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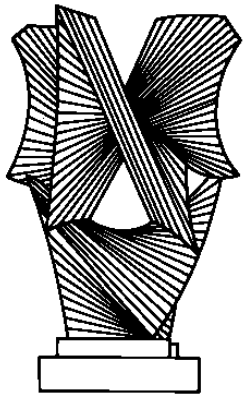

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Abstract. Most scholars believe that courts should enforce government contracts, though they disagree about the extent to which liability or damages rules should trade off relevant considerations – the problem of governments holding up contractors, on the one hand, and the problem of governments using contracts in order to defer costs to future governments, on the other hand. These scholars, however, overestimate the ability of courts to affect policy outcomes. Courts cannot increase the welfare of current or future generations by enforcing government contracts. The reason is that enforcing contracts can benefit future generations only by increasing the credibility of their governments, but if the current government has not already tried to benefit future generations by complying with contracts voluntarily, then it will offset the effect of an adverse judgment by withdrawing value from the future using a policy instrument over which courts have no control.

INTRODUCTION

In United States v. Winstar the Supreme Court held that the United States government breached several contracts when Congress passed a law overturning regulations that permitted purchasers of insolvent S&L's to evade solvency requirements.[2] Each of these contracts involved a thrift and the Federal Home Loan Bank Board, the government agency that regulated thrifts. One deal illustrates the others. In 1983 the Bank Board entered an "Assistance Agreement" with Winstar Corporation, in which Winstar purchased a failing thrift and the Bank Board promised to permit Winstar to use an accounting gimmick so that the transaction would not appear as a loss on Winstar's balance sheet. As a result of the accounting gimmick, Winstar could not be declared in violation of reserve requirements even if the purchase of the insolvent thrift had just that effect. The Winstar deal, and many others like it, were motivated by an ill-conceived Bank Board policy of encouraging the consolidation of the thrift industry rather than declaring it insolvent. When the house of cards collapsed a few years later, Congress enacted the Financial Reform, Recovery, and Enforcement Act of 1989. This package of reforms included a provision banning the accounting gimmicks that the thrift regulators had authorized. The thrifts, holding companies, and shareholders who relied on these gimmicks sued the U.S. government for breach of contract, seeking in the aggregate $30 to $35 billion dollars in damages. Despite the Winstar decision five years ago, only a few of the 140 cases have

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[1] Professor of Law, University of Chicago. Thanks to Douglas Baird, David Currie, Beth Garrett, Jack Goldsmith, John Harrison, Doug Lichtman, Richard Posner, David Strauss, Adrian Vermeule, David Weisbach, and workshop participants at the University of Chicago, for helpful discussions and comments, Lisa Messier and Tana Ryan for their research assistance, and the John M. Olin Foundation Fund and the Sarah Scaife Foundation Fund for financial support.

[2] 518 U.S. 839 (1996).

settled or come to a final judgment. The U.S. government is fighting the lawsuits tooth and nail – the FDIC alone has already spent more than $400 million on litigation and the Justice Department expects to spend $50 million annually over the coming years.[3]

The Supreme Court treated the transactions between the Bank Board and the thrifts loosely as contracts between private parties. The usual reason that private parties enter contracts is to prevent hold up: if a buyer (for example) were not bound by contract law to pay the agreed price for seller's custom-made widgets, then the buyer could extract a price concession from the seller after the latter had made its investment; but if buyers had this power, sellers would not enter contracts with them in the first place. Hold up problems plague government contracts as well as private contracts, as the Court recognized. Denying the thrifts a remedy "would make an inroad on [the Government's] power [to make contracts], by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements."[4] Firms would not make contracts with the government, or would make contracts only for a high price, unless they were entitled to damages if the government breached.

Although the hold up problem besets both private and government deals, a further problem arises only for government contracts. This is the problem of intergenerational opportunism. This problem arises for the government, but not for individuals, because the government represents the interests of a constantly changing population, or the voters who prevail in periodic elections, rather than having a single, time-constant interest itself. If courts enforce government contracts, then earlier governments will enter contracts for the sole purpose of binding later governments to the earlier governments' policies. For example, a conservative government might enter a large number of defense contracts – more than it would if it were certain that it would stay in power – in the hope of binding a future liberal government to a strong policy of defense. If the liberal government cannot breach these contracts without paying high damages, it might purchase the military hardware even though it would rather use funds for other purposes.

