THE STATUS OF THE SOVEREIGN ACTS AND UNMISTAKABILITY DOCTRINES IN THE WAKE OF *WINSTAR*: AN INTERIM REPORT

Joshua I. Schwartz[*]

I. INTRODUCTORY COMMENTS

In response to an invitation to speak at the Court of Federal Claims symposium on retroactive legislation, I agreed to discuss the status of the sovereign acts and unmistakability doctrine defenses in the wake of the Supreme Court's *Winstar*[1] decision. One objective of my presentation is to focus on the significant unresolved and ambiguous points that flow from the decision of the splintered majority in the Supreme Court in *Winstar*. A second objective is to examine the emerging case law of the Court of Federal Claims, that of the Federal Circuit—which has just begun to see significant involvement with these issues in the year preceding this conference—and that of the other federal courts that have addressed post-*Winstar* issues, in order to see how the rest of the federal judiciary has responded to the challenges presented to it by the Supreme Court's decision in *Winstar*. A third focus, which has emerged from the juxtaposition of the first two, is to comment on the institutional issues concerning law-making that are suggested by the interaction between the Supreme Court's *Winstar* decision and the work of the courts that need to implement that decision. Finally, this article will comment on the broader theme of permissible and

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* Professor of Law and Co-Director, Government Procurement Law L.L.M. Program, George Washington University. B.A., 1973, Harvard College; J.D., 1976, Cornell University Law School. I would like to thank Dean Michael Young of the George Washington University Law School for the summer research stipend in support of the research and writing that led to this Article and Judge Eric Bruggink and the United States Court of Federal Claims for the invitation to participate in the 1999 Spring Symposium at which this Article was presented.

1. United States v. Winstar Corp., 518 U.S. 839 (1996).

impermissible retroactivity in law-making respecting government contracts—the broader theme of the symposium of which this Article formed a part.

My basic point with respect to retroactivity is that the sovereign acts and unmistakability doctrines are at best at once removed from addressing the issue of permissibility of retroactive legislation directly. Rather, they should be understood as rules of clear statement or canons of avoidance that enable courts to sidestep the issue of permissible and impermissible retroactivity. They do so by mandating that courts be skeptical as to whether the United States has indeed undertaken by contract to immunize its contracting partners from subsequent exercises of government legislative or regulatory authority. In the face of the normative arguments against retroactive law-making, the adoption of these rules of clear statement with respect to federal government contracts suggests that there are some strong countervailing fundamental values that are being protected by these rules. Indeed there are. These include fundamental values of legislative supremacy, democratic accountability, conservation of the fisc, and respect for the textual constitutional commitment to these principles that is enshrined in the Constitution's Appropriations Clause.[2]

The decision in *Winstar* reflects some degree of restriction in the application of these rules of clear statement. But examination of the post-*Winstar* case law surveyed below will make clear that, aside from the numerous claims arising from the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"),[3] the statute that spawned the claims in *Winstar* itself, that case has not brought about any dramatic change in the law governing claims of retroactive infringement of the federal government's contractual undertakings. Some may argue that *Winstar* itself effectuates a significant shift away from toleration of retroactive statutes in the specialized context of government contracts. But such suggestions are, in my view, unfounded. As explained below, they rest primarily upon uncritical readings of portions of Justice Souter's plurality opinion that

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2. U.S. CONST. art. 1, § 9, cl. 7.

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

rather clearly fail to command the support of a majority of the Court.

I have previously written on the subject of *Winstar*. Indeed, I wrote one major article on the eve of the Supreme Court's decision.[4] It is a matter of record that a majority of the Court did not reach the result that I had urged upon them. I then wrote a second substantial article trying to offer some guidance on the state of the law in the wake of the decision by a fragmented majority in *Winstar*.[5] Given the positions that I have taken publicly, I have decided that, in order to try to get as objective a look as possible at the impact of *Winstar* in the lower courts, I should survey every decision of the federal courts that references *Winstar* rendered since the date of the Supreme Court decision on July 1, 1996, up to the time of writing this Article. The results of this survey are presented in Part III of this Article. As the title of this Article indicates, this is an interim report, as the process of sorting out the state of the law in the wake of *Winstar* remains ongoing. As noted above, however, decisions reported to date do not suggest that *Winstar* has effected any radical change in the law respecting the liability of the United States for retroactive legislation affecting the government's contractual undertakings.

One indication that the survey technique that I have employed has been at least partly successful in eschewing confirmation of the author's preconceived notions is that, in surveying the case law, I have discovered both some things that I had expected and some that were rather unexpected. Given the sharply fragmented constellation of opinions in the Supreme Court in *Winstar*, one of the least surprising things that I encountered was the candid observation by Judge Horn of the Court of Federal Claims that "this court, and, undoubtedly, many others would welcome further clarification" of the status and scope of the unmistakability doctrine.[6] A good example of *unexpected* find-

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4. Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633 (1996) (hereinafter *Liability for Sovereign Acts*).

5. Joshua I. Schwartz, *Assembling* Winstar: *Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CON. L.J. 481 (1997) (hereinafter *Assembling* Winstar).

6. Adams v. United States, 42 Fed. Cl. 463, 482 (1998).

ings I have made is the manner in which *Winstar* has been cited in a series of decisions on Contract Clause claims brought against state entities. Actually, the potential influence of *Winstar* on Contracts Clause jurisprudence is something that I had anticipated.[7] What I certainly had not expected is that every one of these decisions cites *Winstar* as authority for a basic statement of the unmistakability doctrine.[8] In doing so, they rely on that doctrine as a basis for refusing to conclude that a state governmental entity had made a contractual undertaking that would inhibit its ability subsequently to alter the terms of its dealings with private parties.[9] None of these cases gives the slightest hint that *Winstar* might have imposed any restrictions on the scope of the unmistakability doctrine or altered its application so as to make it less favorable to governmental entities or inhibited retroactive legislation.

More central to the federal law concerns about retroactivity, but again unanticipated, was the continuing readiness of the federal courts, at least in cases outside the savings and loan context, to treat the sovereign acts and unmistakability defenses as retaining considerable vitality with respect to the liabilities of the United States. These defenses have continued to be invoked successfully in a wide variety of situations, and they continue to lead the federal courts to be reluctant to find that the United States has made a contractual undertaking that would inhibit its ability subsequently to alter the terms of its regulation of and dealings with private parties.[10] Indeed, what is most striking is how rare it is that *Winstar* has been invoked successfully-outside the savings and loan claims context-to support rejection of government defenses based on its exceptional status as sovereign to breach of contract claims brought against the United States.[11]

The *only* area where a clear and dramatic impact from *Winstar* can be discerned is in the continuing litigation of the savings and loan claims that arose from the enactment of

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7. Schwartz, *Assembling* Winstar, *supra* note 5, at 507 & nn.116, 513.

8. *See, e.g.*, Parker v. Wakelin, 123 F.3d 1 (1st Cir. 1997); McGrath v. Rhode Island Retirement Bd., 88 F.3d 12, 19 (1st Cir. 1996).

9. *See infra* text accompanying notes 202-19.

10. *See infra* text accompanying notes 75-173.

11. *See infra* text accompanying notes 174-82.

FIRREA.[12] As explained below, in that setting, the Court of Federal Claims has, I think understandably, adopted a position that the basic questions of liability were settled by the Supreme Court in *Winstar* and that what remains to be done primarily is to calculate damages and secondarily to address some collateral issues as to which parties are entitled to receive them.[13] Accordingly, in the savings and loan claims cases, the Court is not engaged in exploring or clarifying the significant ambiguities in the *Winstar* opinion's articulation of the law. Although the Court's recourse to this approach is understandable given the daunting caseload management challenges presented by the FIRREA claims, I believe that it is likely, ultimately, to be less than fully successful because *Winstar* simply did not provide any clearly articulated or unified set of principles that enable the courts efficiently to gauge when the facts of a given savings and loan claim are *materially* different from those that support the *Winstar* judgment. The needed clarification of the state of the law in the wake of *Winstar* is likely, however, to emerge instead from the *non*-FIRREA claims in which *Winstar* issues have been raised in the Court of Federal Claims and the Federal Circuit.

Indeed, outside of the savings and loan claims context, the Court of Federal Claims and the Federal Circuit have begun to grapple with the difficult task of piecing together a coherent and unified statement of the law governing the government's sovereign acts and unmistakability defenses to breach of contract liability. In that context, the emerging case law shows a substantial appreciation for the nuances of these two doctrines and for the difficulty of combining the rationales of the disparate opinions that together make up the majority supporting the *Winstar* judgment. These very real difficulties have sometimes led to a division among the judges of the Court of Federal Claims and have divided panels of the Court of Appeals for the Federal Circuit.[14] For instance, this has occurred in the cases arising out of the Emergency Low Income Housing Preservation Act of 1987[15] and the Low Income Housing Preservation and

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12. *See supra* note 5.
13. *See infra* Part III(A).
14. *See* Cienaga Gardens v. United States, 162 F.3d 1123 (Fed. Cir. 1998), *rev'g* 33 Fed. Cl. 196 (1995) & 37 Fed. Cl. 79 (1996).
15. Pub. L. No. 100-242, 101 Stat. 1877 (1987).

Resident Homeownership Act of 1990.[16] These statutes had the effect of preventing developers participating in federally subsidized mortgage programs designed to produce below-market rate housing from taking advantage of the prepayment terms of their mortgages. These issues also divided the Federal Circuit in *Yankee Atomic Electric Co. v. United States,*[17] addressing Congress' imposition on former government contractors of assessments to help create the Uranium Enrichment Decontamination and Decommissioning Fund.[18] But divisions like this are extremely healthy, for they lead to a fuller airing of the issues. Given the difficulties left by *Winstar*, such full airing is particularly important because the Court of Federal Claims, together with the Federal Circuit, will bear the primary responsibility for developing a workable synthesis of the ideas expressed in the different opinions in *Winstar* and for developing that synthesis in the light of experience with cases presenting divergent fact patterns. This will occur, if for no other reason, because of the Supreme Court's evident antipathy to immersing itself in the details of the problems presented by these cases that was evident in *Winstar* itself.[19]

In fact, I think it correct to say, with a law professor's customary 20-20 hindsight, that the grant of certiorari in *Winstar* was by normal standards premature and undesirable for the development of the law respecting the government's sovereign defenses. It was premature and undesirable because the issues had not been "marinated" through a process of serial consideration in multiple courts.[20] Despite the conflict between a panel of the Federal Circuit and the en banc Court in *Winstar*, the arguments and the issues had scarcely been exhaustively can-

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16. Pub. L. No. 101-625, 104 Stat. 4249 (1990). Cases arising under these statutes are discussed *infra* notes 115-60 and accompanying text.

17. 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998). *Yankee Atomic* is discussed *infra* notes 83-116 and accompanying text.

18. 42 U.S.C. § 2297 (1994).

19. *See* Schwartz, *Assembling* Winstar, *supra* note 5, at 492-93 & nn.47-49.

20. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1109 (1987) (describing the benefit that the Supreme Court receives from this process); Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1124-28 (1988) (same); *see also* United States v. Mendoza, 464 U.S. 154, 160, 163 (1984) (same).

vassed in the manner that they optimally are when the Supreme Court grants certiorari to resolve a conflict among the circuits. Of course, because of the specialized jurisdiction assigned to the Court of Federal Claims and the Federal Circuit, this kind of serial consideration in multiple circuits simply *could not have been* achieved in the savings and loan cases. Given that fact, the Supreme Court was not likely to deny the Solicitor General's certiori petition in *Winstar* when he asserted that tens of billions of dollars were potentially at stake and had arguments on the merits that were better than frivolous, as I believe he did. Nonetheless, the distinctly unfinished quality of much of the reasoning in all of the opinions in *Winstar* suggests the need for further consideration of the fundamental underlying policy issues in a series of cases presenting claims that differ from the savings and loan cases.[21] The good news, such as it is, is that the division of the Supreme Court in *Winstar* may now make it possible for the Court of Federal Claims and the Federal Circuit to do the work that had not been completed prior to *Winstar*. As every trial court judge would presumably agree, in most contexts the devil is in the details, and I argue that that is true in the present context as well. Thus, the opportunity to make a sensible and coherent whole out of the unruly strands of law left to us by the nine Justices in *Winstar* really is for the Court of Federal Claims and the Federal Circuit. It is these courts, which have had and will continue to have the opportunity to see a sufficient number of cases presenting the issues raised by the assertion of the government's sovereignty-related defenses and to see them in sufficiently close focus, that may be able to make the best synthesis of the strands of law that are available for weaving. Thus, I am pleased to witness the ongoing process of clarification of the principles underlying *Winstar* that is occurring in these courts in their handling of non-FIRREA claims. This process, inevitably, will ultimately require supplementation of this interim report.

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21. Schwartz, *Assembling* Winstar, *supra* note 5, at 497 & n.74.

II. THE FRAGMENTED MAJORITY IN *WINSTAR*

Although the judgment of the Supreme Court in *Winstar* was supported by a seven Justice majority, there was not a majority opinion, and the Court was thoroughly fragmented in articulating an analysis to support that judgment.[22] Indeed, the degree of fragmentation is such that it is more difficult to articulate the state of the law with respect to the issues in *Winstar* than it is with respect to retrospective impositions of monetary liability after *Eastern Enterprises v. Apfel.*[23] For those seeking a short-cut through the arguments that follow, it may be enough to persuade you that strange things are afoot here by simply pointing out the identity of the two dissenters who joined together in *Winstar:* Chief Justice Rehnquist and Justice Ginsburg. Another ready way of demonstrating that peculiar alignments were generated by *Winstar* is to observe that the most extreme positions articulated in support of the judgment in *Winstar* are those embodied in the opinion of Justice Souter, joined by Justices Stevens and Breyer and, in part, by Justice O'Connor, and in the separate concurring opinion of Justice Breyer. The more moderate position, with a closer affinity to the dissent, is embodied in the opinion of Justice Scalia, joined by Justices Thomas and Kennedy. A third anomaly in this case is that neither Justice O'Connor (who supported the judgment), nor Justice Ginsburg (who dissented) joined in any opinion addressing some of the key issues as to the application of the government's sovereign acts doctrine defense. A closer look at the details of the way the Court divided on various issues will reinforce this picture of severe division and considerable uncertainty.

The issue in *Winstar* was whether the United States' sovereign status affords it a valid defense, either under the sovereign acts doctrine or the unmistakability doctrine, to a claim for breach of contract arising out of the enactment of a statute by Congress.[24] That statute, known as FIRREA imposed new,

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22. Justice Souter announced the judgment; Justice Breyer concurred and filed a separate opinion; Justice Scalia concurred in the judgment and filed a separate opinion in which Justices Kennedy and Thomas joined. Chief Justice Rehnquist dissented and filed a separate opinion in which Justice Ginsburg joined in part.

23. 524 U.S. 498 (1998).

24. United States v. Winstar, 518 U.S. 839, 843 (1996).

more stringent regulatory requirements on federally insured savings and loans.[25] FIRREA made no exceptions to these regulatory requirements for a class of savings and loans that had undergone so-called supervisory mergers: transactions encouraged by federal regulators in which solvent thrifts took over insolvent thrifts in part because of promises of favorable regulatory accounting treatment made by thrift regulators.[26] Plaintiffs claimed that these promises amounted to contracts and that those contracts were breached by the enactment of FIRREA. The Supreme Court agreed in its 1996 *Winstar* decision, rejecting the government's invocation of the sovereign acts doctrine and unmistakability doctrine defenses.[27]

Justice Souter wrote the lead opinion for a plurality comprising four Justices with respect to some issues and only three with respect to others.[28] The first key to Justice Souter's plurality opinion was the reconceptualization of a governmental undertaking that was found literally to promise a particular favorable course of regulatory treatment to savings and loans that emerged from supervisory mergers.[29] This undertaking was instead construed as a promise simply to pay damages in the event that these regulatory requirements were altered by subsequent legislation.[30] Because it promises indemnification rather than directly preventing the exercise of governmental authority, such a promise lies outside the scope of the unmistakability doctrine, according to Justice Souter, unless indemnification would be tantamount in practical effect to an exemption from the subsequently enacted legislation.[31] The unmistakability doctrine, Justice Souter correctly notes, was adapted for federal breach of contract claims from its original doctrinal setting: Contract Clause claims against state and local government entities.[32] If authoritative, his narrow reading of

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25. *See generally* Schwartz, *Assembling* Winstar, *supra* note 5.

