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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.*¹ sent a resounding message to Washington: The government has to make good on its contracts.² At the core of the *Winstar* case were government contracts created in the 1980s under which solvent thrifts³ agreed to acquire failed thrifts in exchange for favorable accounting treatment.⁴ Without the contracts, the government, as the thrifts' federal deposit insurer, would bear the cost of operating or liquidating the failed thrifts.⁵ In 1989, Congress enacted legislation eliminating the favorable accounting treatment, rendering most of the solvent acquiring thrifts insolvent.⁶ The government denied any further responsibility, leaving the acquiring thrifts with the cost of continuing operations or, in most cases, liquidation.⁷ The United States Supreme

1. 116 S. Ct. 2432 (1996).

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. *See Winstar*, 116 S. Ct. at 2445.

5. *See* Michael S. Helfer & William R. Richardson, Jr., *Goodwill and Government Promises*, 2 STAN. L. & POL'Y REV. 117, 122 (1990).

6. *See Winstar*, 116 S. Ct. at 2446; *see also* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in part at 12 U.S.C. § 1464 (1994)); William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 STAN. L. & POL'Y REV. 102, 107 (1990) (stating that more than 500 thrifts failed to meet capital reserve requirements after Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)).

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,⁸ 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."⁹ This came as good news to most thrifts,¹⁰ but for others the victory was bittersweet.¹¹

II. HISTORICAL BACKGROUND

The government stands in a unique position as a contractor because it has the power to legislatively alter its contractual obligations;¹² 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*,¹³ the government issued insurance policies during World War I which provided for annual renewals at the option of the insured.¹⁴ In response to net losses on the policies in excess of \$4.1 billion,¹⁵ the government passed legislation nullifying the annual renewal options.¹⁶ In an opinion written by Justice Brandeis, the Court held that the government could not avoid its obligations un-

the thrift's assets, converting the assets into cash, and using the assets to pay off the thrift's debts. See 3 MICHE ON BANKS AND BANKING ch. 6, § 15, at 87-88 (1996).

8. See *Winstar*, 116 S. Ct. at 2471-72.

9. See *id.* (quoting the *Sinking Fund Cases*, 99 U.S. 700, 719 (1878)).

10. Stephen J. Trafton, chairman and chief executive officer of Respondent Glendale Federal stated, "Today's decision . . . reaffirms the American principle that the government, like any private citizen, cannot walk away from its contracts with impunity." David G. Savage, *High Court Says U.S. Reneged on S&Ls, Must Pay*, L.A. TIMES, July 2, 1996, at A23. Glendale Federal's attorney, Jerry Stouck, stated that the *Winstar* decision "means the government has to honor its obligations when it makes a contract. It can't change the rules after it makes a deal." *Id.*

11. William Hussey, former director of the now defunct Florida League of Financial Institutions stated, "All this means is that we were right, but it's too little, too late for a lot of good thrifts that probably would have survived." *Government Owes S&Ls: Thrifts That Survived the Shutdown Could Use the Money for Acquisitions*, ORLANDO SENTINEL, July 2, 1996, at B1, available in 1996 WL 2615385 [hereinafter *Shutdown*].

12. See generally *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (stating that all contracts are subject to subsequent legislation unless sovereign power is surrendered in unmistakable terms); see also *infra* notes 32-44 and accompanying text (discussing *Bowen*).

13. 292 U.S. 571 (1934).

14. See *id.* at 574.

15. See *id.* at 576 n.2.

16. See *id.* at 575.

der the insurance policies.¹⁷ After determining that the insurance policies were enforceable contracts,¹⁸ 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.”¹⁹ 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.”²⁰ While Congress has the power to reduce excessive spending, it cannot exercise this power if doing so requires breaching government contracts.²¹

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.”²²

In *Perry v. United States*,²³ the government issued bonds containing clauses that the principal and interest must be repaid in United States gold coin.²⁴ In 1933, Congress passed legislation abrogating these so-

17. See *id.* at 579.

18. See *id.* at 576.

19. *Id.* at 579; see *Sinking Fund Cases*, 99 U.S. 700, 719 (1878); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) (“The United States does business on business terms.”) (quoting *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926)); *United States v. Bostwick*, 94 U.S. 53, 66 (1877) (stating that when the United States contracts with its citizens, the government is bound by the same laws that govern citizens); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (explaining that when the United States enters contracts in commerce, it submits itself to the laws governing citizens).

20. See *Lynch*, 292 U.S. at 579. See, e.g., *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253, 262 (1929) (holding that government price-fixing of coal during World War I did not violate the coal owners’ due process rights).

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”).

22. *Lynch*, 292 U.S. at 580 (quoting *Sinking Fund Cases*, 99 U.S. at 719).