The Winstar Court overlooked the problem of intergenerational opportunism. The plurality acknowledged that the Winstar contract raised the cost of subsequent regulation but not that the cost would be born by a different government.[5] The dissent argued that enforcing government contracts could put the budget in peril because of the improvidence of government officials, but again did not mention that the Court's holding creates a perverse incentive for governments to externalize costs on later governments.[6]

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[3] See Timothy Curry and Lynn Shibut, The Cost of the Savings and Loan Crisis: Truth and Consequence, 13 FDIC Banking Rev. 26, 31 tble. 4, 34 (2000); Marcia Coyle, U.S. Digs in Against S&Ls, The National Law J., May 28, 2001, at p. A1.

[4] Winstar, 518 U.S. at 884 (plurality). The two concurring opinions agreed on this point as well, and the dissent did not quarrel with it.

[5] Winstar, 518 U.S. at 883.

[6] Winstar, 518 U.S. at 927 (Rehnquist, J, dissenting).

The academic critics have had to make this point. With no financial stake in the health of the thrift industry and the expectation of leaving office in the near future, officials chose to put off the S&L crisis rather than resolve it. The regulations allowed regulators to avoid declaring that the thrift industry was insolvent but did not solve the problem and in fact permitted it to get worse. Forcing the government to pay damages for overturning bad regulations such as these can only deter the government from correcting its earlier mistakes.[7]

What should the Court have done, according to the critics? Resolving the tension between hold up and intergenerational opportunism is difficult, and there are two proposals on the table. The first is to authorize courts to award limited damages for breach of government contract rather than ordinary expectation damages. The damages should be low enough to permit subsequent governments to escape politically motivated contracts but sensitive enough to the contractors' costs to prevent governments from holding up contractors too much.[8] The second proposal is to award damages for breach of government contract in cases in which the government engages in the ordinary kinds of contracts that firms and individuals do, and not to award damages for breach of government contracts in which sovereignty is at stake.[9] Under these views, the plaintiff thrifts in Winstar should have obtained something less than the gains wiped out by FIRREA or, if financial regulation is considered a sovereign power, nothing at all.

These arguments move beyond the Court's analysis, but they have a flaw. They assume that a court has the ability to maximize utility across generations.[10] This assumption is false, and because it is false, courts should not enforce government contracts.

Hold up, in the commentators' eyes, justifies enforcement or partial enforcement of government contracts. But if a court awards damages for breach of a government contract, the prevention of hold up is not enjoyed by the current generation. The contractor's investment is sunk; the award itself is simply a transfer. The award can benefit only future generations, and it does so indirectly by making future contractors more willing to contract with future governments, secure in the expectation that future courts will continue the policy of awarding

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[7] Daniel R. Fischel and Alan O. Sykes, Government Liability for Breach of Contract, 1 Amer. L. & Econ. Rev. 313, 363-64 (1999). The basic problem of intergenerational opportunism in government contracts has been identified many times: see, e.g., Gillian Hadfield, Of Sovereignty and Contract: Damages for Breach of Contract by Government, 8 U. Southern Cal. Interdisc. L.J. 467 (1999); Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am. B. Found. Research J. 379 (1987); Stewart E. Sterk, Freedom From Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615 (1985); David Dana and Susan P. Koniak, Bargaining in the Shadow of Democracy, 148 U. Pa. L. Rev. 473 (1999).

[8] See Abraham L. Wickelgren, Damages for Breach of Contract: Should the Government Get Special Treatment?, 17 J. Law, Econ., & Org. 121 (2001); cf. Hadfield, supra note __ (advocating reliance damages).

[9] See Fischel and Sykes, supra note __; Dana and Koniak, supra note __.

[10] Fischel and Sykes, supra note __, at 334. The assumption is explicit sometimes; for example, see Wickelgren, supra note __, at 132, equation (8), where social welfare is assumed to be an additive function of the utility functions of citizens at different periods.

damages for breach of government contract. The rub is that the decision to benefit future generations can rest only with the current generation and their political representatives, not with their judges. If the judges defy the current government's efforts to breach contracts, then the current generation will respond by withdrawing benefits that it would otherwise be willing to confer on future generations, in which case the judicial policy of enforcing contracts will make everyone – present and future – worse off.

The argument, then, is that judicial enforcement of government contracts against the will of the political branches is futile, or self-defeating. Courts cannot, and should not, be agents of future generations. These arguments are presented in Part II after a discussion of doctrine and the academic literature in Part I. Part III relates the thesis to some other debates in legal theory. Part IV examines doctrine.

