HOODWINKED BY *HATTER*: CREATING A TEST FOR CONSTITUTIONAL WAIVERS OF SOVEREIGN IMMUNITY TO PRE-JUDGMENT INTEREST AWARDS

> *Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws.*
>
> Francis Bacon[1]

INTRODUCTION

Apart from the actual words of the United States Constitution, precious little evidence remains to indicate the Framers' intent during the drafting process.[2] Admittedly, a few scattered relics and yellowing memoirs attributed to the founding generation do still exist; unfortunately, the information contained within those remnants from the ratification-era generally provides little guidance to contemporary constitutional interpretation.[3] Thus, when interpreting the Constitution, courts should remain true to the Framers' intent as expressed in the words of their carefully crafted provisions.

Deference to the Framers' intent becomes particularly important when courts analyze constitutional provisions under the legal doctrine that existed at the time of the Constitutional Convention. Only by giving the Framers an authentic voice through their constitutionally created provisions may courts adjudicate such traditional matter in the manner that the Framers contemplated. Conversely, when courts ignore the drafters' intent as expressed in the language of constitutional provisions while adjudicating claims brought under ratification-era doctrine, the judiciary runs the risk of offending the Constitution and treading upon illegitimate ground. In *Hatter v. United States*, a recent case involving the "no-interest" rule, the United States Court of Federal Claims did just that.[4]

The no-interest rule provides immunity to the United States government from awards of pre-judgment interest.[5] This common law rule establishes that, absent a categorical waiver of sovereign immunity, interest

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1. FRANCIS BACON, *Of Judicature*, *in* THE ESSAYS 223 (John Pitcher ed., Penguin Books 1985) (1601).

2. *See* [2] 1787: DRAFTING THE U.S. CONSTITUTION (Wilbourn E. Benton ed., 1986) (compiling the notes, commentaries, and speeches of the Founding Fathers during the Constitutional Convention).

3. *E.g.*, *id.*

4. Hatter v. United States, 38 Fed. Cl. 166, 181–83 (1997) (holding for the first time that the Article III Compensation Clause requires the payment of pre-judgment interest).

5. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986).

does not accrue on claims against the federal government.[6] The Supreme Court recognizes three methods by which the United States may waive its sovereign immunity to awards of pre-judgment interest: (1) by statute; (2) by contract; or (3) when required by constitutional provision.[7] For each method, a waiver must convey the government's express consent to a pre-judgment interest award.[8] Because this sovereign immunity allows the federal government to maintain an advantaged position during litigation, some degree of controversy typically accompanies no-interest rule jurisprudence.[9]

Traditionally, litigants and academics have objected to the federal courts' refusals to find waivers of sovereign immunity to the no-interest rule under federal statutes and government contracts.[10] However, some academic circles recently shifted the focus of the sovereign immunity debate to the no-interest rule as applied to constitutional provisions. This shift is most likely attributed to a series of constitutional decisions rendered in the federal courts over the last decade.[11]

Historically, federal courts strictly construed waivers of sovereign immunity when adjudicating constitutional claims brought against the United States.[12] Adhering to the command of the no-interest rule, federal judges refused to find a waiver of sovereign immunity within the text of the Constitution unless a particular provision manifested a contrary intent.[13] In fact, the Supreme Court has found such a contrary intent only within the language of the Takings Clause of the Fifth Amendment.[14] However, the United States Court of Federal Claims' holding in *Hatter v. United States* broke new jurisprudential ground by recognizing a previously untried constitutional waiver of sovereign immunity.[15]

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6. Smyth v. United States, 302 U.S. 329, 353 (1937).

7. *Id.*

8. *Id.*

9. United States v. Verdier, 164 U.S. 213, 219 (1896); *see* Eric G. Bruggink, *Commercial Litigation in the United States Supreme Court*, 53 ALA. LAW. 334, 335 (1992) (noting that the sovereign immunity doctrine remains "under assault and out of vogue in various quarters").

10. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 3.6(2), at 341 (2d ed. 1993) (explaining that commentators, judges, and litigants often criticize judicial limitations on awarding pre-judgment interest in private litigation).

11. *See* discussion *infra* Part III.A–B.

12. *See* United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 658–59 (1947) (reaffirming the traditional rule that pre-judgment interest may not run on a constitutional claim against the federal government without an express mandate within the text of the Constitution).

13. *Smyth*, 302 U.S. at 353.

14. *Shaw*, 478 U.S. at 317 n.5. The Fifth Amendment's Takings Clause declares "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

15. *Hatter*, 38 Fed. Cl. at 168, 181.

In *Hatter*, the Court of Federal Claims awarded federal judges pre-judgment interest on their claims against the United States under Article III's salary provision.[16] Unfortunately, because the Court of Federal Claims ignored the well-established constraints placed upon finding constitutional exceptions to the no-interest rule, the *Hatter* decision is more of a fabrication than an innovation.[17] As a result, *Hatter v. United States* has emerged as a catalyst for both academic debate and experimental litigation. By failing to ground an apparently self-serving decision in precedent, the *Hatter* court unwittingly undermined public confidence in the federal judiciary and stoked the analytical fires of the academy.[18] Simultaneously, *Hatter* opened the door for litigants to claim new constitutional waivers of sovereign immunity that the drafters of the Constitution never contemplated.[19]

In the wake of *Hatter*, several parties have brought constitutional claims against the federal government seeking awards of pre-judgment interest.[20] Primarily rooted in the soil sown by the *Hatter* court, these recent claims force today's federal courts to walk a treacherous path.[21] By incorporating the *Hatter* court's rationale into no-interest rule jurisprudence, the judiciary discounts over two centuries of constitutional interpretation.[22] By refusing to apply the *Hatter* court's rationale to new constitutional interest actions, the judiciary indicates that the Court of Federal Claims' award of pre-judgment interest to federal judges was not grounded in cognizable legal theory.[23] Neither option is acceptable.

To help alleviate any further adjudicatory complications resulting from the *Hatter* decision, this Note proposes a test to aid judicial interpretation of constitutional waivers of sovereign immunity.[24] Part I examines the history

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16. *Id.* Article III provides in pertinent part that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

17. *See* discussion *infra* Part III.A–B.

18. *See* discussion *infra* Part III.B.

19. *Id.*

20. *Id.*

21. *See* discussion *infra* Part III.A–B.

22. *See* discussion *infra* Part III.A.

23. *See* discussion *infra* Part III.B.

24. This Note purposefully avoids discussing the propriety of the sovereign immunity doctrine and avoids evaluating the rectitude of sustained application of the no-interest rule. Those discussions are unbefitting this analysis because they do not further the search for stability in the kaleidoscope of recent sovereign immunity and no-interest rule decisions. Similarly, this Note intentionally refrains from discussing the adequacy of contemporary judicial salaries—a cause célèbre that already receives considerable attention. Rather, this Note seeks to demonstrate that federal courts have recently faltered when administering a routine practice that confronts them every day and proposes a simple test aimed at returning no-interest rule adjudication back to the path from which it has recently strayed.

of the no-interest rule and the United States' sovereign immunity to pre-judgment interest. Part II analyzes constitutional waivers of sovereign immunity and no-interest rule jurisprudence. Part III evaluates *Hatter* under contemporary no-interest rule jurisprudence and concludes that the *Hatter* decision departs from this precedent in a disturbing manner. Finally, Part IV proposes a test to supplement the no-interest rule.

I. THE ORIGINS OF THE NO-INTEREST RULE

As it stands, the no-interest rule exempts the United States from pre-judgment interest awards unless the federal government waives this immunity with express consent in the form of a statute, contract, or when required by constitutional provision.[25] Although derived from English common law, the no-interest rule reflects a combination of historical views toward interest with the doctrine of sovereign immunity.[26] Consequently, any reliable interpretation of no-interest rule jurisprudence necessarily requires an understanding of the independent sources from which the no-interest rule arose.

A. The Development and Transformation of Pre-Judgment Interest

Although the no-interest rule has only recently garnered the attention of legal commentators, historians trace negative views concerning interest to the antediluvian era.[27] Early Christian and Jewish academics believed that the payment of interest was unjust.[28] Greek philosophers, who appear to be the fountainhead of contemporary interest-related thought, similarly disapproved of interest.[29] In a short time, opinions toward interest softened; yet, some distaste for awarding interest persisted as English common law took shape.[30]

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25. United States Shoe Corp. v. United States, 296 F.3d 1378, 1381 (Fed. Cir. 2002).

26. *See* Library of Congress v. Shaw, 478 U.S. 310, 314–17 (1986) (providing a historical account of societal notions concerning interest awards and explaining how the no-interest rule recognizes these traditional notions by limiting the availability of interest awards); *United States Shoe*, 296 F.3d at 1386; Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1361 (Ct. Int'l Trade 2001); *see also* Daniel Lee, *Sovereign Immunity: Holding the Federal Government Liable for Current Basis Fee Enhancements Requires an Explicit Waiver of Sovereign Immunity from Interest*, 66 GEO. WASH. L. REV. 1066, 1067–68 (1998) (discussing the no-interest rule in terms of supplementing traditional sovereign immunity from pre-judgment interest).

27. For a thorough investigation into the roots of pre-judgment interest jurisprudence, see Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 195 (1982).

28. 1 DOBBS, *supra* note 10, § 3.6(1), at 334.

29. Rothschild, *supra* note 27, at 195.

30. *See id.* (noting that the Medicis and Rothchilds soon built vast fortunes through interest on

The founders of English law categorized interest awards as a component of damages but distinguished such awards from the typical damages that courts conferred upon a substantive claim.[31] Evincing traditional negative attitudes towards interest, English courts refused to supplement routine damage awards with interest unless a previous agreement between the litigants stipulated otherwise.[32] This practice reflected the historical view that contracting parties generally did not consider the notion of interest during the negotiation process simply because parties did not foresee the possibility of non-performance of the contract.[33] The logic is sound: if parties did not envision non-compliance under their contract, then they could not have contemplated pre-judgment interest as a remedy for the breach of the contract.

Like much of English common law, early American courts adopted the agreement condition for interest awards.[34] As the United States flourished, though, new ideals and distinct attitudes towards money quickly developed within the burgeoning American society.[35] This new American culture viewed its evolving mercantile system, together with the personal property born of it, with increasing significance.[36] The American public recognized that the use of one's money carried an inherent value independent of the currency's facial worth.[37] Likening the failure to pay money owed to another party to the non-performance of a legal duty, American courts founded the notion of pre-judgment interest as damages.[38]

Increasingly, the courts did not require an express agreement between parties before awarding pre-judgment interest upon delayed payment because they viewed the interest as a form of punishment.[39] However, as

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money-lending); *see also* 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 283, at 553 (9th ed. 1920) (quoting English jurist, Lord Mansfield, stating, "Before the statute of Henry VIII, all interest on money lent was prohibited by the common law.").

31. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 50, at 205 (1935), *cited in Shaw*, 478 U.S. at 314–15.

32. *See* Reid v. Renselaer Glass Factory, 3 Cow. 393, 430 (N.Y. Sup. Ct. 1824) ("[I]nterest had never been allowed for money lent, without a note.") (citing Harris v. Benson, 2 Str. 910 (1732)).

33. HARVEY MCGREGOR, MAYNE AND MCGREGOR ON DAMAGES 281 (12th ed. 1961) (cited in *Shaw*, 478 U.S. at 314–15).

34. *See* Dodge v. Perkins, 26 Mass. (9 Pick.) 368, 384 (1830) ("If the interest is not included in the contract, it cannot be given.").

35. *See* SEDGWICK, *supra* note 30, § 292, at 562 (noting the American view of the "nature of money" differs from the traditional English view).

36. Laycock v. Parker, 79 N.W. 327, 332 (Wis. 1899) (noting that developing societal notions concerning the "increase of the importance of personal property and commerce" led to an ebbing of the traditional distaste for interest).

37. *Id.*

38. *Id.*

39. *Id.*

the American economy gathered steam and the practice of money borrowing became commonplace, social attitudes towards interest changed.[40] Instead of simply employing interest as a disciplinary measure, the courts gradually recognized the equity in using interest as a restorative measure to compensate parties wrongfully denied the use of their money.[41] Thus, with the development of American commerce and the resulting digressive views towards money, the agreement basis for pre-judgment interest awards between private parties eventually disappeared.[42] Although the formality of requiring an express agreement between private parties eroded, the requirement persisted for pre-judgment interest claims against the federal government due to the sovereign immunity doctrine.[43]

B. The Evolution of the Sovereign Immunity Doctrine

Early American jurists retained the agreement requirement for pre-judgment interest claims against the United States in recognition of another principle borrowed from the English common law—sovereign immunity.[44] Described by William Blackstone as the theory that "[t]he King can do no wrong," sovereign immunity prohibited English citizens from bringing claims against the Crown without royal consent.[45] English sovereign immunity sprung from the notion that the King's squires were incompetent and that public property should not be subject to diminution resulting from their plebeian bumblings.[46] Although the genealogy of our sovereign immunity doctrine may be traced to English common law, American sovereign immunity is devoid of such casteism.[47] Initially, however, it was not without fundamental inflexibility.

At its inception, the United States government maintained an absolute immunity from suit.[48] Regardless of the terms of a contract or delayed payment of money legally due, private parties simply could not sue the federal government.[49] Despite the authoritarian qualities of federal sovereign immunity, the doctrine is not specifically enumerated within the

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40. *Id.* at 333.
41. *Id.* at 332–33.
42. *Id.* at 333; *Shaw*, 478 U.S. at 315.
43. *Shaw*, 478 U.S. at 315.
44. *Id.* at 314–15.
45. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 30–31 (1983).
46. URBAN A. LESTER & MICHAEL F. NOONE, LITIGATION WITH THE FEDERAL GOVERNMENT § 9.107, at 262–63 (3d ed. 1994).
47. *See Shaw*, 478 U.S. at 315–19.
48. *Id.* at 314–15.
49. *Id.* at 315.

text of the Constitution.[50] However, by the early nineteenth century, judicial recognition of the United States' immunity to suit was pervasive.[51] At the time, private parties could sue the federal government only by presenting individual requests for waivers of sovereign immunity, which Congress granted through private acts of legislation.[52]

In 1821, when the doctrine made its first appearance in the Supreme Court, Chief Justice John Marshall summarily affirmed that "a sovereign independent State is not suable, except by its own consent."[53] Although the subject of some recent contention, courts continued to uphold sovereign-immunity under both state and federal government alike.[54] In rare cases where courts recognized the federal government's assent to suit, sovereign immunity still shielded the government from liability regardless of the propriety of the governmental action.[55] While the modern sovereign immunity doctrine is not as forgiving of wrongful governmental acts, the same basic principles of traditional American sovereign immunity remain intact.[56] However, the federal government is now more amenable to suit due to Congress' creation of specialty courts for the sole purpose of adjudicating claims against the United States government.[57]

In 1855, Congress established the United States Court of Claims.[58] Congress designed this court to aid in deciding personal suits against the sovereign that the legislature previously handled through individually tailored waivers of sovereign immunity.[59] At that time, the Court of Claims possessed jurisdiction over any claim based upon statute, executive regulation, or contract with the United States government.[60] Congress expanded this jurisdiction in 1887 under the Tucker Act, which allowed the

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50. 1 CIVIL ACTIONS AGAINST THE UNITED STATES 3–4 (Shepard's Editorial Staff ed., 1992). Admittedly, much debate centers on the sovereign immunity doctrine. While recognizing the existing controversy, this Note only considers the accepted contemporary judicial view of sovereign immunity.

51. *See* 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY 4 (1978) (noting the difficulty that the sovereign immunity doctrine posed for private parties who attempted to bring claims against the United States government).

52. *Id.*; *Shaw*, 478 U.S. at 316 n.3.

53. Cohens v. Virginia, 19 U.S. (6. Wheat.) 264, 380 (1821).

54. *Shaw*, 478 U.S. at 315–17.

55. 1 CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 50 at 4.

56. *Shaw*, 478 U.S. at 316–19.

57. *See infra* notes 58–63 and accompanying text.