26. *Winstar*, 518 U.S. at 844-49.

27. *Id.* at 888, 891.

28. Justices Souter, Stevens, O'Connor and Breyer comprised the plurality. Justice O'Connor joined all of the plurality opinion except Parts IV-(A) and IV-(B).

29. *Winstar*, 518 U.S. at 848-57 (Part I-(B)).

30. *Id.* at 868 (Opinion of Souter, J.); Schwartz, *Assembling* Winstar, *supra* note 5, at 494-95.

31. *Winstar*, 518 U.S. at 879-82 (Opinion of Souter, J.); Schwartz, *Assembling Winstar*, *supra* note 5, at 502-07.

32. *Winstar*, 518 U.S. at 870-74 (Opinion of Souter, J.); Schwartz, *Assembling*

the scope of that doctrine would have the important incidental effect of substantially increasing state exposure to liability for retroactive legislation affecting governmental contracts.[33]

In trying to meld Justice Souter's analysis with that offered in Justice Scalia's opinion concurring in the judgment (joined by Justices Kennedy and Thomas), the courts face considerable difficulty, however. By his own account, Justice Scalia's reasoning is "quite different from the principal opinion's."[34] But this turns out to be an understatement, rather than an exaggeration uttered in the pursuit of doctrinal or theoretical purity or rigor. Justice Scalia's concurring opinion rejects as both inconsistent with precedent and otherwise unsound Justice Souter's recharacterization of the nature of the government's contractual undertaking.[35] The two dissenters make the same point, creating a plausible basis for arguing that the precedential effect of *Winstar* is to reject, rather than to accept, Justice Souter's cramped reading of the unmistakability doctrine.[36] Instead of concluding that the unmistakability doctrine was not applicable to the dealings of the parties in *Winstar*, Justice Scalia concludes that in contracting, "the sovereign does *not* ordinarily promise that none of its multifarious sovereign acts, needful for the public good will, will incidentally disable it or the other party from performing one of the promised acts."[37] He thus endorses a rule of interpretation that he recognizes to be a "reversal of the normal reasonable presumption" about contracting parties.[38]

Justice Scalia nevertheless concludes that the government's undertaking to regulate the *Winstar* plaintiffs in a particular manner possessed sufficient clarity to overcome the unmistakability presumption.[39] Here, another significant differ-

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Winstar, *supra* note 5, at 497-99.

33. *See supra* note 5 and *supra* text accompanying notes 202-19.

34. *Winstar*, 518 U.S. at 919 (Scalia, J., concurring in the judgment).

35. *Id.* at 919-22 (Scalia, J., concurring in the judgment); Schwartz, *Assembling* Winstar, *supra* note 5, at 538-39

36. *Winstar*, 518 U.S. at 924-32 (Rehnquist, J., dissenting); Schwartz, *Assembling* Winstar, *supra* note 5, at 553.

37. *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in the judgment); Schwartz, *Assembling* Winstar, *supra* note 5, at 539-40.

38. *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in the judgment).

39. *Id.* at 920-24 (Scalia, J. concurring in the judgment).

ence crops up between the plurality and Justice Scalia. For while the plurality intimates that, where applicable, the unmistakability doctrine could be overborne only by a quite compelling showing such as a "second promise" not to alter a promised course of regulatory treatment, Justice Scalia expressly rejects that interpretation.[40] The dissenters take yet a different view, in this respect closer to that of the plurality, for they would require the kind of clear showing of waiver of sovereign authority that would be established by the "second promise" requirement but would apply it across the full range of contract types.[41] Given these shifting alignments, it becomes particularly hazardous to predict what formulation of the unmistakability doctrine would command majority support in this situation. Indeed, the views of the plurality and the concurring Justices, respectively, as to the *strength* of the unmistakability doctrine are correlated (albeit inversely) with their respective views as to the *breadth* of the doctrine's application. For instance, it would almost certainly be wrong to conclude that a majority of the Court would apply the doctrine to all contract types, rather than excluding contracts that can be reconstructed as providing for indemnification, and then go on to apply the "second promise" requirement willy-nilly to all such contracts. This is so, even though separate majorities on the Court appear to endorse each of these constituent positions when viewed in isolation.

There is yet another dimension to the problem of piecing together a consensus view as to the applicability of the unmistakability doctrine. Before ultimately falling back upon the conclusion that the unmistakability doctrine generally does not apply to a government contractual promise that can be reasonably construed to provide for damages in the event that subsequent exercise of sovereign power makes its literal performance illegal, Justice Souter explored a different typology of contract types in search of a key to the proper application of the

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40. *Compare Winstar*, 518 U.S. at 887 (Opinion of Souter, J.) (referring to the need for "an unmistakably clear 'second promise'"), *with id.* at 921 (Scalia, J., concurring in the judgment) (rejecting the need for "a *further* promise not to go back on the promise to accord favorable regulatory treatment").

41. *Id.* at 934-36 (Rehnquist, C.J., dissenting); Schwartz, *Assembling* Winstar, *supra* note 5, at 550 & n.318.

unmistakability doctrine. This portion of the plurality opinion is particularly opaque and literally comes to no concrete conclusion because the plurality ultimately veers off, seizing upon the reinterpretation of the *Winstar* contracts as providing for damages rather than a promise of static regulatory treatment in the face of general changes in the regulatory environment. In this inconclusive discussion, however, Justice Souter appears to have posited that some contracts, such as those that expressly promise a particular course of regulatory treatment, lie within the core of the unmistakability doctrine.[42] Other contracts, such as those entailing routine exercises of the government's procurement authority, he suggests, lie entirely outside the reach of that doctrine.[43] Finally, between these two extremes is a substantial gray area. Here, however, Justice Souter ultimately avoids application of the unmistakability doctrine by recharacterizing the contracts as simply providing for damages in the event performance is barred by changes in the law.[44] Under the typology thus sketched by Justice Souter, the unmistakability doctrine is most strongly applicable to contractual promises that explicitly concern regulatory treatment. Justice Souter suggests that a special requirement of a clear statement should be applied, since the contractual undertaking facially detracts from sovereign authority. This explains Justice Souter's apparent support, at least in some circumstances, for a selective version of a "second promise" requirement—a rule of interpretation under which the government is contractually bound not to alter the promised regulatory treatment only if it has explicitly warranted the availability of that treatment in the face of changes in the regulatory environment to which others similarly situated are exposed.[45]

Justice Scalia's point of view seems to be just the opposite,

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42. *Winstar*, 518 U.S. at 879-80 (Opinion of Souter, J.); *see* Schwartz *Assembling* Winstar, *supra* note 5, at 503-05.

43. *Winstar*, 518 U.S. at 879-80 (Opinion of Souter, J.). In *Assembling* Winstar, *supra* note 5, at 505-06, I offer examples to show that it is entirely possible for the performance of routine procurement contracts to be obstructed by intervening generic legislation even though the performance of such a contract may not on its face concern the exercise of regulatory authority.

44. *Winstar*, 518 U.S. at 879-82 (Opinion of Souter, J.); *see* Schwartz, *Assembling* Winstar, *supra* note 5, at 506.

45. *See supra* note 40 & *infra* note 115.

however. Precisely because he discerned in *Winstar* tolerably clear contractual undertakings whose, explicit content was the regulatory treatment that the government's contracting partners were to provide, Justice Scalia both held the government liable for their breach and expressly rejected the "second promise" requirement for which the government argued.[46] Thus, assuming that recharacterization of the government's undertaking as one for indemnification is not permissible, the unmistakability doctrine may be strongest under the plurality's approach in just the circumstances where it is weakest for the concurring Justices. As I have suggested elsewhere, none of this necessarily renders the search for consensus fruitless, but it does render it substantially more difficult.[47] This is not a matter of simply finding a midpoint between divergent viewpoints.

When we turn to the sovereign acts doctrine, the search for consensus becomes even more discouraging. Most problematically, except for some cryptic intimations in a stray footnote, Justice Souter's plurality opinion ignores entirely the central problem of delineating the relationship between the unmistakability and sovereign acts doctrines, stating that it was unnecessary to address this issue.[48] This is nothing less than highly irresponsible. It is, moreover, particularly disappointing because Justice Souter's exploration of the unmistakability doctrine starts off with a strong foundation in its historical evolution—as a protection for state sovereignty needed to temper the application of the Contracts Clause to states' impairments of their own contracts. But Justice Souter's historical vision is selective, and no similar historical frame of reference is provided for the sovereign acts doctrine, which in fact fulfilled the same functions for the federal government as the unmistakability doctrine did for state governments as soon as the United States waived sovereign immunity on breach of contract claims under the earliest predecessors to the Tucker Act.[49] Justice Souter

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46. *Winstar*, 518 U.S. at 920-21 (Scalia, J., concurring in the judgment) ("I do not accept that unmistakability demands that there be a *further* promise not to go back on the promise to accord favorable regulatory treatment.").

47. Schwartz, *Assembling* Winstar, *supra* note 5, at 552-65.

48. *Winstar*, 518 U.S. at 887 n.32. *But see id.* at 878-79 n.22 (arguably suggesting a relationship); *see* Schwartz, *Assembling* Winstar, *supra* note 5, at 501 & n.97 (exploring the implications of Justice Souter's footnote 22).

49. 28 U.S.C. § 1491 (1994). *See* Schwartz, *Liability for Sovereign Acts*, *supra*

overlooks the fact that the sovereign acts doctrine has been, in the jurisprudence of the Court of Federal Claims and its predecessors, the primary doctrine governing the United States' immunity from liability for breach of contracts caused by governmental actions, while the cross-application of the unmistakability doctrine to claims against the United States is a quite recent development. In contrast to Justice Souter's studied refusal to address the relationship of these two defenses, Justice Scalia suggests that the sovereign acts doctrine covers largely the same ground as the unmistakability doctrine and has essentially the same effect.[50] While this is descriptively correct, Justice Scalia's analysis suffers from a different species of ahistoricity. He fails to recognize that the sovereign acts doctrine was invented as soon as the United States had consented to be sued for breach of contract in order to to prevent the exercise of sovereign authority from creating damages liability for the United States. It thus played essentially the same role for the federal government that the unmistakability doctrine played for the states once the Contract Clause was applied to states' impairments of their own contracts.[51] Finally, Justice Rehnquist's dissent squarely notes the functional near-identity of the sovereign acts and unmistakability doctrines.[52] But he, too, fails to build his analysis on the historical primacy of the sovereign acts doctrine with respect to federal claims.

It is difficult to avoid the conclusion that the comparatively heavy emphasis in all of these otherwise disparate *Winstar* opinions on the unmistakability doctrine (at the expense of the sovereign acts doctrine) is in large part a manifestation of the Supreme Court's egocentrism. Although the unmistakability doctrine had not been applied to claims against the federal government until relatively late in the twentieth century, its roots are in seminal decisions of the Supreme Court rendered under the Contract Clause, early in the nineteenth century. By contrast, the sovereign acts doctrine was created by the old Court of Claims in its inaugural term in 1865, and it had been adminis-

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note 4, at 651-52 & n.103; Schwartz, *Assembling* Winstar, *supra* note 5, at 558-59.

50. *Winstar*, 518 U.S. at 922-23 (Scalia, J., concurring in the judgment).

51. Schwartz, *Liability for Sovereign Acts*, *supra* note 4, at 650-52 & 660-64; Schwartz, *Assembling* Winstar, *supra* note 5, at 498-99 & 517, 559.

52. *Winstar*, 518 U.S. 934-36.

tered by that Court and its successors as the doctrine limiting federal liability for breach of contract where performance was made impossible by federal governmental action for a century and a third before *Winstar*.[53] Yet, prior to *Winstar*, the sovereign acts doctrine had only once been applied by the Supreme Court.[54] This unfortunate attitude is reflected in the short shrift Justice Scalia gives to the sovereign acts doctrine, treating it as a kind of weak doppelganger of the unmistakability principle.[55] This is particularly ironic because Justice Scalia ultimately reinvents for himself the core principles of the sovereign acts/unmistakability defenses.[56]

The lack of an easily-discerned consensus on the *Winstar* Court with regard to the operation of the sovereign acts doctrine itself is also painfully clear. The *Winstar* plurality opinion restricts the operation of the sovereign acts doctrine in several respects. Most saliently, the plurality adopted a strong reading of the previously stated requirement that governmental action impairing its own contractual obligations be excused only if that action is "public and general."[57] As articulated by Justice Souter, the "public and general" requirement of the sovereign acts doctrine is not met if the governmental action "has the substantial effect of releasing the Government from its own contractual obligations."[58] This appears to mean that the sovereign acts doctrine should not be applied if a significant portion of its impact is to free the government from its own contractual obligations. However, Justice Souter also employs other formulations that render his approach less certain. This additional language is directed at the common situation in which public contracts affected by governmental action have no clear analogues among private contracts.[59] In addition, the plurality reads preconditions into the sovereign acts doctrine that are traditionally associated with the common law impossibility doctrine applica-

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53. Schwartz, *Liability for Sovereign Acts*, *supra* note 4, at 636-39.

54. Horowitz v. United States, 267 U.S. 458 (1925).

55. *Winstar*, 518 U.S. at 922-23 (Scalia, J., concurring in the judgment).

56. Schwartz, *Assembling* Winstar, *supra* note 5, at 538-43.

57. *Winstar*, 518 U.S. at 891-92.

58. *Id.* at 899.

59. *Compare id.* (stating "substantial effect" test), *with id.* at 898 & n.42 (discussing the satisfaction of the "generality requirement" with respect to government contracts); *see also* Schwartz, *Assembling* Winstar, *supra* note 5, at 522-23.

ble to private contracts. These include: (1) a requirement that the possibility of regulatory interference by governmental action must not have been foreseeable by the contracting parties and (2) a caveat that the sovereign acts doctrine creates only a rebuttable presumption that the government is immunized from liability for breach of contract arising from public and general regulatory change.[60]

As previously noted, Justice Scalia gives scant attention to the sovereign acts doctrine and does not take an explicit stand on key issues such as the proper interpretation of the "public and general" requirement. Justice Rehnquist, in his dissent, would apply the sovereign acts defense whenever governmental action has a regulatory purpose and effect that transcends alteration of the government's own contractual obligations, even though a significant impact of that action was to relieve the government of contractual undertakings.[61] Discerning a center of gravity on the Court as to the application of the sovereign acts doctrine is an especially elusive task because Justice O'Connor declined to join the portion of the plurality opinion addressed to the "public and general issue," even though she did not write separately on this point.[62] Similarly, Justice Ginsburg, who dissented from the Court's judgment, nevertheless did not join the portion of Justice Rehnquist's dissent addressing the sovereign acts doctrine, and she joined no other opinion.[63] Thus the Court was divided essentially 3-1 on the interpretation of the critical requirement for application of the sovereign acts defense: the requirement that the government action preventing governmental performance be "public and general." A majority of the Court was silent.

It also bears remembering here that Justice Souter's ringing endorsement of the principle of congruence, the ideal that the federal government's rights and duties under its contracts

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60. *Winstar*, 518 U.S. at 903-09 (Opinion of Souter, J.); *see* Schwartz, *Assembling* Winstar, *supra* note 5, at 526-30.