23. 294 U.S. 330 (1935).

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 305.

called "gold clauses."²⁵ The Court held that the issuance of bonds creates a government obligation to repay the bondholder pursuant to the express terms of the bond.²⁶ 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."²⁷ 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."²⁸ In borrowing money through the issuance of bonds, Congress has authority to pledge the credit of the United States assuring repayment.²⁹ "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."³⁰ 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.³¹

The issues raised in *Lynch* and *Perry* were explored further in *Bowen v. Public Agencies Opposed to Social Security Entrapment*.³² In *Bowen*, Congress amended the Social Security Act of 1935³³ 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.

28. *Perry*, 294 U.S. at 350.

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).

32. 477 U.S. 41 (1986).

33. 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397 (1994)).

curity System voluntarily, from withdrawing their employees from the system.³⁴ Before the amendment, states were permitted to withdraw from the system upon two years notice to the Secretary of Health and Human Services.³⁵ Several public agencies of California and an organization called Public Agencies Opposed to Social Security Entrapment challenged the amendment on constitutional grounds.³⁶ These parties claimed the amendment was a taking of their "contractual right to withdraw" without just compensation in violation of the Fifth Amendment.³⁷ In *Bowen*, the Court upheld the amendment,³⁸ stating that all contracts, even when the government itself is a party, are subject to subsequent government, legislation.³⁹ Justice Powell, writing for the Court, cited *Lynch* and *Perry* as cases that held the government can "enter into contracts that confer vested rights."⁴⁰ 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.⁴¹ The Court emphasized that Congress expressly reserved the right to amend the Social Security Act⁴² and that the agreements with the states did not confer any rights other than those provided by the Act itself.⁴³ 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.⁴⁴

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).

42. The Act contained an express reservation of Congress's right "to alter, amend, or repeal any provision" of the Act. See 42 U.S.C. § 1304 (1994); *Bowen*, 477 U.S. at 44 n.2, 51-52.

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*,⁴⁵ 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.⁴⁶ The tribe based its claim on the assumption that the treaty conveyed the government's navigational easement.⁴⁷ 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.⁴⁸

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.⁴⁹ In an attempt to stabilize thrifts and prevent future collapse, Congress took steps to increase regulation of the thrift industry.⁵⁰ Congress created the Federal Home Loan Bank Board (Bank Board) for the purpose of funding thrifts for home loans and to prevent home foreclosures.⁵¹ Additionally, the legislature authorized the Bank Board to charter and regulate savings and loan associations.⁵² Congress also created the Federal Savings and Loan Insurance Corporation (FSLIC), which was responsible for insuring and regulating all federally insured thrifts.⁵³ Under this newly regulated system, the thrift industry prospered⁵⁴ and regained public confidence.⁵⁵

However, the high inflation and interest rates of the late 1970s and early 1980s wreaked havoc on the thrift industry.⁵⁶ Pursuant to the rules

45. 480 U.S. 700 (1987).

46. *See id.* at 702.

47. *See id.*

48. *See id.* at 707 (citing *Bowen*, 477 U.S. at 52).

49. *See United States v. Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996); *see also* H.R. REP. NO. 101-54(I), at 292 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 88.

50. *See Winstar*, 116 S. Ct. at 2440; *see also* H.R. REP. NO. 101-54(I), at 292, *reprinted in* 1989 U.S.C.C.A.N., at 88.

51. *See Federal Home Loan Bank Act*, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1994)).

52. *See Home Owners' Loan Act of 1933*, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1994)).

53. *See National Housing Act of 1931*, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750(g) (1994)).

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.*

55. In 1988, nearly one half of family mortgages originated with thrifts. *See id.* at 291, *reprinted in* 1989 U.S.C.C.A.N., at 87.

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.⁵⁷ An increase in interest rates forced thrifts to pay higher rates to their depositors.⁵⁸ 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.⁵⁹ As a result, approximately 435 thrifts became insolvent between 1981 and 1983.⁶⁰ In response, the government deregulated the thrift industry.⁶¹ Initially, deregulation involved: (1) allowing thrifts to invest in different markets, (2) a two percent reduction in the capital reserves requirement,⁶² and (3) the adoption of new accounting techniques that masked the declining financial condition of the thrift industry.⁶³ Amidst this deregulation, failed thrifts began making insurance claims to the FSLIC.⁶⁴ The FSLIC lacked sufficient funds to liquidate all the insolvent thrifts, and as a result, ended up insolvent itself.⁶⁵ 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.⁶⁶ The government used the recognition of "supervisory goodwill"⁶⁷ toward

1989, at A24; G. Christian Hill & Paulette Thomas, *The Thrift Rescue—New Fiscal Game: Big Thrift-Rescue Bill is Likely to Realign the Financial System*, WALL ST. J., Aug. 7, 1989, at A1; *With the Thrifts, What Haven't the Regulators Tried?*, N.Y. TIMES, Feb. 12, 1989, § 4, at 5.

