Contracts Written in Stone: An Examination of United States v. Winstar Corp.

Mark T. Cramer
Contracts Written in Stone:
An Examination of
United States v. Winstar Corp.

I. INTRODUCTION

The United States Supreme Court’s decision in United States v. Winstar Corp. sent a resounding message to Washington: The government has to make good on its contracts. At the core of the Winstar case were government contracts created in the 1980s under which solvent thrifts agreed to acquire failed thrifts in exchange for favorable accounting treatment. Without the contracts, the government, as the thrifts’ federal deposit insurer, would bear the cost of operating or liquidating the failed thrifts. In 1989, Congress enacted legislation eliminating the favorable accounting treatment, rendering most of the solvent acquiring thrifts insolvent. The government denied any further responsibility, leaving the acquiring thrifts with the cost of continuing operations or, in most cases, liquidation. The United States Supreme

2. See id. at 2472.
3. The thrift industry consists of various types of financial institutions, including savings and loan associations (S&Ls), savings banks, and credit unions. See 1 BAXTER DUNAWAY ET AL., FIRREA: LAW AND PRACTICE § 3.01, at 3-3 n.2 (1994). Traditionally, regulations prohibited thrifts from offering the full range of services offered by banks, such as checking, savings, and trust accounts. See MICHAEL P. MALLOY, THE REGULATION OF BANKING 41 (1992). However, government deregulation of the thrift industry in the 1980s loosened many of the traditional restraints on thrift services. See id. For the purposes of this Note, the terms “thrift” and “savings and loan” will be used interchangeably because the Winstar decision only considers thrifts in their savings and loan capacity. See Winstar, 116 S. Ct. at 2440.
4. 4 See Winstar, 116 S. Ct. at 2445.
7. See Helfer & Richardson, supra note 5, at 122. Liquidation involves gathering
Court rejected the government's arguments for leaving the acquiring thrifts with the costs of the bailout, and echoed its century-old pronouncement in the Sinking Fund Cases that “[t]he United States are as much bound by their contracts as are individuals.” This came as good news to most thrifts, but for others the victory was bittersweet.

II. HISTORICAL BACKGROUND

The government stands in a unique position as a contractor because it has the power to legislatively alter its contractual obligations; accordingly, there is a danger that the government will abuse this power and avoid its contracts under the aegis of its sovereign power and duties to the public welfare. Historically, in an effort to level the playing field between the government and private contracting parties, the judiciary has taken steps to prevent the government’s abuse of power. For example, in Lynch v. United States, the government issued insurance policies during World War I which provided for annual renewals at the option of the insured. In response to net losses on the policies in excess of $4.1 billion, the government passed legislation nullifying the annual renewal options. In an opinion written by Justice Brandeis, the Court held that the government could not avoid its obligations un-
der the insurance policies. After determining that the insurance policies were enforceable contracts, the Court reasoned that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." In spite of the government's losses and the increased impact of such losses due to the Depression, "the due process clause prohibits the United States from annulling [its contracts] unless . . . the action taken falls within the federal police power or some other paramount power." While Congress has the power to reduce excessive spending, it cannot exercise this power if doing so requires breaching government contracts.

To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

In Perry v. United States, the government issued bonds containing clauses that the principal and interest must be repaid in United States gold coin. In 1933, Congress passed legislation abrogating these so-

---

17. See id. at 579.
18. See id. at 576.
21. See Lynch, 292 U.S. at 580; see also Morgan Guar. Trust v. Republic of Palau, 680 F. Supp. 99, 104 (S.D.N.Y. 1988) (stating that the legislation at issue did not advance any paramount government power and was intended merely "to prevent United States dollars from paying a bad debt" which was not a "sufficient cause to abrogate the contract").
24. See id. at 347. In a companion case to Perry, Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935), the Court dealt with the same "gold clause" legislation as it applied to contracts between private parties. See Norman, 294 U.S. at 306.
called "gold clauses." The Court held that the issuance of bonds creates a government obligation to repay the bondholder pursuant to the express terms of the bond. Although the government unquestionably holds the power to regulate money values, Congress cannot use that power "to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States." The Court rejected the government's claim that the government "is free to . . . alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient." In borrowing money through the issuance of bonds, Congress has authority to pledge the credit of the United States assuring repayment. "To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor." The Court refused to find that the gold clauses restrained the government's exercise of sovereign power, stating that Congress has the power to create obligations on the part of the government, but not the power to alter or destroy the obligations it creates.

The issues raised in Lynch and Perry were explored further in Bowen v. Public Agencies Opposed to Social Security Entrapment. In Bowen, Congress amended the Social Security Act of 1935 to prevent states and public agencies, which had previously participated in the Social Se-

25. Perry, 294 U.S. at 347. The legislation was designed to stabilize the United States' banking industry and currency by preventing people from stockpiling gold. Norman, 294 U.S. at 295-97.
26. See Perry, 294 U.S. at 348.
27. See id. at 350. By contrast, the Norman Court held that contracts between private parties were not shielded from legislative change. Norman, 294 U.S. at 305. The Court reasoned that if such a shield were permitted the government's power to regulate interstate commerce would be forfeited to private individuals. See id. at 310.
29. See id. at 351.
30. Id.
31. See id. at 353. Taken together, Norman and Perry crafted the "critical distinction between legislation affecting contracts between private parties and the same legislation as applied to the government's own contracts." See Helfer and Richardson, supra note 5, at 119. As to the former, legislation had the effect of interdiction; as to the latter, the same legislation had the effect of repudiation. See id.; cf. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 & n.14 (1983) (stating that a higher level of review applies under the Contract Clause when the government alters its own contractual obligations).
curity System voluntarily, from withdrawing their employees from the system. Before the amendment, states were permitted to withdraw from the system upon two years notice to the Secretary of Health and Human Services. Several public agencies of California and an organization called Public Agencies Opposed to Social Security Entrapment challenged the amendment on constitutional grounds. These parties claimed the amendment was a taking of their "contractual right to withdraw" without just compensation in violation of the Fifth Amendment. In Bowen, the Court upheld the amendment, stating that all contracts, even when the government itself is a party, are subject to subsequent government legislation. Justice Powell, writing for the Court, cited Lynch and Perry as cases that held the government can "enter into contracts that confer vested rights." Justice Powell clarified, however, that the government right to exercise its sovereign power is not waived unless such waiver is expressly stated in unmistakable terms in the contract. The Court emphasized that Congress expressly reserved the right to amend the Social Security Act and that the agreements with the states did not confer any rights other than those provided by the Act itself. Further, because the states failed to provide separate consideration under the agreements, no enforceable property rights were created in the so-called right to withdraw.