58. LESTER & NOONE, *supra* note 46, § 6.104, at 139. Other specialty courts created by Congress include bankruptcy courts and military tribunals. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984). Although Congress has created numerous Article I specialty courts over the past 150 years, for purposes of relevance and brevity this Note discusses only the United States Court of Claims/United States Court of Federal Claims.

59. LESTER & NOONE, *supra* note 46, § 6.104, at 139.

60. *Id.* (quoting Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855)).

court to hear private lawsuits against the federal government "founded upon the Constitution."[61] The court, currently known as the United States Court of Federal Claims, now exercises jurisdiction over most claims against the federal government founded upon a congressional statute, an express or implied government contract, or a constitutional provision.[62] Importantly, the Supreme Court recognizes that the Tucker Act provides the necessary waiver of sovereign immunity to claims against the United States based upon statutes, contracts, or the Constitution.[63] However, the waiver of sovereign immunity recognized within the Tucker Act does not affect the mandate of the no-interest rule.[64]

C. Sovereign Immunity to Pre-Judgment Interest

As the doctrine of sovereign immunity became entrenched in American jurisprudence, the beginnings of the contemporary no-interest rule took shape.[65] The no-interest rule blends the traditional distaste for interest awards with the time-honored doctrine of sovereign immunity.[66] In an 1819 opinion letter to the Secretary of the Treasury, the United States Attorney General, William Wirt, provided an early articulation of the no-interest rule.[67] In that letter, Wirt recognized "the usual practice" of denying interest in claims against the federal government.[68] As the sovereign-immunity doctrine evolved, so too, did the no-interest rule.[69] For example, in an 1841 letter, Attorney General J.J. Crittenden noted that in "claims against the government, there is no instance in which interest has ever been allowed, except [] where [the government has] expressly directed or authorized its allowance."[70]

The creation of the United States Court of Claims loosened restraints on citizens suing the federal government.[71] However, in the same statute that validated the Court of Claims as an independent judicial body,

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61. Tucker Act, ch. 359, 24 Stat. 505, 505 (1887) (current version at 28 U.S.C. § 1491(a)(1) (2000)). Congress gave federal District Courts concurrent jurisdiction for claims against the United States involving less than $1000. *Id.* at 505, sec. 2 (current version at 28 U.S.C. § 1346(a)(2) (2000)).

62. LESTER & NOONE, *supra* note 46, § 6.105, at 140–41; 28 U.S.C. § 1491(a)(1).

63. United States v. Mitchell, 463 U.S. 206, 212 (1983).

64. *See* discussion *infra* Part I.C.

65. *See Shaw*, 478 U.S. at 315–16 (discussing the development of the no-interest rule in light of the federal sovereign immunity doctrine).

66. *Id.*

67. 1 Op. Att'y Gen. 268, 268 (1819); *see Shaw*, 478 U.S. at 316 & n.4 (providing a detailed history of the evolution of the no-interest rule).

68. 1 Op. Att'y Gen. 268, 268 (1819).

69. *Shaw*, 478 U.S. at 315–17.

70. 3 Op. Att'y Gen. 635, 639 (1841).

71. *See supra* notes 56–64 and accompanying text.

Congress expressly preserved the United States' immunity to pre-judgment interest.[72] Although the court could more readily hear citizens' claims against the federal government founded upon statute or contract, the court could only award interest on those claims if the statute or contract specifically provided for such an award.[73] Thus, to receive an award of pre-judgment interest on a claim against the United States, the court required a litigant to show two separate waivers of sovereign immunity: a general waiver of sovereign immunity to suit and a specific waiver of sovereign immunity to interest.[74]

The federal government's liability to suit further increased with the passage of the Tucker Act in 1887. Under the Tucker Act, the Court of Claims began recognizing general waivers of sovereign immunity to suit based upon constitutional provisions.[75] Shortly thereafter, the Supreme Court declared that constitutional provisions could also convey the specific waiver of sovereign immunity necessary to award pre-judgment interest.[76]

II. CONSTITUTIONAL WAIVERS OF SOVEREIGN IMMUNITY TO PRE-JUDGMENT INTEREST

As the historical development of the no-interest rule indicates, the United States' immunity from pre-judgment interest awards is deeply-rooted in American jurisprudence.[77] Although congressionally-established specialty courts and jurisdictional statutes, such as the Tucker Act, slackened the constraints upon suing the federal government, sovereign immunity to pre-judgment interest persists today.[78] However, the enactment of the Tucker Act did leave one lasting impression on the sovereign immunity doctrine—an exception to the no-interest rule.[79]

Whereas once a waiver of sovereign immunity to interest could only emanate from a statute or contract, the passage of the Tucker Act allowed

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72. Court of Claims Act, ch. 92, sec. 7, 12 Stat. 765, 766 (1863) (current version at 28 U.S.C. § 2516(a) (2000)). The Court of Claims Act provided, in part, that "no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon contract expressly stipulating for the payment of interest." *Id.*

73. 1 CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 50, at 71–72.

74. *Id.* at 72.

75. Tucker Act, ch. 359, 24 Stat. 505, 505 (1887) (current version at 28 U.S.C. § 1491(a)(1) (2000)). In pertinent part, the Tucker Act as enacted in 1887 granted the Court of Claims "jurisdiction to hear and determine . . . [a]ll claims founded upon the Constitution . . . against the United States." *Id.*

76. *See infra* Part II.A.

77. *See supra* Part I.C.

78. *See* United States Shoe Corp. v. United States, 296 F.3d 1378, 1381 (Fed. Cir. 2002) (citations omitted) (discussing the no-interest rule and sovereign immunity to pre-judgment interest).

79. *See infra* notes 80–81 and accompanying text.

litigants to claim entitlement to interest awards founded upon constitutional provisions as well.[80] Thus, the Supreme Court's most recent formulation of the no-interest rule declares that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States."[81] This Part examines constitutional provisions that litigants have argued to provide a waiver of sovereign immunity to pre-judgment interest.

A. The Takings Clause of the Fifth Amendment

The Supreme Court recognizes only the Fifth Amendment's Takings Clause as providing a constitutional exception to the no-interest rule.[82] The Takings Clause declares that "private property [shall not] be taken for public use, without just compensation."[83] The Supreme Court justifies finding an exception to the no-interest rule within the text of the Takings Clause due to the provision's mandate that the government pay "just compensation" for the taking of land.[84] Interestingly though, the precise origins of the just compensation clause are unknown.[85]

Historians generally trace the roots of the Takings Clause to medieval England and the *Magna Carta*.[86] Declaring: "'No freeman shall be [d]eprived of his freehold [u]nless by the lawful judgment of his peers and by the law of the land[,]'" the *Magna Carta* represented an emerging recognition of private property rights.[87] However, this document lacked a compensation provision comparable with that of the Fifth Amendment.[88] Hugo Grotius, a seventeenth-century Dutch philosopher, pioneered the

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80. Tucker Act, ch. 359, 24 Stat. 505, 505 (1887) (current version at 28 U.S.C. § 1491(a)(1) (2000)). In pertinent part, the Tucker Act as enacted in 1887 granted the Court of Claims "jurisdiction to hear and determine . . . [a]ll claims founded upon the Constitution . . . against the United States." *Id.*

81. United States v. Louisiana, 446 U.S. 253, 264–65 (1980) (alteration in original) (citations omitted).

82. Library of Congress v. Shaw, 478 U.S. 310, 317 n.5 (1986).

83. U.S. CONST. amend. V.

84. *E.g.*, Albrecht v. United States, 329 U.S. 599, 602 (1947) (noting that under the Fifth Amendment "just compensation" is the "fair market value at the time of the taking plus 'interest' from that date to the date of payment").

85. FRED BOSSELMAN ET AL., THE TAKING ISSUE 99–100 (1973).

86. GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 11 (David A. Schultz ed., 1998).

87. *Id.* (quoting THE MAGNA CARTA, Art. 29 (1225) (alterations in original); *see also* ALFRED D. JAHR, LAW OF EMINENT DOMAIN: VALUATION AND PROCEDURE 1 (1953) (discussing *The Magna Carta*).

88. *Compare* THE MAGNA CARTA, Art. 29 (1225), *quoted in* SKOURAS, *supra* note 86, at 11, *with* U.S. CONST. amend. V.

notion of just compensation.[89] Grotius acknowledged the power of the sovereign to take private property to further the interests of society, but he believed that a moral obligation to compensate the landowner attached to governmental takings of land.[90]

Shortly thereafter, William Blackstone similarly recognized that the government should compensate a taking by providing "a full indemnification and equivalent for the injury thereby sustained."[91] With this, the seeds of the Fifth Amendment's Takings Clause were planted, for Blackstone's writings received widespread attention from colonial American jurists.[92] Indeed, many historians believe that Blackstone's articulation of the compensation-for-takings principle greatly influenced the drafters of the Fifth Amendment's Takings Clause.[93]

The earliest American record of a just compensation requirement emerged in 1777 from the text of Vermont's first constitution.[94] Three years later, John Adams included a compensation provision when he authored the Massachusetts Declaration of Rights.[95] The principle of just compensation did not appear in the United States Constitution until a decade later.[96] When James Madison drafted the initial version of the Bill of Rights, he modeled it after the Virginia Declaration of Rights, which lacked a compensation requirement.[97] However, the draft of the Bill of Rights Madison presented to the House in 1789 contained a distinct compensation clause: "No person shall . . . be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[98] The Select Committee reworked this language into the modern Takings Clause of the Fifth Amendment, which became active in 1791.[99]

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89. Robert D. Rubin, *Taking Clause v. Technology:* Loretto v. TelePrompter Manhattan CATV, *A Victory for Tradition*, 38 U. MIAMI L. REV. 165, 168 (1983) (examining the origins of the Takings Clause).

90. *Id.* at 168–69.

91. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 52 & n.55 (1985) (quoting WILLIAM BLACKSTONE, COMMENTARIES 139 (1765)).

92. BOSSELMAN ET AL., *supra* note 85, at 90.

93. *Id.* at 90–91.

94. *Id.* at 94.

95. *Id.* at 95.

96. The state legislatures ratified the Fifth Amendment as part of the Bill of Rights on December 15, 1791. TERRY L. JORDAN, THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 45 (7th ed. 2001).

97. BOSSELMAN ET AL., *supra* note 85, at 99 & n.67.

98. *Id.*

99. *Id.* As ratified, the Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Although the Fifth Amendment requires the government to pay just compensation for the taking of private property, the Constitution fails to delineate the implications of the term.[100] Thus, the responsibility of interpreting the meaning of just compensation belonged to the U.S. Supreme Court.[101] Approximately one century after the Takings Clause became part of the Constitution, the Supreme Court set forth the first clear insight into the meaning of the term just compensation.[102] In *Monongahela Navigation Co. v. United States*, the Court explained:

> The language used in the Fifth Amendment . . . is happily chosen. The entire amendment is a series of negations [and] denials of right or power in the government . . . . The noun "compensation," standing by itself, carries the idea of an equivalent. . . . So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.[103]

While *Monongahela* provided significant guidance for purposes of interpreting the term just compensation, the Court did not consider the issue of pre-judgment interest.[104]

In 1921, the U.S. Supreme Court first recognized the Takings Clause as providing a constitutional waiver of sovereign immunity to pre-judgment interest.[105] In *United States v. Rogers*, the Court concluded that requiring the government to provide interest from the date of a taking until the date of payment for a taking best satisfies the language of the just compensation provision.[106] Two years later, the Supreme Court elaborated on its holding in *Rogers* by explaining that "[t]he requirement that 'just compensation'

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100. 1 CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 50, at 408.

101. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) (stating that the duty of determining the process of measuring just compensation "is a judicial and not a legislative question").

102. *Id.* at 325–26.

103. *Id.*

104. *See id.*

105. United States v. Rogers, 255 U.S. 163, 169 (1921) (describing that "[h]aving taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property.").

106. *Id.*

shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."[107]

In light of these new interpretations, the Court adjusted the no-interest rule to provide that "the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution."[108] However, the Court later limited the scope of this new version of the no-interest rule, explaining that "[t]he allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution."[109] To this day, the Supreme Court recognizes only the Takings Clause of the Fifth Amendment as furnishing a constitutional waiver of sovereign immunity to pre-judgment interest.[110]

B. Article III's Judicial Compensation Clause

Although the Supreme Court recognizes only the Takings Clause as providing a constitutional waiver of sovereign immunity to pre-judgment interest, in *Hatter v. United States*, the United States Court of Federal Claims concluded that the judicial Compensation Clause contains a similar waiver.[111] The judicial Compensation Clause provides that, "[t]he Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[112] The *Hatter* court based its finding of a new exception to the no-interest rule partly upon this specific language and partly upon the historic purpose of the judicial Compensation Clause.[113]

1. The Road to *Hatter*—The Origins of the Judicial Compensation Clause

American jurists commonly cite the purpose of Article III's judicial Compensation Clause as providing the foundation for judicial independence.[114] The independence of the judiciary remains a deeply-rooted and

107. Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

108. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928).

109. Smyth v. United States, 302 U.S. 329, 353 (1937).

110. Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1360 (Ct. Int'l Trade 2001).

111. Hatter v. United States, 38 Fed. Cl. 166, 183 (1997).

112. U.S. CONST. art. III, § 1.

113. *Hatter*, 38 Fed. Cl. at 182–83.

114. *See, e.g.*, Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—And Disservice—1789–1992*, 142 U. PA. L. REV. 333, 333–34 (1993) (noting, in part, that the protection of judicial salaries functions as a "means to ensure that federal judges [are] independent and impartial in their decision-making").

uniquely American institution.[115] Commentators trace the concept of an independent judiciary to early seventeenth century England.[116] Historically, English judges served as political figureheads subject to the will of the King.[117] However, the Act of Settlement of 1701 removed some of the King's authority over England's judiciary by delegating power to the Houses of Parliament to remove judges from the bench.[118]

When the colonies organized in America, King George III retained control over the colonial judges.[119] The King possessed powers to appoint the colonial judiciary and to remove American judges from the bench for any reason.[120] At the same time, the Houses of Parliament in England had the authority to pay or withhold the judicial salary based upon their satisfaction with a judge's performance.[121] Thus, one of the primary reasons for colonial revolt enumerated within the Declaration of Independence was that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[122]

During the Constitutional Convention, a desire emerged among the drafters to create a judiciary capable of functioning independently from the will of the executive.[123] On May 29, 1787, Edmund Randolph proposed the establishment of a National Judiciary that "receive[s] punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution."[124]

The terms of this proposed compensation provision generated some dissension among the drafters. Gouverneur Morris, of Pennsylvania, objected to the prohibition on the "increase" of judicial salaries.[125] Morris reasoned that legislative increases for judges' salaries would not threaten

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115. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 567 (1996).

116. *Id.* at 568.

117. *Id.* at 569.

118. *Id.* at 570 n.12 (quoting the Act of Settlement, 12 & 13 Will. 2, ch. 2, § 3 (1700) (Eng.)).

119. L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 257 (2000).

120. *Id.*

121. *Id.*

122. *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

123. *See* Notes of James Madison from the Constitutional Convention (May 29 & July 18, 1787), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1310, 1326–27 (compiling the notes, journals, and speeches of the drafters during the Constitutional Convention).

124. Notes of James Madison from the Constitutional Convention (May 29, 1787), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1310.

125. Notes of James Madison from the Constitutional Convention (July 18, 1787), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1326.

the independence of the judiciary and that the Legislature should possess the power to raise judicial salaries in response to changing social and economic trends.[126] James Madison disagreed.