I. BACKGROUND

A. Doctrinal Preliminaries

At the outset it is necessary to clear up some ambiguities in the title and thesis of this paper. The phrase, "Courts should not enforce government contracts" – *federal* courts and *federal* government contracts except when otherwise noted – has several possible meanings. (1) Courts should not have jurisdiction over government contract disputes, with the consequence that the victim of a breach by the government does not have the right to sue in court. (2) Courts should have jurisdiction over government contract disputes, and should resolve them, but should not provide a remedy of any sort. (3) Courts should award a remedy but they should not order Congress to appropriate money in order to pay damages; but courts could enjoin government officials from acting in ways inconsistent with the victim's contract rights or order government officials to pay damages out of their own pockets, in which case Congress would probably indemnify them. (4) Courts should award a remedy of damages against the government and order Congress to appropriate money in order to pay the award.

This article argues that assuming that courts have the relevant constitutional authority, they should refrain from exercising the powers under (3) and (4), that is, the powers to compel Congress, directly or indirectly, to comply with a government contract or pay damages. Further, with limited exceptions courts should not have the power under (2) if, as a result of judicial resolution of a contract dispute, Congress incurs a political cost from refusing to pay damages even if it has the formal legal and constitutional power not to pay damages.

The doctrine is ambiguous, and more will be said about it in Part IV, but for present purposes one should understand that this position contradicts aspects of doctrine, and conventional wisdom among scholars. Under the Tucker Act,[11] Congress has waived sovereign immunity for breach of contract claims, and everyone agrees that this means that courts (usually the Court of Federal Claims,

[11] 28 U.S.C. § 1491.

with appeal to the Federal Circuit, and then to the Supreme Court) have jurisdiction over breach of contract claims, and that courts can and should resolve these disputes, and declare a winner (meaning #2). Further, if Congress voluntarily appropriates money for a reserve fund to be used to pay Tucker Act claims, as it currently does, courts should award damages in the expectation that the appropriation will be used to pay them. The problem arises if Congress refuses to appropriate money to pay Tucker Act claims, or orders the disbursing agent not to use money from the reserve fund to pay a particular judgment.

Under what will be called the "strong" interpretation, the victim of a government breach of contract acquires a property interest – a "vested" contract right – and if Congress refuses to pay damages, this amounts to a taking under the Constitution, for which there is a judicial remedy.[12] If this is true, the court might enforce government contracts in sense #4. And even if the Supreme Court would not order Congress to appropriate money, it might award damages against officials or enjoin them to act consistently with the victim's contract rights when that is possible (meaning #3).[13] If either of these statements describes the position of the Supreme Court, the Court should withdraw federal jurisdiction over government contract appeals or else (more pragmatically) strengthen doctrines, such as sovereign immunity and the sovereign acts doctrine, that make it hard for plaintiffs to obtain remedies against the government.

Under the weak interpretation, the Court cannot order Congress to appropriate money to pay damages, because only Congress has the power to appropriate under the Constitution.[14] This would undermine meaning #4. Further, the Court might refuse to order officials to pay damages for breach of contract, or enjoin them to act consistently with the promisee's contract rights, because the officials are acting as agents of the sovereign rather than as persons acting ultra vires. This would undermine meaning #3.[15] Congress would be free to refuse to pay damages in Winstar and the Winstar-related cases. If this is the law, it is correct, but goes against the weight of scholarly commentary, which wants Congress to pay damages for breach of contracts and takings.[16]

An intermediate interpretation is that although the Supreme Court cannot formally compel Congress or its agents to pay damages, the Court's resolution of

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[12] Lynch v. United States, 292 U.S. 571 (1934); cf. First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 316 n.9 (1987).

[13] Cf. United States v. Lee, 106 U.S. 196 (1882).

[14] See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530 (1962), which suggests that the Court must rely on the "good faith" of Congress in satisfying judgments against the United States government. See also Reeside v. Walker, 52 U.S. 286, 290-91 (1850) (officer of United States cannot pay damages award unless there is an appropriation by Congress); National Association of Regional Councils v. Costle, 564 F.2d 583, 588-90 (D.C. Cir. 1977) (courts have no constitutional power to force Congress to appropriate funds); and see generally Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1392-96 (1988).

[15] See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and the discussion in Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 36 (1963). For similar reasoning involving a state breach of contract, see Edelman v. Jordan, 415 U.S. 651 (1974).