34. See Bowen, 477 U.S. at 48-51.
35. See id. at 45.
36. See id. at 49.
37. See id.
38. See id. at 56.
39. See id. at 52 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982)).
40. See id.
41. See id. (citing Merrion, 455 U.S. at 148); see also Jefferson Branch Bank v. Skelley, 66 U.S. 436, 446 (1861) (stating that no power of sovereignty will be deemed "surrendered unless such surrender has been expressed in terms too plain to be mistaken"). This legal principle has come to be known as the unmistakability doctrine. See United States v. Winstar Corp., 116 S. Ct. 2432, 2454-55 (1996).
43. See Bowen, 477 U.S. at 54.
44. See id. At least one commentator has pointed out that because there was "no bargained-for consideration" in Bowen, there was no contract for the government to breach. See Helfer & Richardson, supra note 5, at 120.
Finally, in *United States v. Cherokee Nation*, an Indian tribe that acquired property rights in a riverbed through a government treaty brought suit for damages after the government made navigational improvements to the river. The tribe based its claim on the assumption that the treaty conveyed the government's navigational easement. Applying the unmistakability doctrine from *Bowen*, the Court held that the navigational easement was not conveyed to the tribe because the treaty was silent on the matter and the silence was not unmistakable.

III. FACTUAL BACKGROUND

The modern thrift industry developed in the 1930s in response to the failure of more than 1700 thrifts during the Great Depression. In an attempt to stabilize thrifts and prevent future collapse, Congress took steps to increase regulation of the thrift industry. Congress created the Federal Home Loan Bank Board (Bank Board) for the purpose of funding thrifts for home loans and to prevent home foreclosures. Additionally, the legislature authorized the Bank Board to charter and regulate savings and loan associations. Congress also created the Federal Savings and Loan Insurance Corporation (FSLIC), which was responsible for insuring and regulating all federally insured thrifts. Under this newly regulated system, the thrift industry prospered and regained public confidence.

However, the high inflation and interest rates of the late 1970s and early 1980s wreaked havoc on the thrift industry. Pursuant to the rules

---

46. See id. at 702.
47. See id.
48. See id. at 707 (citing *Bowen*, 477 U.S. at 52).
54. The thrift industry held three percent of the country's total financial assets in 1945. See H.R. Rep. No. 101-54(I), at 293, reprinted in 1989 U.S.C.C.A.N., at 89. This figure increased to 15% by 1985. See id.
56. See, e.g., Paul Getman, *The Last Temptation of Thrifts*, WALL ST. J., Mar. 23,
and regulations of the time, thrifts issued only long-term, fixed-rate mortgages, rather than adjustable-rate mortgages. An increase in interest rates forced thrifts to pay higher rates to their depositors. The thrifts' revenues could not keep pace with the costs of the deposits because the thrifts' mortgage rates were fixed, but short-term deposits were adjustable and rising. As a result, approximately 435 thrifts became insolvent between 1981 and 1983. In response, the government deregulated the thrift industry. Initially, deregulation involved: (1) allowing thrifts to invest in different markets, (2) a two percent reduction in the capital reserves requirement, and (3) the adoption of new accounting techniques that masked the declining financial condition of the thrift industry. Amidst this deregulation, failed thrifts began making insurance claims to the FSLIC. The FSLIC lacked sufficient funds to liquidate all the insolvent thrifts, and as a result, ended up insolvent itself. To facilitate liquidation of the failed thrifts in spite of the FSLIC's insolvency, the Bank Board encouraged healthy thrifts to take over the failed thrifts. The government used the recognition of "supervisory goodwill" toward


57. See Black, supra note 6, at 103.
59. See id.
60. See id. (citing General Accounting Office, THRIFT INDUSTRY: FORBEARANCE FOR TROUBLED INSTITUTIONS 1982-1986 (May 1987)).
61. See id.
62. Capital reserves serve as a safety net to protect thrifts from future losses. See id. In November 1980, the capital reserves requirement was decreased from 5% to 4% of assets. See id. In January 1982, the capital reserves requirement was further reduced to 3% of assets. See id. at 2441.
63. See id.
64. See id.
65. As of 1988, the FSLIC was over $50 billion in debt. See id.; see also H.R. REP. No. 54(I), 101st Cong., 1st Sess. 304 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 100. In April 1987, the chairman of the Bank Board testified that the FSLIC's cash and short-term securities holdings were less than $1 billion, yet the FSLIC was then insuring approximately $900 billion worth of deposits. See GAO Report to Proxmire on Forbearance for Troubled Thrifts, AM. BANKER, May 29, 1987, at 4, available in 1987 WL 5524514.
66. See Winstar, 116 S. Ct. at 2442.
67. Supervisory goodwill is an intangible asset calculated by taking the excess of the acquisition cost over the fair market value of the acquired thrift's assets. See id.
the capital reserve requirement to induce healthy thrifts to enter into so-called "supervisory mergers." Supervisory mergers appealed to the government because the government could not otherwise afford to bail out failed and failing thrifts. Supervisory mergers appealed to healthy acquiring thrifts because supervisory goodwill counted toward the capital reserve requirement, which gave the acquiring thrifts' overall reserves an inflated appearance attractive to potential investors. Supervisory mergers additionally appealed to acquiring thrifts because thrifts were permitted to amortize supervisory goodwill over as much as forty years.

Respondents Glendale Federal Bank, FSB, Winstar Corporation, and The Statesman Group, Inc. each entered into separate supervisory merger transactions with the government. In 1981, Glendale Federal submitted a proposal to the Bank Board to acquire First Federal Savings and Loan Association of Broward County (Broward). At the time, Broward was $734 million in debt and would cost the FSLIC approximately $1.8 billion to liquidate. The Bank Board approved Glendale Federal's proposal, which contemplated the amortization of supervisory goodwill over a forty-year period. Although the actual agreement between the Bank Board and Glendale Federal was silent as to supervisory goodwill, the amortization of supervisory goodwill was recognized in two forbearance...
letters and a memorandum incorporated into the agreement through the agreement’s integration clause.

In 1983, the FSLIC sought bidders to acquire Windom Federal Savings and Loan Association (Windom). Windom was on the brink of insolvency at the time, and liquidation would cost the FSLIC approximately $12 million. A number of investors formed Winstar Corporation in order to acquire Windom. Winstar submitted a proposal to the FSLIC that called for the amortization of supervisory goodwill over a thirty-five year period. The Bank Board accepted Winstar’s proposal in an agreement similar to Glendale Federal’s agreement. Like Glendale Federal, Winstar incorporated supervisory goodwill terms into its agreement through a forbearance letter. In addition, the Winstar agreement specifically provided for the accounting principles that would control the agreement. The agreement recognized the amortization of supervisory goodwill and that this accounting principle would govern over any other accounting principles, including those established by the Bank Board or its successors.

In 1987, Statesman submitted a proposal to the FSLIC to acquire an insolvent subsidiary of First Federated Savings Bank. The FSLIC conditioned approval of the acquisition on Statesman acquiring three addi-

76. See id. at 2449. One of the letters, drafted by Glendale Federal’s independent accountant, described the goodwill to be recorded on Glendale Federal’s books and specified the corresponding amortization periods. See id. The other letter contained “a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with [Bank Board] Memorandum R 31b.” Id.