Madison contended that permitting any legislative control, positive or negative, over the judges' compensation encroached upon the separation of powers that the Committee sought.[127] Madison warned that allowing the Legislature to augment judicial salaries could produce the undesirable situation where a legislative denial of a salary increase could spark less-than-impartial adjudication within the courts.[128] In the end, Morris' argument prevailed among the Committee members and Article III's judicial Compensation Clause was born.[129]

Shortly after the Convention, Alexander Hamilton explained the importance of maintaining an independent judicial branch.[130] He reasoned that "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . . [F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches."[131] Hamilton accounted for Article III's judicial Compensation Clause because "*a power over a man's subsistence amounts to a power over his will.*"[132] In elaborating upon the Committee's decision to remove the ban on judicial salary increases, Hamilton explained that "the value of money and . . . the state of society" fluctuate over time.[133] Thus, placing a constitutional cap on judicial compensation could result in judges' salaries being incommensurate with the magnitude of their profession.[134] Hamilton further described Article III as precluding any diminution in judicial salaries to assure federal judges that they do not function as official marionettes, orchestrated by the whims of the legislative and executive powers.[135] This

126. *Id.* at 1327.

127. *Id.*

128. *See id.* ("If at such a crisis there should be in Court suits, to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented."). Conversely, a situation could also arise where the legislature approved a judicial salary increase in hopes of enticing judges to rule in a particular manner.

129. As Morris desired, Article III only forbids Congress from diminishing the judicial salary. *See* U.S. CONST. art. III, § 1.

130. *See infra* notes 131–36.

131. THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Ernest Rhys ed., 1911).

132. THE FEDERALIST NO. 79, at 402 (Alexander Hamilton) (Ernest Rhys ed., 1911).

133. *Id.*

134. *Id.*

135. *See id.* ("A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.").

was the final word on the judicial Compensation Clause for the next five decades.[136]

2. A Survey of Judicial Compensation Clause Litigation

The issue of the judicial salary has rarely been contested through litigation, but when courts have considered the topic of judges' salaries, they have engaged in a comprehensive analysis.[137] Chief Justice Roger Taney first addressed the implications of the judicial Compensation Clause in 1862.[138] After Congress levied an income tax upon all federal civil officers, the Chief Justice protested to the Secretary of the Treasury: "The act in question . . . diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature."[139] In response, Congress excluded federal judges and the President from the tax's reach.[140] Likewise, in 1895, the Supreme Court invalidated the Income Tax Act because it decreased judicial salaries as prohibited by Article III.[141] Thereafter, all acts of federal income taxes exempted judges so as not to decrease their compensation.[142] In instances where Congress failed to exempt federal judges from an enacted income tax, the Supreme Court responded swiftly, and confidently struck down any levy that worked a diminution in judicial compensation.[143]

In 1939, however, the Supreme Court reconsidered its sentiment concerning Article III judges and income taxes.[144] In *O'Malley v. Woodrough*, the Court responded to the Revenue Act of 1932, in which Congress declared the federal judiciary susceptible to any income taxation levied upon the general public.[145] The Supreme Court upheld the tax, reasoning that a non-discriminatory net income tax that applies to all

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136. *See infra* Part II.B.2.

137. *See* cases cited *infra* notes 138–62.

138. Evans v. Gore, 253 U.S. 245, 257 (1920) (discussing the history of taxation upon the judiciary).

139. *Id.* (quoting a letter of protest from Chief Justice Taney to the Secretary of the Treasury).

140. *Id.* (citing ch. 311, 27 Stat. 306).

141. Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 604–06 (1895).

142. *Evans*, 253 U.S. at 259.

143. *See generally* Booth v. United States, 291 U.S. 339, 350–52 (1934) (certifying that a salary reduction for retired federal judges is unconstitutional in light of Article III's mandate of undiminished compensation); Miles v. Graham, 268 U.S. 501, 509 (1925) (holding invalid a "gross income" tax levied after a judge's appointment to the bench because "there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law"); *Evans*, 253 U.S. at 263–64 (striking down a federal income tax because it unconstitutionally decreased judges' salaries).

144. O'Malley v. Woodrough, 307 U.S. 277, 281–82 (1939).

145. *Id.*

citizens of the United States did not offend Article III's intended protection over judicial independence.[146] The *O'Malley* Court concluded, "[t]o subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[147] With that, the Supreme Court dispositively assented to the notion that general taxation upon the judicial salary did not unconstitutionally diminish judicial compensation.[148]

As the twentieth century progressed, controversy over judicial salaries developed because judicial compensation failed to reflect the rigors that accompanied appointment to the bench.[149] The indignation federal judges felt over low salaries gave way to misgivings about Congress' intent in refusing to acknowledge the mounting predicament of an inadequate judicial emolument.[150] Finally, 140 Article III judges brought a claim against the federal government, asserting, in part, that Congress' failure to account for inflation resulted in a prohibited diminution of their compensation.[151] The United States Court of Claims disagreed, however.[152] The court reasoned that "the Constitution affords no protection from such an indirect, non-discriminatory lowering of judicial compensation, not involving an assault upon the independence of judges."[153]

In 1980, the Supreme Court first addressed the issue of judicial salaries and inflation after Congress enacted a series of statutes that provided for the salaries of certain federal employees, including Article III judges.[154] The statutes established the judicial wage and provided for an "annual cost-of-living adjustment[]."[155] Shortly thereafter, Congress enacted a series of statutes that eliminated or decreased the already-enacted cost-of-living

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146. *Id.* at 282.

147. *Id.* Thus, the *O'Malley* decision overruled both *Evans v. Gore* and *Miles v. Graham*. *O'Malley*, 307 U.S. at 281, 283.

148. *O'Malley*, 307 U.S. at 282.

149. Van Tassel, *supra* note 114, at 361.

150. *Id.* (citing Atkins v. United States, 556 F.2d 1028, 1033–35 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978)).

151. *Atkins*, 556 F.2d at 1033.

152. *Id.* at 1053.

153. *Id.* at 1051.

154. *See* United States v. Will, 449 U.S. 200, 202–09 (1980) (discussing the "interlocking network of [federal] statutes" providing for judicial compensation); Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613, 642–45 (current version at 2 U.S.C. §§ 351–364 (2000)); Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, 1946–50 (current version at 5 U.S.C. §§ 5305–5306 (2000)); Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, 419 (current version at 5 U.S.C. § 5318 (2000)).

155. *Will*, 449 U.S. at 202.

adjustments.[156] The judges responded by filing a class action suit against the federal government, asserting that the new statutes violated the judicial Compensation Clause by reducing the judicial salary.[157] In *United States v. Will*, the Supreme Court held that Congress unconstitutionally diminished the judges' compensation when it repealed the cost-of-living increases that it had already enacted.[158] However, the Court further concluded that Congress could permissibly repeal the "cost-of-living adjustment" before the provision took effect.[159]

The Supreme Court's decision in *Will* implicitly attested to the veracity of the Court of Claims' holding in *Atkins v. United States* that the judicial Compensation Clause does not obligate Congress to adjust the judicial wage in response to inflation.[160] Although the impact of inflation upon the judicial salary did not factor into the Supreme Court's analysis in *Will*, the Court could not have reached its holding without deeming the coupling of inflation and Article III to be moot.[161] By concluding that Congress could constitutionally repeal a proposed cost-of-living increase that had not yet taken effect, the Court indicated that the judicial Compensation Clause did not obligate Congress to counter the effects of inflation on a regular basis.[162] This deduction comported with the trend laid out in the lineage of twentieth-century Supreme Court opinions concerning the judicial Compensation Clause.[163] That trend, however, changed when the United States Court of Federal Claims contemplated applying the no-interest rule to federal judges in light of Article III's command of an undiminished judicial salary.[164]

3. Hatter v. United States

Like the majority of previous judicial Compensation Clause claims, *Hatter v. United States* originated when Congress levied a new tax.[165] On January 1, 1983, the Tax Equity and Fiscal Responsibility Act took effect, thereby withholding the Hospital Insurance portion of the Social Security

156. *Id.* at 202–03.

157. *Id.* at 209.

158. *Id.* at 226.

159. *Id.* at 228–29.

160. *Id.* at 227–28; *Atkins*, 556 F.2d at 1051–53.

161. *See generally Will*, 449 U.S. at 200–29.

162. *See id.* at 227 ("The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.").

163. *See* cases cited *supra* notes 138–48, 154–59 and accompanying text.

164. *See infra* Part III.A–B.

165. Hatter v. United States, 38 Fed. Cl. 166, 168 (1997).

tax from the salaries of federal judges for the first time.[166] Similarly, on January 1, 1984, the IRS began withholding funds from federal judges' salaries for the first time under the Old Age Survivors and Disability Insurance portion of the Social Security tax.[167]

In response to the new taxes, sixteen Article III judges, who accepted their appointments to the bench prior to Congress' withholdings, sued the United States government.[168] The judges brought a claim against the federal government, alleging that the new taxes violated Article III's judicial Compensation Clause by causing a diminution to their salaries.[169] The judges sought the recovery of the sum withheld from their salaries under the new Social Security taxes, plus annual compound interest.[170]

The Court of Federal Claims initially disagreed with the judges, holding that although the taxes diminished the judicial salary, they did not violate the judicial Compensation Clause because the taxes applied non-discriminately.[171] However, the United States Court of Appeals for the Federal Circuit reversed that decision because Congress imposed the tax upon sitting judges, who were already receiving a fixed compensation.[172] On remand, the Court of Federal Claims awarded refunds to some of the federal judges for the amount withheld by the taxes in violation of the judicial Compensation Clause.[173] More importantly, the Court held that these judges were also entitled to pre-judgment interest in addition to the refunds.[174]

Founded upon an earlier ruling by the Federal Circuit declaring that the judicial Compensation Clause is money-mandating,[175] the Court of Federal Claims (CFC) held that the provision was also interest-mandating.[176] In holding that Article III provides a waiver of sovereign immunity to pre-

166. *Id.*; 26 U.S.C. § 3101(b) (2000) (imposing hospital insurance tax on the income of employees covered by the section); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, sec. 278(a), 96 Stat. 324, 559 (1982) (current version at 26 U.S.C. § 3121(u) (2000)).

167. *Hatter*, 38 Fed. Cl. at 168 (citing Social Security Amendments of 1983, Pub. L. No. 98-21, sec. 101(a)(1), (b)(1), (d), 97 Stat. 65, 67–69 (current version at 26 U.S.C. § 3121(b)(5)(E) (2000) & 42 U.S.C. § 410(a)(5)(E) (2000)).

168. *Hatter*, 38 Fed. Cl. at 168.

169. *Id.* at 168–70.

170. *Id.* at 168–69.

171. Hatter v. United States, 31 Fed. Cl. 436, 446–47 (1994).

172. Hatter v. United States, 64 F.3d 647, 652–53 (Fed. Cir. 1995).

173. *Hatter*, 38 Fed. Cl. at 170.

174. *Id.* at 183.

175. Hatter v. United States, 953 F.2d 626, 628 (Fed. Cir. 1992) (holding that the Court of Federal Claims possessed jurisdiction over the judges' claims because the claim arose under a constitutional provision that requires the payment of money for its violation, and was not a tax refund claim).

176. *Hatter*, 38 Fed. Cl. at 183.

judgment interest awards, the CFC reasoned that the provision arises under the federal Constitution, is money-mandating, and "affirmatively require[s] the payment of compensation."[177] The court recognized that this was a case of first impression and noted the rigors of the no-interest rule; however, it maintained that the judges' claim for interest survived the waiver of sovereign-immunity requirement.[178]

The CFC initially rationalized its holding by comparing the judicial Compensation Clause to the Takings Clause—the only constitutional provision that the Supreme Court recognizes as containing an exception to the no-interest rule.[179] First, the *Hatter* court explained that both provisions arise under the Constitution.[180] Second, the CFC reasoned that both clauses are money-mandating, i.e., they require monetary payments in the event of violations.[181] The court concluded that an affirmative requirement to pay "compensation" arises under both the Takings Clause and the judicial Compensation Clause.[182] Thus, the CFC proclaimed that, "[i]f recompense for delay in compensation is required for takings claimants despite the general [no-interest] rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense."[183]

The *Hatter* court next asserted two reasons why the judicial Compensation Clause provides a more judicious basis for awarding pre-judgment interest than the Supreme Court recognized in the Takings Clause.[184] The court based one reason upon differences in the textual commands of the provisions, and based the other upon policy.[185] The CFC remarked that Article III mandates that judicial salary be paid "at stated Times," while the Fifth Amendment simply requires that "private property [not] be taken without just compensation."[186] These textual differences led the court to conclude that the only manner to remedy a violation of Article III is with an interest payment that atones for delayed deference to the judicial Compensation Clause.[187] On the other hand, because the Takings Clause lacks the timing element that the CFC recognized in Article III, the

177. *Id.*

178. *Id.* at 181–83.

179. *Id.*; *Smyth*, 302 U.S. at 353 ("The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution.").

180. *Hatter*, 38 Fed. Cl. at 182.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 182–83.

185. *Id.*

186. *Id.* at 183; U.S. CONST. art. III, § 1 & amend. V.

187. *Hatter*, 38 Fed. Cl. at 183.

court averred that "entitlement to interest [under the Fifth Amendment] depends on interpretation of the term 'just compensation.'"[188]

The *Hatter* court's other line of reasoning is policy-based. The CFC contends that there is a "sounder basis" for finding a waiver of sovereign immunity to pre-judgment interest under the judicial Compensation Clause than under the Takings Clause because the Framers created the former to maintain judicial independence.[189] The court argues that a denial of the judges' claims for pre-judgment interest would endanger this independence by enabling Congress to withhold the adjudged refund of the taxes indefinitely.[190] The *Hatter* court reasoned that without a pre-judgment interest award, federal judges lacked a remedy if Congress spurned their claims for repayment.[191]

Strikingly, the court failed to connect this enthymeme to its assertion; the CFC never explained why this policy-based premise causes Article III to provide a more substantial basis for an award of pre-judgment interest than the Fifth Amendment provides.[192] Without further discussion, the *Hatter* court held that the judicial Compensation Clause provides a waiver of sovereign immunity to pre-judgment interest awards.[193] Importantly, the CFC's holding in *Hatter* did not receive any substantive appellate review, and the case was adjudicated on other grounds.[194] The *Hatter* decision opened the door to new claims of constitutional exceptions to the no-interest rule founded upon the fallacies contained in the opinion.[195] Even a perfunctory analysis of the CFC's decision to award the judges pre-judgment interest under the command of Article III's salary provision reveals the hamartian shortcomings in *Hatter*.[196]

III. PULLING A RABBIT OUT OF A *HATTER*: REASONS THAT ARTICLE III CANNOT PROVIDE AN EXCEPTION TO THE NO-INTEREST RULE

In *Hatter*, the CFC discerned the first new constitutional waiver of sovereign immunity to pre-judgment interest since the Supreme Court

188. *Id.*
189. *Id.* at 182–83.
190. *Id.* at 183.
191. *Id.*
192. *See id.*
193. *Id.*
194. *See* Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1361 & n.8 (Ct. Int'l Trade 2001) (discussing the complicated history of the *Hatter* litigation, which the Federal Circuit finally put to rest on remand from the Supreme Court primarily on the basis of procedural issues).
195. *See infra* Part III.B.
196. *See infra* Part III.A–B.

recognized such a waiver within the text of the Takings Clause in 1921.[197] However, the CFC's reasoning falters under the weight of scrutiny rendering the *Hatter* decision more enigmatic than automatic. The fallacies in the court's analysis contribute to the decision's impotence.

The problems with *Hatter* abound. The CFC founded its holding squarely upon policy and unsubstantiated constitutional interpretation.[198] The court failed to address the conventional requirements of the no-interest rule that the Supreme Court apparently believed merited repeated consideration in its own opinions.[199] An unmitigated analysis of *Hatter* in light of the no-interest rule reveals that Article III lacks the necessary waiver of sovereign immunity to grant awards of pre-judgment interest against the United States.[200]

These deficiencies indicate that the CFC's holding departed from Supreme Court precedent in a maverick-like display of juristic self-emancipation. The deficiencies also indicate a measure of egocentric expedience by the *Hatter* court in removing itself from the constitutionally-prescribed judicial hierarchy.[201] In fact, by eroding confidence in society's vision of the judiciary as an impartial arbiter, *Hatter* actually endangers the judicial independence that the CFC professes to defend.[202] Moreover, the ramifications of the *Hatter* decision persist because the CFC inadvertently engineered a new avenue on which to usher misconceived theories of no-interest rule exceptions into litigation.[203] Fortunately, the various courts confronted with these new theories have avoided the *Hatter* decoy providing further evidence of the CFC's mistake.[204] This Part examines various aspects of the *Hatter* decision, both express and implied, to demonstrate that the judicial Compensation Clause *cannot* provide a waiver of sovereign immunity to pre-judgment interest.