[16] See, e.g., Akhil Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987).

a dispute in the victim's favor makes it politically costly for Congress to refuse to appropriate money to pay damages. The Supreme Court, on this view, has the power to impose political costs on a Congress that breaches a contract or takes property. If this is the current state of affairs, then the Court should withdraw federal jurisdiction over government contract appeals or else make it harder for plaintiffs to prove a breach of contract.

As should be clear, the doctrine is complex, and we will return to it in Part IV.

B. The Academic View of Government Contracts: Hold Up versus Intergenerational Opportunism

Conventional wisdom among academics holds that courts should enforce private contracts in order to enable parties to attract investment in their projects. Suppose, for example, that a buyer needs special custom made widgets for its factory. Seller is capable of producing these widgets but it fears that if it produces these widgets, Buyer will hold up Seller – that is, refuse to pay for them unless Seller lowers the price. Because by assumption the widgets are custom made, Seller cannot recover its investment by selling the widgets on the market, and must submit to Buyer's threat. But then Buyer will pay only a low price, one that will not compensate Seller for the cost of its sunk investment. Anticipating this outcome, Seller will not agree to produce the widgets in the first place. But if Buyer can commit itself to paying the contract price by entering a legally enforceable contract, the problem is solved. Seller will invest in the widgets and depend on the courts to extract damages from Buyer if Buyer refuses to pay the full price. The purpose of contract enforcement, then, is to protect a party's investment against hold up, so that parties can maximize the value of their joint projects.[17]

Some authors have applied this argument directly to government contracts, arguing that courts should enforce government contracts so that the government cannot hold up those it contracts with.[18] The Winstar Court also made this argument, and observed correctly that if the government is permitted to hold up, it will have trouble attracting contractors and have to pay them more.[19] There is a further consideration, however. In ordinary cases the party to the private contract has the same identity at the time of entry into the contract and the time of performance,[20] whereas the government does not have the same identity at the

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[17] Although this theory of contract law is welfarist or "economic," it should be noted at the outset that the critique of government contract enforcement advanced in this paper does not depend on any particular theory of contract law being true.

[18] See Ronald J. Daniels and Michael J. Trebilcock, Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier, 46 U. Toronto L.J. 375 (1996); Richard Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703 (1984).

[19] Winstar, 518 U.S. at 884.

[20] Cf. Derek Parfit, Reasons and Persons (1984). If personal identity changes over time, then the explanation for private contract enforcement must be that the early self has both sufficient motivation to benefit the later self, and sufficient information about the later self's interests

time of entry and the time of performance. Call the government at the time of breach (or performance) G2, and the government at the time of contract entry G1. G1 and G2 are different entities, and this is what distinguishes the government contract case from the individual contract case, where the individual is the same person at time 1 and time 2.[21]

The problem with G2 being subject to a contract made by G1 is that G1 has an incentive to enact policies that benefit G1 at the expense of G2. The standard example is debt: G1 borrows money to fund projects that benefit current citizens, leaving G2 to foot the bill. If G1 is a conservative government, it might borrow the money rather than raise taxes, so that a liberal G2 will have to fund debt rather than social programs.[22] But the problem of intergenerational opportunism applies to other contracts as well. The regulatory contract at the heart of the Winstar case is a possible example of a government – or regulators acting on their own – putting off a problem rather than solving it, with the result that a later government pays the bills for the malfeasance of an earlier government. And even ordinary procurement contracts can be subject to intergenerational opportunism. A conservative government might enter long-term military contracts, for example, in order to bind future liberal governments, which would rather go ahead and make the final payments on weapons they do not want very much, than breach and pay damages.

For government contracts, then, hold up *and* intergenerational opportunism are problems that must be addressed by courts. If G1 and G2 – or the populations they govern – have similar interests, then the intergenerational opportunism problem becomes less severe, and the hold up problem becomes more significant. In that case, government contract enforcement would seem to be less objectionable. If G1 and G2 have quite different interests, then intergenerational opportunism becomes more objectionable. Thus, authors differ on whether courts should enforce government contracts, and if so, how liability or damages rules should be altered in order to account for opportunism. One might argue that for practical purposes, or for certain kinds of contracts, G1 and G2 are likely to differ enough to make contract enforcement unwarranted;[23] or one might argue that contracts should be enforced but damages reduced to reflect the interest of G2.[24]

(compared to the government); then enforcement of contracts would be like deference given by the government to parents, who are assumed to have sufficient motivation and information for taking care of their children.