77. See id. Memorandum R 31b, issued by the Bank Board, provided for Glendale Federal to amortize supervisory goodwill. See id.

78. See id. at 2448-49. The integration clause provided, in pertinent part, “This Agreement . . . constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith.” Id.

79. See id. at 2450.

80. See id.

81. See id.

82. See id.

83. See id.

84. See id.

85. See id.

86. See id.

87. See id. Like Winstar, Statesman was not a thrift. See id.
tional failing thrifts.\(^8\) Statesman and the FSLIC ultimately entered an agreement that employed the purchase method of accounting.\(^9\) Under the agreement, Statesman contributed $21 million in cash and the FSLIC contributed $60 million.\(^9\) The Statesman agreement differed from Glendale Federal's and Winstar's agreements in that Statesman was permitted to treat $26 million of the money from the FSLIC as a capital credit toward Statesman's capital reserve requirements.\(^5\) Like Winstar's agreement, the Statesman agreement provided for the use of the accounting principles in effect on the date of the agreement.\(^6\) The agreement also contained an integration clause which incorporated forbearance letters and Bank Board resolutions that provided for the amortization of supervisory goodwill over a period of twenty-five years.\(^7\)

In response to the poor results from the deregulation of the early and mid-1980s, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).\(^4\) Under FIRREA, thrift regulations were radically changed.\(^5\) The regulatory change with the greatest impact on respondents was that supervisory goodwill no longer counted toward the thrifts' capital reserve requirements.\(^6\) As a result of this new regulation, respondents, along with many other similarly situated acquiring thrifts, had inadequate capital reserves.\(^7\) Consequently, federal regu-

\(^8\) See id. at 2450-51.
\(^9\) See id. at 2451. Under the purchase method, the acquiring thrift accounts for the acquired thrift's assets and liabilities based on their fair market value at the time of the acquisition. See John W. Chierichella & Douglas E. Perry, Mergers and Acquisitions of Government Contractors: Special Considerations and Due Diligence Concerns, 23 PUB. CONT. L.J. 471, 490 (1994). Any excess in the purchase price over the fair market value is recorded as goodwill, which is amortized by the acquiring thrift for as many as forty years. See Michael S. Helfer & Richard Sigel, Litigating For and Against the FDIC and the RTC, in SUPERVISORY GOODWILL 656 (PLI Comm. Law and Practice Course Handbook Series No. 666, 1993). Under the FSLIC agreements, this type of goodwill was called supervisory goodwill. See Winstar, 116 S. Ct. at 2443. This same purchase method of accounting was also recognized and used in the Glendale and Winstar agreements. See id. at 2448, 2450.
\(^5\) See Winstar, 116 S. Ct. at 2451.
\(^6\) See id.
\(^7\) See id.
\(^4\) See id. at 2446 (citing a General Accounting Office report and the conclusions reached in Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 602 (D.C. Cir. 1992)).
\(^5\) See id.
\(^6\) See id. FIRREA also abolished the FSLIC, created a new thrift insurance fund in the Federal Deposit Insurance Corporation (FDIC), replaced the Bank Board with the Office of Thrift Supervision (OTS), and established the Resolution Trust Corporation (RTC) to liquidate insolvent thrifts. See id.; see also 12 U.S.C. §§ 1437, 1441(G) (1994) (explaining standards and collection for core capital).
\(^7\) See Winstar, 116 S. Ct. at 2446-47. Under FIRREA, thrifts were required "to
lators seized and liquidated Winstar and Statesman. Respondent Glendale Federal avoided liquidation by raising sufficient private capital to stay in compliance with the capital reserve requirements.

Respondents each filed suit for breach of contract against the federal government in the Court of Federal Claims. The Court of Federal Claims granted summary judgment in favor of respondents on the breach of contract issue, rejecting the government's defenses that: (1) the government cannot be bound by a contract that limits its regulatory powers unless there is an "unmistakably clear" provision to that effect in the contract, and (2) liability cannot attach to the government for sovereign acts under FIRREA. The Federal Circuit Court of Appeals, en
banc, affirmed the Court of Federal Claims, also rejecting the
government's unmistakability and sovereign acts arguments.104 The
United States Supreme Court granted the government's writ of certiora-
ri.105

IV. THE OPINIONS

A. Justice Souter's Majority Opinion

Justice Souter delivered the opinion of the Court,106 which began
with a list of the four arguments advanced by the government to refute
respondents' breach of contract claims.107 The government's defenses
were: (1) the unmistakability doctrine,108 (2) that there must be an ex-
press delegation of authority for an agent to make contracts surrendering
sovereign authority,109 (3) that reserved powers cannot be contracted
away,110 and (4) the sovereign acts doctrine.111 After a close examina-
tion of the individual contracts at issue, Justice Souter concluded that
ordinary contract principles applied to the case.112 Justice Souter pro-
ceeded to reject each of the government's defenses in turn.

With regard to the government's first defense, Justice Souter stated
that the scope of the unmistakability doctrine depends on the effect of a
contract's enforcement.113 If enforcement of the contract would prevent

---

104. See Winstar, 116 S. Ct. at 2447; see also Winstar Corp. v. United States, 64 F.3d 1531 (C.A. Fed. 1995) (en banc).
106. Justices Stevens and Breyer joined in the judgment. See Winstar, 116 S. Ct. at 2440. Justice O'Connor joined in the judgment, except as to Parts IV-A and IV-B. See id.
107. See id. at 2448.
110. See Stone v. Mississippi, 101 U.S. 814, 820-21 (1880) (holding that the government may not contract away its police power).
111. See Winstar, 116 S. Ct. at 2448. Under the sovereign acts doctrine, "public and general" governmental acts are deemed non-violative of contracts the government enters into with private persons. See Horowitz v. United States, 267 U.S. 458, 461 (1925).
112. See Winstar, 116 S. Ct. at 2453.
113. See id. at 2457. Justice Souter emphasized that the type of remedy sought is not the defining element. See id. For example, in Bowen and Cherokee Nation the
the government from exercising its sovereign powers, the unmistakability doctrine applies. Because the Winstar contracts did not prevent the government from exercising its authority to regulate the thrift industry, the unmistakability doctrine did not apply. Respondents sought monetary damages for losses suffered due to regulatory change, a risk specifically assumed by the government in its contracts with respondents. Unlike prior cases applying the unmistakability doctrine, respondents did not seek specific performance or an exemption from the new regulations. Justice Souter also expressed concern that if the unmistakability doctrine indiscriminately permitted the government to escape from its contractual obligations, public confidence in the government as a "reliable contracting partner" would be lost.

Justice Souter rendered the government’s second and third defenses moot based on the Court's conclusion that the Winstar contracts did not implicate the surrender of sovereign powers, but merely shifted the risk of future regulatory change to the government. Nevertheless, upon examination of the statute, Justice Souter concluded that the Bank Board and the FSLIC had express authority to enter into the contracts with respondents.