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197. *Id.*; Hatter v. United States, 38 Fed. Cl. 166, 183 (1997); United States v. Rogers, 255 U.S. 163, 169 (1921) (holding that the term "just compensation" as used in the Fifth Amendment provides a waiver of sovereign immunity to pre-judgment interest).

198. *See infra* Part III.A.2.

199. *See infra* Part III.A.

200. *Id.*

201. *See* U.S. CONST. art. III, § 1 (providing in pertinent part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

202. *See infra* Part III.B.

203. *Id.*

204. *Id.*

A. Snubbing Stare Decisis

Before *Hatter*, every federal court recognized that only the Fifth Amendment's Takings Clause provides a constitutional exception to the no-interest rule.[205] In *Hatter*, the CFC discerned a previously unrecognized exception to the no-interest rule within the text of Article III's judicial Compensation Clause.[206] Because the drafters of the Constitution envisioned a judiciary that exudes some semblance of order and continuity, precedent generally compels the lower courts to espouse the decisions of the Supreme Court.[207] In order to maintain an air of legitimacy, the Supreme Court typically binds itself to precedent, and it expects the lower courts to adjudicate in similar accordance—particularly in the realm of constitutional interpretation.[208] However, the CFC's holding in *Hatter* appears unaffected by the Supreme Court's previous no-interest rule opinions and by the no-interest rule itself.

The Supreme Court's most recent articulation of the no-interest rule prior to the *Hatter* decision explained that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."[209] This expression of the no-interest rule reflects the established principle that finding a waiver of sovereign immunity to interest requires emphatic proof that the government intended such a waiver.[210] Thus, the Supreme Court concluded that "waivers of sovereign immunity to suit must be read against the backdrop

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205. *See, e.g.*, Smyth v. United States, 302 U.S. 329, 353 (1937) ("The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution."); Merchs. Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456, 459 (7th Cir. 1960) ("With the exceptions of just compensation claims under the Fifth Amendment interest is not recoverable against the United States in the absence of express provision to the contrary."); Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1360 (Ct. Int'l Trade 2001) ("The Just Compensation Clause of the Fifth Amendment . . . is the only provision of the Constitution that the U.S. Supreme Court has found to contain a clear waiver of sovereign immunity authorizing prejudgment interest.").

206. *See Hatter*, 38 Fed. Cl. at 181 ("All parties agree that this is an issue of first impression.").

207. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992) (stating that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable").

208. *See, e.g.*, *id.* at 865. Thus, the *Casey* Court wrote:

> The underlying substance of [the Court's] legitimacy is . . . the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.

Id.

209. Library of Congress v. Shaw, 478 U.S. 310, 311 (1986).

210. *Id.* at 315.

of the no-interest rule."[211] The Supreme Court continually adhered to this prescript in its line of Takings Clause cases; conversely, in *Hatter*, the CFC did not.

1. The Takings Clause Is Interest-Mandating

The Supreme Court finds the required express waiver of sovereign immunity to pre-judgment interest within the text of the Takings Clause.[212] The Court recognizes that the unique language of the Fifth Amendment establishes an affirmative requirement to pay interest in the event of a government taking of private property.[213] The Court explains that the term "just compensation" entails payment of "the full and perfect equivalent of the property taken . . . [so that the owner is] put in as good [sic] position pecuniarily as he would have been if his property had not been taken."[214] Because the Fifth Amendment permits the federal government to take private property for the benefit of the public, the language of the Takings Clause, through its just compensation mandate, requires that the government pay interest from the time of the taking.[215]

Moreover, the plain language of the Takings Clause demonstrates that the provision is both money-mandating and interest-mandating.[216] In other words, the Takings Clause provides a general waiver of sovereign immunity to suit and a specific waiver of sovereign immunity to pre-judgment interest.[217] The provision is money-mandating because it provides a property owner with a substantive right to sue the federal government for money if the government takes the owner's property without paying

211. *Id.* at 319. At this point in its discussion of the no-interest rule, the Supreme Court is addressing a statutory waiver of sovereign immunity. *Id.* However, there is no logical reason not to apply the same principle to constitutional provisions.

212. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928).

213. *Shaw*, 478 U.S. at 317 n.5.

214. Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923).

215. *See, e.g.*, Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937) ("Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages."); Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893) ("Congress has supreme control over the regulation of commerce, but if . . . it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.").

216. Recall that the Takings Clause mandates that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V; *see supra* Part II.A. and notes 175–77, 181.

217. Recall that the United States government retains a general sovereign immunity to suit and a specific sovereign immunity to pre-judgment interest. The federal government must waive both of these immunities before a court may grant an award of pre-judgment interest. *See supra* Part I.B–C.

compensation.[218] This is the general waiver of sovereign immunity to suit.[219]

The provision also provides a specific waiver of sovereign immunity to interest, or is interest-mandating, because it explicitly requires that the compensation paid be "just," or the "full and exact equivalent" of the property taken.[220] It is this affirmative requirement that provides the express waiver of sovereign immunity to pre-judgment interest.[221]

2. The Judicial Compensation Clause Is Not Interest-Mandating

The CFC embarked upon its misguided route to *Hatter* on faulty footing. After a brief discussion of the no-interest rule and a cursory overview of the Takings Clause exception to that rule, the *Hatter* court concluded that "[b]oth the Fifth Amendment and Article III affirmatively require the payment of compensation."[222] Importantly, the CFC correctly discounts any relevance to the presence of the term "compensation" within the texts of each provision.[223] The CFC instead relies upon Article III's requirement that the judicial salary be paid "at stated Times."[224] In fact, the court contends that the presence of this timing element within the judicial Compensation Clause provides a more reliable basis on which to award pre-judgment interest than the Taking Clause's just compensation requirement provides.[225] This is the *Hatter* court's first misstep. The CFC subsequently errs again by claiming that the judicial Compensation Clause's intended purpose of preserving judicial independence further illustrates the provision's requirement to pay pre-judgment interest.[226]

a. Article III's Text Lacks an Affirmative Requirement to Pay Pre-Judgment Interest

Article III does not contain an affirmative requirement to pay pre-judgment interest—only the Fifth Amendment contains this requirement. While the Takings Clause stipulates that the United States pay just

218. *See Seaboard*, 261 U.S. at 304, 306 (finding that a land owner's right to just compensation requires the federal government to pay for property taken at the time of the taking).

219. *See supra* Part I.B.

220. *Monongahela Navigation Co.*, 148 U.S. at 326–27.

221. *Shaw*, 478 U.S. at 317 n.5.

222. *Hatter*, 38 Fed. Cl. at 182.

223. *Id.*

224. *Id.* at 183.

225. *Id.*

226. *Id.*

compensation in the event that the government takes property, the judicial Compensation Clause only requires that Congress pay judges' salaries at specific times and that the salary paid may not be decreased.[227] The critical difference between the clauses is not the minor nuances in the texts; rather, the critical difference is that these two provisions are semantically disparate.

The language of the Takings Clause carries an affirmative requirement in the form of a condition: the United States may take private property for public use only if the government pays the owner just compensation.[228] When used in the context of the Fifth Amendment, the affirmative requirement of the just compensation proviso is unmistakable.[229] That requirement translates into the criterion that the government may take private property provided that Congress pays the owner for the value of the property taken and accounts for the duration between the date of the taking and the date of payment with interest.[230] As the Supreme Court explained, "[w]hatever be the true value of that which [the government] takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made."[231]

On the other hand, the judicial Compensation Clause lacks a similar affirmative requirement to pay interest. This provision simply contains a requirement to pay the judicial salary at stated intervals and prohibits Congress from actively diminishing that salary.[232] Nowhere within the text of Article III is there an affirmative requirement to pay interest.[233] To thoroughly demonstrate this, the timing provision and the diminution prohibition must be analyzed both independently and collectively to evaluate whether they contain an affirmative requirement to pay pre-judgment interest.

It is necessary to first analyze these two elements in isolation because Congress could violate the command of Article III by delaying payment of the judicial salary without diminishing the amount actually paid to the

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227. *Compare* U.S. CONST. amend. V, *with* U.S. CONST. art. III, § 1.

228. *See Monongahela Navigation Co.*, 148 U.S. at 337 (explaining that "the power of Congress to take . . . property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation").

229. *See. e.g.*, United States v. Reynolds, 397 U.S. 14, 16 (1970). Recall that "'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Id.* (citation omitted).

230. *Seaboard*, 261 U.S. at 305–06.

231. *Monongahela Navigation Co.*, 148 U.S. at 337.

232. U.S. CONST. art. III, § 1.

233. *See infra* Part III.A.2.a.i–iii.

judges.[234] Conversely, Congress could violate the provision by diminishing the amount of the judicial salary, but still pay this diminished amount at the specified time.[235] Next, the timing provision and the prohibition against salary diminution must be examined as an aggregate, for Congress could also violate Article III by delaying payment and decreasing the judicial salary simultaneously.[236]

i. "At Stated Times"

If Congress fails to pay the judicial salary at the specified time, then federal judges have a claim against the United States to ensure that the legislature pays any money rightfully due.[237] Thus, the term "at stated Times" provides judges with a general waiver of sovereign immunity to suit.[238] However, viewed in light of the no-interest rule, the "at stated Times" requirement cannot expressly or impliedly mandate interest payments in the event that Congress delays salary payments.

Unlike the Takings Clause, which requires the payment of "just compensation" in the event of a taking, Article III is silent as to any requirement in the event of delayed salary payments.[239] Without the express requirement to pay interest, the term "at stated Times" cannot supply the specific waiver of sovereign immunity necessary to award pre-judgment interest.[240] In other words, the term "at stated Times" indicates a money-mandating intent within the text of the judicial Compensation Clause, but not an interest-mandating intent.[241] This means that federal judges may bring a claim against the United States for the sum of money that they are constitutionally due but not for the interest upon that sum.[242]

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234. *See infra* Part III.A.2.a.i.

235. *See infra* Part III.A.2.a.ii.

236. *See infra* Part III.A.2.a.iii.

237. Recall that the Tucker Act allows claimants to meet the general waiver of sovereign immunity requirement by founding a claim upon constitutional provisions. *See supra* Part I.C.

238. *See Hatter*, 953 F.2d at 627–28 (Fed. Cir. 1992) (providing that the federal judges' claims garner jurisdiction in the Claims Court because Congress violated a constitutional provision, violation of which carries a substantive right to a monetary award); *see supra* Part I.C. Recall that the United States retains a general sovereign immunity from suit and a specific sovereign immunity from interest. To collect an award of pre-judgment interest against the federal government, a litigant must show that the government has expressly waived both of these immunities separately. 1 CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 50, at 71.

239. *Compare* U.S. CONST. amend. V, *with* U.S. CONST. art III, § 1.

240. *See supra* Part I.C and note 238.

241. *See supra* Part II.A. and text accompanying notes 175–77, 181.

242. *See supra* Part I.C and note 238.

ii. "Shall Not Be Diminished"

Like the term "at stated Times," the phrase "shall not be diminished" provides a general waiver of sovereign immunity to suit but does not waive the federal government's immunity to awards of pre-judgment interest.[243] If Congress violates Article III by diminishing the judicial salary, the language "shall not be diminished" provides a substantive right upon which federal judges may ground a claim against the United States for payment of the full salary.[244] Nevertheless, this only constitutes a general waiver of sovereign immunity to suit.[245] No affirmative requirement to pay pre-judgment interest emanates from the provision.[246] Unlike the Takings Clause, the judicial Compensation Clause lacks any stipulation specifying the payment of interest or its equivalent in the event of a salary decrease.[247] By lacking this stipulation, the plain language of Article III provides federal judges with the remedy of recouping the exact amount of their wrongfully-withheld salary.[248] However, the remedy does not include the payment of pre-judgment interest because Article III's salary provision does not provide for such a payment.[249] Again, the simple prohibition expressed in the phrase "shall not be diminished" illustrates that Article III is money-mandating but not interest-mandating.

iii. "At Stated Times" and "Shall Not Be Diminished"

When examined as an aggregate, Article III's timing element and diminution restriction also fail to exhibit the affirmative requirement to pay interest that the Court of Federal Claims recognized in *Hatter*.[250] As discussed above, both the term "at stated Times" and the term "shall not be diminished" are money-mandating elements of Article III.[251] Each provides federal judges with a cause of action for the return of money wrongfully

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243. *See supra* Part III.A.2.a.i.

244. *See supra* Part I.C and note 238.

245. *See supra* Part I.C and note 238.

246. Recall that the Supreme Court found that the Takings Clause's mandate for the payment of "just compensation" provided a specific waiver of sovereign immunity to pre-judgment interest. *See supra* Part III.A.1.

247. *Compare* U.S. CONST. amend. V, *with* U.S. CONST. art III, § 1.

248. *See supra* note 238.

249. *See supra* Part I.C and note 238.

250. *See Hatter*, 38 Fed.Cl. at 183. Recall that the CFC declared that the Takings Clause and the judicial Compensation Clause both "affirmatively require" the payment of recompense or damages plus interest. *Id.* at 182.

251. *See supra* Part III.A.2.a.i–ii.

withheld or wrongfully diminished.[252] However, neither of the terms by themselves, nor the remaining text of Article III, requires that Congress adjust any recoverable payments with an award of pre-judgment interest.[253]

Surely, the *Hatter* court does not allege that two distinct money-mandating elements within a constitutional provision equate to a money-mandating element *and* an interest-mandating element. Such a position would defy logic. Accepting that premise implies that any constitutional provision containing more than one general waiver of sovereign immunity to suit also contains a specific waiver of sovereign immunity to pre-judgment interest. Under the terms of the no-interest rule, this is impossible. The rule precludes any finding of a specific waiver of sovereign immunity to pre-judgment interest within the Constitution, unless a contrary intent is communicated in the form of an express constitutional requirement.[254]

The *Hatter* court appears to have avoided falling into the trap of relying upon this fallacious syllogism. Instead, the CFC justifies its award of pre-judgment interest in a brief, muddled discussion of the implications of the "at stated Times" requirement.[255] The CFC asserts that an interest award provides the sole remedy for delayed payments to judges.[256] The CFC fails to substantiate this deduction, though, and any analysis of the court's logic is open to interpretation.[257]

The *Hatter* court's reasoning does not lead directly to its holding. The most sensible interpretation of the CFC's decision is that Article III requires an award of pre-judgment interest for delayed salary payment because the effects of inflation upon the delayed payment work to diminish the judicial salary.[258] Thus, the argument would run: If Congress does not make payment "at stated Times," then inflation diminishes judicial compensation, and an award of pre-judgment interest would provide the only manner in

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252. *See supra* Part III.A.2.a.i–ii and note 238.

253. Recall that the judicial Compensation Clause provides that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

254. *See Shaw*, 478 U.S. at 317 n.5 (noting that "the constitutional mandate 'just compensation' [under the Fifth Amendment] includes a payment of interest"); United States Shoe Corp. v. United States, 296 F.3d 1378, 1386 (Fed. Cir. 2002); *Swisher*, 178 F. Supp. 2d at 1361 (noting that [w]hile the Export Clause may be interpreted as money-mandating, it does not contain *express* language which requires that the government provide 'just' compensation." (emphasis added)).

255. *Hatter*, 38 Fed. Cl. at 183.

256. *Id.*

257. *See id.* at 181–83 (stating that once it is determined that interest is appropriate, "the rate of interest, whether interest shall be simple or compounded and the frequency of compounding are matters within the broad discretion of the trial court").

258. *See id.*

which to rectify this diminution under Article III. However, precedent supplied by the Supreme Court, elaboration into Constitutional Convention supplied by the Framers, and the principles inherent to the no-interest rule render this argument impotent.