57. See Black, *supra* note 6, at 103.

58. See *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996).

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.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."⁶⁸ Supervisory mergers appealed to the government because the government could not otherwise afford to bail out failed and failing thrifts.⁶⁹ 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.⁷⁰ Supervisory mergers additionally appealed to acquiring thrifts because thrifts were permitted to amortize supervisory goodwill over as much as forty years.⁷¹

Respondents Glendale Federal Bank, FSB, Winstar Corporation, and The Statesman Group, Inc. each entered into separate supervisory merger transactions with the government.⁷² In 1981, Glendale Federal submitted a proposal to the Bank Board to acquire First Federal Savings and Loan Association of Broward County (Broward).⁷³ At the time, Broward was \$734 million in debt and would cost the FSLIC approximately \$1.8 billion to liquidate.⁷⁴ The Bank Board approved Glendale Federal's proposal, which contemplated the amortization of supervisory goodwill over a forty-year period.⁷⁵ 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

at 2442-43.

68. *Id.* at 2443.

69. *See id.* Describing the supervisory mergers, Harold Gilkey, Chairman of Sterling Financial Corp. of Spokane, Washington, stated, "What the government asked us to do was the heavy lifting." Bert Caldwell, *Court Opens Door for Sterling; Decision Allows Thrift to Seek \$90 Million Damage Claim*, SPOKESMAN REV., July 2, 1996, at A6, available in 1996 WL 10787402. Sterling entered contracts with the government to take over three failed thrifts with a combined negative net worth of \$50 million and \$40 million in failing loans. *See id.*

70. *See Winstar*, 116 S. Ct. at 2443.

71. *See id.* Amortizing intangible goodwill is tantamount to depreciating tangible assets. *See id.* at 2443-44 n.7; *see also* Newark Morning Ledger Co. v. United States, 507 U.S. 546, 571 n.1 (1993) (Souter, J., dissenting). Supervisory goodwill has a limited useful life, prompting the thrift to "write down" the declining value of the asset each year as an operating expense. *See Winstar*, 116 S. Ct. at 2443-44.

72. *See Winstar*, 116 S. Ct. at 2447.

73. *See id.* at 2448.

74. *See id.*

75. *See id.*

letters⁷⁶ and a memorandum⁷⁷ incorporated into the agreement through the agreement's integration clause.⁷⁸

In 1983, the FSLIC sought bidders to acquire Windom Federal Savings and Loan Association (Windom).⁷⁹ Windom was on the brink of insolvency at the time, and liquidation would cost the FSLIC approximately \$12 million.⁸⁰ A number of investors formed Winstar Corporation in order to acquire Windom.⁸¹ Winstar submitted a proposal to the FSLIC that called for the amortization of supervisory goodwill over a thirty-five year period.⁸² The Bank Board accepted Winstar's proposal in an agreement similar to Glendale Federal's agreement.⁸³ Like Glendale Federal, Winstar incorporated supervisory goodwill terms into its agreement through a forbearance letter.⁸⁴ In addition, the Winstar agreement specifically provided for the accounting principles that would control the agreement.⁸⁵ 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.⁸⁶

In 1987, Statesman submitted a proposal to the FSLIC to acquire an insolvent subsidiary of First Federated Savings Bank.⁸⁷ 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.⁸⁸ Statesman and the FSLIC ultimately entered an agreement that employed the purchase method of accounting.⁸⁹ Under the agreement, Statesman contributed \$21 million in cash and the FSLIC contributed \$60 million.⁹⁰ 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.⁹¹ Like Winstar's agreement, the Statesman agreement provided for the use of the accounting principles in effect on the date of the agreement.⁹² 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.⁹³

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).⁹⁴ Under FIRREA, thrift regulations were radically changed.⁹⁵ The regulatory change with the greatest impact on respondents was that supervisory goodwill no longer counted toward the thrifts' capital reserve requirements.⁹⁶ As a result of this new regulation, respondents, along with many other similarly situated acquiring thrifts, had inadequate capital reserves.⁹⁷ Consequently, federal regu-

88. *See id.* at 2450-51.

89. *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.

90. *See Winstar*, 116 S. Ct. at 2451.

91. *See id.*

92. *See id.*

93. *See id.*

94. *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)).

95. *See id.*

96. *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).