61. *Winstar*, 518 U.S. at 903-07 (Rehnquist, C.J., dissenting); Schwartz, *Assembling* Winstar, *supra* note 5, at 548-49. Regarding "congruence" and the contrasting philosophy of exceptionalism" that has been applied to the interpretation of federal government contracts, see Schwartz, *Liability for Sovereign Acts*, *supra* note 4, at 637.

62. *See Winstar*, 518 U.S. at 885.

63. *See id.* at 946.

should follow those of parties to private contracts, is imbedded in his "public and general" discussion and accordingly did not receive an endorsement from the majority of the Court.[64] Indeed, Justice Scalia's position, recognizing that the government ordinarily *should not* be taken to warrant that none of its actions will incidentally interfere with either contracting party's performance, commanded at least as much support from Court as Justice Souter's strong support for congruence.[65] This observation is particularly significant with respect to this symposium's theme focusing on opposition to statutory retroactivity. For I suspect that much of the support for any suggestion that *Winstar* is part of a broader movement to delegitimate retroactive legislation can be traced to Justice Souter's rhetorical support for the norm of congruence in government contract disputes. Certainly, much of the enthusiasm of the private government contracts bar for *Winstar* rests on this rhetoric. So it is important to recall that this norm was not endorsed by the Court.

In an earlier article addressing the Supreme Court's decision in *Winstar*, I have propounded two versions of a synthesis of the various opinions in the case that might command consensus support for future cases.[66] For a full exposition of these points, I must refer you to the earlier article. For present purposes, the "minimalist" version of this synthesis, incorporating the points of which one can be most confident, rests on the following points:

▪First, there seems to be no majority support for Justice Souter's device of recharacterizing a government contract that appears to promise a particular performance or promise respecting regulatory treatment as a promise to pay damages if that regulatory performance is not delivered. Similarly, there is no majority support for Justice Souter's narrowly applicable version of the unmistakability doctrine. Instead, consensus is more likely to be reached on the basis of Justice Scalia's broader, but shallower (and more easily rebutted) version of the presumption created by the unmistakability doctrine. Justice Souter's effort to

64. *Id.* at 895 (quoting Lynch v. United States, 292 U.S. 571, 579 (1934)); Schwartz, *Assembling* Winstar, *supra* note 5, at 519-20.

65. *Id.* at 922-23.

66. Schwartz, *Assembling* Winstar, *supra* note 5, at 552-65.

narrow the reach of the unmistakability doctrine is a second major pillar supporting any suggestion that *Winstar* advances a movement against statutory retroactivity. And, again, it is important to note that Justice Souter's reasoning did not command the Court.

▫Second, any broad-based consensus is likely to build upon the insight that the sovereign acts doctrine and the unmistakability doctrine serve the same basic function as applied to federal government contracts: identifying the circumstances in which the United States government should be excused from what otherwise appears to be a breach of contract because of the circumstance that performance was obstructed by an act of the government exercising uniquely governmental authority to legislate or regulate. The two doctrines should be interpreted so that they yield a single, integrated answer or set of answers to this question.

▫Third, the key to identifying a consensus among the factions on the Court is to focus on the strong commonalities among (1) the "reverse presumption" identified by Justice Scalia, which he identifies with the application of the unmistakability doctrine, (2) the sovereign acts doctrine as interpreted by Justice Souter, and (3) Justice Breyer's concurring opinion explaining his approach to the unmistakability doctrine.

▫Fourth, consensus is most likely to be achieved in support of a broad version of the unmistakability doctrine, with variable intensity. The nature and strength of the showing required to support the conclusion that the United States has made a binding contractual commitment respecting the regulatory treatment to be afforded to a particular contracting partner should be viewed as a function of various factors, which include:

▫*The degree of generality of the governmental action from which the government's contracting partner claims contractual insulation.* The more widely applicable the government's regulatory or sovereign action is, the more inherently unlikely it is that such a promise of immunity was made and the more compelling the showing must be that the government indeed promised regulatory stasis or promised to keep a contractual commitment notwithstanding changes in the regulatory environment. All factions of the Supreme Court seem to accept these basic propositions; consensus may be forged among them by suggest-

ing that the strength of the government's sovereign defenses operates along a sliding scale, rather than in the binary mode that Justice Souter's opinion seems to favor.

■*The subject matter of the government's express undertaking and its relationship to an express or implied undertaking to afford the contracting partner static regulatory treatment.* This factor affects the form that a requirement of unmistakability should take. Specifically, when a promise of a particular regulatory treatment is the essence of the government's express undertaking (as the Court found to be the case in the *Winstar* cases themselves), it may be inappropriate, as Justice Scalia suggests, to require a separate "second promise" that regulatory stasis will be maintained. Instead, in such a case, the policy of the unmistakability/sovereign acts defense demands only that the primary undertaking to maintain the promised regulatory treatment be made with sufficient clarity. By contrast, when the government has undertaken a performance facially unrelated to regulatory treatment and that performance is obstructed by a governmental action that was not explicitly the subject of the contract, the claim respecting sovereign authority amounts to one that the government *implicitly* promised not to utilize its regulatory authority in a manner that would obstruct performance of the contract. Here, enforcement of a "second promise" requirement is most apt, especially when the regulatory obstruction against which an (implied) immunity is claimed is broadly applicable to many other similarly situated parties. *A fortiori*, such a second promise is necessary when the subject matter of the contract is not explicitly related to regulatory treatment and the interfering regulatory action affects public and private contracts alike.[67]

In addition to these basic points, I have also outlined a critical synthesis of the elements of the various opinions in *Winstar*, which takes a somewhat freer hand with portions of

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67. This portion of the minimalist synthesis as delineated here goes beyond that outlined in my previous writing on this subject. Because it is less clear that Justice Souter would accept this last formulation in its entirety (although I believe he logically should do so), it is arguable that this new portion of my minimal synthesis belongs in the critical synthesis which is described in the test that follows. Because this portion of the analysis is integrated into other aspects of the minimal synthesis offered here, I have nonetheless placed it here.

the opinions supporting the judgment, without, I believe, adopting any position that is irreconcilable with the Court's judgment.[68] The additional elements of this critical synthesis are:

- Recognition that application of the unmistakability doctrine to claims against the United States is a recent development, whereas the sovereign acts doctrine was developed by the Court of Claims more than a century ago specifically to prevent the government's sovereign acts from giving rise to liability for breach of contract in most circumstances. Accordingly, it is the traditional formulation of the sovereign acts doctrine that should form the centerpiece of a unified sovereign acts/unmistakability principle applicable to federal government contracts. Because the sovereign acts doctrine was framed to address breach of contract claims for damages, rather than claims against States for injunctive relief under the Contract Clause, it does not tempt the courts to recharacterize the government's contractual undertakings as Justice Souter did in the unmistakability doctrine portion of his plurality opinion.
- When the government acts in a manner that affects private and public contracts alike, no contractual immunity from the effect of such action should be recognized unless that immunity was expressly promised in the clearest terms. In cases where the subject matter of the contract itself is not an express undertaking by the government to afford the contractor with regulatory stasis, this will normally entail an explicit "second promise" that the undertaking should be fulfilled notwithstanding generally applicable changes in the regulatory environment that would interfere with performance.
- In instances where the government's action that interferes with contractual performance is less generally applicable than in the last category, the unmistakability doctrine applies, though it does not require as uncompromising a showing that the government has committed itself to perform notwithstanding intervening sovereign acts that would interfere with performance as is required under the sovereign acts doctrine. This second tier of the broader unmistakability principle is particularly important in the class of cases where the government's contractual undertaking has no private analogues and, as Justice Souter acknowl-

68. Schwartz, *Assembling* Winstar, *supra* note 5, at 557-65.

edges, where the criterion of affecting private and public contracts alike, accordingly becomes indeterminate.[69]

■This second, weaker tier of the unmistakability requirement should only be applied when the government acts in a fashion that is at least minimally general: when it has acted so as to treat all similarly situated people alike. The government is not entitled to any exceptional sovereignty-based defense when it singles out a particular contracting partner for impairment of its contract rights.

In applying this two-tier framework to gauge the government's contractual undertaking, it is also important to take into account evidence that suggests that the government has *not* made the unqualified undertaking that is alleged. Such evidence may include statutory reservations of authority to alter the terms of the government's performance.[70] It may also include constitutionally-based inhibitions that render it unlikely that the United States has made, or could make, the unqualified undertaking that the contractor asserts was made. Most important among these is the Appropriations Clause,[71] together with an important implementing statute, the Anti-Deficiency Act,[72] which reinforces this constitutional mandate for legislative supremacy in the area of spending the government's money.[73]

III. *WINSTAR* IN THE FEDERAL COURTS

A. Two Winstar *Legacies*

Based on a survey of the post-*Winstar* law, it seems clear

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69. *Winstar*, 518 U.S. at 897 n.42 (Opinion of Souter, J.); *see also* Schwartz, *Assembling* Winstar, *supra* note 5, at 522.

70. *See* Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 53-54 (1986) (noting statutory reservation of authority to alter).

71. U.S. CONST. art. I, § 9, cl. 7.

72. 31 U.S.C. § 1341 (1994).

73. *See* Hercules, Inc. v. United States, 516 U.S. 417 (1996) (refusing to find implied-in-fact contract to indemnify contractor where no appropriation existed that would fund the indemnity); *cf.* Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (holding that equitable estoppel is never available against the United States when payment is sought from the Treasury in violation of the terms of statutory appropriations).

that the Court of Federal Claims and the Federal Circuit have continued to be reluctant—outside the savings and loan claims context—to find a contractual waiver or surrender of sovereign power that would render the government liable for damages based on the impact of statutes on previously entered contracts. In considering the impact of the Supreme Court's decision in *Winstar,* it is important to distinguish between the so-called *Winstar*-related savings and loan claims that arise out of the enactment of FIRREA and its impact on supervisory mergers undertaken prior to its enactment, and all other claims of breach of contract against the government in which the government may have a defense based on actions taken in a sovereign capacity. In particular, the roles played by the Court of Federal Claims and the Court of Appeals for the Federal Circuit differ in the two classes of cases.

In the former class of cases, the Court of Federal Claims has attempted to sidestep the need to explore and clarify the significant ambiguities presented by the *Winstar* opinions' articulation of the law. Rather, in the FIRREA cases, the Court has attempted to build directly upon the judgment in *Winstar* rather than upon any of the opinions in the Supreme Court. What that judgment tells us, the Court has reasoned, is that, on facts reasonably similar to those presented by the *Winstar* plaintiffs themselves, the government is liable for breach of contract and has no sufficient defense based on the sovereign acts and unmistakability doctrines. In effect, the Court has determined that it is unnecessary, in the context of cases sufficiently factually similar to the ones that went to the Supreme Court, to piece together the opinions of a fragmented Court, a majority statement of the principles that govern this area from the opinions of a fragmented Court.[74] The Supreme Court's judgment is treated as something analogous to the physicist's "black box" into which we cannot see, but whose ultimate impact on our world is sufficiently clear.

With abundant respect for the Court of Federal Claims, I

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74. *See* California Fed. Bank v. United States, 39 Fed. Cl. 753, 754-58, 779 (1997) (explaining the arrangements made by the Court of Federal Claims to handle the voluminous FIRREA-related claims caseload and reflecting the view that the basic issues pertaining to liability in these cases were settled by *Winstar*).

nonetheless want to express my own view that the its understandable desire to use efficient case management techniques to deal with the host of *Winstar*-related claims that clog its docket has proven to be an unfortunate combination with the delphic puzzle presented by the fragmented set of opinions rendered by the Supreme Court in *Winstar*. *Winstar* simply did *not* provide the Court of Federal Claims with any clearly articulated or unified set of principles that would enable the court to efficiently gauge when the facts of a given savings and loan claim are *materially* different from those that support the *Winstar* judgment. Thus, although the Court of Federal Claims has understandably tried to sidestep many of the important uncertainties as to the shape of the law left by the Supreme Court in *Winstar*, it is doubtful that those efforts ultimately can succeed. While the Court's approach has been an effective response to the daunting caseload management challenge posed by the *Winstar*-related claims, it has limits because the fragmentation of the Supreme Court renders it difficult to be certain which factual differences in the pending related cases are in fact material. Legitimate uncertainty on that point has, moreover, functioned to discourage settlement of the remaining claims.

In sharp contrast, as is detailed below, in non-FIRREA cases, the Court of Federal Claims and the Federal Circuit are actively engaged in sorting out the status of the government's sovereignty defenses-seeking to elucidate the points left obscure by the Supreme Court's *Winstar* decision. It is certainly premature to forecast the final outcome of that process, but it is already clear that the Court of Federal Claims and Federal Circuit are grappling with important nuances of the applicable doctrine. It is also clear that the government's sovereignty defenses retain considerable force. In general, notwithstanding certain language in the plurality opinion in *Winstar* that might suggest a wholesale assimilation of government contracts into the principles that govern private contracts, these courts have been properly reluctant, in my view, to find contractual waivers or surrenders of sovereign power to regulate.

B. Winstar*'s Limited Impact Outside the FIRREA Context*

This reluctance is evident in a wide range of settings and cases, several of which will be discussed in some detail here. However, first consider the humble example of the non-officially reported decision in *Quiman, S.A. v. United States*.[75] There the plaintiff sought damages for an alleged breach of contract arising out a cooperative agreement between itself and the Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS").[76] The court rejected the government's arguments that the cooperative agreement was too indefinite to be enforced as a contract; instead, it affirmed the Court of Federal Claims' determination that the agreement had not been breached.[77] The key to that ruling was the determination that the cooperative agreement did not incorporate the terms of APHIS' Veterinary Services Notice describing the operation of APHIS' "Overseas Inspection Program" as it was in effect at the time of the agreement.[78] The court thought that the cooperative agreement, on its face, did not incorporate the Veterinary Services Notice, but reasoned further that any ambiguity on this score would have to be resolved in the government's favor because if it were contractually bound by the terms of the Notice, the result would be to "restrict the government's absolute authority over imports."[79] Citing the *Winstar* plurality opinion, the court affirmed that such "'an ambiguous term of a grant or a contract [will not] be construed as a conveyance or surrender of sovereign power.'"[80] The *Quiman* court's use of *Winstar* is most

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75. No. 98-5036, 1999 U.S. App. LEXIS 732 (Fed. Cir. Jan. 21, 1999).

76. *Quiman*, 1999 U.S. App. LEXIS 732, at *1.

77. *Id.* at *2-3.

78. *Id.* at *4.

79. *Id.* at *5

80. *Id.* at *4-5 (quoting *Winstar*, 518 U.S. at 878). Although the panel does not remark upon this fact, *Quiman* seems to be a case in which the plurality would not have applied the unmistakability doctrine because if the terms of the Veterinary Services Notice were read into the cooperative agreement, it could be construed as an undertaking to pay damages if the government were to change the programs described in the Notice in a fashion that detrimentally affected the plaintiff. *See supra* note 30 and accompanying text.

consistent with Justice Scalia's approach to the unmistakability doctrine, treating it as broadly applicable to all government contracts and operating as a common sense canon of construction.[81] Here, as in many other instances, the Court almost certainly would have reached the same result without the unmistakability doctrine. What is noteworthy is that the Federal Circuit cites *Winstar* as a reaffirmation, rather than a limitation of the unmistakability principle.[82]

1. Yankee Atomic.—The first significant appellate ruling interpreting *Winstar* came in *Yankee Atomic Electric Co. v. United States*.[83] In that case, the Court of Federal Claims had granted summary judgment to the plaintiff prior to the Supreme Court's

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81. In an unpublished opinion such as this, one would not expect a detailed account of the court's reasons for ignoring Justice Souter's restrictive approach to unmistakability and for following Justice Scalia's approach. Nevertheless, the court's approach reflects a basic judgment that the plurality approach to unmistakability is, in this respect, unsound, at least as applied to cases like this. Surely it makes sense to follow Justice Scalia and simply say, as did the *Quiman* court, that one should be especially skeptical about interpolating promises respecting the government's ongoing exercise of its authority over exports into contracts that are at best ambiguous on this score.