Justice Souter rejected the government’s fourth defense, stating that the sovereign acts doctrine did not apply to this case, and even if it ap-

114. See id.
115. See id. at 2458. "Saying the government can be liable for breaching a contract it made is not the same as saying the government waived its right to pass laws." Helfer & Richardson, supra note 5, at 120.
116. See Winstar, 116 S. Ct. at 2458.
117. See, e.g., Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991) (involving a thrift which sought a preliminary injunction to prevent the OTS from excluding supervisory goodwill from its capital reserves requirements).
118. Justice Souter pointed out that "Glendale (the only respondent thrift still in operation) would still be required to maintain adequate tangible capital reserves under FIRREA." Winstar, 116 S. Ct. at 2458. Thus, the government’s regulatory authority was in no way implicated by the Winstar contracts.
119. See id. at 2459-60; see also The Binghamton Bridge, 70 U.S. 51, 74 (1865) ("If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would.").
120. See Winstar, 116 S. Ct. at 2461-62.
121. See id. at 2462.
plied, the doctrine would not excuse liability under the contracts.\textsuperscript{122} Justice Souter explained that the sovereign acts doctrine places the government as a contractor in the same position as a private contractor.\textsuperscript{123} The rationale underlying the sovereign acts doctrine is that liability should not attach to the government-as-contractor for the acts of the government-as-sovereign.\textsuperscript{124} In the present case, the government's capacities as sovereign and as contractor were inextricably linked.\textsuperscript{125} In such cases, the greater the government's self-interest, the less likely the sovereign acts doctrine will apply.\textsuperscript{126} Because the congressional record reflected the debate surrounding the issue of breach of contract with regard to the passage of FIRREA, Justice Souter concluded that the enactment of FIRREA indicated the specific intent to breach the contracts with respondents and similarly situated thrifts.\textsuperscript{127} For example, during the House debate on FIRREA, Representative Rostenkowski stated that "the Federal government should be able to change requirements when they have proven to be disastrous and contrary to the public interest. The contracts between the savings and loan owners when they acquired failing institutions in the early 1980's [sic] are not contracts written in stone."\textsuperscript{128} In addition, Justice Souter noted that every court of appeals

\begin{flushleft}

122. See id. at 2463.
123. See id.
124. See id. at 2463-64.
125. See id. at 2464.
126. See id. at 2465-66.
127. See id. at 2467. Although not mentioned in the opinion, there were approximately twenty proposed amendments to FIRREA regarding supervisory goodwill. See Robert M. Garsson, Amendments Threaten Delay of Bailout Vote; House Panel Weighs 100 Changes to S&L Bill, AM. BANKER, June 6, 1989, at 1, available in 1989 WL 7316313. Representative Quillen’s amendment was designed to protect supervisory goodwill altogether, essentially grandfathering in all thrifts which had supervisory merger agreements with the government. See 135 CONG. REC. H2700 (daily ed. June 15, 1989). An amendment proposed by Representative Hyde sought to provide for an intense administrative procedure before a thrift could be forced to write off its supervisory goodwill, thus guaranteeing thrifts due process. See 135 CONG. REC. H2704 (daily ed. June 15, 1989). The House limited debate to the Hyde amendment. See id. Representative Quillen withdrew his amendment because he felt debate on both amendments was unfair to the House due to the House’s self-imposed time constraints for decision on the bill. See 135 CONG. REC. H2602-01, H2701, (daily ed. June 15, 1989). The Hyde Amendment was rejected by a 94-326 vote. See 135 CONG. REC. H2717 (daily ed. June 15, 1989). Prophetically, during debate on the Hyde Amendment, Representative Porter warned that if the Hyde Amendment was not passed, "those thrifts that were encouraged to merge . . . will take the Government to court to force us to recognize our commitments." See 135 CONG. REC. H2709 (daily ed. June 15, 1989).
\end{flushleft}
that heard the issue concluded that Congress intended to breach its supervisory goodwill contracts.\textsuperscript{129} Justice Souter also stated that the sovereign acts defense is not available “where a substantial part of the impact of the government's action rendering performance impossible falls on its own contractual obligations.”\textsuperscript{130} Justice Souter concluded that even though Congress intended to protect the public by passing FIRREA, “the extent to which this reform relieved the government of its own contractual obligations precludes a finding that the statute is a 'public and general' act for purposes of the sovereign acts defense.”\textsuperscript{131} Finally, Justice Souter stated that even if the sovereign acts doctrine applied, the defense failed because the government could not prove that the passage of future regulation rendering performance of the \textit{Winstar} contracts impossible was not contemplated by the parties.\textsuperscript{132} Rather, the possibility of regulatory change was not only foreseen and contemplated by the parties, but the government impliedly assumed the risk of such regulatory change.\textsuperscript{133} Concluding the plurality opinion, Justice Souter stated that “[i]t would, indeed, have been madness for respondents to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would then have

\textsuperscript{129} See id. at 2467 n.47. See, e.g., Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 617 (D.C. Cir. 1992); Carteret Sav. Bank v. Office of Thrift Supervision, 963 F.2d 567, 581-82 (3rd Cir. 1992); Security Sav. & Loan v. Director, Office of Thrift Supervision, 960 F.2d 1318, 1322 (5th Cir. 1992); Far W. Fed. Bank v. Director, Office of Thrift Supervision, 951 F.2d 1093, 1098 (9th Cir. 1991); Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994, 1006 (11th Cir. 1991); Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision, 927 F.2d 1332, 1341 (6th Cir. 1991).

\textsuperscript{130} See \textit{Winstar}, 116 S. Ct. at 2466.

\textsuperscript{131} See id. at 2469.

\textsuperscript{132} See \textit{id}.

\textsuperscript{133} See \textit{id}. at 2469-70. The government may contractually assume the risk of future regulatory change. See Amino Bros. Co. v. United States, 372 F.2d 485, 491 (Cl. Ct. 1967) (“The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.” (citations omitted)).
been in jeopardy from the moment their agreements were signed." Consequently, the Court affirmed the federal circuit's decision. Consequently, the Court affirmed the federal circuit's decision.