It offends Supreme Court precedent to argue that Article III requires an award of pre-judgment interest to counter inflation's devaluing effect upon the judicial salary resulting from congressional delays in payment.[259] While the Supreme Court recognizes that the payment of interest offsets the losses attributed to opportunity costs and inflation,[260] the Court implicitly refuses to recognize these losses as a diminution in salary under the judicial Compensation Clause.[261] The Court demonstrated this refusal in *United States v. Will*, where it permitted Congress to repeal an inactive cost-of-living increase for judicial salaries.[262] Thus, the Court indicated that Article III does not compel Congress to regularly account for the devaluation effects of inflation upon judicial compensation.[263] Otherwise, the Court would require the legislature to counter the effects of inflation on judges' salaries, and would not have permitted Congress to repeal the proposed cost-of-living increase.[264] If the Supreme Court believed that inflation produces a prohibited compensation diminution, then Article III would constitutionally obligate the Court to ensure that Congress accounts for such inflation-based diminution.[265] Tellingly, the Court does not require Congress to make these adjustments.[266]

Not only do the Supreme Court's opinions provide evidence that Article III's prohibition on salary diminution does not require Congress to neutralize the effects of inflation, clues in the text of the Constitution itself lead to the same conclusion. Article III declares that "Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be

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259. *See supra* Part II.B.2.

260. *Shaw*, 478 U.S. at 322 n.7.

261. *See supra* Part II.B.2. This was one of the express holdings of the Court of Claims in *Atkins*. Tellingly, the Supreme Court did not feel obligated to review this holding. *See* Atkins v. United States, 556 F.2d 1028, 1033, 1051–53 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); *see also* United States v. Will, 449 U.S. 200, 228–29 (1980) (holding that Congress may repeal a proposed cost-of-living increase for judicial salaries provided that the increase has not yet taken effect).

262. *Will*, 449 U.S. at 228–29.

263. *See supra* text accompanying notes 158–64.

264. *See supra* text accompanying notes 158–63.

265. Recall that the judicial Compensation Clause requires Congress to provide "a Compensation, which shall not be diminished during [federal judges'] Continuance in Office." U.S. CONST. art. III, § 1; *see supra* text accompanying notes 158–63.

266. *See Will*, 449 U.S. at 228–29 (holding that Congress may repeal a proposed cost-of-living increase for judicial salaries provided that the increase has not yet taken effect); *see supra* note 261 and accompanying text.

diminished during their Continuance in Office."[267] As discussed above, the primary purpose of Article III's salary provision is to ensure the independence of the judiciary.[268] The Constitution furnishes a similar provision in Article II, which ensures the independence of the chief executive.[269] Article II provides that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be *encreased nor diminished* during the Period for which he shall have been elected."[270] Thus, while the Constitution permits Congress to increase the judicial salary, it prohibits Congress from increasing the presidential salary.[271]

This slight textual difference provides substantial insight into the intentions of the Founding Fathers, as do their own words chronicled during and after the Constitutional Convention. During the Convention, James Madison argued that Article III should permanently fix the judicial salary, thereby precluding Congress from either decreasing or increasing judges' compensation.[272] In fact, Article III, as originally composed, prohibited both the increase and decrease of the judiciary's salary.[273] However, the drafters removed the proscription against increases to the judicial salary, recognizing that federal judges retained life tenure and that the value of money could drastically fluctuate during their time on the bench.[274]

Little record remains of the Framers' discussions during the Convention regarding the drafting of the Presidential Compensation Clause.[275] Certainly though, the drafters intended to guarantee the separation of the executive and legislative branches.[276] Framer Hugh Williamson expressed this intent during the drafting of Article II: "As the Salary of the Executive will be fixed . . . there will not be such a dependence on the Legislature as has been imagined."[277] Thus, the Framers intended to maintain the separation of both the executive and judicial branches by relieving their dependence upon the legislative branch for their salaries.[278]

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267. U.S. CONST. art. III, § 1.

268. *See supra* Part II.B.1. Recall that Article III secures judicial impartiality by precluding any financial dependence of federal judges upon the legislature.

269. U.S. CONST. art. II, § 1, cl. 6.

270. *Id.* (emphasis added).

271. *Compare* U.S. CONST. art. III, § 1, *with* U.S. CONST. art. II, § 1, cl. 6.

272. Notes of James Madison from the Constitutional Convention (July 18, 1987), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1326–27.

273. *Id.*

274. *Id.* at 1327.

275. *See generally* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2 (compiling the notes of the drafters during the Constitutional Convention).

276. Notes of James Madison from the Constitutional Convention (July 17, 1787), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1128.

277. *Id.*

278. *Id.*

They granted Congress the power to increase the judicial salary because judges have life tenure, but retained the provision prohibiting Congress from increasing the Presidential salary.[279] Because the Framers only allotted the President a four-year term in office, it is logical to conclude that they felt it unnecessary to account for the effects of inflation during that four-year period.[280] Otherwise, the Framers would have eliminated the increase-prohibition from Article II, just as they eliminated the increase-prohibition from Article III.

Alexander Hamilton's account of the Constitution, penned well after the end of the Convention, supports this conclusion.[281] Hamilton explained that the drafters removed all congressional power over the control of the Presidential salary to secure executive independence from the legislative will.[282] He wrote, "[t]hey can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."[283] Further, Hamilton attributed "the difference in the duration of the respective offices" as the reason that the Constitution allows Congress to increase the judicial salary, but not the Presidential salary.[284]

Hamilton explained that because the Constitution limits the President to a four-year term, "it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end."[285] Conversely, Hamilton describes that because federal judges retain life tenure, "it may well happen . . . that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service."[286] It is reasonable to infer then that not only is the Supreme Court unconcerned with the regular effects of inflation on judicial compensation, but that the Framers of the Constitution were as well—at least for a four-year time period. In light of Madison's revelation and because an award of pre-judgment interest has the primary purpose of offsetting the devaluing effects of inflation, it is irrefutable that Article III lacks an express requirement to pay pre-judgment interest.

This is significant because the no-interest rule requires an express constitutional requirement in order to waive sovereign immunity to pre-judgment interest.[287] The Supreme Court regularly interprets this rule to

279. *See supra* Part II.B.1.
280. U.S. CONST. art. II, § 1, cl. 1.
281. THE FEDERALIST NO. 73, at 373–78 (Alexander Hamilton) (Ernest Rhys ed., 1911).
282. *Id.* at 373.
283. *Id.* at 374.
284. THE FEDERALIST NO. 79, *supra* note 132, at 403.
285. *Id.*
286. *Id.*
287. *Shaw*, 478 U.S. at 317 n.5; *United States Shoe*, 296 F.3d at 1386; *Swisher*, 178 F. Supp. 2d at 1361.

declare that, without a finding of this affirmative requirement, interest does not accrue on a constitutional claim against the United States.[288] In view of the Court's opinions, the textual differences between Article II and Article III's respective salary provisions, and Alexander Hamilton's commentary, the conclusion that the judicial Compensation Clause lacks an affirmative requirement to pay pre-judgment interest is undeniable.

Supreme Court testimony concerning constitutional interpretation renders this conclusion indisputable. In presenting guidelines for interpreting the Constitution, the Supreme Court explains, "[t]he framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text."[289] This principle finds direct application under Article III. The decree of the judicial Compensation Clause is unambiguous; no ancillary tools of interpretation are required to decipher its import. Hence, the provision's mere requirement to pay the judicial salary at specific times and prohibition against decreasing the salary paid cannot amount to a tacit requirement for an award of interest. Inferences drawn from the Supreme Court opinions, the text of the Constitution, and the words of the Framers only serve to bolster this conclusion.

b. The Intended Purpose of Article III Cannot Constitute a Requirement to Pay Interest

The *Hatter* court also reasoned that, because the drafters created the judicial Compensation Clause to preserve an independent judiciary, there is a more stable basis, than there is with the Takings Clause, on which to conclude that Article III requires the payment of interest.[290] However, this argument fails due to the express terms of the no-interest rule.[291] Although the underlying purposes of both Article II and Article III's salary provisions provide sound evidence with which to argue against the *Hatter* court's decision under the no-interest rule, the rule prohibits courts from using arguments as the sole basis for finding a waiver of sovereign immunity to

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288. *See, e.g.*, United States v. Louisiana, 446 U.S. 253, 264–65 (1980) ("Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." (alteration in original)) (quoting Smyth v. United States, 302 U.S. 329, 353 (1937)).

289. McPherson v. Blacker, 146 U.S. 1, 27 (1892).

290. *Hatter*, 38 Fed. Cl. at 183.

291. *See supra* Part I.C and note 288.

interest.[292] While this may initially appear contradictory, the no-interest rule supports this conclusion.

Because the no-interest rule requires an express waiver of sovereign immunity to awards of pre-judgment interest, policy arguments and inferences—like those that the *Hatter* court proposed—typically should not enter into a court's analysis when determining interest entitlements.[293] For constitutional interpretation, the no-interest rule obligates the courts to discern a specific requirement to pay interest within the text of the applicable constitutional provision.[294] Common sense dictates that arguments based upon policy and inference alone cannot indicate an express waiver of sovereign immunity or a constitutional requirement. Certainly, courts may consider such arguments when evaluating the scope of a potential constitutional requirement to pay interest because policy and inference may indicate the intent of the provision's drafters.[295] However, the drafters' intent, without an accompanying express requirement to pay interest, does not meet no-interest rule standards.[296]

Admittedly, the no-interest rule's aversion to arguments grounded in policy and inference derives from judicial interpretation of statutes and government contracts.[297] In fact, the Supreme Court has held that the term just compensation, standing alone, does not confer a requirement to pay pre-judgment interest in the context of statutes or contracts.[298] For the reasons set out below, this apparent discrepancy is rational, however.

Under the Fifth Amendment's Takings Clause, Congress possesses the power to take private land only if it pays just compensation.[299] Numerous Supreme Court opinions tell Congress that the term just compensation as used in the Fifth Amendment includes the payment of pre-judgment interest for a taking.[300] This notification provides Congress with a choice. If

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292. Recall that the drafters created the salary provisions of Article II and Article III with the specific purpose of maintaining the independence of the executive and judicial branches respectively. *See supra* notes 267–80 and accompanying text.

293. *Shaw*, 478 U.S. at 317.

294. *See supra* notes 286–87 and accompanying text.

295. *See supra* text accompanying note 289.

296. The drafters' intent alone simply cannot amount to the constitutional requirement needed to satisfy the terms of the no-interest rule because intent does not equate to an express mandate to pay interest.

297. *See, e.g.*, United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947) ("[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms.").

298. United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 589–91 (1947).

299. U.S. CONST. amend. V.

300. *E.g.*, *Shaw*, 478 U.S. at 317 n.5; Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923); United States v. Rogers, 255 U.S. 163, 169 (1921).

Congress decides to take private property, the legislature knows that pre-judgment interest automatically attaches to the payment for the taking. The existence of this express decision to take property, knowing that such a decision requires the payment of pre-judgment interest, leads to the conclusion that when Congress approves a taking, the legislature concurrently approves an award of pre-judgment interest.[301] Therefore, the Supreme Court reasonably deciphers a difference between the use of the term just compensation in statutes and contracts and in the Constitution.

Although the Supreme Court unreservedly precludes the use of policy and inference-based arguments in the evaluation of statutory and contractual waivers of sovereign immunity to pre-judgment interest, the Court may be slightly more flexible in instances of constitutional evaluation.[302] This flexibility, however, cannot justify the *Hatter* court's reliance on a policy-based argument to hold that the judicial Compensation Clause provides an exception to the no-interest rule. In *Hatter*, the Court of Federal Claims inferred the presence of a requirement to pay interest within Article III.[303] As discussed above, this inference is tenuous at best and insufficient to confer an award of pre-judgment interest under the no-interest rule.[304]

Regardless of the deduction's logical soundness, the *Hatter* decision rests on a supposition coupled with a policy argument concerning Article III's intended purpose to find an express waiver of sovereign immunity to interest awards.[305] This contravenes the specific terms and the purpose of the no-interest rule by ignoring the rule's mandate of demonstrating an express requirement to pay pre-judgment interest.[306] The unambiguous language of the no-interest rule precludes finding a waiver of sovereign immunity to pre-judgment interest based only upon either an inference or a policy argument.[307] Neither inference nor policy, standing alone, may

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301. *See* United States v. Goltra, 312 U.S. 203, 208–11 (1941). In *Goltra*, the Supreme Court held that an individualized congressional act directing the payment of "just compensation" for the sequestration of the claimant's boats during wartime was not an act of eminent domain. *Id.* at 211. The use of claimant's boats did not have specific congressional authorization; therefore, Congress did not have the opportunity to approve a taking in return for compensation plus interest. *Id.* at 209–11. This congressional authorization is required to constitute an express waiver of sovereign immunity to pre-judgment interest, even if the individualized congressional act directs the payment of "just compensation." *Id.*

302. *See supra* note 297 and accompanying text.

303. *Hatter*, 38 Fed. Cl. at 182–83.

304. *See supra* Part III.A.2.a.

305. *Hatter*, 38 Fed. Cl. at 181–83.

306. *Shaw*, 478 U.S. at 317 n.5; *United States Shoe*, 296 F.3d at 1386; *Swisher*, 178 F. Supp. 2d at 1361.

307. *See supra* note 297 and accompanying text.

provide an express requirement to pay interest.[308] Similarly, logic dictates that arguments rooted in policy and arguments founded upon inference, when taken together, do not provide an express waiver of sovereign immunity to pre-judgment interest. Although the *Hatter* court would not agree with this conclusion, every subsequent federal court decision evaluating constitutional waivers of sovereign immunity indicates some discordance with the *Hatter* ruling.[309]

B. Hatter in Hindsight

The faulty precedent that the CFC created in *Hatter* allows any claimant to construe a constitutional requirement to pay pre-judgment interest based upon mere inference and policy.[310] Fortunately, in every instance where a claim for pre-judgment interest has ridden into court on the coat-tails of *Hatter*, the presiding court has accorded little weight to the CFC's decision.[311] Both the United States Court of International Trade (CIT) and the Federal Circuit recently disposed of claims for pre-judgment interest founded upon the Export Clause without discussing *Hatter* in any meaningful detail.[312] That these courts generally disregarded the *Hatter* decision is of particular significance because the Export Clause claims for pre-judgment interest primarily depended upon the no-interest rule analysis that the *Hatter* court employed.[313]

The CIT first adjudicated a claim for pre-judgment interest under the Export Clause of the Constitution in *Swisher International, Inc. v. United States*.[314] The Export Clause provides: "No Tax or Duty shall be laid on Articles exported from any State."[315] *Swisher* involved the taxation of

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308. *See supra* note 297 and accompanying text.

309. *See infra* Part III.B.

310. By allowing claimants to sue the federal government for pre-judgment interest under a theory drawn from inference and policy, the CFC essentially created a new cause of action against the United States. Following *Hatter*, numerous claimants availed themselves of this new cause of action, basing constitutional claims for pre-judgment interest upon policy and inference arguments. *See* cases discussed *infra* Part III.B.

311. *See United States Shoe*, 296 F.3d at 1385 (stating that *Hatter* "is not binding upon" the Federal Circuit); *Swisher*, 178 F. Supp. 2d at 1361 (dismissing *Hatter*'s precedential force because the opinion lacked appellate review).

312. *See supra* note 311.

313. *See United States Shoe*, 296 F.3d at 1385 (citing the claimant's reliance on *Hatter* for the proposition that the Takings Clause is no longer considered the sole constitutional provision capable of providing a waiver of sovereign immunity to pre-judgment interest); *Swisher*, 178 F. Supp. 2d at 1361 (noting the claimant's reliance on *Hatter* to bring a previously untried constitutional claim for pre-judgment interest).

314. *Swisher*, 178 F. Supp. 2d at 1356, 1360–62.