82. *See In re* CF & I Fabricators of Utah, Inc., 150 F.3d 1233 (10th Cir. 1998). In that case, the Tenth Circuit upheld the application of amendments to 28 U.S.C. § 1930(a)(6), governing quarterly fees for the United States Trustee ("UST") to a reorganized debtor under a plan of reorganization that had been substantially consummated by the time of the amendment. *In re CF & I Fabricators*, 150 F.3d at 1234-37. It did so in the face of an argument that the amendments worked a retroactive change in the terms of the previously confirmed reorganization plan. *Id.* at 1237-38. The effect of the amendment was to make a debtor liable for UST fees for the additional time period from confirmation of a reorganization plan until the case was dismissed or converted. *Id.* at 1237. The debtor argued that the reorganization plan was a contract to which the United States was a party and noted that the Plan provided that the debtor's liability for UST fees terminated upon confirmation of the Plan, invoking *Winstar* for the proposition that a legislative modification of the terms of a contract to which the United States is a party is impermissible. *Id.* at 1239. Assuming, without deciding, that a reorganization plan is a contract subject to *Winstar*, the court held that the "[p]lan's provisions regarding UST fees were merely recitations of the state of the law when the Plan was drafted, not binding contractual provisions." *Id.* Although the court did not explicitly invoke the sovereign acts or unmistakability doctrines, it concluded that the contract, despite its literal terms, should not be read as promising continuation of the included provisions respecting trustee fees, which appears to embody the core policy behind the unmistakability doctrine as explained by Justice Scalia. *See In re CF & I Fabricators*, 150 F.3d at 1239.

83. 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

decision in *Winstar,* but on the Government's appeal, the Federal Circuit was confronted with the intervening *Winstar* opinion from the Supreme Court.[84] The plaintiff had contracted with the government to secure enriched uranium for the operation of its nuclear power plants.[85] The terms of those contracts provided that the plaintiff would pay the government for these enrichment services at a going rate based on a generally applicable set of policies.[86] Subsequently, after those contracts were fully performed, Congress enacted the Energy Policy Act of 1992, creating a Uranium Enrichment Decontamination and Decommissioning Fund (the "Fund")—intended to accumulate funds to pay for the clean-up of the old uranium enrichment plants, including those used in the provision of services to the plaintiff.[87] The Fund was to draw on annual deposits of appropriated funds from the Treasury, but it was also to collect a special assessment from U.S. utility companies.[88] Each utility's annual obligation to the fund was based on its share of the total amount of past enrichment work performed by the government facilities under the control of the Department of Energy.[89] The assessment was imposed based on the identity of the utility that actually used the enriched uranium, whether or not it was purchased by that utility directly from the United States Department of Energy (as opposed to in a secondary market).[90] After paying its special assessment, Yankee Atomic brought suit in the Court of Federal Claims to recover the assessment payments.[91] That court granted summary judgment for the plaintiff, regarding the assessments as a "unilateral retroactive increase" in the contract price for the enrichment services that the government had provided to the plaintiff.[92] The court reasoned that the plaintiff had a vested property right in the contract price that the government could not lawfully take away.[93] On

84. *Yankee Atomic*, 112 F.3d at 1571 & 1574.
85. *Id.* at 1572.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Yankee Atomic*, 112 F.3d at 1572.
90. *Id.*
91. *Id.* at 1573.
92. *Id.*
93. Yankee Atomic Elec. Co. v. United States, 33 Fed. Cl. 580, 585 (1995).

appeal, the government argued that the special assessment was not an alteration in the contract price for enriched uranium that it had afforded Yankee Atomic, but it should be viewed as an entirely separate exercise of its taxing authority to fund the clean-up effort, which had not been the subject of the prior contracts.[94] The government argued, accordingly, that it would only be liable if it had contracted not to impose such separate charges for decontamination costs.[95]

A divided Federal Circuit reversed the decision of the Court of Federal Claims.[96] The court concluded initially that the enactment of the special assessment provisions of the challenged Energy Policy Act of 1992 (the "Act") challenged was within the sovereign acts doctrine.[97] This conclusion rested partly on the view that the purpose of the Act was to benefit the public rather than to relieve the government of contractual obligations and primarily on the related fact that the special assessment was keyed to *consumption* of government-enriched uranium, irrespective of whether it had been purchased by the party assessed under a government contract.[98] The court did not explicitly ad-

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94. *Yankee Atomic*, 112 F.3d at 1573.

95. *Id.*

96. *Id.* at 1571.

97. *Id.* at 1577.

98. *Id.* at 1575-77. In arriving at its characterization of the purpose and effect of the statutory provisions at issue, the Federal Circuit emphasized that it had to appraise the relevant statute as a whole, rather than focus upon the provisions of the statute that affected parties who had contractual relations with the United States in isolation. *Yankee Atomic*, 112 F.3d at 1576. While this appears to be correct in its particular context, it also appears to be in tension with portions of the plurality opinion in *Winstar* that conclude that the relevant provisions of FIRREA did not meet the standard of "public and general" sovereign acts. In *Winstar*, the plurality was satisfied that this test was not met where evidence indicated that the effect of statutorily-mandated regulatory changes on the government's contracting partners was sufficiently clear that it became a focal point of Congressional debate. 518 U.S. at 900-03. Moreover, the plurality also expressed the concern that "any act of repudiation can be buried in a larger piece of legislation." *Id.* at n.52. That could be read to reject *Yankee Atomic*'s premise that the whole statute should be the focus of analysis. But, as in so many other respects, the plurality's treatment of this point in *Winstar* ends somewhat inconclusively:

> To the extent that THE CHIEF JUSTICE relies on the fact that FIRREA's core capital requirements applied to all thrift institutions, we note that neither he nor the Government has provided any indication of the relative incidence of the new statute in requiring capital increases for thrifts subject to regulatory agreements affecting capital and those not so subject.

dress the various formulations of the "public and general" test employed by the *Winstar* plurality and by Justice Rehnquist in his dissent, but the case appears to have presented a doubtful application of the sovereign acts doctrine under the plurality's approach because the predominant, though not exclusive, effect of the assessment was on parties who had secured their enriched uranium under contracts with the government.[99] On the other hand, the court did not rest its judgment directly on a conclusion that this was public and general action. Rather, the court concluded that it was sufficiently generic that it should be treated as "a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services."[100] That conclusion, however, was not the end of the panel's analysis, for it assumed that even where the sovereign acts doctrine applied, it was still necessary to apply the unmistakability doctrine to determine "whether the Government, by contract with Yankee Atomic, has surrendered the right to exercise this sovereign power" in sufficiently clear terms.[101]

Id. The reader is left to guess whether such data would be sufficient to alter the outcome. Of course, this enigmatic discussion did not in any event command support from a majority of the Court.

Given the uncertain foundation in *Winstar*, this aspect of the court of appeals' approach in *Yankee Atomic* reflects an understandable and appropriate effort to try to make sense of the contours of the government's sovereignty defenses without giving controlling weight to every view intimated in the fragmentary opinions of the Supreme Court. Still, one cannot escape the impression that the *Yankee Atomic* panel was somewhat cavalier here about honoring Supreme Court authority by reconciling its analysis with that of the Supreme Court plurality. Rather, the panel's approach appears to have been more heavily influenced by pre-*Winstar* decisions of the Federal Circuit. *See infra* note 101.

99. *See supra* note 98; *see supra* text accompanying notes 58-59.

100. *Yankee Atomic*, 112 F.3d at 1577.

101. *Id.* Again, the court of appeals proceeded by its own lights on a point on which the Supreme Court offered either uncertain or nonexistent guidance. On the one hand, the Supreme Court plurality had resolutely declined to address the relationship between the sovereign acts and unmistakability doctrines. *See supra* text accompanying note 47. On the other hand, after holding the unmistakability doctrine inapplicable and rejecting the claim that FIRREA was "public and general," the plurality rejected the government's sovereign acts doctrine defense for the additional reason that it concluded the contracts involved had allocated the risk of generic changes in the regulatory capital requirements to the government, requiring it to perform its undertakings notwithstanding such changes. *Winstar*, 518 U.S. at 909-10.

In making this determination, the *Yankee Atomic* panel was confronted with the fragmentation of the Supreme Court on the applicability of the unmistakability doctrine.[102] The court of appeals initially decided that the unmistakability doctrine was applicable to the contracts involved, notwithstanding the views expressed by the *Winstar* plurality restricting its application.[103] The court noted that the concurring justices and the dissenters together made a majority of five in support of the conclusion that the unmistakability doctrine was applicable even if the government's undertaking were recharacterized as promising indemnification in the event of changes in the regulatory regime, rather than immunity from those changes.[104] Second, the court suggested that even the *Winstar* plurality would have applied the unmistakability doctrine in *Yankee Atomic* because, under an exception recognized by Justice Souter, that doctrine applies when any indemnification would amount, as a practical matter, to an exemption from the governmental action inconsistent with a contractual undertaking.[105] That exception would apply in *Yankee Atomic,* the court of appeals reasoned, because the effect of paying damages to Yankee Atomic would be identical to excusing the plaintiff from the operation of the special assessments challenged.[106] Finally, and most importantly, the court of appeals concluded that the fixed price contracts that the plaintiffs had entered into with the government for the purchase of uranium enrichment services did not constitute an unmistakable contractual commitment not to subsequently impose the special assessments that were at issue.[107] Rather, the language of these contracts addressed the price to be paid for enrichment services and made no clear commitment forswearing the exercise

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Because the Supreme Court offered no authoritative or coherent explanation of the relationship between the government's two sovereignty-based defenses, the Federal Circuit applied an approach that had previously been applied by the Federal Circuit panel in *Winstar*. Winstar Corp. v. United States, 994 F.2d 797, 808 (Fed. Cir. 1993), *vacated and reh'g en banc granted*, 64 F.3d 1531 (Fed. Cir. 1995), *rev'd* 518 U.S. 839 (1996).

102. *See supra* text accompanying notes 29-46.

103. *Yankee Atomic*, 112 F.3d at 1579.

104. *Id.* at 1578-79.

105. *Id.* at 1579.

106. *Id.*

107. *Id.*

of taxing authority that would apply to the government's contractual partners and that would fund subsequent clean-up efforts.[108]

Judge Mayer dissented from the decision of the court of appeals.[109] Although he acknowledged that there could be no breach of Yankee Atomic's contracts, which had been fully performed, he concluded that there had been a taking of Yankee Atomic's property right to retain the benefits of the completed contracts.[110] In Judge Mayer's view, the government's contracting partners were being asked to bear burdens that should be borne by society as a whole, thus offending a key policy behind the Fifth Amendment's assurance of just compensation for takings.[111] Judge Mayer asserted that the sovereign acts doctrine could not apply because the plaintiff was recovering for a taking and not for contractual breach, and in any event the doctrine would not apply because the effect of the statutory assessment "falls so substantially . . . on Yankee and the government's other contractors."[112] Of course, the latter conclusion rests on the

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108. *Yankee Atomic*, 112 F.3d at 1579-80. The court also rejected the claim that the statutory assessments effected a taking of their vested property rights. *Id.* at 1583-84. Because there was no infringement of the vested contract right, which provided a fixed price only for the enrichment services themselves, there was likewise not a taking. *Id.* at 1580 n.8.

109. *Id.* at 1582 (Mayer, J., dissenting).

110. *Id.* The Court of Federal Claims, which ruled for the plaintiff, likewise eschewed the label "breach of contract" in holding the government to be liable. *Yankee Atomic* 112 F.3d at 1584 (stating that "this is not a breach of contract case."). The trial court appeared to regard the assessment as either an unlawful exaction or perhaps as a taking. *Yankee Atomic*, 33 Fed. Cl. at 585.

111. *Yankee Atomic*, 112 F.3d at 1583 (Mayer, J., dissenting) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). Of course, in *Winstar*, Justice Souter invoked *Armstrong*, an oft-cited takings authority, and the policy reflected therein as a key basis for his narrowing construction of the unmistakability doctrine. *Winstar*, 518 U.S. at 883 (Opinion of Souter, J.). Jed Rubenfeld has set forth his view that modern courts' reliance on *Armstrong* in regulatory takings cases reflects a view that is mistaken in textual, historical and normative terms. *See* Jed Rubenfeld, *Taxing, Taking and Using*, in Spring Symposium, *When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises, and Beyond (U.S. Court of Federal Claims, Apr. 29-30, 1999); *see also* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1136-39 & n.265 (1993) (addressing these issues).

112. *Yankee Atomic*, 112 F.3d at 1584 (Mayer, J., dissenting). The *Yankee Atomic* majority appeared to adopt the position that the sovereign acts doctrine and unmistakability doctrine defenses were available to the government irrespective of whether the plaintiff's claim was regarded as one for breach of contract, for an uncompensated taking, or as an illegal exaction. *Id.* at 1573 n.2.

plurality's view of the sovereign acts doctrine's "public and general" requirement.[113] Judge Mayer would also have sidestepped the unmistakability doctrine on the ground that the government's liability was not for breach of contract, but he added that he thought any requirement of unmistakability was in fact met.[114] This argument rests, however, on what appears to be a misreading of Justice Souter's position on the strength of the unmistakability doctrine where it, in fact, applies.[115]

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113. *Winstar*, 518 U.S. 891-903.

114. *Yankee Atomic*, 112 F.3d at 1584 (Mayer, J., dissenting).

115. In reaching this conclusion, Judge Mayer relied on language in Justice Scalia's concurring opinion criticizing the government's suggestion that the unmistakability doctrine required a "second promise" not to deviate from its primary undertaking in the event of an altered regulatory environment. *Id.* (quoting *Winstar*, 518 U.S. at 920-21 (Scalia, J., concurring in the judgment)). Judge Mayer also suggested that the plurality in *Winstar* had also rejected the "second promise" requirement. *Id.* (quoting *Winstar*, 518 U.S. at 887) (Opinion of Souter, J.)). But read in context, the passage from Justice Souter cited by Judge Mayer for the latter point suggests precisely the opposite position. Justice Souter reasoned that the unmistakability doctrine is inapplicable in *Winstar* and that, accordingly, there was "no need for an unmistakably clear 'second promise' not to change [the] capital requirements." *Winstar*, 518 U.S. at 887 (Opinion of Souter, J.). This plainly does not support Judge Mayer's conclusion that where the unmistakability doctrine applies, there is no need for such a second promise.

Of course, as I have suggested previously, it is not clear that Justice Scalia would oppose the "second promise" interpretation of the unmistakability doctrine in cases where the government's primary contractual undertaking does not promise a particular course of regulatory treatment, as he concluded it did in *Winstar* itself. Schwartz, *Assembling* Winstar, *supra* note 5, at 556. Conversely, it is not clear that Justice Souter would in all cases conclude that such a second promise was necessary to fulfill the requirements of unmistakability, where it is applicable.