97. *See Winstar*, 116 S. Ct. at 2446-47. Under FIRREA, thrifts were required "to

lators seized and liquidated Winstar and Statesman.⁹⁸ Respondent Glendale Federal avoided liquidation by raising sufficient private capital to stay in compliance with the capital reserve requirements.⁹⁹

Respondents each filed suit for breach of contract against the federal government in the Court of Federal Claims.¹⁰⁰ The Court of Federal Claims granted summary judgment in favor of respondents on the breach of contract issue,¹⁰¹ 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,¹⁰² and (2) liability cannot attach to the government for sovereign acts under FIRREA.¹⁰³ The Federal Circuit Court of Appeals, en

maintain core capital in an amount not less than 3 percent of the savings association's total assets." See 12 U.S.C. § 1464(t)(2)(A) (1994).

98. See *Winstar*, 116 S. Ct. at 2447.

99. See *id.* Glendale Federal raised \$451 million in its epic recapitalization campaign, the largest in United States' history. See *Glenfed, Completing Parts of Overhaul, To Begin Common-Stock Rights Offer*, WALL ST. J., Aug. 27, 1993, at B4 [hereinafter *Overhaul*]. Under the recapitalization plan, which Glendale Federal's stockholders narrowly approved, outside institutional investors purchased \$201 million in preferred stock and \$169 million in outstanding shares of common stock. See *California Thrift Survives Another Round With U.S. Government*, LIABILITY WK., Sept. 27, 1993, at 3, 4 available in 1993 WL 2780678 [hereinafter *Another Round*]; see also *Overhaul, supra*. In addition, Glendale Federal issued \$81 million in new shares of common stock. See *Overhaul, supra*. Existing stockholders purchased \$10.1 million of the new issuance. See *Glendale Federal Bank Meets Worth Requirements*, L.A. DAILY NEWS, Sept. 18, 1993, at B2. Institutional investors purchased the remainder. See *id.* When Glendale Federal's recapitalization was complete, the stake of existing debenture holders, common stockholders, and preferred stockholders was slashed to a paltry twenty percent, with new investors reaping the remaining eighty percent. See *Overhaul, supra*. The common stockholders were left with barely two percent ownership in the thrift. See *Another Round, supra*. According to Glendale Federal's CEO, Stephen Trafton, "the significant dilution for the common shareholders was required in order to attract enough new money to recapitalize the bank." Sam Zuckerman, *Q&A: Glendale's Trafton: The Possibility of Failure 'Never Crossed My Mind'*, AM. BANKER, Aug. 26, 1993, at 5, available in 1993 WL 5813910. A failed recapitalization would cause the liquidation of Glendale Federal, and the shareholders would receive nothing. See *Another Round, supra*. In that respect, the true beneficiaries of Glendale Federal's recapitalization were the American taxpayers, who ultimately bear the financial burden of government liquidations.

100. See *Winstar*, 116 S. Ct. at 2447.

101. See *id.*

102. See *id.*; see also *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 116 (1990).

103. See *Winstar*, 116 S. Ct. at 2447; see also *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 550-53 (1992).

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 certiorari.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 express 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 examination of the individual contracts at issue, Justice Souter concluded that ordinary contract principles applied to the case.¹¹² Justice Souter proceeded 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).

105. See *United States v. Winstar Corp.* 116 S. Ct. 806 (1996).

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.

108. Relying on *Bowen*, the government argued that the unmistakability doctrine requires that any contractual limitation or surrender of government authority must be expressed in unmistakable terms in the contract. See *Winstar*, 116 S. Ct. at 2453; see also Brief for the Petitioner at 16, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996) (No. 95-865), available in 1996 WL 99716. For a discussion of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), see *supra* notes 32-44 and accompanying text.

109. See *Home Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 272-74 (1908).

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.¹¹⁴ Because the *Winstar* contracts did not prevent the government from exercising its authority to regulate the thrift industry, the unmistakability doctrine did not apply.¹¹⁵ Respondents sought monetary damages for losses suffered due to regulatory change, a risk specifically assumed by the government in its contracts with respondents.¹¹⁶ Unlike prior cases applying the unmistakability doctrine,¹¹⁷ respondents did not seek specific performance or an exemption from the new regulations.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹

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-

claimants sought monetary damages, but damage awards in those cases would have had the effect of an exemption, and therefore, the unmistakability doctrine applied. *See id.*

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.¹²² Justice Souter explained that the sovereign acts doctrine places the government as a contractor in the same position as a private contractor.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.¹²⁴ In the present case, the government's capacities as sovereign and as contractor were inextricably linked.¹²⁵ In such cases, the greater the government's self-interest, the less likely the sovereign acts doctrine will apply.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.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."¹²⁸ In addition, Justice Souter noted that every court of appeals

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).

128. *Winstar*, 116 S. Ct. at 2468 (quoting 135 CONG. REC. H2717 (daily ed. June 15, 1989)).

that heard the issue concluded that Congress intended to breach its supervisory goodwill contracts.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."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."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 *Winstar* contracts impossible was not contemplated by the parties.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.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

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).