B. Justice Breyer's Concurring Opinion

Justice Breyer wrote a concurring opinion in which he gave further treatment to the unmistakability doctrine issue. Justice Breyer stated that the unmistakability doctrine "was not intended to displace the rules of contract interpretation applicable to the government as well as private contractors in numerous ordinary cases, and in certain unusual cases." In Justice Breyer's view, the Winstar case was one of the "unusual cases" in which the government was not shielded from liability under the unmistakability doctrine. Breyer pointed to "common sense and precedent" to support his position that unmistakable contract language is not always necessary for private parties to prove that the government agreed to bear the risk of damages caused by newly enacted legislation. For instance, the Court held the government liable in Lynch and Perry without unmistakable contract language. From a practical standpoint, strict enforcement of an unmistakability requirement could make private parties wary of doing business with the government. Justice Breyer dismissed the government's argument that the unmistakability doctrine strictly applies to prevent the deterrence of necessary legislation. In Justice Breyer's view, it is inappropriate to use a stricter approach to contract interpretation merely because more

134. Winstar, 116 S. Ct. at 2472; see Appleby v. Delaney, 271 U.S. 403, 413 (1926) (stating that it was unreasonable to construe a deed and ordinance as leaving the city council "the absolute right completely to nullify the chief consideration" for acquiring the subject property); Detroit v. Detroit Citizens' St. Ry., 184 U.S. 368, 384 (1902) (stating that it would not be credible for an individual to agree that a critical contract provision could be changed at the city government's sole discretion); Murray v. Charleston, 96 U.S. 432, 445 (1877) (stating with regard to government contracts that "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"); The Binghamton Bridge, 70 U.S. 51, 78 (1865) (reflecting that "it would be madness for adventurers to build toll-bridges in a new country, where travel was limited and settlers few, if the right was retained to authorize other adventurers to build other bridges, so near as to divide even that limited travel").

135. See Winstar, 116 S. Ct. at 2472.

136. See id. at 2472-76 (Breyer, J., concurring).

137. Id. at 2472 (Breyer, J., concurring).

138. See id. (Breyer, J., concurring).

139. See id. (Breyer, J., concurring).

140. See id. at 2473 (Breyer, J., concurring); see also supra notes 13-22 and accompanying text (discussing Lynch); supra notes 23-31 and accompanying text (discussing Perry).

141. See Winstar, 116 S. Ct. at 2473 (Breyer, J., concurring) (citations omitted).

142. See id. at 2475 (Breyer, J., concurring).
money is involved, and hence, a greater potential for future legislation to be deterred.\textsuperscript{143} However, this is not to suggest the abandonment of the unmistakability doctrine altogether.\textsuperscript{144} The cases applying the unmistakability doctrine involved "unique features of sovereignty" which justified relieving the government of its contractual obligations on the basis of public policy.\textsuperscript{146}

C. Justice Scalia's Concurring Opinion

Justice Scalia, joined by Justices Kennedy and Thomas, wrote an opinion concurring in the judgment.\textsuperscript{146} Although Justice Scalia agreed with the plurality in rejecting each of the government's defenses, he gave different reasons for his rejection.\textsuperscript{147}

In Justice Scalia's view, the unmistakability doctrine applied to the contracts in \textit{Winstar}.\textsuperscript{148} However, respondents overcame the "reverse-presumption that the government remains free to make its own performance impossible through its manner of regulation" because the parties expressly agreed that the respondents would receive favorable regulatory treatment.\textsuperscript{149} If the government was not bound to give respondents favorable regulatory treatment, the government's promise would be illusory.\textsuperscript{150}

Justice Scalia rejected the governments other arguments in short order.\textsuperscript{151} Justice Scalia rejected the "reserved powers" defense on the ground that respondents sought damages, and were not attempting to prevent the government from exercising its sovereign power.\textsuperscript{152} Justice Scalia rejected the "express delegation" defense on the ground that the applicable statutes granted the agents of the Bank Board and FSLIC the authority to contract on behalf of the government.\textsuperscript{153} Finally, Justice Scalia rejected the "sovereign acts" defense, stating that the "sovereign
acts" defense should be avoided whenever the "unmistakability doctrine" defense fails, in other words, whenever the government assumes the risk of regulatory change.\footnote{154}

\textbf{D. Chief Justice Rehnquist's Dissent}

Chief Justice Rehnquist wrote a dissenting opinion, in which Justice Ginsburg joined as to Parts I, III, and IV.\footnote{155} Rehnquist's dissent criticized the \textit{Winstar} plurality for severely limiting the breadth of both the unmistakability doctrine and the sovereign acts doctrine.\footnote{156} Rehnquist agreed with the government's argument that the surrender of sovereign authority must be expressed in unmistakable terms in the contract.\footnote{157} Rehnquist argued that the plurality's refusal to apply the unmistakability doctrine to the present case was inconsistent with precedent.\footnote{158} Rehnquist traced the relevant case law from \textit{United States v. Cherokee Nation},\footnote{159} back through \textit{Bowen v. Public Agencies Opposed to Social Security Entrapment}\footnote{160} and \textit{Merrion v. Jicarilla Apache Tribe},\footnote{161} which relied on language from \textit{St. Louis v. United Railways Co.}\footnote{162} that stated the government retains the right to tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation."\footnote{163}

Similar to \textit{United Railways}, \textit{Merrion} involved the sovereign right to tax, but it was the sovereignty of an Indian tribe rather than the sovereignty of the government which was at issue.\footnote{164} \textit{Bowen} involved an amendment to the Social Security Act which affected states' rights to withdraw their employees from the Social Security System.\footnote{165} Quoting \textit{Merrion}, the \textit{Bowen} Court applied the unmistakability doctrine to the contracts, stating that "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign."\footnote{166}

\begin{itemize}
  \item \footnote{154} See id. (Scalia, J., concurring).
  \item \footnote{155} See id. at 2479-85 (Rehnquist, C.J., dissenting).
  \item \footnote{156} See id. at 2479 (Rehnquist, C.J., dissenting).
  \item \footnote{157} See id. (Rehnquist, C.J., dissenting).
  \item \footnote{158} See id. at 2480 (Rehnquist, C.J., dissenting).
  \item \footnote{159} 480 U.S. 700 (1987).
  \item \footnote{160} 477 U.S. 41 (1986).
  \item \footnote{161} 455 U.S. 130 (1982).
  \item \footnote{162} 210 U.S. 266 (1908).
  \item \footnote{163} Id. at 280; see also \textit{Winstar}, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).
  \item \footnote{164} See \textit{Merrion}, 455 U.S. 130, 137 (1982); see also \textit{Winstar}, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).
  \item \footnote{165} See \textit{Bowen}, 477 U.S. at 43-51 (1986); see also \textit{Winstar}, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).
  \item \footnote{166} \textit{Winstar}, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting) (quoting \textit{Bowen}, 477 U.S. at 43-51)
\end{itemize}
In *Cherokee Nation*, the Court applied the unmistakability doctrine to a treaty between the United States and an Indian tribe. The Court held that the treaty did not exempt the tribe from a navigational servitude because no such exemption appeared in the treaty in unmistakable terms.

In sum, Rehnquist stated that until *Winstar*, existing case law pointed to "the well-understood proposition" that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." Rehnquist criticized the plurality for inventing a new distinction under which the unmistakability doctrine applies to cases in which a party seeks an injunction or exemption from a new law, but not to cases in which a party seeks only damages. According to Rehnquist, the distinction raises a practical problem because it is impossible to determine whether damages will implicate the unmistakability doctrine until the actual damages in each case are assessed, and only then can a court determine whether the damages would have the effect of an injunction or an exemption. Rehnquist concluded that "we do not know in this very case whether the award of damages would amount to an injunction [and] if it did, under the plurality's theory, the unmistakability doctrine would apply, and that application may preclude respondents' claim."

