and thus could have claim heard in federal district court under section 702 of the APA) and *Lechliter v. Rumsfeld*, No. 03-098-KAJ, 2004 U.S. Dist. LEXIS 17968, at *9-*16 (D. Del. Aug. 25, 2004) (stating that veteran who sought retroactive disability benefits was seeking specific monetary relief and thus his claim could be heard in district court under section 702), *aff'd*, No. 04-3613, 2006 U.S. App. LEXIS 12895 (3d Cir. May 23, 2006), *with* *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997) (finding that primary purpose of plaintiff's suit for a change in his military records was to obtain retroactive disability benefits and thus Court of Federal Claims, rather than district court, had jurisdiction over suit).

plaintiff but rather the original thing to which the plaintiff allegedly is entitled based on the service that the plaintiff rendered.

3. *Contractual Entitlements*

If the plaintiff has a contract with the defendant under which the defendant’s original obligation is to pay the plaintiff money, the monetary remedy should be considered specific relief. The plaintiff gets the original thing to which it is entitled under the contract—the payment of money. This concept of money as a specific remedy has roots in early common law. Professor Dobbs has explained that the action for debt was a “claim to recover a specific sum, such as money loaned. It was conceived not as a breach of contract claim, but as a property claim, analogous to a claim for a specific chattel, with the specific sum of money due standing in the place of the chattel.”¹⁸⁸ More recently, the Supreme Court in *Bowen* recognized that some actions “for monetary relief under a contract” are specific remedies.¹⁸⁹

As noted earlier, a contract for services, goods, or land can give rise to a claim for specific monetary relief.¹⁹⁰ A plaintiff who has rendered the services, delivered the goods, or tendered the land, seeks specific relief when it sues for the contract price. Further examples of contracts that can give rise to claims for specific monetary relief are contracts for lending money and for insurance. A remedy that compels the defendant to make the loan or to pay the money due under an insurance claim gives the plaintiff the original thing to which the plaintiff was entitled.¹⁹¹

In characterizing remedies for the contract price as specific relief, I do not mean to suggest that these remedies cannot also be described as “damages” or “compensatory damages.” As detailed in part II, a specific monetary remedy can be accurately described as “damages” or “compensatory damages” when the terms are used in the broad sense of a remedy for the plaintiff’s loss¹⁹² or to connote a legal, as opposed to an equitable, rem-

188. 3 DOBBS 1993 treatise, *supra* note 1, § 4.2(3), at 577.

189. *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). Justice Scalia, dissenting in *Bowen*, admitted that the contract for services scenario fits “a general description of a suit for specific relief, since the award of money undoes a loss by giving respondent the very thing (money) to which it was legally entitled.” *Id.* at 917-18 (Scalia, J., dissenting).

190. See *supra* notes 19, 32, and accompanying text; see also DOBBS 1993 treatise, *supra* note 1, § 3.1, at 209 (stating that plaintiff recovery of “the price due on an account or on a contract of sale” is an example of specific monetary relief). For a discussion of whether remedies for wages and benefits in the employment context fit the category of specific relief, see *supra* notes 181-187 and accompanying text.

191. See, e.g., *Associated Fin. Corp. v. Kemp*, 769 F. Supp. 398, 402 & n.6 (D.D.C. 1991) (determining that remedy against Department of Housing and Urban Development compelling it to make loans to plaintiffs as provided under contract would be specific remedy, not money damages under section 702).

192. See *supra* notes 120-122 and accompanying text. For example, Justice Scalia also described this scenario as “precisely fit[ting] the classic definition of suits for money damages” because the plaintiff “seeks compensation for the loss the [plaintiff] sustains by expending resources to provide services to the [defendant] in reliance on the [defendant’s] contractual duty to pay.” *Bowen*, 487 U.S. at 917 (Scalia, J., dissenting).

edy.¹⁹³ My particular point here is simply that a remedy for the contract price is not substitutionary relief.

In this part, I have offered categories of monetary remedies that fit the definition of specific relief. When a plaintiff seeks unique coins or bills, the return of money taken by, or transferred to, the defendant, or money that the defendant owes the plaintiff as an original matter, then the requested monetary remedy would give the plaintiff the very thing to which it is entitled rather than a substitute. I have argued that a monetary remedy may constitute specific relief even if the defendant does not have in its possession the specific *res* belonging to the plaintiff.

CONCLUSION

Despite the practical necessity of sometimes distinguishing between “specific” and “substitutionary” relief, courts have had difficulty drawing the distinction with respect to money. Courts have frequently conflated the concepts of specific, equitable, and prospective relief on the one hand, and substitutionary, legal, and retrospective relief on the other. Moreover, courts often have not appreciated the variety of meanings ascribed to the term “damages,” and they accordingly have failed to discern the accurate relationship between specific monetary relief and damages.

Based on a definition of specific relief as affording the plaintiff the original thing to which the plaintiff is or was entitled, I have identified categories of monetary remedies that constitute specific relief. In addition, I have shown that specific monetary relief can be a subset of damages or the opposite of damages, depending on which meaning of “damages” applies in a given context. The taxonomy of monetary remedies is complex; fully understanding the concept of specific relief is an essential step towards untangling the many labels given to money.

193. See *supra* notes 121-122 and accompanying text. See also FARNSWORTH, *supra* note 17, § 12.2, at 156 (“The principal legal remedy to enforce a promise is a judgment awarding a sum of money. . . . [The sum of money may] be specific, as when the sum is an amount due under the contract.”); *id.* § 12.4, at 162 (noting that typical form of relief at common law for breach of contract was a money judgment and that “if the promise was simply to pay a sum of money, the effect of such a judgment was to give the plaintiff specific relief”).