130. See *Winstar*, 116 S. Ct. at 2466.

131. See *id.* at 2469.

132. See *id.*

133. See *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 (Ct. Cl. 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.¹³⁴ Consequently, the Court affirmed the federal circuit's decision.¹³⁵

B. Justice Breyer's Concurring Opinion

Justice Breyer wrote a concurring opinion in which he gave further treatment to the unmistakability doctrine issue.¹³⁶ 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."¹³⁷ 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.¹³⁸ 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.¹³⁹ For instance, the Court held the government liable in *Lynch* and *Perry* without unmistakable contract language.¹⁴⁰ From a practical standpoint, strict enforcement of an unmistakability requirement could make private parties wary of doing business with the government.¹⁴¹ Justice Breyer dismissed the government's argument that the unmistakability doctrine strictly applies to prevent the deterrence of necessary legislation.¹⁴² 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.¹⁴³ However, this is not to suggest the abandonment of the unmistakability doctrine altogether.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.¹⁴⁵

C. Justice Scalia's Concurring Opinion

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

In Justice Scalia's view, the unmistakability doctrine applied to the contracts in *Winstar*.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.¹⁴⁹ If the government was not bound to give respondents favorable regulatory treatment, the government's promise would be illusory.¹⁵⁰

Justice Scalia rejected the governments other arguments in short order.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.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.¹⁵³ Finally, Justice Scalia rejected the “sovereign acts” defense, stating that the “sovereign

143. *See id.* (Breyer, J., concurring).

144. *See id.* at 2476 (Breyer, J., concurring).

145. *See id.* (Breyer, J., concurring).

146. *See id.* at 2476-79 (Scalia, J., concurring).

147. *See id.* at 2476 (Scalia, J., concurring).

148. *See id.* at 2477 (Scalia, J., concurring).

149. *See id.* (Scalia, J., concurring).

150. *See id.* (Scalia, J., concurring).

151. *See id.* at 2478 (Scalia, J., concurring).

152. *See id.* (Scalia, J., concurring).

153. *See id.* (Scalia, J., concurring).

acts” defense should be avoided whenever the “unmistakability doctrine” defense fails, in other words, whenever the government assumes the risk of regulatory change.¹⁵⁴

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.¹⁵⁵ Rehnquist's dissent criticized the *Winstar* plurality for severely limiting the breadth of both the unmistakability doctrine and the sovereign acts doctrine.¹⁵⁶ Rehnquist agreed with the government's argument that the surrender of sovereign authority must be expressed in unmistakable terms in the contract.¹⁵⁷ Rehnquist argued that the plurality's refusal to apply the unmistakability doctrine to the present case was inconsistent with precedent.¹⁵⁸ Rehnquist traced the relevant case law from *United States v. Cherokee Nation*,¹⁵⁹ back through *Bowen v. Public Agencies Opposed to Social Security Entrapment*¹⁶⁰ and *Merrion v. Jicarilla Apache Tribe*,¹⁶¹ which relied on language from *St. Louis v. United Railways Co.*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.”¹⁶³

Similar to *United Railways*, *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.¹⁶⁴ *Bowen* involved an amendment to the Social Security Act which affected states' rights to withdraw their employees from the Social Security System.¹⁶⁵ Quoting *Merrion*, the *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.”¹⁶⁶

154. See *id.* (Scalia, J., concurring).

155. See *id.* at 2479-85 (Rehnquist, C.J., dissenting).

156. See *id.* at 2479 (Rehnquist, C.J., dissenting).

157. See *id.* (Rehnquist, C.J., dissenting).

158. See *id.* at 2480 (Rehnquist, C.J., dissenting).

159. 480 U.S. 700 (1987).

160. 477 U.S. 41 (1986).

161. 455 U.S. 130 (1982).

162. 210 U.S. 266 (1908).

163. *Id.* at 280; see also *Winstar*, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).

164. See *Merrion*, 455 U.S. 130, 137 (1982); see also *Winstar*, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).

165. See *Bowen*, 477 U.S. at 43-51 (1986); see also *Winstar*, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).

166. *Winstar*, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting) (quoting *Bowen*, 477

In *Cherokee Nation*, the Court applied the unmistakability doctrine to a treaty between the United States and an Indian tribe.¹⁶⁷ 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.¹⁶⁸

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."¹⁶⁹ 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,¹⁷⁰ but not to cases in which a party seeks only damages.¹⁷¹ 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,¹⁷² and only then can a court determine whether the damages would have the effect of an injunction or an exemption.¹⁷³ 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."¹⁷⁴

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."¹⁷⁵ According to Rehnquist, the plu-

U.S. at 52 (quoting *Merrion*, 455 U.S. at 147)).