[21] Several authors advance this position in the course of arguing that courts should not treat government contracts in the same way that they treat private contracts. See Sterk, supra note __; Dana and Koniak, supra note __; and Hadfield, supra note __. They have in mind a democratic justification for sovereign immunity along the lines suggested by Harold J. Krent, Reconceptualizing Sovereign Immunity, 45 Vand. L. Rev. 1529 (1992).

[22] For evidence of this kind of behavior, see Per Pettersson-Lidbom, An Empirical Investigation of the Strategic use of Debt, 109 J. Pol. Econ. 570 (2001).

[23] See Dana and Koniak, supra note __.

[24] See Wickelgren, supra note __.

But the authors agree on most things. They agree that courts should attach equal weight to the welfare of different generations, and they agree, implicitly, that legislatures cannot adjust in response to courts' decisions when these decisions do not reflect the legislatures' time preferences. These assumptions are vulnerable to critique.

II. WHY COURTS SHOULD NOT ENFORCE GOVERNMENT CONTRACTS

A. The Futility Argument

The real problem with government contract enforcement has nothing to do with intergenerational opportunism. The problem is that courts do not have enough power to impose their time preferences on legislatures. Judicial enforcement of government contracts, even if G1 and G2's interests are the same, can produce no benefit.

1. Some simplifying assumptions

Let us begin with very simple assumptions. Suppose that the government is a perfect agent of the public; it does exactly what the public wants, with the public interest conceived as some aggregation of citizens' preferences. If the government does what the public wants, then the interests or preferences of the government must constantly change, because the public constantly changes with births, deaths, immigration, emigration, and shifts in opinion, and because the way that the public's preferences are aggregated and incorporated in government policy changes as political institutions evolve. One might say that the government itself constantly changes, and not just after elections or when one official is replaced with another. As the government changes it represents the current generation of the public, not some aggregation of the interests of different generations over time, except to the extent that future interests are incorporated in the preferences of the current generation.

We must separate out the judiciary from this government, but we also assume that the judiciary acts in a benevolent way. The question facing the judiciary is whether it should treat government contracts the same as contracts between private parties.

2. The intergenerational trust fund

To answer this question, we introduce the concept of the "intergenerational trust fund." The current generation benefits future generations in many ways. It invests in bridges, canals, dams, levees, roads, and other infrastructure with very long useful lives. It invests in universities and other institutions that generate valuable intellectual property, when that value cannot be captured by the current generation. It preserves large areas of the environment and

restricts long-term pollution. It educates the young. It maintains high standards for government service. It keeps government facilities in working order. It defends itself against foreign invaders and tries to develop an international reputation for firmness. Some of these benefits are capital investments and intellectual property, and others are investments in the reputation of the government and its agencies, but their common element is that, like any investment, they produce a return in the future. Because of this, it is helpful to think of these investments as transfers to an intergenerational trust fund whose value is distributed over time.

The intergenerational trust fund shares two important characteristics with a private trust fund. First, a generation can draw down the capital of this fund as well as augment it. For example, during a war a government might draw down the fund by exploiting natural resources that have been set aside for future generations. Second, the generation will make transfers to the trust fund in the most efficient way. Ordinary individuals who set up trusts for the benefit of others, have every incentive to deposit in the trust fund the welfare maximizing mix of assets – cash, real estate, stock, bonds – given the settlor's risk preferences, the laws of finance, tax regulations, the beneficiary's needs, and so forth. Generations should likewise equalize the marginal benefit of each transfer instrument: investing in natural resources to the point of diminishing returns, and then switching to universities and the army. Even a very stingy generation will choose the optimal mixture of instruments for transferring resources to the future.

One might ask why one generation cares enough about future generations to want to invest in the trust fund. The reason is that future generations contain both older versions of members of the current generation and the descendants of the members of the current generation. Some people also feel benevolence for future citizens to whom they are not related by identity or family. At the same time, people discount their own future consumption, and also the consumption of their children, and the future consumption of their children and others. That is why it is reasonable to assume that each generation cares about its own consumption at the current time (undiscounted) and the consumption of future generations (discounted).