Chief Justice Rehnquist further argued that the sovereign acts doctrine applied in the present case, and that the plurality's failure to apply it rendered the doctrine a mere "shell."

---

U.S. at 52 (quoting *Merrion*, 455 U.S. at 147).
168. See *Cherokee Nation*, 480 U.S. at 707; see also *Winstar*, 116 S. Ct. at 2480 (Rehnquist, C.J., dissenting).
170. See id. (Rehnquist, C.J., dissenting). Damages having the effect of an injunction or exemption from the new law are also included under this category. See id. (Rehnquist, C.J., dissenting).
171. See id. (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that the distinction drawn by the plurality was "never before seen in our caselaw." See id. (Rehnquist, C.J., dissenting).
172. See id. (Rehnquist, C.J., dissenting).
173. See id. (Rehnquist, C.J., dissenting).
174. Id. (Rehnquist, C.J., dissenting) (internal citations and quotations omitted).
175. See id. at 2482 (Rehnquist, C.J., dissenting). The plurality responded to Rehnquist's doomsday prophecy in a footnote stating that "the sun is not, in fact,
rality curtailed the sovereign acts doctrine by making the public and general nature of an act contingent upon the legislative intent behind the act. 176 Rehnquist criticized the plurality's excessive quoting from the legislative record to demonstrate possible "governmental self-interest" or a motive of "self-relief" underlying the enactment of FIRREA because, in so doing, the plurality melded the government's dual roles as contractor and sovereign. 177 Rehnquist ignored the comments of legislators from the legislative record, and instead, looked at the text of FIRREA itself to determine whether FIRREA was sufficiently public and general to merit protection under the sovereign acts doctrine. 178 Because of the sweeping language describing FIRREA as "[a]n [a]ct [t]o reform, recapitalize, and consolidate the Federal deposit insurance system, to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies," 179 and the drastic reforms FIRREA made in the regulation of the thrift industry, Rehnquist likened FIRREA to a public and general act worthy of protection under the sovereign acts doctrine. 180

Because he believed the unmistakability doctrine and the sovereign acts doctrine had not been overcome, Chief Justice Rehnquist recommended reversal of the remand of the judgment of the Court of Appeals to the Federal Circuit for reconsideration based upon his formulation of the unmistakability doctrine and sovereign acts doctrine. 181

likely to set on the sovereign acts doctrine . . . . [W]e may expect that other sovereign activity will continue to occasion the sovereign acts defense in cases of incidental effect." Id. at 2466 n.45.
176. See id. at 2482 (Rehnquist, C.J., dissenting).
177. See id. at 2483 (Rehnquist, C.J., dissenting). Rehnquist pointed out that Horowitz v. United States warned against confusing the government's role as a contractor with its role as a sovereign. See id. at 2482-83 (Rehnquist, C.J., dissenting); see also Horowitz v. United States, 267 U.S. 458 (1925) (stating that "the United States when sued as a contractor cannot be held liable for an obstruction of the performance of the particular contract resulting from its public and general acts as a sovereign").
178. See Winstar, 116 S. Ct. at 2483 (Rehnquist, C.J., dissenting).
180. See Winstar, 116 S. Ct. at 2483 (Rehnquist, C.J., dissenting).
181. See id. at 2485 (Rehnquist, C.J., dissenting).
V. IMPACT

A. Impact on the Thrift Industry

Perhaps the most immediate, short-term impact of Winstar was reflected in the steady rise of S&Ls’ stock prices after the July 1, 1996 Winstar decision.\textsuperscript{182} Another immediate impact will be the damages that the Winstar respondents are likely to be awarded. The Supreme Court remanded the case to the Court of Federal Claims to determine the correct measure and amount of each respondent’s damages.\textsuperscript{183} Pursuant to special case-management procedures in the damages phase of the case, more than 120 similarly situated thrifts with Winstar-related litigation pending against the government joined respondents.\textsuperscript{184} The special case-management procedures allow for the efficient and expedient resolution of certain issues common to many or all of the thrifts.\textsuperscript{185}

On February 24, 1997, respondent Glendale Federal was the first to present evidence of its estimated $1.86 million in damages before Chief Judge Loren A. Smith.\textsuperscript{186} Glendale Federal’s trial was expected to last only a few weeks, however, the trial proceeded longer because Glendale

\textsuperscript{182} See, e.g., Jaret Seiberg, Top Court: U.S. Must Pay for Accounting-Policy Shift; Over 100 Thrifts May Be Awarded Damages, \textit{Am. Banker}, July 2, 1996, at 1, available in 1996 WL 5565368 (stating that Glendale Federal’s stock increased $1.50 to $19.625 after the Winstar decision was announced).

\textsuperscript{183} See Winstar, 116 S. Ct. at 2472.


\textsuperscript{185} See id. In Winstar-Related Cases, the Court of Federal Claims determined when the plaintiffs’ breach of contract claims accrued for purposes of calculating the relevant statute of limitations. See id. The government filed motions to dismiss against twenty-six thrifts based on the running of the six-year statute of limitations. See id. at 177. The court rejected the government’s argument that the statute of limitations began running upon the enactment of FIRREA and determined that the statute was triggered only after the OTS’s implementation of the regulations against the thrifts. See id. at 182-84. The deadline for filing was December 8, 1995. See id. at 182. The court, therefore, denied the government’s motions to dismiss because the twenty-four plaintiffs had brought suit less than six years after the OTS regulations took effect. See id. at 182-83. However, the government’s motions to dismiss were granted as to Leonard Shane and Ariadne Financial Services, which had filed on February 22, 1996 and April 16, 1996, respectively. See id. at 184-91 & n.4.

Federal presented evidence in meticulous detail. Trial critics dubbed the case "the banking industry's equivalent of the O.J. Simpson trial," complete with parties presenting, defending, and objecting to a mountain of evidence and a judge who never seemed to have control over the lawyers, the case, or the courtroom. As a result, Glendale Federal's trial was not expected to conclude until October 1997, delaying Statesman's trial and ten other thrifts' trials by at least six months.

Operating S&Ls that benefit from Winstar precedent are expected to use the funds awarded as damages for future mergers and acquisitions. The pending resolution of the Winstar-related cases delayed many mergers and acquisitions in the S&L industry. Thrifts on both sides of takeover scenarios are proceeding with caution due to difficulties in calculating takeover prices because it is impossible to predict the amount of potential damages, if any. Determining a takeover price is further complicated because the Winstar decision inflated target thrifts' stock prices.

After its recapitalization campaign to stay afloat, respondent Glendale Federal is recovering from its FIRREA-triggered setback. Glendale Federal reported profits of $23.2 million for the fiscal second quarter ending December 31, 1996, a 61% increase over the previous year. In 1995, before the Winstar decision, Glendale Federal posted a loss of $10.7 million in the second quarter.