167. See *Cherokee Nation*, 480 U.S. 700, 701, 705-07 (1989); see also *Winstar*, 116 S. Ct. at 2479-80 (Rehnquist, C.J., dissenting).

168. See *Cherokee Nation*, 480 U.S. at 707; see also *Winstar*, 116 S. Ct. at 2480 (Rehnquist, C.J., dissenting).

169. *Winstar*, 116 S. Ct. at 2840 (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).

179. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in part at 12 U.S.C. § 1464 (1994)).

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.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.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.¹⁸⁴ The special case-management procedures allow for the efficient and expedient resolution of certain issues common to many or all of the thrifts.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.¹⁸⁶ Glendale Federal's trial was expected to last only a few weeks, however, the trial proceeded longer because Glendale

182. See, e.g., Jaret Seiberg, *Top Court: U.S. Must Pay for Accounting-Policy Shift; Over 100 Thrifts May Be Awarded Damages*, AM. BANKER, July 2, 1996, at 1, available in 1996 WL 5565638 (stating that Glendale Federal's stock increased \$1.50 to \$19.625 after the *Winstar* decision was announced).

183. See *Winstar*, 116 S. Ct. at 2472.

184. See *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 177 (1997).

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.

186. See Jaret Seiberg, *Capital Briefs: Glendale Federal Goes to Court in Goodwill Case*, AM. BANKER, Feb. 25, 1997, at 2, available in 1997 WL 4747881; see also Jaret Seiberg, *Glendfed Seeking up to \$1.86B From U.S. in Goodwill Suit*, AM. BANKER, Nov. 13, 1996, at 2, available in 1996 WL 14013540.

Federal presented evidence in meticulous detail.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

Operating S&Ls that benefit from *Winstar* precedent are expected to use the funds awarded as damages for future mergers and acquisitions.¹⁹⁰ The pending resolution of the *Winstar*-related cases delayed many mergers and acquisitions in the S&L industry.¹⁹¹ 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.¹⁹² Determining a takeover price is further complicated because the *Winstar* decision inflated target thrifts' stock prices.¹⁹³

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.¹⁹⁴ In 1995, before the *Winstar* decision, Glendale Federal posted a loss of \$10.7 million in the second quarter.¹⁹⁵

Glendale Federal is working hard to remain competitive in the banking industry.¹⁹⁶ Since the *Winstar* decision, Glendale Federal has launched

187. Jaret Seiberg, *Docket: Goodwill Case is Trial of Everybody's Patience*, AM. BANKER, June 11, 1997, at 3, available in 1997 WL 4751205.

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).

191. *See Snigdha Prakash, Goodwill Suits Seen Hampering Calif. Thrift Buyouts*, AM. BANKER, Feb. 10, 1997, at 13, available in 1997 WL 4747458.

192. *See id.*

193. *See id.*; Bill Richards, *Glendale Federal and Golden West Post Strong Profits*, WALL ST. J., Jan. 24, 1997, available in 1997 WL-WSJ 2406938.

194. *See id.*

195. *See id.*

196. For instance, Glendale Federal plans to open 42 new branches in California before 1999 in order to capitalize on branch closings throughout California following the onslaught of recent thrift and bank mergers. *See 16 New Glendale Branches by Mid-July*, AM. BANKER, Feb. 25, 1997, at 6, available in 1997 WL 4747874. Also, Glendale Federal announced it would be the first California bank to offer medical savings accounts which "enable customers to set aside funds earmarked for health expenses." *See GlenFed to Offer Medical Savings Accounts*, L.A. TIMES, Feb. 14, 1997, at D2.

aggressive advertisements targeting its rivals' customers¹⁹⁷ and has become active in the mergers and acquisitions arena.¹⁹⁸ 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.¹⁹⁹ However, any merger involving Glendale Federal will have to await the resolution of the damages phase of the *Winstar* case.²⁰⁰

The *Winstar* decision is likely to have a tremendous res judicata effect.²⁰¹ Over one hundred similarly situated thrifts will be lining up to sue the government for breach of contract, wielding the newly sharpened

197. Foremost among Glendale Federal's targets are Wells Fargo Bank and BankAmerica Corp. See Christopher Rhoads, *Wells Says It's Offsetting Flight of 1st Interstate Customers*, AM. BANKER, Oct. 24, 1996, at 5, available in 1996 WL 5568883; see also *Glendale Federal Bank Purchase Pact is Reached With TransWorld Bancorp*, WALL ST. J., Nov. 5, 1996, at B4 [hereinafter *Purchase Pact*]. Glendale Federal's strategy is paying off with a twofold increase in its checking deposits from 1996 to 1997. See Jim Carlton, *Wells Fargo Shares Tumble on News It Will Post Lower-Than-Expected Net*, WALL ST. J., July 10, 1997, at A3. Glendale Federal attributes a large number of its new accounts to "former First Interstate customers unhappy at seeing their neighborhood branches closed" after Wells Fargo's acquisition of First Interstate. See *id.*