Indeed, *Yankee Atomic* makes a rather interesting test case with regard to the "second promise" issue. For this is neither a case in which the government's express contractual undertaking is facially unrelated to any particular course of regulatory treatment, nor is it a case like *Winstar* itself in which the government's explicit undertaking was to provide a fixed course of regulatory treatment. This case lies somewhere in the middle, for the question is whether the fixed price terms of the contracts can fairly be understood to imply a further promise not to impose the kind of special assessment that was in fact imposed here by statute. The inference suggested by Judge Mayer is more plausible than an inference that, on the facts of Horowitz v. United States, 267 U.S. 458 (1925), where the government undertook to ship silk to a purchaser within a stated period, the government effectively undertook to perform the shipment, notwithstanding a general embargo on rail shipments. *Horowitz*, 267 U.S. at 459-61. But because the alleged implied promise in *Yankee Atomic* does not flow inexorably from the stated undertaking, it still seems perfectly clear that the policies behind the unmistakability doctrine should be given effect here. The harder question, of course, is whether the inference that such a promise was made is sufficiently strong, in the circumstances, to meet a test of

Thus, in *Yankee Atomic,* the Federal Circuit panel took a position rejecting the *Winstar* plurality's view that the unmistakability doctrine normally goes out the window when the government's alleged undertaking can be recast as one requiring indemnification in the event of a change in the regulatory regime instead of one asserted to guarantee regulatory stasis. The court gave a rather weak reading to the "public and general" requirement of the sovereign acts doctrine that may, if viewed in isolation, be inconsistent with the plurality opinion *Winstar*. But the court of appeals also took a position on the manner in which the sovereign acts and unmistakability defenses relate to each other in a way that may make the result more palatable to supporters of the plurality position. That is, rather than treating the existence of a public and general act as a defense unto itself, the court asked whether this public act violated an unmistakable contractual commitment not to act in this fashion.[116] If one follows the *Winstar* plurality approach, which implies that sovereign acts and unmistakability are independent government defenses, one might well conclude that *Yankee Atomic*'s discussion of the sovereign acts doctrine was in fact unnecessary to the result.[117] Alternatively, if one follows the synthesis for which I have argued, the real significance of finding that the governmental action was "public and general" is simply to strengthen the force of the rebuttable presumption that the government usually does not make contractual commitments respecting its future exercise of the regulatory and other sovereign powers. In that event, one would conclude that a mod-

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unmistakability.

116. *See Yankee Atomic*, 112 F.3d at 1579.

117. One might also observe that the facts of *Yankee Atomic*, in which an implied exemption from governmental taxing authority was sought based on the price terms of a supply contract, are extremely close to those of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), decided on the basis of the unmistakability doctrine. In *Merrion*, the plaintiffs had oil and gas leases on Indian tribal lands issued by the defendant tribe and claimed that Tribes' enactment of severance taxes on oil produced on reservation land was a violation of the fixed royalty terms of their leases. 455 U.S. at 133. The Court held that the royalty terms of the leases were not a sufficiently unmistakable undertaking to eschew such taxation to support the plaintiffs' claim. *Id.* at 152. No reference was made to the sovereign acts doctrine in *Merrion*. *Id.* Because the result in *Merrion* was not questioned in *Winstar*, it follows that the result in *Yankee Atomic* is likewise reconcilable with *Winstar*. *See Winstar*, 518 U.S. at 839.

erately strong showing of a commitment not to impose the kinds of assessments at issue here should be demanded, given the fact that such a commitment would take the form of exempting the government's contracting partners from requirements that were imposed on some who were not contracting partners.

Yankee Atomic also serves as a useful reminder of the basic policy reasons that underlie the government's exceptional defenses based on its sovereignty. As much as the rhetoric of congruence—the idea that government contracts should be interpreted like private contracts—may appeal to plaintiffs on contract claims in the Court of Federal Claims, the fact remains that in critical respects the government cannot easily be assimilated to the status of a private party. As a sovereign, the government has the power to impose taxes and related exactions which a private contracting party does not possess. Accordingly, when unanticipated expenses—such as clean-up costs—arise following the performance of an activity such as nuclear fuel enrichment, there is an inherent difficulty in distinguishing between an impermissible rewriting of the terms of the contract for enrichment services and a proper tax or user fee imposed by the government. Moreover, while the claim of impermissible retroactive action seems strong when one portrays the governmental action as a breach of contract, the issue is in fact difficult because it turns out on close examination, that the government has not breached any explicit undertaking in a case like *Yankee Atomic*, but it has only breached a term which it may or may not be fair to imply in the contract. The court of appeals' judgment in *Yankee Atomic* is sound, in my judgment, because it places on those who contract with the government the duty to make explicit in their agreements any immunity that they seek to acquire from governmental taxing authority.

2. Emergency Low Income Housing Preservation Act Claims.—Outside of the FIRREA context, the factual and programmatic setting in which *Winstar* has been most frequently invoked concerns programs under which agencies of the United States guaranteed the mortgages of housing developers who were required to provide below-market rate rental housing to needy tenants in return for receiving mortgage interest rate

subsidies.[118] In a series of cases the claim has been made, fortified by invocation of *Winstar*, that the United States breached the developers' contracts by the enactment of a series of statutes that suspended or limited the pre-existing rights of these developers to prepay their mortgages and thereby free themselves from their undertaking to provide below market rental rates.

As of the time of this symposium, the leading case is *Cienega Gardens v. United States*.[119] There, the Federal Circuit reversed the decision of the Court of Federal Claims that had granted summary judgment to the plaintiffs.[120] The issues in *Cienega Gardens* had divided the judges of the Court of Federal Claims.[121] Moreover, in *Cienega Gardens*, just as in *Yankee Atomic*, the issues divided the panel of the Federal Circuit, with Judge Archer dissenting from the court's opinion by Judge Schall (joined by Judge Mayer).[122] The division of the court reflects the on-going ferment as to the impact of *Winstar*. But the outcome in the Federal Circuit itself suggests that *Winstar* has not made revolutionary changes in the law governing government liability for breach of contract claims arising out of retroactive statutes.

Cienega Gardens arose out of federal programs designed to spur the development of low-income housing by private developers.[123] The key mechanism of these programs was federal subsidization of the mortgage loans made available to developers through private lending institutions.[124] The federal Department of Housing and Urban Development ("HUD") would insure the mortgage issued, and the developer would give a note and deed of trust to the lender.[125] A rider to the developer's note

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118. *See, e.g.*, Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (in scattered sections of 12 U.S.C.).

119. 162 F.3d 1123 (Fed. Cir. 1998), *rev'g* 33 Fed. Cl. 196 (1995) & 37 Fed. Cl. 79 (1996).

120. *Cienega Gardens*, 162 F.3d at 1124-25.

121. *Compare* Greenbrier v. United States, 40 Fed. Cl. 689 (1998) (Merow, J.), *and* Lurline Gardens Ltd. Housing Partnership v. United States, 37 Fed. Cl. 415 (1997) (Weinstein, J.), *with* Cienega Gardens v. United States, 33 Fed. Cl. 196 (1995) *and* Cienega Gardens v. United States, 37 Fed. Cl. 79 (1996) (Robinson, J.).

122. *Cienega Gardens*, 162 F.3d at 1124.

123. *Id.* at 1125.

124. *Id.*

125. *Id.*

governed the issue of prepayment, providing that developers generally could not prepay their loans without HUD approval sooner than twenty years after their issuance, but they could do so thereafter.[126] At the same time, in consideration of HUD's approval of the loan for mortgage insurance, the developer committed itself in a separate "regulatory agreement" with HUD to maintain restrictions on the rental levels to be charged and the rate of return to be earned on the project.[127] Both the regulatory agreement restrictions and the HUD mortgage insurance were to remain effective as long as the underlying loan remained outstanding.[128] Accordingly, if the developer took advantage of the prepayment provisions, the mortgage insurance would become moot, and the economic restrictions imposed on the developer by the regulatory agreement would lapse.[129]

In the late 1980s and early 1990s, Congress became concerned that because of the age of the projects involved and market conditions, a large number of prepayments were about to take place and that the supply of low-income housing would be materially diminished as a result.[130] In response, Congress first adopted a two year moratorium on prepayments without HUD approval and subsequently a ban on such prepayments; however, by 1996 Congress ultimately backed off from these restrictions, largely eliminating them.[131] A large number of claims were brought against the government based on the first

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126. *Id.* at 1126.

127. *Cienega Gardens*, 162 F.3d at 1125-26.

128. *Id.* at 1126.

129. *Id.* at 1125-26.

130. *Id.* at 1126.

131. *Id.* The Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"), Pub. L. No. 100-242, 101 Stat. 1877 (codified at 12 U.S.C. § 4104 (1994)) established a two-year freeze on prepayments without HUD approval, designed to allow Congress time to craft a longer-term solution. The Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA"), Pub. L. No. 101-625, 104 Stat. 4249 (codified at 12 U.S.C. § 4104 (1994)), made the ban on developer prepayments without HUD approval permanent for the life of existing mortgages under these low income housing programs, while it authorized HUD to provide compensating incentives to developers. In 1996, however, following the shift of control of Congress to the Republican party, Congress enacted the Housing Opportunity Program Extension Act of 1996 ("HOPE"), Pub. L. No. 104-120, 110 Stat. 834 (codified at 42 U.S.C. § 1437(f) (1994)), which eliminated restrictions on prepayment, provided that prepaying owners agreed not to raise rents for at least 60 days following the prepayment.

two enactments in this series: Developers of these low income housing projects generally claimed both a breach of contract and a taking of vested property rights.[132]

In *Cienega Gardens*, as in all the analogous cases,[133] the government argued that the contractual undertakings alleged to have been breached were the terms of the developers' notes to their lenders with respect to prepayment rights and that the government was not a party to the contracts embodied in those notes.[134] By contrast the government further asserted that it although it was a party to the regulatory agreements entered into with each of the plaintiff/developers, no undertaking with respect to prepayment rights formed any part of those regulatory agreements.[135] In sum, because the government was not a party to any contract alleged to have been breached, it argued that the Court of Federal Claims lacked jurisdiction over the claim of breach of contract under the Tucker Act.[136] The *Cienega Gardens* trial court rejected this contention, reasoning that the regulatory agreements and the developers' notes should be "read together in order to determine the full intentions of the parties"; under this approach, the court concluded that when HUD and the developers "entered into the regulatory agreement they also intended to be mutually bound by the prepayment rules set forth in the rider to the contemporaneous deed of trust note."[137] The trial court thus upheld its own jurisdiction over the claims and granted summary judgment to the plaintiffs, finding that ELIHPA and the Low-Income Housing Preservation and Resident Homeownership Act ("LIHPRHA") breached the contract found to exist between the developers and the government and rejecting the government's invocation of sovereign acts

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132. *Cienega Gardens*, 162 F.3d at 1126-27. Judge Robinson's opinion on damages issues for the Court of Federal Claims reviews the numerousness of the claims and the measures taken by the court to cope with them in an efficient manner. Cienega Gardens v. United States, 38 Fed. Cl. 64, 67 & n.3 (1997).

133. *See, e.g.*, Adams v. United States, 42 Fed. Cl. 463 (1998); Franconia Assocs. v. United States, 43 Fed. Cl. 702 (1999).

134. *Cienega Gardens*, 162 F.3d at 1127.

135. *Id.*

136. *Id.* The defense rejected by the trial court was accepted by other judges of the court in *Greenbrier* and in *Lurline Gardens*. *See supra* note 115.

137. *Cienega Gardens*, 33 Fed. Cl. at 210.

and unmistakability doctrine defenses.[138]

A divided panel of the Federal Circuit reversed, approving the government's jurisdictional defense.[139] Judge Schall, joined by Chief Judge Mayer, noted that HUD had fulfilled its undertakings to provide mortgage insurance and had not breached any undertaking of the regulatory agreements, which were the only contracts on which the United States was named as a party.[140] The Federal Circuit further found that the regulatory agreements did not incorporate by reference the deed of trust notes or their prepayment riders, nor did the agreements otherwise mention rights regarding prepayment.[141] Accordingly, the court of appeals concluded that it was error to "import[] requirements from the deed of trust note . . . into the regulatory agreement," and that the United States was not bound on any contractual undertaking to allow prepayment in stated circumstances.[142] The court also observed that the trial court's reading of the government's contractual undertaking to include binding rights respecting prepayment was inconsistent with the HUD regulations in force at the time of the agreements, for those regulations expressly reserved the right to modify the rules on prepayment so long as the modification did not adversely affect the interests of secured lenders under existing insured mortgages.[143] The final contention addressed by the court of appeals was the plaintiffs' reliance on *Winstar*.[144] The Federal Circuit concluded that the facts on which they had relied readily distinguished *Winstar*.[145] Judge Archer, dissenting, adhered

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138. *Id.*
139. *Cienega Gardens*, 162 F.3d at 1130-34.
140. *Id.*
141. *Id.*
142. *Id.* at 1133.
143. *Id.* at 1133-34.
144. *Cienega Gardens*, 162 F.3d at 1135.
145. The court of appeals summarized:

> The plaintiffs in *Winstar* had contracts with integration clauses that expressly incorporated contemporaneous documents that allowed them [the rights against the government, the deprivation of which was the subject of their breach of contract claims.] The Owners in the present case can point to no similar contractual provisions. The regulatory agreements [here] do not address prepayment and do not contain integration clauses that incorporate any document addressing prepayment. In fact, no documents between HUD and the Owners *address prepayment. The deed of trust notes* and attached Riders . . . were

substantially to the trial court's analysis.[146]

Because of the Federal Circuit's analysis the contracts involved, it determined that the Court of Federal Claims lacked jurisdiction over the breach of contract claim against the United States, and accordingly, it did not reach the issues as to the applicability of the sovereign acts and unmistakability doctrines addressed by the trial court.[147] Nevertheless, the decision actually effectuates the larger policies embodied in those doctrines. In particular, the court displayed a proper reluctance to infer contractual undertakings that would inhibit on-going exercise of federal regulatory power in circumstances in which the contracts did not clearly embody such undertakings. It is this attitude toward the interpretation of federal government contracts—and not an omnibus excuse for repudiation of undertakings deliberately and competently made—that lies at the heart of the unmistakability and sovereign acts doctrines, properly understood.[148]

Technical issues about the proper reading of *Winstar* were more squarely presented in *Adams v. United States,*[149] which arose from the impact of a similar set of statutory changes on a distinct but closely related federal housing program. The Farmers Home Administration ("FmHA") had been authorized to make or insure loans to developers undertaking to construct low and moderate income housing in rural areas, to limit tenancy to qualifying persons, to limit rental rates charged, and to limit the rate of return earned on these projects.[150] Promissory notes executed by borrowers allowed for prepayment by the borrower and also subjected the agreement to the terms of existing FmHA regulations as well as "future regulations not inconsistent with

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not incorporated into the regulatory agreements by reference, nor was HUD a party to the deed of trust notes and incorporated riders. The regulatory agreements, which set forth obligations on the part of the Owners, merely referenced HUD's role as endorser for insurance of mortgage loans. *Winstar* provides no support for the Owners' claims.

Id. at 1136.

146. *Id.* at 1136-40 (Archer, J., dissenting).

147. *Id.* at 1136.

148. *See infra* text accompanying notes 218-30.

149. 42 Fed. Cl. 463 (1998); *see also* Franconia Assocs. v. United States, 43 Fed Cl. 702 (1999).

150. *Adams,* 42 Fed. Cl. at 465-66.

the express provisions" of the agreement.[151] In a series of complex statutes enacted between 1979 and 1992, Congress imposed a variety of restrictions on the exercise of these prepayment rights.[152] Actions were brought on behalf of a substantial number of developers who had participated in these housing programs, asserting breach of contract and takings claims based on these restrictions.[153] The government defended the contract claims by raising the unmistakability and sovereign acts doctrines.[154]

In *Adams*, the Court of Federal Claims rejected the sovereign acts doctrine defense but endorsed the unmistakability doctrine defense in an opinion by Judge Horn.[155] The sovereign acts doctrine defense was unavailable, the court reasoned, because the pertinent statutory provisions "specifically targeted the termination options found in FmHA's contracts" and accordingly were not public and general acts covered by that doctrine.[156] The court concluded, however, that the unmistakability doctrine barred the plaintiff's success on its breach of contract claim.[157] Initially, Judge Horn reasoned that a majority of the Supreme Court had rejected Justice Souter's suggestion that the unmistakability doctrine normally did not apply to contracts that could be recast as promising payment of damages rather than promising unwavering adherence to a par-

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151. *Id.*

152. *Id.* at 466-67.