Glendale Federal is working hard to remain competitive in the banking industry. Since the Winstar decision, Glendale Federal has launched

---

188. See id.
189. See id.
190. See, e.g., Shutdown, supra note 11, at B1 (stating that most S&Ls have the flexibility to use the proceeds of any damage awards toward mergers and acquisitions because the thrift industry is recovering and becoming more financially stable).
192. See id.
194. See id.
195. See id.
aggressive advertisements targeting its rivals' customers and has become active in the mergers and acquisitions arena. Despite its own aggressive acquisition maneuvers, Glendale Federal is considered a prime target for acquisition in the recent wave of thrift and bank mergers in Southern California. However, any merger involving Glendale Federal will have to await the resolution of the damages phase of the Winstar case.

The Winstar decision is likely to have a tremendous res judicata effect. Over one hundred similarly situated thrifts will be lining up to sue the government for breach of contract, wielding the newly sharpened


199. See Debora Vrana, State's Remaining Big Thrifts Vulnerable to Takeover, L.A. TIMES, Feb. 19, 1997, at D5; see also Lee, supra note 198, at D2.

200. See Vrana, supra note 199, at D5. In the meantime, Glendale Federal is expected to seize the opportunity to lure customers away from banks that are in the midst of a post-merger transition. See id.; see also supra note 197 and accompanying text (discussing Glendale Federal's strategy of targeting dissatisfied customers at rival banks, such as Wells Fargo Bank and BankAmerica).

201. Under the doctrine of res judicata, also known as claim preclusion, a final judgment on the merits bars subsequent litigation between the parties or persons in privity with the parties from re-litigating the same cause of action. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).
sword of nonmutual collateral estoppel. Provided such thrifts' contracts are at all similar to those of the Winstar respondents, the government stands to lose an estimated $15 billion in future litigation. Ultimately, taxpayers will bear the burden of paying any and all judgments against the government. Among the potential beneficiaries of Winstar's res judicata effect are a number of thrifts and banking institutions that filed amicus briefs on behalf of the Winstar respondents. Many of the amicus thrifts or banking institutions entered merger agreements similar

202. Collateral estoppel, also known as issue preclusion, precludes relitigation in a subsequent case of an issue previously litigated, decided, and necessary to the judgment in a prior case. See id.; see also Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). Res judicata and collateral estoppel prevent relitigation of the same issues and promote judicial efficiency. See Parklane, 439 U.S. at 326. Unlike res judicata, collateral estoppel does not require mutuality between the parties. See Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 349-50 (1971). Collateral estoppel can be invoked as a defensive measure, i.e. a "shield," or as an offensive measure, i.e. a "sword." See Parklane, 439 U.S. at 329. Thus, in subsequent cases brought by Winstar-related thrifs, the government is precluded from relitigating any of the four defenses the Court rejected in Winstar.

203. See Shutdown, supra note 11, at B1. Of course, Winstar alone does not guarantee that similarly situated thrifts will also prevail in the Court of Federal Claims. See id. Each thrift's contract will have to be reviewed independently. See id. Robert O. Smedley, Jr., President of Lochaven Federal Savings and Loan Association in Orlando and a former manager with the Resolution Trust Corp., questioned the precedential value of the Winstar decision, stating "[e]ach thrift] cut individual deals with the government." See id. "Every contractual agreement was on a case-by-case basis, so this [ruling] may not mean that the next guy will win." See id.

to those of the *Winstar* respondents and have litigation pending against the federal government.\(^{205}\) Of these, the lawsuit filed by Trinity Ventures, Ltd. and Castle Harlan, Inc. is the only other *Winstar*-related case presently pending before a federal appellate court.\(^{206}\) Another group of amici consisted of thrifts entering into contracts with the government to acquire other insolvent thrifts in exchange for government forbearance notes which provided that the acquiring thrifts were not required to post the required capital to support FSLIC insurance.\(^{207}\) These amici's contracts did not involve any supervisory goodwill.\(^{208}\)

Another group of amici included four thrifts with contracts similar to that of respondent Statesman which involved regulatory capital credits rather than supervisory goodwill.\(^{209}\) Including amici thrifts, there are approximately 122 similarly situated thrifts with breach of contract lawsuits.

\(^{205}\) See infra note 210 and accompanying text (discussing pending litigation in the U.S. Court of Federal Claims).

\(^{206}\) See Brief of Amici Curiae Trinity Ventures, Ltd. and Castle Harlan, Inc., *supra* note 204. In *Trinity Ventures*, Far West Bank entered into a series of agreements with the Bank Board in 1987 including a forbearance letter exempting Far West Bank from the then-applicable capital reserve requirements for ten years. *See* Far W. Fed. Bank, S.B. v. Office of Thrift Supervision-Director, 119 F.3d 1358, 1362 (9th Cir. 1997). Before FIRREA was enacted, bank loans to individual borrowers could not exceed a certain percentage of the bank's capital reserves. *See id.* With intangible assets included in its capital reserves, Far West Bank was able to loan more money to individual borrowers. *See id.* After the passage of FIRREA, however, Far West Bank lost the benefit of its forbearance agreements with the government. *See id.* The district court awarded $26.6 million to Far West Bank based on a frustration of purpose theory. *See* Far W. Fed. Bank, S.B. v. Office of Thrift Supervision, Director, 777 F. Supp. 952, 960-62 (D. Or. 1992), aff'd on other grounds, 119 F.3d 1358 (9th Cir. 1997). The court of appeals rejected the district court's frustration of purpose rationale, but relying on the *Winstar* decision, affirmed the district court's ruling on the grounds that the government breached its forbearance agreement with Far West Bank. *See* Far W. Fed. Bank, 119 F.3d at 1363-64, 1366.


\(^{208}\) See id.

pending against the government in the United States Court of Federal Claims. 210

B. Impact Beyond the Thrift Industry

Despite the magnitude of the Winstar decision, its effect on most everyday, run-of-the-mill government supply contracts will be minimal. Government contracts usually contain boilerplate provisions anticipating and protecting against nearly every conceivable situation. 211 For instance, most government contracts contain "terminate for convenience" clauses as standard provisions. 212 Thus, businesses such as those represented in the United States Chamber of Commerce's amicus brief 213 will derive little benefit from the Winstar decision. Similarly, the academic institutions, scientists, environmental and health care organizations, and social services represented by amici curiae 214 are unlikely to benefit substantially from the decision because these organizations' contracts are usually standardized and contain provisions permitting the government to avoid its contract without effecting a breach.