198. In November 1996, Glendale Federal acquired TransWorld Bancorp for nearly \$63 million in cash. See *Purchase Pact*, *supra* note 197, at B4; see also *Summary of U.S. Public Merger Activity Greater Than \$25M—Finance, Insurance, Real Estate: TransWorld Banc, MERGERS & RESTRUCTURING*, Nov. 22, 1996, at 7, 7, available in 1996 WL 12775569. In July 1997, Glendale Federal formed a holding company named Golden State Bancorp Inc. to facilitate stock buybacks and future acquisitions. See *GlenFed Plans to Form Thrift Holding Company*, L.A. TIMES, May 31, 1997, at D2; *Glendale Federal Bank Shareholders Approve Formation of Holding Company* (July 23, 1997) <http://biz.yahoo.com/prnews/97/07/23/gln_gsb_y_1.html> (cite no longer in service). By mid-August 1997, Golden State Bancorp agreed to acquire CenFed Bank in a \$210 million stock swap. See Don Lee, *Golden State to Buy CenFed for \$210 Million*, L.A. TIMES, Aug. 19, 1997, at D2.

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.²⁰² 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.²⁰³ 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.²⁰⁴ 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 thrifts, 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 "[each 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.*

204. *See, e.g.*, Brief Amicus Curiae of Western Federal Savings and Loan Association and Westfed Holdings, Inc. in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), *available in* 1996 WL 144106 (thrift that entered merger agreement with the federal government pre-FIRREA, became insolvent post-FIRREA, and was subsequently seized); Brief Amici Curiae of AmBase Corporation and Carteret Bancorp, Inc. in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), *available in* 1996 WL 139764 (banking institutions that suffered financial losses due to FIRREA's effect on government contracts); Brief of Franklin Financial Group, Inc.; Franklin Federal Savings Bank; First American Corporation; C. Robert Suess, Leo C. Sherry, Jr., Richard A. Green, Irving Roberts and Foster, Paulsell & Baker, Inc.; Landmark Land Company, Inc.; Charter One Bank, F.S.B.; Commercial Federal Corporation and Commercial Federal Bank, F.S.B.; Citizens Federal Bank, F.S.B.; and Perpetual Financial Corporation as Amici Curiae in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), *available in* 1996 WL 143635 (ten thrifts and banking institutions that acquired ailing thrifts under government contracts during the S&L bailout); Brief of Amici Curiae Trinity Ventures, Ltd. and Castle Harlan, Inc. in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), *available in* 1996 WL 143638 (thrifts that recapitalized two insolvent thrifts in exchange for the government's promise to count the insolvent thrifts' supervisory goodwill toward the acquiring thrift's capital requirements "notwithstanding any subsequent changes" in how capital requirements are defined).

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*, 787 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.

207. See generally Brief Amicus Curiae of Keystone Holdings, Inc., and American Savings Bank, F.A. in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996) (No. 95-865), available in 1996 WL 144110.

208. See *id.*

209. See generally Brief of Coast Federal Bank, FSB, Union Federal Savings Bank of Indianapolis, Union Holding Company, Inc., Meadows Resources, Inc. and Republic Holding Company, as Amici Curiae in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996) (No. 95-865), available in 1996 WL 139763 (proposing that the government is not immune from damages caused when promises are breached regarding regulatory capital credits).

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 brief²¹³ will derive little benefit from the *Winstar* decision. Similarly, the academic institutions, scientists, environmental and health care organizations, and social services represented by amici curiae²¹⁴ 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.

210. See Richard C. Reuben, *S&L Seek U.S. 'Deposits': Thrifts and Investors Allege in Pending Lawsuits That Broken Federal Promises Entitle Them to Damages*, 83 A.B.A. J. 38, 38 (January 1997). Approximately one half of the thrifts with litigation pending are no longer in operation. See Patricia Lamiell, *High Court Sides With Thrifts in Lawsuit; Says Rule Change Damaged Industry*, ARIZ. REPUBLIC, July 2, 1996, at E1, available in 1996 WL 7718581.

211. See Marianne Lavelle, *Federal Contractors Hail High Court's S&L Ruling*, NAT'L L.J., July 15, 1996, at B1.

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.

213. See generally Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996) (No. 95-865), available in 1996 WL 144124 (challenging the government's ability to abrogate a valid contract following a unilateral act of Congress).