153. *Id.* at 467-68.

154. *Id.* at 469. Apparently, because of the way the loans and the contracts were structured, the government could not or did not make here the arguments that were dispositive in its favor in *Cienega Gardens*.

155. *Adams*, 42 Fed. Cl. at 477-82.

156. *Id.* at 480. The court also noted that legislative history reflected Congress's subjective intent to alter its contractual undertakings. *Id.* Judge Horn's sovereign acts doctrine analysis thus applies the test for public and general action articulated by the *Winstar* plurality and does not focus on the fact that it did not command endorsement by a majority of the Court. On the other hand, the court also took pains to invoke other authority from the Federal Circuit and the Court of Federal Claims and their predecessors (including the decisions of these courts in *Winstar* itself) to portray the Supreme Court plurality's test as harmonious with the pre-*Winstar* case law. *Id.* at 478-80. In any event, because of the court's ruling on the unmistakability doctrine defense, this portion of Judge Horn's analysis was not critical to the result.

157. *Id.* at 480-81. The court did not address the relationship between the sovereign acts and unmistakability doctrines.

ticular course of regulatory treatment.[158] Next, Judge Horn reasoned that a (different) majority of the Court had agreed that, *where applicable,* the unmistakability doctrine "imposes a high burden on the party asserting that the government has promised to immunize the contractor from subsequent changes in the law."[159] Ultimately she concluded that this burden was not satisfied because the prepayment terms of the mortgage agreement did not "guarantee the prepayment option against future acts of Congress."[160] Judge Horn noted particularly that the mortgage agreements were explicitly made subject to future *regulations* "not inconsistent with the express provisions" of the agreement, but they lacked similar language with respect to future *statutes*.[161] She also noted that, in contrast to *Winstar*,

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158. *Adams*, 42 Fed. Cl. at 481. Judge Horn finds a consensus on this point among the Justices concurring in the judgment and those who dissented. *Id.* at 481-82. Her analysis closely resembles that which I have articulated. *See* Schwartz, *Assembling* Winstar, *supra* note 5, at 553 (reaching this conclusion).

159. *Adams*, 42 Fed. Cl. at 483. Judge Horn correctly noted that Justice Souter's plurality opinion can be read to imply that where the unmistakability doctrine is applicable, a "mere promise to regulate in a particular fashion does not constitute an unmistakable promise that its subsequent action would not frustrate the contract" and that something more—a "'second promise' not to exercise its [sovereign] authority to change a contractual term" is needed to bind the government in this respect. *Id.* at 484 & n.10. *See supra* note 115 (criticizing Judge Mayer's dissent in *Yankee Atomic* for misreading Justice Souter's opinion on this point); Schwartz, *Assembling* Winstar, *supra* note 5, at 555-56. Judge Horn likewise correctly notes that the dissenters, Justices Rehnquist and Ginsburg, adopted this position. *Adams,* 42 Fed. Cl. at 484. Finally, she correctly notes that Justice Scalia seems to reject the notion that the burden of proof required by the unmistakability doctrine should entail such a "second promise." *Id.* at 484.

In piecing together this consensus approach, however, Judge Horn failed to consider the significance of the fact that Justice Souter apparently would not apply the unmistakability doctrine at all in a case such as *Adams*. Thus, as I have suggested above, *see supra* text accompanying notes 40-41, it is particularly hazardous to identify consensus by adding together the views of the overlapping separate majorities on these issues in this fashion. On the other hand, Judge Horn may have too quickly written off Justice Scalia, whose opinion, I have argued, should be construed to reject the "second promise" requirement only where—as in *Winstar* itself—the overt subject of the government's undertaking is the nature of the regulatory treatment to be afforded to the government's contracting partner. Schwartz, *Assembling* Winstar, *supra* note 4, at 556, 562. It appears to me to be a close question whether Justice Scalia would regard the contract language in *Adams* as sufficiently specific to meet the burden imposed by the unmistakability doctrine.

160. *Adams*, 42 Fed. Cl. at 484.

161. Of course, one might argue that the salient omission was that of any suggestion that the agreement was subject to future legislation, rather than the omis-

where the Court believed the terms abrogated were essential to the contract, the prepayment option did not have that significance in *Adams*.[162]

Although *Adams* appears to entail a relatively close call as to the proper application of the unmistakability doctrine, it is a valuable contribution to the post-*Winstar* elucidation of the scope of the unmistakability doctrine. In particular, it makes a valuable contribution to discerning a consensus approach to difficult questions left by *Winstar* both as to the scope of application of and the intensity of the showing required by the unmistakability doctrine. Whether or not the Court of Federal Claims in *Adams* correctly anticipated how the various *Winstar* factions would respond to the *Adams* fact pattern, Judge Horn's opinion directly and aggressively addresses the key issues, seeking simultaneously to distill as much as possible from the fragmented opinions of the Supreme Court while resisting the temptation of reaching for unsupportable oversimplifications in most instances. *Adams* is also consistent with the overriding insight that the unmistakability and sovereign acts doctrines both should be understood primarily as doctrines of contractual interpretation rather than as excuses for abrogation of governmental undertakings.

3. Other Claims.—In a wide variety of other cases outside the savings and loan context, courts have been at least as ready to distinguish *Winstar* on legal or factual grounds as to follow the judgment by imposing liability upon the United States. For instance, in *Marathon Oil Co. v. United States*,[163] oil companies that held leases issued by the United States covering tracts off the coast of North Carolina sued to recover restitutionary relief on a breach of contract theory where the companies had been denied permits necessary for them to engage in oil exploration. The Federal Circuit reversed a judgment in favor of the plain-

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sion of any suggestion that such future legislation need not be inconsistent with the express terms of the agreement. However, a strong argument can be made that the unmistakability doctrine effectively recognizes a presumption that government contracts normally are subject to subsequently enacted legislation. Indeed, this appears to be the central thrust of Justice Scalia's concurring opinion in *Winstar*.

162. *Adams*, 42 Fed. Cl. at 485.

163. 158 F.3d 1253 (Fed. Cir. 1998).

tiffs, concluding that the plaintiffs' rights under their leases were expressly conditioned on state concurrence in granting certain regulatory approvals, that the state had withheld these approvals, and that the challenged federal actions accordingly were not the operative cause of the plaintiffs' inability to proceed under their leases.[164] The court accordingly did not reach the issue of the application of the sovereign acts doctrine or the relevance of *Winstar*, which had been addressed by the trial court.[165] Similarly, in *Barseback Kraft AB v. United States*,[166] the Federal Circuit rejected a breach of contract claim against the United States based on a change in the manner in which the government calculated the price for the uranium enrichment services provided to the plaintiffs under contract. Although the plaintiffs invoked *Winstar*, the court distinguished that case, stating that plaintiffs' contracts "place[d] the risk of any changed government pricing policy on" plaintiffs and that the case was accordingly "the other side of the *Winstar* coin."[167]

In a number of other cases, courts have rejected rather tenuous claims in which plaintiffs creatively sought support in the broad themes that they claimed emerged from *Winstar*.[168] In many of these cases, plaintiffs relied particularly on the "congruence" language of Justice Souter's opinion, suggesting that government contracts ought to be interpreted like private contracts; the courts had little difficulty resisting the suggestion that they should give broad effect to this norm of "congruence."[169] As noted above, Justice Souter's congruence rhetoric

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164. *Marathon*, 158 F.3d at 1259-60.

165. *Id.* at 1257-58. The Court of Federal Claims had concluded that *Winstar* supported the imposition of liability on the United States. *Id.* On appeal, Judge Newman, dissenting, thought that the circumstances of the case warranted rescission and restitutionary relief, but acknowledged that "the United States did not breach this contract by deliberate acts in its derogation, as in the *Winstar* cases." *Id.* at 1262.

166. 121 F.3d 1475 (Fed. Cir. 1997).

167. *Barseback*, 121 F.3d at 1481.

168. *See, e.g.*, Bellevue Manor Assoc. v. United States, 165 F.3d 1249 (9th Cir. 1999); Schism v. United States, 972 F. Supp. 1398 (N.D. Fla. 1997); Missouri Gas Energy v. Public Serv. Comm'n, 978 S.W.2d 434 (Mo. Ct. App. 1998).

169. *See, e.g., Bellevue*, 165 F.3d at 1253 n.3 (finding that *Winstar*'s "congruence" principle has no bearing on the availability to the government of relief under Federal Rule of Civil Procedure 60(b)(5) from injunctive relief previously granted in interpreting contract governing adjustments in the level of federal housing assistance

did not command the support of a majority of the Supreme Court.[170]

In *Stohler v. Menke*,[171] for instance, the plaintiffs invoked *Winstar* in support of a takings and due process challenge to legislation that retroactively clarified a Medicaid reimbursement formula in a manner adverse to them. But the court found no indication that Congress had theretofore created a contract right to payment at a higher rate, and it distinguished *Winstar* on the ground that in *Winstar* "the government had in fact entered into contracts."[172] Indeed, without so labeling it, the court invoked one aspect of the unmistakability doctrine in support of its decision, noting that "absent some clear indication by a legislative body that it intends to bind itself contractually, there is a presumption a law is not intended to create private contractual or vested property rights."[173]

In a few cases outside the FIRREA context, *Winstar* has supported imposition of liability on the government or at least a rejection of its sovereignty based defenses.[174] However, these

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payments to landlords); Research Triangle Inst. v. Board of Governors of the Fed. Reserve Sys., 132 F.3d 985, 989-90 (4th Cir. 1997) (finding that *Winstar* has no bearing in determining availability of a waiver of sovereign immunity against a governmental entity, rejecting the assertion that sovereign immunity should not be to frustrate the expectations of private parties who contract with the government); Kucharczyk v. Regents of Univ. of Cal., 946 F. Supp. 1419, 1437 (N.D. Cal. 1996) (stating that *Winstar* has no bearing on the availability of mandamus or the standard of review in a dispute regarding licensing of patents under agreements between plaintiffs and a state university).

170. *See supra* text accompanying note 59.

171. 998 F. Supp. 836 (E.D. Tenn. 1997).

172. *Stohler*, 998 F. Supp. at 839. Similarly, in *Schism*, 972 F. Supp. at 1398, plaintiffs invoked *Winstar* in support of military retirees' claims for damages based on alleged representations that they would receive lifetime free medical care, asserting that the case supported their position respecting the availability of an applicable waiver of sovereign immunity. The court distinguished *Winstar*: "as that case involved express written contracts, the existence of which was not disputed." *Schism*, 972 F. Supp. at 1402 n.4. The court allowed claims based on alleged implied-in-fact contracts to go forward, *id.* at 1404, but noted that no recovery based on unauthorized representations or equitable estoppel could be had. *Id.* at 1405.

173. *Stohler*, 998 F. Supp. at 839. This branch of the unmistakability doctrine has been repeatedly invoked, with citation to *Winstar*, in a series of Contract Clause cases decided by the First Circuit, described in Part III(E) of this Article. *See infra* text accompanying notes 202-19.

174. *See, e.g.*, Scott Timber Co. v. United States, 40 Fed. Cl. 492 (1998); Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F. Supp. 2d. 15 (D.D.C. 1998).

isolated cases do not suggest any radical shift in determining the liability of the government for exercises of sovereign authority in a manner that arguably undercuts the government's contractual undertakings. For instance, in *Scott Timber Co. v. United States,*[175] the plaintiff sought breach of contract damages based on the government's suspension of the plaintiff's timber harvesting operations under their contract. The suspensions were caused by on-going consultations with respect to the impact of timber cutting on endangered species in the area.[176] The court held that the suspension was authorized under specific provisions of the contract involved, but it concluded that the contract terms required denial of summary judgment so as to preserve the claim that the government had exercised its suspension authority unreasonably in the particular circumstances.[177] Significantly, in addition to its authority to suspend performance by the contractor under the particular contracts, the government had argued in *Scott Timber* that various acts that caused the suspension of performance were sovereign acts and that it was shielded from liability by the sovereign acts doctrine.[178] The district court rejected this alternative contention.[179] Invoking a portion of the *Winstar* plurality's discussion of the sovereign acts doctrine, the court held that that defense was unavailable because the government could not show that the alleged sovereign acts were "'contrary to the basic assumption of the parties.'"[180] Although I have elsewhere criticized this portion of Justice Souter's analysis for its overbreadth and although the district court might be faulted for failing to appreciate that the test it relied upon was not endorsed by a majority of the Supreme Court, on the particular facts of the case, the court's result appears to be sound.[181] Specifically, the

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175. 40 Fed. Cl. 492 (1998).

176. *Scott Timber*, 40 Fed. Cl. at 495.

177. *Id.* at 500-04 (regarding authority to suspend); *id.* at 504-07 (regarding reasonableness of suspension).

178. *Id.* at 499.

179. *Id.* at 508.

180. *Scott Timber*, 40 Fed. Cl. at 508 (quoting *Winstar*, 116 S. Ct. at 2469 (Opinion of Souter, J.)).

181. *See* Schwartz, *Assembling* Winstar, *supra* note 5, at 526-28 (criticizing this portion of Justice Souter's opinion). As I have explained, *id.* at 527, Justice Souter's language in *Winstar* in this connection, literally applied, is so broad as to be irrecon-

court's conclusion that the contractual language was controlling and could not be circumvented by invocation of the sovereign acts doctrine because the contract specifically detailed the rights and responsibilities of the parties in the very eventualities that actually arose, seems entirely sound.[182]

C. Winstar's *Lack of Impact in the Government Procurement Setting*

Based on the reported cases, *Winstar* thus far has had a negligible impact on claims arising under traditional government procurement contracts of the kind covered by the Federal Acquisition Regulation ("FAR"). Simply stated, none of the reported cases in which *Winstar* plays any discernable role is a dispute arising out of an ordinary procurement contract.

Why has government procurement not spawned substantial litigation concerning *Winstar* and the government's sovereignty defenses? In brief, it is because the FAR makes more specific provisions for many eventualities that might otherwise cause the government to invoke judge-made defenses based on its sovereign status, including the sovereign acts and unmistakability doctrines, and recourse to these doctrines is both unnecessary and inappropriate.[183] The standard and mandatory FAR clauses that often will obviate recourse to such judge-made defenses include termination for convenience clauses, suspension and delay clauses, and changes clauses.[184] Broadly speaking, these clauses often provide for sharing between the contractor and the government of the full cost of the government's action that alters or suspends contractual performance, rather than imposing

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cilable with the holding of Horowitz v. United States, 267 U.S. 458 (1925) and may not have been meant to cover cases like *Horowitz*.

182. This does not appear to be a case such as I have discussed in *Assembling* Winstar, *supra* note 5, at 527, in which the parties contemplated the eventualities that arose, but nonetheless may have assumed that the contract would not be binding in those circumstances. Accordingly, as applied to cases like *Scott Timber*, Justice Souter's generalization is unobjectionable.

183. *See generally* Termination for Convenience of the Government (Fixed Price), 48 C.F.R. § 52.249-2 (1999).