315. U.S. CONST. art. I, § 9, cl. 5.

exporters' shipments under the Harbor Maintenance Tax.[316] When the CIT held that the Harbor Maintenance Tax violated the Export Clause by placing a tax or duty upon exports, Swisher International brought a claim against the IRS to recoup the erroneously-collected money.[317]

Swisher International argued that the language of the Export Clause categorically denies Congress the power to tax exports.[318] Further, Swisher contended that the sole remedy for violations of the Export Clause is a refund of the wrongfully-taxed principal complete with pre-judgment interest.[319] The *Swisher* court, however, disagreed. The CIT closely evaluated the Export Clause, but refused to recognize a constitutional exception to the no-interest rule within the text of the provision.[320]

In *Swisher*, the CIT recognized that the Export Clause, like the Takings Clause and Article III, is money-mandating, thereby providing a general waiver of sovereign immunity to suit.[321] The CIT also noted that a general waiver of sovereign immunity to suit "does not equate, however, to a waiver of sovereign immunity to interest claims."[322] The CIT next discussed the long and complex history of the *Hatter* litigation, before concluding that *Hatter* does not furnish any binding precedent that would obligate the *Swisher* court to rely on the CFC's analysis of Article III.[323] Almost as an afterthought, the CIT states, "*[e]ven if the court were to accept* [the CFC's] view of the Compensation Clause of Article III, *Hatter*[] does not provide the answer here."[324]

The *Swisher* court further indicated its dissension from the CFC's reasoning by directly contradicting the *Hatter* decision.[325] The CIT declared that the important issue in determining constitutional exceptions to the no-interest rule is not that the claim arises under the Constitution, but rather that the particular constitutional provision contains unique language

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316. *Swisher*, 178 F. Supp. 2d at 1356; *see* 26 U.S.C. § 4461(a) (2000) (imposing harbor maintenance tax "on any port use").

317. *Swisher*, 178 F. Supp. 2d at 1356–57.

318. *Id.* at 1360.

319. *Id.*

320. *Id.* at 1362.

321. *Id.* at 1360 (citing Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

322. *Id.*

323. *Id.* at 1361.

324. *Id.* (emphasis added).

325. *Compare id.*, *with Hatter*, 38 Fed. Cl. at 182. In *Hatter*, the CFC argued that "the common denominator [between the Takings Clause and the judicial Compensation Clause] is that both clauses are contained in the Constitution." *Hatter*, 38 Fed. Cl. at 182. Conversely, the *Swisher* court concluded that "[i]nterest does not attach merely because a claim arises under the Constitution." *Swisher*, 178 F. Supp. 2d at 1361.

that requires the payment of pre-judgment interest.[326] The CIT then evaluated Swisher International's claim for pre-judgment interest by analyzing the Export Clause relative to existing Takings Clause pre-judgment interest jurisprudence.[327]

The *Swisher* court recognized that the language of the Export Clause only contains a prohibition against taxation and reasoned that a mere prohibition cannot amount to a waiver of sovereign immunity to pre-judgment interest.[328] The court concluded that a waiver of sovereign immunity only results from an affirmative requirement to pay pre-judgment interest.[329] Again refusing to rely upon the analysis in *Hatter*, the CIT noted, "[i]t is this affirmative requirement that fully waives sovereign immunity under the [Takings Clause] *and perhaps under Article III*."[330] Because the Export Clause lacked the affirmative requirement to pay interest, the *Swisher* court held that the provision does not allow for an exception to the no-interest rule.[331]

The United States Court of Appeals for the Federal Circuit considered a similar claim in the summer of 2002.[332] In *United States Shoe Corp. v. United States*, an exporter again brought a claim for pre-judgment interest based upon a governmental violation of the Export Clause.[333] Like the CIT in *Swisher*, the Federal Circuit avoided any substantive application of the *Hatter* analysis in its evaluation of the Export Clause under the no-interest rule. Of related importance, the *United States Shoe* court echoed the sentiments of the CIT by declaring that the *Hatter* analysis does not furnish binding precedent on the Federal Circuit.[334] The very mention of *Hatter*'s lack of precedential force indicates that the Federal Circuit does not entirely agree with the CFC's decision; otherwise, the Federal Circuit's characterization of the *Hatter* holding as non-binding would be superfluous.

The *United States Shoe* court did mention that the Export Clause contains a mere prohibition while the judicial Compensation Clause contains a requirement to pay a salary at a specific time.[335] However, that is the extent of the Federal Circuit's Article III analysis.[336] The *United States*

326. *Swisher*, 178 F. Supp. 2d at 1361–62.
327. *Id.*
328. *Id.* at 1362.
329. *Id.*
330. *Id.* (emphasis added).
331. *Id.*
332. *United States Shoe*, 296 F.3d 1378, 1380–81.
333. *Id.*
334. *Id.* at 1385.
335. *Id.*
336. *See id.* at 1385–86.

Shoe court instead relied upon contrasting the texts of the Export Clause and the Takings Clause.[337] The Federal Circuit explained that the Export Clause does not provide an exception to the no-interest rule because it lacks the restorative language contained within the text of the Fifth Amendment.[338] The court noted that, although both the Takings Clause and the Export Clause contain prohibitive language, only the Takings Clause contains "remedial language."[339] The court reasoned that this remedial language requires the government to include pre-judgment interest with the payment for a taking.[340] Because the Export Clause does not exude any similar compensatory requirement, the *United States Shoe* court concluded that the Export Clause cannot provide a waiver of sovereign immunity to pre-judgment interest.[341]

Moreover, the Federal Circuit explained that simply because the Export Clause is money-mandating, it does not necessarily follow that the provision is also interest-mandating.[342] The court reasoned that, although a violation of the Export Clause requires the return of money erroneously taxed, it does not require the refund of the principal plus pre-judgment interest.[343] The Federal Circuit logically deduced that a court cannot import a non-existent requirement to pay pre-judgment interest into the text of a provision if that court intended to "follow the express textual command of the Export Clause."[344]

The Federal Circuit further explained that it was irrelevant that the federal government retained the exporter's money for an extended time period under the volition of an unconstitutional tax.[345] The court reasoned that, even if principles of equity suggested that the government should refund the wrongfully-taxed principal plus interest, the no-interest rule precluded the court from awarding pre-judgment interest to satisfy judicial notions of fairness.[346] In fact, the Federal Circuit stated that "a waiver of sovereign immunity to an award of interest must be affirmative and unequivocal, [so] . . . a judge-fashioned remedy . . . would be an abuse of discretion."[347] This principle, and the analysis of both the CIT and the

337. *Id.* at 1385.
338. *Id.*
339. *Id.*
340. *Id.* (citing *Seaboard*, 261 U.S. at 305–06).
341. *Id.* at 1385–86.
342. *Id.* at 1385.
343. *Id.*
344. *Id.* (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 862 (1996)).
345. *Id.* at 1386.
346. *Id.*
347. *Id.* (citation omitted).

Federal Circuit, should apply to the Court of Federal Claims' decision in *Hatter*.[348]

Like the *Swisher* and *United States Shoe* courts, the *Hatter* court reasoned that Article III's salary provision is money-mandating.[349] Unlike the courts in *Swisher* and *United States Shoe*, the *Hatter* court imported a vague requirement to pay pre-judgment interest into the text of a constitutional provision.[350] Indeed, there is no requirement to pay interest in any form located within the language of the judicial Compensation Clause.[351] The provision merely requires that Congress pay the judicial salary at a set time and that the legislature abstain from diminishing that salary.[352] Thus, the remedy for delayed compensation should be the immediate payment of the salary due; likewise, the remedy for a diminished salary should be the payment of the remainder owed.[353] Any recognition of a requirement to pay interest discerned within the text of Article III derives from judicial inference and notions of equitability.[354] As the Federal Circuit explained, such a finding cloaks the court's holding in illegitimacy and constitutes an abuse of discretion.[355]

The significance of the CIT and Federal Circuit's independent refusals to overstate the plain meaning of the Export Clause is enormous. The *Swisher* and *United States Shoe* opinions indicate that, although the *Hatter* decision exposes the no-interest rule to groundless constitutional attack, the typical federal court will remain an impartial arbiter.[356] Unfortunately, but

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348. From an institutional standpoint, the Federal Circuit maintains appellate review over both the Court of Federal Claims and the Court of International Trade. *See Hatter*, 38 Fed. Cl. at 169 (discussing the Federal Circuit's appellate role in the *Hatter* litigation); Arbon Steel & Serv. Co. v. United States, 315 F.3d 1332, 1333 (Fed. Cir. 2003) (affirming the CIT's holding in *Swisher*). In hindsight, the circuit's reluctance to create a judge-fashioned remedy in *United States Shoe* and in *Arbon Steel* indicates that the CFC should have been similarly reluctant to create a judge-fashioned remedy in *Hatter*. *United States Shoe*, 296 F.3d at 1386; *Arbon Steel*, 315 F.3d at 1333.

349. *Hatter*, 38 Fed. Cl. at 183.

350. *Compare id.* at 182–83, *with United States Shoe*, 296 F.3d at 1386, *and Swisher*, 178 F. Supp. 2d at 1361–62; *see supra* Part III.A.2 (analyzing *Hatter* and arguing that the judicial Compensation Clause is not interest-mandating).

351. *See supra* Part III.A.2.

352. U.S. CONST. art. III, § 1.

353. *See supra* Part III.A.2.

354. *See supra* Part III.A.2; *see also United States Shoe*, 296 F.3d at 1386. The *United States Shoe* court declared that an award of interest rooted in notions of equity and fairness would be improper because the no-interest rule requires the waiver of sovereign immunity to pre-judgment interest to be "affirmative and unequivocal." *Id.* As discussed above, Article III lacks any such affirmative requirement to pay pre-judgment interest. *See supra* Part III.A.2. Logically, then, the *Hatter* court must have inferred the waiver of sovereign immunity to pre-judgment interest that it found within the text of Article III.

355. *United States Shoe*, 296 F.3d at 1386.

356. While the judges of the Federal Circuit and the CIT could have simply accepted *Hatter* and

not surprisingly, for many litigants whose constitutional claims for pre-judgment interest have been denied in the wake of *Hatter*, the courts' recent return to established no-interest rule jurisprudence smacks of professional nepotism. Feelings of impartiality will only continue to grow as new courts, following the lead of the Federal Circuit and the CIT, refuse to apply the *Hatter* court's analytical principles of inference and policy. Hence, while the CFC sought to protect judicial independence by awarding pre-judgment interest to judges, the *Hatter* court may have actually eroded judicial autonomy by raising concerns over possible bias within the courts.[357]

This evolving view of an impartial judiciary is not the only blight that *Hatter* has cast upon no-interest rule jurisprudence. The CFC's analysis also carved out a backdoor through which policy considerations may enter into the evaluation of pre-judgment interest claims.[358] Neither the CIT, nor the Federal Circuit shut this door during the recent round of Export Clause cases.[359] In fact, while the Federal Circuit cited Article III's function in its analysis, the court completely avoided discussing the purpose of the Export Clause.[360] The Federal Circuit simply remarked that the *Hatter* court's policy-based argument does not apply to the Export Clause.[361] Such a practice establishes an unacceptable precedent, where the court considers

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further incorporated the decision into federal court precedent—thereby guaranteeing themselves and their respective comrades a cause of action for pre-judgment interest—both courts chose to see *Hatter* for the anomaly that it is and avoided relying upon the decision in their own opinions. *United States Shoe*, 296 F.3d at 1385–86; *Swisher*, 178 F. Supp. 2d at 1361–62.

357. *Hatter*, 38 Fed. Cl. at 183.

358. Recall that prior to *Hatter*, no court had granted an award of pre-judgment interest without first finding an affirmative requirement to pay such an award. *See supra* Part II.A. Following the *Hatter* decision, parties began bringing constitutional claims for pre-judgment interest founded primarily upon inference and policy. *E.g.*, *United States Shoe*, 296 F.3d at 1385–86; *Swisher*, 178 F. Supp. 2d at 1360–62.

359. Although both courts refused to follow the *Hatter* holding, neither expressly discredited the CFC's award of pre-judgment interest under Article III. *United States Shoe*, 296 F.3d at 1385–86; *Swisher*, 178 F. Supp. 2d at 1361–62. The *United States Shoe* court did, however, appear to restate the no-interest rule in a manner abrasive to *Hatter* when it concluded, "true to the 'no-interest rule,' under which a waiver of sovereign immunity for an award of interest must be affirmative and unequivocal, the foregoing analysis demonstrates that a judge-fashioned remedy . . . would be an abuse of discretion." *United States Shoe*, 296 F.3d at 1386.

360. *United States Shoe*, 296 F.3d at 1385–86. The Supreme Court recognizes that the underlying purpose of the Export Clause is to free all exports from national taxation. Fairbank v. United States, 181 U.S. 283, 292–93 (1901). This freedom from taxation precludes the federal government from making exports a source of national revenue and prohibits the federal government from burdening or controlling exports. *Id.* Thus, like Article III, the Export Clause plays a role in limiting legislative power and thwarting government tyranny. Certainly, there would be an equitable foundation on which to award pre-judgment interest for violations of the Export Clause if such an award was not prohibited by the no-interest rule.

361. *United States Shoe*, 296 F.3d at 1385.

policy arguments under one constitutional provision but not under others.[362] This precedent is particularly intolerable when the court will only consider policy arguments under a constitutional provision that benefits federal judges.

For these reasons, it is necessary to develop a test for determining constitutional waivers of sovereign immunity to pre-judgment interest. Human nature dictates that when a court renders a decision in favor of judges, society will meticulously scrutinize that decision—particularly when the court would have reached an opposite outcome had the claimants been ordinary citizens without ties to the bench. Although the decision in *Hatter* does not furnish any binding precedent that requires courts to apply the CFC's analysis, the holding does allow unqualified claims for pre-judgment interest into the federal courts.[363] These unfounded claims not only tie up the judicial system, but also they inevitably instill feelings of resentment in citizen-claimants when a sitting judge chooses to disregard the *Hatter* analysis because it contradicts the no-interest rule. Formulating a test for determining constitutional exceptions to the no-interest rule will alleviate the jurisprudential dilemmas and public strife that the Court of Federal Claims created in *Hatter*.

IV. RIGHTING THE WRONGS OF *HATTER*: A TEST FOR DETERMINING CONSTITUTIONAL WAIVERS OF SOVEREIGN IMMUNITY TO PRE-JUDGMENT INTEREST

The Court of Federal Claims' anomalous decision in *Hatter* has forged an enduring impairment into judicial analysis of constitutional waivers of sovereign immunity to pre-judgment interest.[364] *Hatter*'s lasting effects have created new constitutional claims for interest against the United States and produced irregular judicial analysis of these newly-created claims.[365] By wavering between traditional no-interest rule evaluation and fabricated analysis, the *Hatter* decision has wreaked jurisprudential havoc in courts that adjudicate claims for pre-judgment interest.[366] In some instances, the holding may even lead society to question the judiciary's ability to remain

362. *See supra* notes 207–08 and accompanying text.

363. *See supra* notes 311, 358 and accompanying text.

364. *See supra* Part III.B.

365. *See supra* Part III.B.

366. *See supra* Part III.A–B. Recall that the *Hatter* decision presented subsequent federal courts with the perplexing choice of either discounting two centuries of constitutional jurisprudence by following the CFC's holding or following Supreme Court precedent and tacitly acknowledging the aberration in the CFC's award of pre-judgment interest to federal judges under Article III.

objective.[367] Thus, *Hatter* has made a substantial impact even though the decision did not receive any substantive appellate review.[368]

The *Hatter* decision has significantly altered no-interest rule analysis, yet the terms of the no-interest rule remain unaffected.[369] A preposterous situation has emerged where judicial evaluation of claims for pre-judgment interest may disregard the existing framework established for analyzing such claims.[370] The *Hatter*-created evaluation permits the consideration of policy-based arguments and allows courts to recognize inferred requirements to pay interest, while the no-interest rule prohibits both policy and inference from entering into the pre-judgment interest analysis.[371] The situation could at least be tolerable if the federal courts affirmatively chose one approach over the other. However, some federal judges are content with receiving pre-judgment interest under the "*Hatter* rule" while denying ordinary citizens' claims for pre-judgment interest under the traditional no-interest rule.[372] These two approaches cannot coexist in a legal community that often boasts about founding the first independent and impartial judiciary.