214. See generally Brief of the American Association of State Colleges and Universities, American Council on Education, the California Association of Health Facilities, Envirotec Systems Corp., the Federation of American Societies for Experimental Biology, and the National Association of State Universities and Land-Grant Colleges as Amici Curiae in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996) (No. 95-865), available in 1996 WL 144140 (noting how important it is for these organization to rely upon government contracts); Brief of Amici Curiae Watts Health Foundation, Inc. and Beyond Shelter, Inc. in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), available in 1996 WL 139765 (focusing on contracts between non-profit organizations and the government).

Winstar's broadest and most far-reaching impact will arguably be on ad-hoc contracts drafted for special circumstances.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.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*,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.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.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."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."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.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.²²³ The court gave special attention to the provision in the con-

215. See Lavelle, *supra* note 211, at B1.

216. See *id.*

217. 998 F.2d 953 (Fed. Cir. 1993).

218. See *id.* at 955.

219. See *id.*

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.*

221. *Id.* at 957.

222. See *id.* at 956.

223. See *id.* at 959; see also *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2469-

tract that stated that the parties entered into the contract subject to the space program policies as of August 6, 1982.²²⁴ It made no difference to the court that the changes resulted from the government's sovereign acts.²²⁵ As in *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.²²⁶

Additionally, *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).²²⁷ As a result of the Tongass Act, Alaska Pulp Corp. (APC) filed a \$1.6 billion suit against the government based on *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.²²⁸ Ketchikan Pulp Corp. (KPC) also filed suit for breach of its logging contracts with the government.²²⁹ KPC seeks damages for annual losses allegedly caused by the passage of the Tongass Act.²³⁰ As in *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.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 *Winstar*.²³² For example, both the timber industry and the thrift industry are highly regulated by the government.²³³ The government created the thrift industry to facilitate the purchase of affordable housing.²³⁴ Similarly, the

70 (1996); *supra* notes 130-34 and accompanying text (discussing the government's assumption of the risk of regulatory change in the *Winstar* contracts).

224. *See Hughes*, 998 F.2d at 959.

225. *See id.*

226. *See id.*; *see also Winstar*, 116 S. Ct. at 2458.

227. *See Margaret Kriz, Forest Fight*, NAT'L J., Sept. 21, 1996, at 1998, 2000, *available in* 1996 WL 10107652.

228. *See id.*

229. *See id.*

230. *See id.* KPC expects to lose \$40 million in 1996. *See id.*

231. *See H.R. REP. NO. 101-84*, at 24 (1989).

232. *See Tongass National Forest Management: Hearing on H.R. 3659 Before a Joint Hearing of the House Comm. on Agriculture and Comm. of Resources*, 104th Cong., 2d Sess. (1996) (testimony of Scott W. Horngren, attorney for the Northwest Forest Resource Council). The Northwest Forest Resource Council is "a coalition of timber trade associations comprised of over 90% of federal timber purchasers in the Pacific Northwest." *Id.*

233. *See id.*

234. *See 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.*

237. *See* S. 1877, 104th Cong., 2d Sess. (1996). Representative Young from Alaska introduced an identical bill in the House of Representatives. *See* H.R. 3659, 104th Cong., 2d Sess. (1996).

238. *See Hearing on S. 1877, The Environmental Improvement Timber Contract Extension Act of 1996*, 104th Cong., 2d Sess. (1996) (opening statement of Senator Murkowski).

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).

240. Senator Johnston cited *Winstar* during a debate over an Amendment to the Nuclear Waste Policy Act of 1996 that would affect contracts with commercial nuclear power companies. *See* 142 CONG. REC. S9216-02 (daily ed. July 31, 1996).

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).

242. *See* Anthony L. Velocci, Jr., *U.S. Industry in Vigorous Fight Against Proposed Policy Reversal*, AVIATION WK. & SPACE TECH., July 22, 1996, at 30, 30-31, available in 1996 WL 10848231; *see also* Brief for Aerospace Industries Association of America,

may not be the panacea for every legally contracted disease,²⁴³ 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.

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Inc., Electronic Industries Association, National Security Industrial Association, and Shipbuilders Council of America as Amici Curiae in Support of Respondents, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), available in 1996 WL 144129. Amici have entered thousands of contracts with the government, primarily related to military and defense. *See id.* These contracts in the aggregate are worth billions of dollars. *See id.*

243. *See, e.g.,* *Lurline Gardens Ltd. Hous. Partnership v. United States*, 37 Fed. Cl. 415, available in 1997 WL 94675 at *6 n.10 (refusing to apply *Winstar* to contracts between a housing developer and the Federal Housing Administration because the contracts did not incorporate regulations in effect at the time the contracts were formed).