184. *See id.* § 52.249-2 (termination for convenience); *id.* § 52.242-14 (supervision of work); *id.* § 52.243-1 (changes).

these costs entirely on one party.[185] This is most obviously true of the compensation mechanism prescribed for termination for convenience. The contractor is not provided with full expectancy damages but is allowed to recover costs incurred in partial performance of the terminated contract, together with a reasonable profit on work done, and reasonable settlement costs.[186]

In fact, it is the absence of this framework of provisions that prevents a breakdown of contractual performance and provides for a "soft landing" for the contractor when breakdown is inescapable that explains the paucity of *Winstar* claims in traditional government procurement settings. Conversely, the absence of this tried and true safety net in less traditional contracting settings goes a long way to explain the litigation that has arisen in these non-traditional, non-procurement settings. It is no accident that the most thorny claims of government breach of contract arising out of retroactive changes in existing programs and obligations arise in such non-procurement settings as nuclear waste reprocessing (where the government is a service provider), satellite launch agreements, sale of national forest timber, or government subsidies for low income housing (where the government serves as a regulator and a mortgage guarantor). Of course, the contracts that gave rise to the *Winstar*-related savings and loan claims also exemplify this pattern. In all of these cases, the government is either selling goods or services or is entering contracts as an instrumentality to serve its regulatory functions. The agreements and understandings in these cases too often neither take the form of comprehensive integrated agreements nor include the standard clauses that procurement contracts include (that address a range of extraordinary occurrences that might arise in the course of contract performance). Moreover, in many of these contexts, the agreements are not standardized, as they are in most procurement settings, and they do not reflect the accumulated body of experience with recurring grounds of contention that is effectively distilled in the FAR. For these reasons, it is no surprise that atypical government contracts continue to generate *Winstar*-like issues, while

185. *See id.* § 52.249-2(f).

186. 48 C.F.R. § 52.249-2(f) (allowing for termination for convenience of the government of a Fixed Price Contract).

traditional procurement contracts have not done so.[187]

D. Winstar *and the Other FIRREA Cases*

1. Liability Issues.—In the savings and loan context, the United States Court of Federal Claims has been reluctant to distinguish any of the other claims from those in *Winstar* itself.[188] The court has been eager to establish an efficient case management model to reduce the burden of this mass of substantial claims on the court. Toward that end, it has established special case management procedures, provided for briefing of a series of common issues and adopted a procedure for short-form motions for summary judgment.[189] What these procedures do, it seems, is to treat the *judgment* in *Winstar* as the basic fixed point of reference, rather than relying directly on an analysis of the disparate opinions supporting the judgment. There is, of course, considerable appeal to this approach—for it is by definition true that the one thing a Supreme Court majority endorsed in *Winstar* was the judgment, which established the government's liability.[190] The Court of Federal Claims has taken *Winstar* to hold, in effect, that in all cases where the facts are not materially different from those of the *Winstar* case itself, the government is liable.[191] The case management procedure adopted is designed to enable the court to efficiently address, in isolation, any claim that a particular facet of a case distinguishes that case from the *Winstar* model.[192] Not surprisingly, the court has almost invariably found that the distinctions proffered by the government are insufficient or immaterial.[193] As an application

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187. *See* Schwartz, *Assembling* Winstar, *supra* note 5, at 509-11 & nn.127-29 (anticipating this pattern).

188. *See* Castle v. FDIC, 42 Fed. Cl. 859 (1999) (generalizing the *Winstar* result); California Fed. Bank v. United States, 39 Fed. Cl. 753 (1997) (declining to distinguish cases).

189. *California Fed. Bank*, 39 Fed. Cl. at 754-58, 779 (describing caseload management procedures).

190. *Id.* at 756-58.

191. *Id.* at 754-56.

192. *Id.* at 756.

193. *Id.* at 760-79.

of common sense judgment, each of these conclusions may make considerable sense. But I question whether, without a clear understanding of the theory that rendered the government liable in *Winstar,* it is possible to discern which factual distinctions among the cases are in fact material.

This inability to evaluate the significance of factual distinctions may also explain the considerable disappointment that the court has found occasion to express regarding the government's litigation tactics in the wake of *Winstar.*[194] In the view of the Court of Federal Claims, the government has adopted something approaching a "scorched earth policy," under which no point is conceded and every conceivable point of distinction is preserved and argued. I would suggest that this conduct is not just the result of the stubbornness of the Justice Department's Civil Division, nor is it just the consequence of the enormous monetary stakes involved here. Rather, it flows from a combination of those enormous stakes and the fact that the government can no more be certain which factual distinctions truly are material than the rest of us can be. While the government's tactics may understandably frustrate the court, I would suggest that it is most accurate to view the court and counsel on all sides as captives of the Supreme Court's decision, which is significantly indeterminate as a precedent for other cases.

2. Calculation of Damages.—Calculation of damages has presented a thorny problem in *Winstar*-related claims. This is entirely predictable, at least in the class of cases in which the breached undertaking explicitly concerned the regulatory treatment to be afforded to the plaintiff. It is an inherently speculative endeavor to discern what the economic fortunes of an entity would have been had it been afforded a different regulatory treatment. This is especially so because the changed regulatory treatment was implemented, in the case of FIRREA, in the course of a sweeping change of policy which altered the terms of regulation for an entire industry. Thus, there may be no direct evidence of how a comparable institution would have fared under the counter-factual course of regulatory treatment through the same stretch of time.[195] The truth seems to be that it is ex-

194. *California Fed. Bank*, 39 Fed. Cl. at 754-55, 779.

195. One analogy that might be considered is the analogy to calculation of dam-

tremely difficult to establish with any confidence what the economic fortunes of a particular enterprise would have been had it been afforded a radically different regulatory environment. Thus, we should not have been surprised to be treated to the spectacle in the *Glendale* litigation of Professors Miller and Modigliani testifying as opposing experts, giving diametrically opposed assessments of the implications of their Miller-Modigliani Propositions for the proof of injury and damages in the *Winstar* cases.[196]

The first two decisions on damages from the Court of Federal Claims point in divergent directions, although both deny the plaintiffs expectancy damages. In *Glendale Federal Bank v. United States*,[197] Chief Judge Smith awarded a judgment of over $900 million based on reliance and restitutionary theories of recovery.[198] In doing so, Judge Smith specifically discounted the testimony of Professor Merton Miller that the supervisory goodwill, the use of which the plaintiff was denied, lacked real economic value.[199] By contrast, in *California Federal Bank v. United States*,[200] Judge Hodges rejected almost all of the plaintiff's damages claims, awarding only the roughly $23 million cost of raising certain replacement capital.[201] Judge Hodges specifically rejected the argument that the plaintiff should be compensated for the loss of its supervisory goodwill.[202] Although it is too early to say for certain how damage calculation will go in other *Winstar*-type cases in the savings and loan industry, *Glendale* and *California Federal* confirm that wildly disparate damages models, proposed by the opposing par-

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ages in private civil anti-trust cases. The Court has often held that damages need not be proven to the normal standard of confidence in such cases because proof of damages is inherently speculative. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-64 (1946). But it is also stated that damages may not be grounded on sheer speculation. *Bigelow*, 327 U.S. at 264. Plainly, these two principles exist in some tension.

196. Stephen Labaton, *Long After the S&L Crisis, Courts Are Handing Taxpayers a New Bill*, N.Y. TIMES, Nov. 22, 1998, § 3, at 1, 12.

197. 43 Fed. Cl. 390 (1999).

198. *Glendale Fed. Bank*, 43 Fed. Cl. at 409.

199. *Id.* at 401.

200. 43 Fed. Cl. 445 (1999).

201. *California Fed. Bank*, 43 Fed. Cl. at 462.

202. *Id.* at 450-62.

ties, have met with widely divergent receptions. One side effect of this is to make such cases difficult to settle. Plainly, Judge Smith hoped that his decision in *Glendale* would encourage settlements in other cases.[203] The fact that the *Glendale* court came down somewhere in the middle on damages and that it rejected the plaintiff's theories in support of expectancy damages, may encourage settlements, but it is still not clear how broadly generalizable the *Glendale* court's concerns about the speculative basis for the claims for expectancy damages will prove to be.[204] Moreover, the disparate approaches taken in the *Glendale* and *California Federal* cases will encourage appeals on all sides and will continue to impede settlements in other cases.

E. Winstar*'s Impact on Contracts Clause Litigation*

As noted above, I have previously cautioned that if the *Winstar* plurality's restrictive interpretation of the scope of application of the unmistakability doctrine were accepted, it would wreak havoc upon established Contract Clause jurisprudence.[205] The preliminary evidence that we have available to date, however, suggests that courts are simply not applying *Winstar* in that fashion. To date, the federal courts have not read *Winstar* as diminishing the force of the unmistakability doctrine that protects states from Contracts Clause liability for impairment of their own contracts. Indeed, curiously enough, *Winstar* is being cited as if it were a ringing reaffirmation of the unmistakability doctrine's broad application.

Specifically, the United States Court of Appeals for the First Circuit has faced a series of cases presenting Contract Clause claims arising out of a state or local government entity's alleged retroactive modification of its pension plan for government employees.[206] In these cases, *Winstar* has been cited as support for "the recognized presumption that statutory enactments do not create contractual obligations in the absence of an

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203. *Glendale Fed. Bank*, 43 Fed. Cl. at 410.

204. *See id.* at 397-402 (rejecting plaintiff's lost profits claim as too speculative).

205. *See* Schwartz, *Assembling* Winstar, *supra* note 5, at 507, 513 & n.116.

206. *See, e.g.*, Parker v. Wakelin, 123 F.3d 1 (1997); McGrath v. Rhode Island Retirement Bd., 88 F.3d 12 (1st Cir. 1996).

'unmistakable' intent on the legislature's part to do so."[207] For instance, in *McGrath v. Rhode Island Retirement Board*,[208] the First Circuit considered a Contract Clause claim based on a change Rhode Island made in its public employee retirement plan that deprived employees of the ability to count toward their retirement time spent in military service that they previously had been allowed to count for this purpose.[209] The court recognized that pension plans have been treated as a species of unilateral contract wherein the employee accepts the employer's offer by performance of the time in service required for vesting.[210] It also recognized that even where an employer purports to reserve an unqualified right to alter its pension plan, that right to amend is generally held to be subject to the employee's contractual rights to receive the promised benefits once an employee has performed the service required for vesting.[211] However, invoking the unmistakability doctrine and *Winstar*, the court cautioned that this last rule had developed in cases involving private sector pension plans and might not apply to public sector retirement plans:

> It is unclear whether the same limitations apply *ex proprio vigore* to public-sector retirement plans. On one hand, principles of fairness argue for comparability of treatment. On the other hand, the very nature of a republican form of government and that government's unique duty to represent the public interest combine to create a special employment environment. Lawmakers pay homage to this reality in many ways . . . and there are sound policy reasons to recognize this difference in terms of maximizing the states' flexibility vis-a-vis the retirement benefits that it offers to public employees. *Indeed such concerns underlie the recognized presumption that statutory enactments do not create contractual obligations in the absence of an "unmistakable" intent on the legislature's part to do so.*[212]

In *McGrath*, the court of appeals ultimately found it unnecessary to decide whether the unmistakability doctrine precluded

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207. *McGrath*, 88 F.3d at 19.
208. 88 F.3d 12 (1st Cir. 1996).
209. *Id.* at 13-14.
210. *Id.* at 16-17.
211. *Id.* at 18-19.
212. *Id.* at 19 (emphasis added) (citing *Winstar*).

treating pension rights as protected contract rights, no longer subject to modification.[213] The court concluded that the earliest point at which such a protected contract right could arise would be upon meeting the age and service requirements for vesting under the pension plan, noting that the plaintiff had not reached that juncture.[214] The First Circuit next returned to this problem in *Parker v. Wakelin*,[215] a case arising out of changes made to the Maine public employee retirement system by that state's legislature that had the effect of reducing the expected pension benefits of many current employees.[216] The district court had held the amendments unconstitutional as to employees who had met the service requirements for eligibility, but the court of appeals reversed, finding "no unmistakable intent on the part of the Maine legislature to create private contractual rights against the reduction of pension benefits prior to the point at which pension benefits may actually be received."[217]

Accordingly, Maine's alteration of its pension system did not violate the Contracts Clause.[218] In reaching this result, the court eschewed any blanket answer to the issue of Contract Clause protection for vested employees under a state pension plan, reasoning that the unmistakability doctrine demands first a case-specific determination as to whether the state "[l]egislature ha[d] unmistakably evinced the intention to create binding contractual rights" effective at this juncture.[219]

In applying this approach, an ambiguous statute was construed not to create contract rights that were secure against legislative alteration.[220] As in *McGrath*, the court's analysis

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213. *McGrath*, 88 F.3d at 20.
214. *Id.*
215. 123 F.3d 1 (1st Cir. 1997).
216. *Parker*, 123 F.3d at 2.
217. *Id.*
218. *Id.* at 9.
219. *Id.* at 7-8.
220. The relevant section of the Maine pension statute reserved to the state the power, generally, to alter or amend the pension system, but it provided that "[n]o amendment . . . may cause any reduction in the amount of benefits which would be due a member . . . immediately preceding the effective date of the amendment." ME. REV. STAT. ANN. Tit. 5, § 17801 (West 1985) (repealed 1999). The plaintiffs argued that, at a minimum, benefits were "due" for purposes of this statute at the time when all service requirements for their eventual payment were satisfied. *Parker*, 123 F.3d at 8-9. The state argued that benefits were not "due," and thus protected

gave no hint that the vigor of the unmistakability doctrine had been diminished or its reach curtailed, and again *Winstar* itself is cited simply as an embodiment of these unmistakability principles.[221] The same approach was applied in *Rhode Island Laborers' District Council, Local Union 808 v. Rhode Island*[222] and most recently in *National Education Association-Rhode Island v. Retirement Board.*[223]

IV. *WINSTAR* AND ANTI-RETROACTIVITY

In surveying the division of the Supreme Court in *Winstar*, I have noted that much of the support that may be adduced for viewing *Winstar* as a blow against retroactive legislation in the field of government contracts lies in the congruence rhetoric, and other portions, of Justice Souter's plurality opinion that did not command the support of a majority of the Court.[224] Indeed,

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against reduction, until they were actually payable. *Id.* The *Parker* court concluded that, given the ambiguity of this language, the unmistakability doctrine required the rejection of the plaintiffs' interpretation. *Id.*

221. *Id.* at 5. In none of these cases is there any consideration of Justice Souter's suggestion that the unmistakability doctrine ordinarily does not apply to contracts that could be recast as governmental undertakings to pay damages if performance of the literal undertakings were barred by an intervening statute. Because these are pension cases where the practical effect of payment of damages would be tantamount to undoing the change in pension rights, it may well be that even Justice Souter would apply the unmistakability doctrine in this context. *See supra* text accompanying note 24; Schwartz, *Assembling* Winstar, *supra* note 5, at 502-04. Alternatively, because damages are not available in federal court as a remedy for violation of the Contract Clause, it might be that this recasting device was thought to be unavailable in dealing with a Contract Clause claim. *See* Carter v. Greenhow, 114 U.S. 317, 322 (1885). But because none of these points was even mentioned, it seems likeliest that the court simply did not regard *Winstar* as imposing any limitation on the protection previously afforded to the states by the unmistakability doctrine.

Because a literal application in the Contracts Clause context of Justice Souter's approach to the scope of the unmistakability doctrine would radically alter long-settled points of Contract Clause jurisprudence, Schwartz, *Assembling* Winstar, *supra* note 5, at 507 n.116, it is highly likely that the courts will seize on one rationale or another for declining so to apply Justice Souter's reasoning. The more uncertain point is whether the unworkability of Justice Souter's approach in the Contracts Clause context, in which the unmistakability doctrine was first devised and operated exclusively for a century and a half, will give the courts an additional reason to refuse to follow that approach in the federal liability context as well.

222. 145 F.3d 42 (1st Cir. 1998).

223. 172 F.3d 22 (1st Cir. 1999).