212. See id. Had the parties incorporated such clauses in the Winstar contracts, the Winstar Court would probably have reached a different result. However, it is unlikely that any of the acquiring thrifts would have agreed to merger contracts with terminate for convenience clauses.


contracts written in stone

Winstar's broadest and most far-reaching impact will arguably be on ad-hoc contracts drafted for special circumstances.\textsuperscript{215} The government usually enters such ad-hoc contracts with private parties using favorable contract terms as incentives to resolve a predicament the government cannot resolve itself.\textsuperscript{216} The Winstar contracts, for example, were thrown together in a flurry, indicating the government's desperation to find a cure for its S&L headache. The government assumed the risk of contract-breaching legislative changes in exchange for the thrifts' agreement to bail out insolvent thrifts that the FSLIC, and later the FDIC, could not afford to bail out themselves.

In Hughes Communications Galaxy, Inc. v. United States,\textsuperscript{217} the government entered into another ad-hoc agreement with a private contractor. In Hughes, the National Aeronautics and Space Administration (NASA) entered a contract with Hughes Communications Galaxy, Inc. to launch ten of Hughes's satellites from its space shuttles.\textsuperscript{218} At the time, NASA promoted commercial use of its space shuttles and encouraged private industries to use the shuttles as a means to finance its space program.\textsuperscript{219} Although the contract granted termination rights to both parties, NASA could terminate only "upon a determination in writing that NASA is required to Terminate such services for Reasons Beyond NASA's Control."\textsuperscript{220} The contract also provided a schedule for launch services which was expressly subject to "the United States policy governing launch assistance approved by the President of the United States on August 6, 1982."\textsuperscript{221} After the Challenger disaster in 1986 and before NASA launched any of Hughes's satellites, President Reagan issued an order announcing that the space shuttle would no longer launch commercial satellites.\textsuperscript{222}

The Hughes court, taking an approach similar to the Court in Winstar, found that NASA assumed the risk of future changes affecting the space program.\textsuperscript{223} The court gave special attention to the provision in the con-

\begin{thebibliography}{9}
\bibitem{215} See Lavelle, supra note 211, at B1.
\bibitem{216} See id.
\bibitem{217} 998 F.2d 953 (Fed. Cir. 1993).
\bibitem{218} See id. at 955.
\bibitem{219} See id.
\bibitem{220} Id. (citing Art. VII, ¶ 1.a(iv) of the contract). Hughes, on the other hand, could terminate the contract at any time so long as it reimbursed NASA for its costs. See id.
\bibitem{221} Id. at 957.
\bibitem{222} See id. at 956.
\bibitem{223} See id. at 959; see also United States v. Winstar Corp., 116 S. Ct. 2432, 2460-
tract that stated that the parties entered into the contract subject to the space program policies as of August 6, 1982.\textsuperscript{224} It made no difference to the court that the changes resulted from the government’s sovereign acts.\textsuperscript{225} As in \textit{Winstar}, the court emphasized that the government was not enjoined or otherwise prevented from regulating its space program, but was liable for damages its new regulations caused.\textsuperscript{226}

Additionally, \textit{Winstar} may create government liability for breach of contract in pending litigation in the timber and pulp industry. The trigger for the government’s possible breach with respect to the timber and pulp industry is the Tongass Timber Reform Act of 1990 (Tongass Act).\textsuperscript{227} As a result of the Tongass Act, Alaska Pulp Corp. (APC) filed a $1.6 billion suit against the government based on \textit{Winstar}, alleging that the Tongass Act unilaterally changed the terms of APC’s logging contracts with the Forest Service, causing APC to go out of business.\textsuperscript{228} Ketchikan Pulp Corp. (KPC) also filed suit for breach of its logging contracts with the government.\textsuperscript{229} KPC seeks damages for annual losses allegedly caused by the passage of the Tongass Act.\textsuperscript{230} As in \textit{Winstar}, the government asserts that APC and KPC are not entitled to damages because the Tongass Act was an exercise of the government’s sovereign powers to protect the public welfare.\textsuperscript{231}

In attacking the government’s sovereign act defense, the two companies are likely to emphasize the similarities between the thrift and timber industries in an effort to exploit the favorable outcome in \textit{Winstar}.\textsuperscript{232} For example, both the timber industry and the thrift industry are highly regulated by the government.\textsuperscript{233} The government created the thrift industry to facilitate the purchase of affordable housing.\textsuperscript{234} Similarly, the

\textsuperscript{70} (1996); \textit{supra} notes 130-34 and accompanying text (discussing the government’s assumption of the risk of regulatory change in the \textit{Winstar} contracts).

\textsuperscript{224} See \textit{Hughes}, 998 F.2d at 959.
\textsuperscript{225} See \textit{id}.
\textsuperscript{226} See \textit{id.}; see also \textit{Winstar}, 116 S. Ct. at 2458.
\textsuperscript{228} See \textit{id}.
\textsuperscript{229} See \textit{id}.
\textsuperscript{230} See \textit{id.} KPC expects to lose $40 million in 1996. See \textit{id}.
\textsuperscript{231} See \textit{H.R. REP. NO. 101-84, at 24 (1989).}
\textsuperscript{233} See \textit{id}.
\textsuperscript{234} See \textit{id}.
government created the federal timber sale program to meet the demands of residential housing.\(^{235}\) Also, as in *Winstar*, the plaintiffs do not seek injunctive relief restricting the government’s regulatory and legislative authority, but monetary damages for the breach of contract resulting from the government’s legislative changes.\(^{236}\)

A few days after the *Winstar* decision, Senator Murkowski introduced a bill to extend KPC’s contract with the government for an additional fifteen years.\(^{237}\) In his opening statement, Senator Murkowski used the *Winstar* decision as leverage, stating that the *Winstar* decision undermined Congress’s and the Clinton Administration’s assumptions that the sovereign acts doctrine would protect the government from liability to KPC and APC for unilaterally modifying the pulp contracts.\(^{238}\)

The types of contracts that *Winstar* may affect are potentially limitless. *Winstar* has already been invoked with regard to the following: Indian tribe sovereign rights,\(^{239}\) the effect of a proposed nuclear waste clean-up amendment on existing government contracts with private nuclear power companies,\(^{240}\) and the effect of regulatory changes on production flexibility contracts with farmers.\(^{241}\) There is also potential government liability to defense and aerospace contractors resulting from defense downsizing by the Clinton administration.\(^{242}\) Although *Winstar*

---

235. See id.
236. See id.
239. The effect of *Winstar* on tribal sovereign immunity has been debated in the United States Senate. See Tribal Rights in Private Property Cases: Hearing Before the Senate Indian Affairs Comm., 104th Cong. (1996) (testimony of Lana E. Marcussen).
241. An argument was made in a debate in the House of Representatives that, pursuant to the holding of *Winstar*, the government assumed the risk of regulatory change in its contracts with farmers. See 142 CONG. REC. E1902-02 (daily ed. Oct. 2, 1996) (extension of remarks of Rep. Roberts).
may not be the panacea for every legally contracted disease, the diversity of the areas in which *Winstar* is being cited, debated, and argued indicates that its holding will leave behind a legacy limited only by the creativity of plaintiffs' lawyers.

MARK T. CRAMER