The courts recently have intimated a desire to return to the traditional no-interest rule approach.[373] Because *Hatter* has not received any substantive appellate review and because the CIT and Federal Circuit commendably indicated a general unwillingness to apply the *Hatter* analysis to Export Clause claims, it appears that the traditional no-interest rule remains intact.[374] Thus, it seems that the no-interest rule will continue to remain intact until either the Supreme Court or Congress decides otherwise. Given Congress' longstanding aversion to awards of pre-judgment interest and the Supreme Court's steadfast application of the traditional no-interest rule, it is logical to conclude that the no-interest rule

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367. *See supra* notes 356–62 and accompanying text.

368. *See supra* notes 311, 358 and accompanying text.

369. *See* United States Shoe Corp. v. United States, 296 F.3d 1378, 1381 (Fed. Cir. 2002). In *United States Shoe*, the Federal Circuit provided the most recent appellate court definition of the no-interest rule: "Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution." *Id.* Recall that *Hatter* altered no-interest rule analysis by allowing parties to found constitutional claims for pre-judgment interest upon policy and inference. *See supra* Part III.A.

370. *See supra* Part III.A–B and notes 22–24, 366.

371. *See supra* Part III.A–B and notes 358–62 and accompanying text.

372. *See supra* notes 356–63 and accompanying text.

373. Both the Federal Circuit and Court of International Trade chose to disregard *Hatter*'s new doctrine when the courts subsequently adjudicated new constitutional claims for pre-judgment interest that the *Hatter* court made possible. *United States Shoe*, 296 F.3d at 1385–86; Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1360–62 (Ct. Int'l Trade 2001).

374. *See supra* notes 311, 356 and accompanying text.

will prevail over the *Hatter* decision.[375] Therefore, a test to determine constitutional waivers of sovereign immunity should supplement the no-interest rule, not rewrite it. Indeed, the test should comport with the established terms of the no-interest rule itself—not amend, append, or modify the rule's conditions.

Developing a test for constitutional waivers of sovereign immunity to pre-judgment interest will clarify the no-interest rule evaluation process. Therefore, the test created in this Part will highlight the traditionally accepted terms of the no-interest rule and provide a simple framework under which to analyze constitutional claims for pre-judgment interest. This test will honor the deeply-rooted principle that the United States retains immunity from pre-judgment-interest awards unless the federal government expressly indicates a contrary intent.[376] As a result, this supplementary test to the no-interest rule mandates that pre-judgment interest should not run on a constitutional claim against the United States unless: (1) the claim is founded on a money-mandating constitutional provision; (2) the provision contains a specific and express waiver of sovereign immunity to pre-judgment interest; (3) the specific and express waiver contains unique language—articulated in the form of an affirmative requirement—that evinces a plain intent by the provision's drafters to mandate the payment of pre-judgment interest; and (4) the drafters of a provision do not evince a plain intent to mandate the payment of pre-judgment interest unless such a payment is necessary to give perfect and unmitigated effect to the particular constitutional provision involved.

A. The Claim Should Be Founded upon a Money-Mandating Constitutional Provision

The no-interest rule originated from a historic distaste for interest awards.[377] Courts prohibited interest awards in contracts between private parties unless they manifested an express agreement to pay interest.[378] Without an express agreement, courts presumed that the parties had not considered interest as a form of damages.[379] This agreement requirement eventually became the cornerstone of the no-interest rule and the United States' immunity from awards of pre-judgment interest.[380]

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375. *See supra* Parts I, II.A.
376. *See supra* Part I.C.
377. *See* discussion *supra* Part I.
378. *See* discussion *supra* Part I.
379. Library of Congress v. Shaw, 478 U.S. 310, 314–15 (1986).
380. *Id.* at 315.

Because interest has the specific purpose of offsetting the devaluing effects of inflation upon money, it is reasonable to assume that parties can only agree to pay interest when their interaction concerns a transfer of money. It is likewise reasonable to assume that the devaluing effects of inflation cannot result from the coordinated dealings between parties without some transfer of money—the conduct of one party simply cannot depreciate the value of another party's money when their interaction does not involve money. Because interest offsets inflation's devaluing effects upon money, an interest-based-damage award is only sound when one party causes inflation to devalue another party's money.[381] Therefore, it is logical to conclude that parties could not contemplate interest awards when their interaction did not involve a transfer of money.

This conclusion is sound because interest, by its very nature, cannot accrue upon an unspecified amount or an intangible value. A specific amount of money with a discernible value must exist before inflation can devalue the money. Without first being able to determine the specific monetary value of the parties' interaction, the amount of monetary depreciation is indeterminable. Similarly, without being able to determine the depreciation to a party's money, the courts cannot accurately offset any depreciation with an interest award.

The same logic applies to constitutional claims against the United States. Unless a particular constitutional provision requires the payment of money, an award of interest is unavailable.[382] If the provision does not entitle a claimant to money damages, the claimant has no cause of action for an interest award because interest cannot accrue in the absence of money.[383] Neither inflation, nor interest, may exist in isolation; both are dependent upon a monetary interaction. Only if a litigant has a cause of action against the government for money damages can the government's conduct devalue any money that the government owes to that party.[384] Hence, a litigant may only claim interest as a remedy for governmental conduct if the government owes money damages as a remedy to the litigant's claim.

Because the United States maintains a general sovereign immunity to suit, a party may only make a constitutional claim for money damages if a particular provision provides that party with a cause of action for money

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381. *See supra* text accompanying notes 35–42.

382. *See supra* note 237.

383. *See supra* note 237.

384. Recall the early-American notion that the use of one's money carried an inherent value which the user may offset with the payment of interest. *See supra* text accompanying notes 37, 41. Therefore, it would be illogical for a party to have a cause of action against the government for interest where the government does not owe the party any money (or is not using the party's money).

damages.[385] A constitutional provision that provides a cause of action with a monetary remedy is called a money-mandating provision.[386] A simple syllogism demonstrates the necessity of requiring a litigant to found a constitutional claim for pre-judgment interest on a money-mandating constitutional provision: (1) Interest cannot accrue on a constitutional claim unless the government owes money damages to a party; (2) The government does not owe money damages to a party on a constitutional claim unless the provision is money-mandating; (3) Therefore, interest cannot accrue on a constitutional claim unless the provision is money-mandating.

The Takings Clause, the Export Clause, and the judicial Compensation Clause all provide a cause of action for money damages—they are money-mandating.[387] However, this is not to say that the provisions are interest-mandating. Under the no-interest rule a money-mandating constitutional provision is not necessarily an interest-mandating provision.[388] Even if a claim is founded on a money-mandating provision, the courts cannot award pre-judgment interest on the claim unless the constitutional provision also contains a specific and express waiver of sovereign immunity to pre-judgment interest.[389]

B. The Money-Mandating Constitutional Provision Should Contain a Specific and Express Waiver of Sovereign Immunity to Pre-Judgment Interest

A litigant's right to claim money damages against the United States does not automatically entail a similar right to claim pre-judgment interest on those money damages.[390] Indeed, the Supreme Court asserts that "[t]he allowance of interest on damages is not an absolute right."[391] A citizen cannot make a valid claim for pre-judgment interest unless the constitutional provision involved provides the citizen with a specific waiver of sovereign immunity to pre-judgment interest that is separate from the

385. *See, e.g.*, Hatter v. United States, 38 Fed. Cl. 166, 169 (1997) (explaining that the Federal Circuit allowed the federal judges to bring their claim under the judicial Compensation Clause because it "mandates the payment of money").

386. *Id.*

387. *See supra* Part III.

388. *See supra* Part III.A.2.a.

389. *See supra* notes 44–45.

390. Recall that a claimant must have met two requirements to recover interest: the general waiver of sovereign immunity to suit and the specific waiver of sovereign immunity to pre-judgment interest. *See supra* Part I.C.

391. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 49 (1928) (quoting The Scotland, 118 U.S. 507, 518 (1886)).

general waiver of sovereign immunity to suit.[392] A constitutional provision's money-mandating status simply provides a general waiver of sovereign immunity to suit by allowing courts to award money damages on a constitutional claim.[393] Thus, a money-mandating provision is necessary to establish a constitutional claim for pre-judgment interest, but independently it is insufficient to provide an exception to the no-interest rule.[394]

A court should only find that a claimant has satisfied the requirements of the no-interest rule if the claimant demonstrates that a constitutional provision contemplates an award of money damages and an award of pre-judgment interest on those damages respectively. The courts should recognize that, under the no-interest rule, money-mandating constitutional provisions do not always confer a right to collect money-damages *and* a separate right to collect pre-judgment interest. The provision should contain both of these independent rights to constitute a specific and express waiver of sovereign immunity to interest awards. Only by requiring a claimant to demonstrate a specific and express waiver of sovereign immunity to interest does a court comply with the command of the no-interest rule.[395] Requiring a demonstration of such a waiver is not foreign to no-interest-rule jurisprudence—the Supreme Court historically recognizes this specific and express waiver within the text of the Takings Clause.[396] But, as *Hatter* and its progeny illustrate, some elaboration on this requirement is needed.

C. The Provision Should Contain Unique Language, in the Form of an Affirmative Requirement, That Evinces a Plain Intent by the Drafters to Provide for the Payment of Pre-Judgment Interest

The traditional no-interest rule has always required claimants to demonstrate a specific and express waiver of sovereign immunity to pre-judgment interest.[397] Federal courts historically required that the waiver be

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392. *See supra* Part I.C.

393. *See, e.g.*, *Hatter*, 38 Fed. Cl. at 169 (explaining that the Federal Circuit allowed the federal judges to bring their claim under the judicial Compensation Clause because it "mandates the payment of money"); *see also supra* Part I.C.

394. *See supra* Part I.C.

395. Recall that the no-interest rule states that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of [sovereign] immunity to suit, the United States is immune from an interest award." *Shaw*, 478 U.S. at 314.

396. *See* United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947) (noting that the federal government waives sovereign immunity to pre-judgment interest under the Fifth Amendment because the provision's just compensation requirement entitles a private property owner to an interest award).

397. *Shaw*, 478 U.S. at 314–15.

"affirmative, clear-cut, [and] unambiguous."[398] Even when the Supreme Court interpreted the Takings Clause as requiring the payment of pre-judgment interest, the Court first had to determine whether that provision contained a specific and express waiver of sovereign immunity to interest awards.[399] The custom of requiring a claimant to demonstrate a specific and express waiver of sovereign immunity remained intact until the Court of Federal Claims awarded pre-judgment interest under Article III.[400]

The CFC did not attempt to explain its departure from the Supreme Court's no-interest-rule precedent.[401] Perhaps the *Hatter* court did not offer any rationale for rendering a decision that offends no-interest-rule jurisprudence because the court was unaware that its holding stood in direct opposition to the no-interest rule.[402] Or, possibly the CFC did not justify its decision in *Hatter* because the court believed that the holding adhered to the terms of the no-interest rule.[403] In either case, the CFC's holding in *Hatter* indicates that the federal courts need guidance for determining express constitutional waivers of sovereign immunity to pre-judgment interest.[404] The third prong of the no-interest-rule test attempts to provide this guidance.

Under the terms of this supplementary test to the no-interest rule, courts should not find a specific and express constitutional waiver of sovereign immunity to interest awards unless a provision contains unique language. This unique language must be formulated as an affirmative requirement that plainly indicates the manifest intent to pay pre-judgment interest. This prong would disentangle the jurisprudential knots that *Hatter* left in the contemporary line of pre-judgment interest cases.[405] Requiring unique language in the form of an affirmative requirement to pay pre-judgment interest closes the backdoor that *Hatter* opened, in which the CFC considered policy arguments and inferred a tacit requirement to pay pre-judgment interest where no express requirement existed.[406] Precluding

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398. *Thayer-West Point Hotel Co.*, 329 U.S. at 590.

399. *See* Jacobs v. United States, 290 U.S. 13, 16-17 (1933) (explaining that the Fifth Amendment's Takings Clause provides a substantive right to sue the federal government for money damages when the government uses its power of eminent domain to take private property for public use).

400. *See* discussion *supra* Parts II.A, III.A.

401. *Hatter*, 38 Fed. Cl. at 181–83.

402. *See* discussion *supra* Part III.A.2 (providing an in-depth analysis of the CFC's *Hatter* decision as standing in stark contrast to previous no-interest rule jurisprudence).

403. *See Hatter*, 38 Fed. Cl. at 181–83 (discussing the judicial Compensation Clause as providing an exception to the no-interest rule).

404. *See supra* text accompanying notes 364–72.

405. *See* discussion *supra* Part III.B.

406. *See* discussion *supra* Part III.A.

courts from considering policy-based arguments and inferring requirements to pay interest is a necessary measure if the courts intend to abide by the terms and practice of the traditional no-interest rule.[407]

The no-interest rule resulted from the common law's animosity toward interest awards.[408] Thus, courts refused to award interest unless an agreement between opposing litigants indicated a contrary intent.[409] The agreement requirement developed into and remains the primary impetus behind the no-interest rule.[410] Indeed, the rule precludes a court from awarding pre-judgment interest unless the drafters indicated an intent to pay interest within the text of the contract or statute, or when it is required by the constitutional provision that is the subject of the claim.[411] By prohibiting courts from considering policy or inference when evaluating constitutional provisions for a waiver of sovereign immunity, the supplementary test would reaffirm the agreement requirement of the no-interest rule.[412] Such reaffirmation is proper in the wake of the CFC's undue departure from the agreement-based requirement in its analysis of the judicial Compensation Clause in *Hatter*.[413]

The evaluating court should also find that the constitutional provision contains an affirmative requirement to pay pre-judgment interest. This affirmative requirement clause would ensure that courts investigate the plain intent of the provision's drafters at the time they composed a particular provision. By demanding that judges find an affirmative requirement to pay pre-judgment interest, the clause would foreclose a court's ability to consider policy arguments. Similarly, by stipulating that any requirement to pay pre-judgment interest must be affirmative, the clause would effectively eliminate a court's ability to infer requirements to pay

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407. Recall the Federal Circuit's recent statement in *United States Shoe*: "[T]rue to the 'no-interest rule,' under which a waiver of sovereign immunity for an award of interest *must be affirmative and unequivocal* . . . a judge-fashioned remedy here would be an abuse of discretion." *United States Shoe*, 296 F.3d at 1386 (citation omitted) (emphasis added).

408. *Shaw*, 478 U.S. at 314–15.

409. *Id.*

410. *Id.* at 315.

411. Smyth v. United States, 302 U.S. 329, 353 (1937).

412. By eliminating judicial reliance on inference and policy, this prong of the supplementary test would require courts to search for an affirmative and separate requirement to pay pre-judgment interest. Such an affirmative and separate requirement is the impetus behind the agreement requirement. *See Shaw*, 478 U.S. at 315.

413. The *Hatter* court did not reason that Article III required the payment of pre-judgment interest. *See Hatter*, 38 Fed. Cl. at 182–83. Rather, the CFC simply reasoned that Article III arises under the Constitution and requires that Congress pay the judicial salary at specific times. *Id.* Any recognition of a separate and affirmative requirement to pay pre-judgment interest resulted from the *Hatter* court's use of policy and inference—a practice that the no-interest rule prohibits. *See* discussion *supra* Part III.A.

interest. Thus, courts could not construe an affirmative requirement out of simple prohibition against government action—a simple prohibition against action alone could never manifest a plain intent to provide for pre-judgment-interest awards under a constitutional provision.