224. *See supra* text accompanying note 64.

several of these key propositions are demonstrably rejected by a majority of the Court. A careful study of *Winstar* therefore suggests that the case has less to say than first leaps to the eye on the subject of permissible and impermissible statutory retroactivity in the field of government contracts. Nevertheless, study of the unmistakability and sovereign acts doctrines does have something to contribute to the discussion of retroactivity in government lawmaking.[225]

It may be useful to hazard a general observation about the relationship of the takings cases, generally, to breach of contract jurisprudence in cases against the United States. Normative antipathy to retroactive changes in the law typically assumes that the pre-existing rights and duties of the parties are clearly established. In assessing takings claims, we are engaged in assessing claims of unreasonable infringement of reasonable investment-backed expectations.[226] As the division between the majority and the dissenters in *Eastern Enterprises v. Apfel*[227] well illustrates, however, a significant problem for judges in these cases is that it is difficult to reconstruct with sufficient clarity and accuracy the operative expectations of the involved parties at a time in the historical past. As Justice Stevens observes in his *Eastern Enterprises* dissent, moreover, "[s]ome

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225. *Winstar* has lent some modest rhetorical support to the nascent movement against retroactive legislation. For instance, in *Lynce v. Mathis*, 519 U.S. 433 (1997), the Court held that Florida's statutory cancellation of previously earned good time credits after they had resulted in a prisoner's release violated the Ex Post Facto Clause of Article I, sec. 10. Justice Stevens' opinion for the Court describes the protection of the Ex Post Facto Clause as a part of a larger constitutional antipathy to the use of "lawmaking power to modify bargains [the sovereign] has made with its subjects." *Lynce*, 519 U.S. at 440. He remarks that this broader principle "protects not only the rich and the powerful . . . but also the indigent [criminal defendants]." *Id.* (citing *Winstar*, 518 U.S. at 839). These passages from *Lynce* were in turn cited in *Doe v. Gregoire*, 960 F. Supp. 1478, 1487 (W.D. Wash. 1997), in a successful Ex Post Facto challenge to retroactive application of a sex offender registration statute. But both of these cases were decided on the textual basis of the Ex Post Facto Clause and do not suggest that *Winstar* has had a significant effect on the law of retroactive statutes generally. As we have seen, the Contract Clause cases regarding modification of state pension plans, where the issue has been presented most clearly, reflect strong reluctance, undiminished by *Winstar*, to read state pension statutes as making contractual promises that would inhibit a state's ability to change its pension scheme.

226. Eastern Enters. v. Apfel, 524 U.S. 498, 522 (1998); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

227. 524 U.S. 498 (1998).

appellate judges are better historians than others."[228]

I suspect that takings scholars who are not versed in the law of the sovereign acts and unmistakability doctrines might assume that this kind of problem is less significant when it comes to the government's sovereignty-based defenses to claims of breach of contract. That is, it is tempting to assume that the relevant expectations of the parties are authoritatively established by the text of the discrete contract that is allegedly breached; thus, enforcement of contracts is a simpler endeavor than discerning unconstitutional takings: It requires only that the parties be held to their undertakings. Scholars of the law of private contracts might tell you, however, either that that model of textual determinacy was never an adequate account of the law of contract obligations, or that it reflects a classical model of contracts that has now been superseded by a neoclassical or in some quarters a "relational" model, under which the materials for interpretation range well beyond the "four corners of the instrument."[229] But whether this model of discrete contracts and textual determinacy offers a realistic account of the law of private contracts, it assuredly is not an adequate way to look at the law of government contracts.

First of all, in a procurement context, government contracts are routinely interpreted as though they included all of the standardized terms that they should have included according to the government's voluminous contracting regulations, the FAR.[230] Second, government contracts are interpreted in light of relevant constitutional constraints and the statutes that implement them, most importantly the Appropriations Clause and the Anti-Deficiency Act.[231]

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228. *Eastern Enters.*, 524 U.S. at 550 (Stevens, J., dissenting).

229. GRANT GILMORE, THE DEATH OF CONTRACT 87-102 (1974); Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982); Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Ian MacNeil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

230. This is the doctrine of G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963).

231. *See, e.g.*, Hercules Inc. v. United States, 516 U.S. 417 (1996) (rejecting implication of a duty to indemnify a manufacturer of Agent Orange for tort liabilities arising from the performance of that contract based on the Anti-Deficiency Act, 31 U.S.C. § 1341 (1994) (which in turn serves to enforce the Appropriations Clause,

Third, as Professor Richard Speidel pointed out many years ago, to a degree unequaled in most private contracts, governmental contractual undertakings are vulnerable to claims of breach arising from generic governmental activities that may appear to violate an implied duty of cooperation and noninterference but which are also essential to the performance of the government's sovereign responsibilities.[232] Accordingly, Speidel suggested that the sovereign acts doctrine could in large part be understood as a caution against applying implied duties of noninterference against the government when the government's generic acts as sovereign have the effect of burdening its contracting partner or barring its own performance.[233] Concerns about over-extension of the government's sovereignty defenses of the kind articulated in this symposium by my colleague emeritus, John Cibinic, should not blind us to the validity of the core concerns that fueled the invention of the sovereign acts doctrine.[234]

For instance, in the seminal case *Deming v. United States*,[235] the plaintiff claimed that the United States had breached its contract to supply certain provisions to the military by imposing certain import duties that covered the items to be supplied and by issuing paper currency.[236] Similarly, in *Jones v. United States*,[237] the alleged breach arose out of the manner in which the government positioned troops in Indian country, which allegedly made the plaintiff's undertaking to survey adja-

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U.S. CONST. art. I, § 9, cl.7)); Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287 (1928) (finding the United States immune from liability as a holdover tenant under a lease because of the operation of the Appropriations Clause). *Hercules*, decided by a unanimous Supreme Court the same term as *Winstar*, makes clear that a court's ability to find an implied-in-fact contract binding on the government is significantly restricted by the Appropriations Clause and the Anti-Deficiency Act. 516 U.S. at 427-28. *Hercules* thus undercuts both the congruence rhetoric of Justice Souter's opinion and any model of textual determinacy that might be applied to federal government contracts.

232. Richard Speidel, *Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts*, 51 GEO. L.J. 516 (1963).

233. *Id.* at 517-18; Schwartz, *Liability for Sovereign Acts*, *supra* note 4, at 660-65.

234. John Cibinic, *Retroactive Legislation and Regulations and Federal Government Contracts*, 51 ALA. L. REV. 965-70 (2000).

235. 1 Ct. Cl. 190 (1865).

236. *Deming*, 1 Ct. Cl. at 190-91.

237. 1 Ct. Cl. 383 (1865).

cent lands more burdensome.[238] These cases imported into the law recognition of the principle rediscovered by Justice Scalia in his *Winstar* concurrence: that it is not normally reasonable to presume that a sovereign implicitly "promise[s] that none of its mutifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts."[239]

Accordingly, the doctrinal heart of the government's sovereign acts and unmistakability defenses concerns the standard of proof required in determining whether the government has made an undertaking constraining its future exercise of legislative and regulatory power. Of course, these standards of proof frequently may have outcome determinative effects in cases in which the government has not made explicitly clear commitments of this kind. *But the fact remains that they are at least ordinarily rules about how to deal with uncertainties about the reasonable expectations of the parties to a government contract.* It is my view, moreover, that this is true not only of the unmistakability doctrine, but also of the sovereign acts doctrine, which in fact is a special version of the unmistakability doctrine that applies with particular force when the government's contracting partner asserts a contract-based immunity from applicable federal legislation that applies generically to others similarly situated. Although the different factions of the *Winstar* Court disagreed as to many of the particulars (some quite significant) of these rules, it appears in the end that all (with the possible exception of Justice Breyer) agreed that there are good reasons to read many government contracts with different presuppositions than one would apply in interpreting analogous private undertakings. The functioning of the sovereign acts and unmistakability doctrines as an aid to interpretation in circumstances in which the government's undertaking is disputed in some relevant respect, or in which an implied undertaking is attributed to the government, is well reflected in cases like *Yankee Atomic*. To the extent that these sovereignty-based defenses serve as rules of clear statement, they also serve the valuable function of alerting the government's contracting partners to the

238. *Jones*, 1 Ct. Cl. at 384.

239. *Winstar*, 518 U.S. at 921 (Scalia, J., concurring).

need to pin down the government when it seeks by the terms of its contracts to immunize itself from subsequent exercises of legislative authority.[240]

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240. In his Article for this Symposium, John Cibinic makes the reverse argument: "if the Government wants the contractor to bear the risk of subsequent regulations or legislation *it* should do so up front in clear and unmistakable language." Cibinic, *supra* note 234, at 975 (emphasis added). Professor Cibinic's "reverse unmistakability" doctrine may be appealing in the situation in which the government has made an explicit contractual undertaking regarding the regulatory treatment to be afforded to its contracting partner. This, in Justice Scalia's view, was the case in *Winstar*. *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in the judgment) (agreeing with plaintiffs that "the very *subject matter* of these agreements . . . was government regulation"). In such cases, Justice Scalia would find that the contractor has received a tolerably clear assurance that it will be immunized from subsequent changes in generally applicable regulations. *See id.* It would follow from this view that in cases where the government appears to promise regulatory stasis, it must correct the impression that it has so promised, in unmistakable terms, if it is not to be bound by the primary promise.

But this is not the typical situation in which the sovereign acts doctrine has been applied, and it may not be representative of the unmistakability doctrine either. For instance, in *Deming* and *Jones*, the archetypal sovereign acts doctrine cases, the plaintiffs could allege only that the government had breached an implied duty not to indirectly burden the plaintiffs' promised performance by doing things like enacting import tariffs or altering the deployment of government soldiers. *Deming*, 1 Ct. Cl. at 190-91; *Jones*, 1 Ct. Cl. at 384. It would be wholly unreasonable to place the onus on the government to expressly reserve in the contract the right to exercise each species of government power that might indirectly burden the contractor's performance in this fashion. Rather, if the contractor's performance depends upon particular forbearance by the government in the exercise of its regulatory powers and other responsibilities, it seems more reasonable to place the burden on the contractor to identify that dependence explicitly in the terms of the contract. This, I take it, is one of the points Justice Scalia has in mind in emphasizing that a sovereign does not implicitly promise that "*none* of its *multifarious* sovereign acts" will obstruct performance, by either party, of a government contract. *Winstar*, 518 U.S. at 921 (Scalia, J., concurring) (emphasis added).

Similarly, consider a case such as *Horowitz*, in which the Supreme Court first applied the sovereign acts doctrine, Horowitz v. United States, 267 U.S. 458 (1925). There, the Court invoked the doctrine to exonerate the United States from liability for failing to ship silk to the plaintiff on the promised schedule, where, following entry into the contract, the United States Railroad Administration promulgated a ban on rail shipments such as this. *Horowitz*, 267 U.S. at 459-61. Although the government's regulatory action literally precluded the promised performance, it does not seem reasonable to conclude that the government needed expressly to reserve the right to take this kind of action in the contract. Rather, the range of government action that might potentially interfere with the government's own undertaking is sufficiently broad that it is unreasonable to infer immunity from the government's silence on the subject of potential interference by government embargo, in circumstances where a private shipper who made the same undertaking would not be liable for nonperformance caused by the government's embargo. The situation would be

It has been noted in this symposium that one form, albeit a weak one, of antipathy to retroactive legislation is the clear statement rule reflected in *Landgraf v. USI Film Products.*[241] *Landgraf*, of course, teaches that statutes should not be interpreted to alter the legal consequences of past conduct unless "Congress first make[s] its intention" that the statute be given retroactive effect "clear."[242] As the Court explained there, "[r]equring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[243] The clear statement rule embodied in the sovereign acts and unmistakability doctrines, by contrast, serves a different but equally legitimate function. It assures that contract rights that would inhibit the authority of the federal government to exercise its normal legislative and regulatory powers are not lightly inferred where they have not been unmistakably granted. In a formal sense, of course, the clear statement rule of unmistakability can be reconciled with the normative antipathy to retroactivity reflected in the *Landgraf* rule: both are consistent with a reluctance to disturb settled rights. Unmistakability simply insists that the rights be clearly settled before they acquire contractual protection, while *Landgraf* insists that the intent to disturb entrenched expectations be clear. While both concerns have some application when Congress acts in a manner that affects only private parties, the sovereign acts/unmistakability doctrine reflects the special concern that arises when the government enters into contracts that might be mistaken inadvertently to compromise sovereign authority.

In this connection, I would take the "portable" teaching of *Winstar* to be simply that these rules of clear statement must be applied reasonably. Specifically, if, as Justice Scalia found to be the case, *Winstar* is that unusual case in which the government's primary undertaking was explicitly to afford the plaintiffs a particular package of favorable regulatory treatment

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quite different, however, if the government had contracted with a railroad that it sought to keep in business, not to ban rail shipments of silk.

241. 511 U.S. 244 (1994); *see* Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123 (2000).

242. *Landgraf*, 511 U.S. at 268.

243. *Id.* at 272-73.

over a defined period of time, then the requirements of the unmistakability principle have been satisfied.[244] However, where the government's explicit contractual undertaking does not directly constrain its future exercise of legislative power, nothing in *Winstar* undercuts the principle that courts should be very slow to infer a contractual immunity from such legislation. Enthusiasm for a principle of anti-retroactivity should not blind us to the important values that are served by the government's sovereignty based defenses. These rules protect a different set of conservative constitutional values: legislative supremacy, democratic accountability, conservation of the fisc, and the textual constitutional commitment to these principles embodied in the Appropriations Clause. In the analogous Contract Clause context, these sovereignty based defenses also serve as an important protection for state sovereignty. Review of the post-*Winstar* case law indicates that *Winstar* has provided, to date, at most, modest support for intensified review of retroactivity in federal legislation affecting federal contracts.

An important lesson may also be learned from the finding that *Winstar* has not been a major issue to date in government procurement disputes. This experience suggests that federal agencies have considerable ability to minimize problems of unfair retroactivity affecting government contracts. It may be unrealistic to expect the development for non-procurement contracts of a set of universally-applicable standardized clauses, similar to those found in the FAR, that have largely pre-empted the development of *Winstar*-like claims in government procurement settings. Still, adaptation of the FAR model emphasizing use of standardized clauses covering foreseeable contingencies on an agency-specific basis offers a significant promise even for non-procurement contracts as a means of preventing unfair surprise

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244. Of course, it is equally necessary to show that the governmental actors who made such an undertaking had the requisite authority to do so. I am dubious that Justice Scalia's analysis in *Winstar* adequately addresses this concern. *Compare Winstar*, 518 U.S. at 919 (Scalia, J., concurring in the judgment) (holding authority to be sufficient), *with* Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (holding that the government astopping a payment unauthorized by statute violates the Appropriations Clause); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (finding that the government is not bound where an agent acts outside of his or her authority). *See* Schwartz, *Assembling Winstar*, *supra* note 5, at 543 & n.282 (critiquing Justice Scalia's discussion).

arising from retroactive changes in the law. As a policy prescription, I would argue that it would be desirable to build into nontraditional government contracting practice anticipatory sensitivity to the range of unforeseen developments that might overtake the agreements entered, and to make explicit provision therefor to the maximum extent possible. The lesson to be learned from experience under the FAR is that where an agency engages in a set of standardized transactions affecting private parties, it is not infeasible to build in an elaborate set of safeguards to address eventualities that may seem relatively remote in any single case. Every agreement entered into with the government that concerns current regulatory policy and that even arguably might be considered a contract should routinely make provision for circumstances in which the then-current regulatory policy is altered by Congress or by general regulation. Conversely, Congress would be well advised to take more seriously than it did in the enactment of FIRREA the need to provide transitional regimes that take account of any contractual rights respecting future regulatory treatment.[245] It is likely that a strategy combining advance planning for these issues by agencies that enter nontraditional government contracts with increased attentiveness to such problems on the part of Congress will be more effective in alleviating problems of unfair retroactivity than any across-the-board solution that could be instituted by courts.

245. The model of amortization of nonconforming uses that is commonly used in enacting of new zoning ordinances has considerable appeal and should be considered in many contexts.