Of the three constitutional provisions that federal courts have evaluated, only the Takings Clause would survive scrutiny under the third prong of the supplementary test to the no-interest rule.[414] Although the Takings Clause contains a prohibition, the provision also contains an affirmative requirement to pay pre-judgment interest.[415] The clause expresses this affirmative requirement in unique language that requires the government to pay just compensation when it takes private property for public use.[416] Further, as described by the Supreme Court, the term just compensation evinces a plain intent by the drafters of the Fifth Amendment to make claimants whole in the event that federal government must take private property.[417]

The Export Clause, however, would not survive scrutiny under the third prong of the supplementary test because that provision only contains a bare prohibition against governmental action.[418] As a result, the Export Clause cannot provide an affirmative requirement to pay pre-judgment interest.[419] Because the provision lacks the necessary affirmative requirement to pay pre-judgment interest, courts using the supplementary test would not need to evaluate the clause for unique language that evinces an intent to pay interest.

Article III would also fail the third prong of the supplementary test. The judicial Compensation Clause contains a requirement to pay judges' salaries at a specific time and a prohibition against decreasing the judges'

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414. The Takings Clause declares that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

415. *See* Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937).

416. *Shaw*, 478 U.S. at 317 n.5.

417. *Monongahela Navigation Co.*, 148 U.S. at 325–26. The Supreme Court reasoned that:

> The noun "compensation," standing by itself, carries the idea of an equivalent . . . . So that, if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.

Id. at 326.

418. The Export Clause declares: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

419. *See United States Shoe*, 296 F.3d at 1385 (explaining that the Export Clause and the Takings Clause both contain prohibitions, but that the "Export Clause's prohibition lacks [the] remedial language" that provides for the payment of pre-judgment interest under the Takings Clause).

salaries.[420] The provision does contain a requirement but not an affirmative requirement to pay pre-judgment interest.[421] Further, Article III does not contain any unique language that evinces a plain intent by the drafters to require an award of pre-judgment interest.[422] The provision's language simply indicates the drafters' intent that Congress pay federal judges at regular intervals and that Congress refrain from actively decreasing the salary provided to judges.[423] If the drafters intended to provide judges with pre-judgment-interest awards, they failed to convey such an intent in the language of the judicial Compensation Clause.[424] Article III's deficiencies under the no-interest rule analysis become even more apparent when the fourth prong of the supplementary test is applied to the provision.

D. The Drafters of a Provision Do Not Evince a Plain Intent to Mandate the Payment of Pre-Judgment Interest Unless Such a Payment is Necessary to Give Perfect and Unmitigated Effect to That Provision

The supplementary test to the no-interest rule would require courts to examine constitutional provisions for the drafters' intent to mandate the payment of pre-judgment interest. This requirement would ensure that the evaluating court determines the underlying purpose of the constitutional provision at issue. The previous prongs of the test provide some guidance to courts in discerning the drafters' intent. For example, unless the evaluating court identifies an affirmative requirement to pay pre-judgment interest, the drafters' intent does not provide a waiver of sovereign immunity.[425] Similarly, if the drafters of a provision did not intend to create a constitutional requirement to pay pre-judgment interest, but the court discerns such a requirement anyway, then the test would preclude courts from granting interest awards.[426]

While the first three prongs of the supplementary test would provide some guidance to courts in determining the drafters' intent, they do not fully preclude courts from engaging in inference and weighing policy considerations during this evaluation. This is problematic because inference and

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420. The judicial Compensation Clause provides that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

421. *See* discussion *supra* Part III.A.2.

422. *United States Shoe*, 296 F.3d at 1385.

423. Notes of James Madison from the Constitutional Convention (May 29 & July 18, 1787), *in* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2, at 1310, 1326–27; *see* discussion *supra* Part II.B.1.

424. *United States Shoe*, 296 F.3d at 1385.

425. *See* discussion *supra* Part IV.C.

426. *See* discussion *supra* Part IV.C.

policy are anathema to the no-interest rule.[427] Thus, the final prong of the supplementary test would prevent courts from using inference and policy to discern the drafters' intent to mandate an award of pre-judgment interest. Courts could only recognize such a drafting intent within a provision if the payment of pre-judgment interest is necessary to give perfect and unmitigated effect to the particular provision.

In other words, under the supplementary test, the drafters of a provision did not intend to mandate an award of pre-judgment interest unless providing an interest award is the only remedy that fulfills the express terms of the provision. Likewise, if the payment of pre-judgment interest is not necessary to give perfect and unmitigated effect to a provision simply because another remedy is available, then the drafters did not intend to mandate the payment of pre-judgment interest under that provision. This prong would ensure that courts do not misconstrue the drafters' intent. It would function as a necessary attribute of the no-interest rule that recognizes the historic attitudes towards interest payments.

Due to the deep-seated antipathy toward interest awards that is woven into the fabric of the federal government's immunity to pre-judgment interest, it is reasonable to conclude that the drafters of a constitutional provision did not intend to waive sovereign immunity to interest unless no other remedy could accomplish the drafters' goal in creating the provision.[428] Written accounts of the Constitutional Convention depict the Framers as agonizing over the meaning of each word in every provision of the Constitution.[429] Thus, if the drafters of a provision intended to award pre-judgment interest, then the words of the provision should indicate that intent. However, because of the traditional aversion to interest awards, the Framers of the Constitution generally did not intend for a provision to supply a cause of action for pre-judgment interest.[430] Therefore, courts should strictly construe the drafters' intent to award interest. Requiring such a strict interpretation of intent accommodates the advantage that courts historically accorded to the federal government by requiring a claimant to demonstrate an agreement to pay interest.[431]

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427. *See supra* note 419.

428. *See* 1 DOBBS, *supra* note 10, § 3.6(2), at 344 (discussing the historical principles behind allowing the recovery of interest); *see also* discussion *supra* Part I.A.

429. *See generally* [2] 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 2 (compiling the journals of the Founding Fathers that indicate a scrupulous effort exerted in the drafting of each constitutional provision).

430. This conclusion follows logically from federal courts' continued observance of the agreement requirement during no-interest rule adjudication. *Shaw*, 478 U.S. at 315; *see* discussion *supra* Part I.

431. *Shaw*, 478 U.S. at 315–16.

The "perfect and unmitigated effect" requirement recognizes the traditional agreement basis for interest payment that common law courts required for an award of interest.[432] It operates upon the notion that the drafters' intent plays a particularly important role in evaluating whether a provision contains a specific and express waiver of sovereign immunity to pre-judgment interest. Although the intent requirement partially replaces the common law's agreement basis, it preserves the principle of requiring some form of an agreement, thereby remaining true to the command of the no-interest rule.[433] This requirement acknowledges that the intent of the Constitution's drafters is not always obvious. Thus, the final prong of the supplementary test provides a framework to aid judicial determination of the drafters' intent in writing the constitutional provision at issue. Put simply, if there is an alternative remedy available for the payment of interest, then courts should not award pre-judgment interest on a constitutional claim.

Only the Fifth Amendment's Takings Clause would survive judicial scrutiny under the perfect and unmitigated effect requirement. An award of pre-judgment interest is the only remedy that gives complete effect to the Takings Clause.[434] The provision requires that the government pay "just compensation" for the taking of private property for public use.[435] If the government only pays the landowner for the value of the property at the time of the taking, then the government has provided compensation but not "*just* compensation."[436] Pre-judgment interest is the only available remedy that satisfies the "just compensation" requirement. Further, because eminent domain is a right that the Constitution grants to the federal government, equitable relief generally is not available. Typically, claimants cannot enjoin the United States from taking private land since the government has the constitutional power to do so.[437] Only a payment for

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432. *Id.*, at 314–15; *see* discussion *supra* Part I.

433. By requiring courts to find the drafters' intent to pay pre-judgment interest under a constitutional provision, this prong would comply with the traditional no-interest rule notion that courts should only award interest when such an award is "within the contemplation of the parties." *Shaw*, 478 U.S. at 314.

434. *Monongahela Navigation Co.*, 148 U.S. at 325–26; *see supra* note 417 (quoting the *Monongahela Navigation Co.* Court's explanation of just compensation).

435. U.S. CONST. amend. V.

436. *Monongahela Navigation Co.*, 148 U.S. at 325–26; *see supra* note 417 (quoting *Monongahela Navigation Co.* Court's explanation of the difference between compensation and just compensation).

437. *Monongahela Navigation Co.*, 148 U.S. at 337 ("While the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation.").

the value of the land taken satisfies the language of the Takings Clause.[438] Adding pre-judgment interest to that payment gives perfect and unmitigated effect to the language of the provision.

Conversely, the Export Clause would fail the final prong of the supplementary test because an award of pre-judgment interest is not necessary to give perfect and unmitigated effect to the provision. If the government taxes exports, then the tax violates the Export Clause.[439] When a tax violates the Export Clause, the remedy that gives full effect to the provision is the return of the wrongfully-taxed amount.[440] The Internal Revenue Service provides a refund system that enables victims of an unconstitutional tax to recover the erroneously-withheld amount.[441] Congress also enacted a separate provision that generally provides interest from the date of the tax until the date of the refund.[442] However, a statutory waiver of sovereign immunity provides for this interest, not a waiver derived from the Export Clause.[443] A similar statutory waiver exists for claimants who seek a tax refund in court rather than through the IRS's tax refund system.[444] Because these statutes exist, an award of pre-judgment interest does not give perfect and unmitigated effect to the Export Clause.[445] The interest award is not necessary to fulfill the terms of the provision.

In *Hatter*, the Court of Federal Claims argued that denying the judges' claim for an award of pre-judgment interest would leave the judiciary without a remedy for congressional delay of payment.[446] However, pre-judgment interest is not the only remedy available to federal judges under Article III. Thus, an award of pre-judgment interest is not necessary to give perfect and unmitigated effect to the judicial Compensation Clause. If the federal government delays payment of the judicial salary, then the government must pay the salary immediately.[447] If Congress diminishes the

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438. *See* United States v. Rogers, 255 U.S. 163, 169 (1921) (agreeing with lower courts that "the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled").

439. U.S. CONST. art. I, § 9, cl. 5.

440. *See* Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000) (noting that "the Export Clauses [sic] restriction on taxing power requires Congress to refund money obtained in contravention of the clause").

441. I.R.C. § 6511 (West Supp. 2003).

442. 28 U.S.C. § 2411 (2000) (requiring interest to be paid by the United States upon judgment by a court on any overpayment from the "date of the payment . . . to a date preceding the date of the refund check").

443. Andalex Res., Inc. v. United States, 54 Fed. Cl. 563, 566 (2002).

444. *Id.* at 565 (citing the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000)).

445. *Id.* at 565–66.

446. *Hatter*, 38 Fed. Cl. at 183.

447. *See* discussion *supra* III.A.2.a.i.

judicial salary, then the salary must be returned to its undiminished rate.[448] In the last century, every successful claim against the government for violations of the judicial Compensation Clause arose out of a tax that effectively decreased the salaries of federal judges.[449] Like taxes that violate the Export Clause, taxes that violate Article III have a statutory remedy provided under the Internal Revenue Code.[450]

Moreover, because Article III is money-mandating, judges have a cause of action against the United States for unconstitutional diminutions and delayed salary payments.[451] Therefore, the *Hatter* court's fears—that a failure to award pre-judgment interest under Article III would allow Congress to delay payment of the judicial salary indefinitely—are unfounded.[452] If the judges bring a claim under Article III, then the federal government cannot effectively delay payment of the judicial salary. During adjudication of the claim, the government cannot indefinitely delay trial without the federal court imposing sanctions for the continued delay.[453] Further, it is unlikely that such a delay would occur due to the time and financial constraints upon government attorneys.

Finally, in the event that the court renders a judgment in favor of the federal judges, post-judgment interest will prevent the government from further delaying payment of the salary.[454] Post-judgment interest accrues from the date of a monetary judgment until the date of the payment.[455] Unlike pre-judgment interest, however, post-judgment interest typically is available to all claimants without requiring the showing of a waiver of sovereign immunity.[456] Thus, the government could not delay payment after the sitting court has rendered a judgment in favor of federal judges without interest accruing upon the claim.[457] Because of this and other numerous alternative remedies available to federal judges under the judicial Compensation Clause, an award of pre-judgment interest does give perfect and unmitigated effect to the provision. Therefore, Article III would fail the final prong of the supplementary test to the no-interest rule.

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448. *See* discussion *supra* III.A.2.a.ii.

449. *See* discussion *supra* II.B.2.

450. *See supra* text accompanying notes 439–44.

451. Hatter v. United States, 953 F.2d 626, 628 (Fed. Cir. 1992).

452. *Hatter*, 38 Fed. Cl. at 183.

453. *E.g.*, FED. R. CIV. P. 11(b) & (c) (1992 & Supp. 2002).

454. *See* W. NOEL KEYES, GOVERNMENT CONTRACTS: IN A NUTSHELL 317 (2d ed. 1990) (explaining that "[i]nterest on amounts found due contractors is payable from the date the contracting officer receives the claim").

455. *Id.*

456. *See, e.g.*, 28 U.S.C. § 1961(a) (2000) (declaring that "[i]nterest shall be allowed on any money judgment in a civil case recovered in district court").

457. *Id.*

CONCLUSION

The no-interest rule is a little known facet of federal jurisprudence that is easily overlooked. That the no-interest rule is frequently neglected over the course of litigation, however, does not render the doctrine insignificant. The government's immunity from awards of pre-judgment interest affects every party who brings a claim for money damages against the United States. Unless claimants successfully demonstrate that the federal government has waived its sovereign immunity, they may not recover pre-judgment interest upon any money awarded by any court.[458] So, although the no-interest rule is relatively unknown, its ramifications are far-reaching. Because the federal government's immunity from pre-judgment interest operates in such a broad manner and precludes inflation adjustments on so many claims, the courts have a duty to articulate the no-interest rule with fidelity and precision.

Federal courts historically recognized the fundamental requirements of the no-interest rule.[459] The judiciary abstained from awarding pre-judgment interest on claims in the absence of an express waiver of sovereign immunity discernible within a statute, contract, or as required by constitutional provision.[460] Traditionally, judicial scrutiny of constitutional exceptions to the no-interest rule was characterized by an unsparing rigidity.[461] In fact, this inflexibility led the Supreme Court to declare that the Takings Clause provides the only constitutional waiver of sovereign immunity to pre-judgment interest.[462] Recently though, the United States Court of Federal Claims relented and awarded pre-judgment interest to federal judges under Article III's judicial Compensation Clause.[463]

What renders the *Hatter* decision odious is not that the Court of Federal Claims recognized a new constitutional exception to the no-interest rule; the ruling is offensive because the court ignored the express command of the

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458. Library of Congress v. Shaw, 478 U.S. 310, 315 (1986).

459. *See* discussion *supra* Part II.A.

460. *Shaw*, 478 U.S. at 315, 317 n.5; United States Shoe Corp. v. United States, 296 F.3d 1378, 1386 (Fed. Cir. 2002); Swisher Int'l, Inc. v. United States, 178 F. Supp. 2d 1354, 1361 (Ct. Int'l Trade 2001).

461. *See, e.g.*, United States v. Louisiana, 446 U.S. 253, 264–65 (1980) (stating that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States" (alteration in original)) (quoting Smyth v. United States, 302 U.S. 329, 353 (1937)).

462. *See, e.g.*, Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928) ("We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution.").

463. Hatter v. United States, 38 Fed. Cl. 166, 183 (1997).

no-interest rule and awarded pre-judgment interest to federal judges based only upon inference and policy considerations.[464] Just as disturbing, following the decision in *Hatter* the federal courts returned to the traditional strict interpretation of the no-interest rule and refused to award pre-judgment interest on private exporters' claims for pre-judgment interest.[465] Apparently, the federal courts are not concerned with the blatant incongruity of relying on policy and inference when awarding pre-judgment interest to federal judges, while refusing to apply the same considerations when a claim for interest originates from outside the courthouse doors. By proposing a new test, this Note seeks to raise awareness of the recent problems that have arisen under the no-interest rule and to return sovereign immunity jurisprudence to the path from which it deviated in *Hatter v. United States*. Only by faithfully reverting to the doctrine of the no-interest rule will the federal judiciary avoid being hoodwinked by *Hatter*.

Parker Moore

464. *See* discussion *supra* Part III.A.2.

465. *See* discussion *supra* Part III.B.