It is common today to argue that the present generation does not make sufficient provision for the future. This argument might be true, but it should not obscure the considerable value that is transferred. Wilderness preserves and government integrity are important, but the greatest transfer to the trust fund occurs unintentionally. This is the phenomenon of "value leakage" from one generation to the next, the result of the impossibility of capturing the full value of ideas whose exploitation must occur over time. A person who invents a useful idea (like calculus) or product (like the polio vaccine) cannot capture the full value of the invention because it cannot be exploited immediately and because intellectual property rights do not give the inventor rights over the idea or product for the length of its useful life. To be sure, the inventor might want such rights, and be able to obtain laws that provide these rights, but no one tries to create such intellectual property rights for the simple reason that the future would not obey them and not much is at stake for the present in any event. The future would not respect these rights and the present does not try to force the future to respect them

because the future enjoys the *undiscounted* value of calculus or the polio vaccine (a gigantic amount) whereas the present generations' inventors would enjoy only the *discounted* value (an infinitesimal amount after a few decades). Happily, discounting helps the future when current generations produce things with long-term good effects; discounting's bad reputation comes from scholarly preoccupation with the current generation's incentives to produce pollution and other long-term harms.

Significant value leakage does not prove the existence of intergenerational altruism; inventors would invent even if they were purely selfish. What is worth observing is that the current generation chooses to make transfers above the value that is leaking into the trust fund. *That* shows that the current generation is altruistic toward the future, even if not as altruistic as some would like.

3. Government contract compliance as a transfer to the intergenerational trust fund

Now let us turn to a government's voluntary compliance with its own contracts. Although people tend to think of this behavior as compelled by courts, the truth is that voluntary government compliance with contracts does not differ conceptually from any of the other instruments for making transfers to the intergenerational trust fund.

To see why, imagine that G2 must decide whether to pay or repudiate a $1 million debt (including interest) incurred by G1 and owing to a particular creditor, and that courts have no jurisdiction over this question.

G2's decision will reflect the costs and benefits of paying the debt. The cost of paying the debt is simply $1 million. The benefit from paying the debt can be divided into two elements: the utility gain to the creditor and the enhanced creditworthiness of the governments of future generations.

The transfer to the creditor is unlikely to be, in itself, an interest of G2. Creditors are just ordinary people or institutions like banks, and G2 has no more incentive to give money to them than it does to other ordinary people or institutions. Governments often make transfers to the poor, but it is unlikely that creditors are impoverished. Governments often make transfers to important political supporters; but again it is unlikely that ordinary creditors are political supporters, or if they are, that the transfers they receive are on account of the debt that they hold.

The only real benefit from paying the debt is the enhancement of the ability of future governments to borrow money. History shows that creditors will refuse to lend money, or will lend money but charge high interest rates, to governments that have defaulted on prior debts.[25] Thus, G2's decision comes

[25] See Barry Eichengreen, Historical Research on International Lending and Debt, 5 J. Econ. Perspectives 149 (1991). For models of sovereign debt default and repayment, see Herschel I. Grossman and John B. Van Huyck, Sovereign Debt as a Contingent Claim: Excusable Default, Repudiation, and Reputation, 78 Amer. Econ. Rev. 1088 (1988); Harold L. Cole, James Dow, and

down to that of whether it should invest $1 million (by paying G1's creditor) in order to reduce the interest rate that G3 must pay on future loans.

If G2 makes this investment, we can think of the $1 million as a kind of transfer to the future, though the future benefits in terms of access to credit rather than receiving the $1 million directly. People in the current generation will not value this access to credit as much as the future generations will; some discounting will occur to reflect the fact that (a) members of the future generation receive this benefit in the future, and (b) some members of future generations will not be descendants of members of the current generation, and so less likely to be the subject of ordinary intergenerational altruism. Thus, G2 will pay the debt if $1 million is less than the increase in the credit costs for future generations, discounted to reflect G2's altruism toward future generations.

Governments often pay their debts, and comply with other contracts, even if they are not compelled by courts, as current practice and history show.[26] In the United States Congress had a good record of complying with government contracts or paying "damages" long before it created a legal remedy. On reflection, this is not surprising: governments constantly make promises to citizens and foreign countries – they promise to pay for goods and services, enter military alliances, promise aid after natural disasters, swear they won't reduce Social Security benefits or raise taxes – and frequently although not always keep their promises, even though nothing constrains them other than their concern for their reputations. This is why international credit markets function, and extend to countries with weak judicial systems.[27]

4. The futility of judicial intervention

Governments have ample incentive to comply with contracts but they will not invariably comply with contracts. The question is whether courts should force a government to perform contractual obligations or pay damages when that government would otherwise prefer to breach without compensating the victim.

Judicial enforcement of a government contract with a damages award has, it is assumed, the same effect as voluntary compliance with that contract: it transfers resources from the current generation to future generations. For that

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William B. English, Default, Settlement and Signalling: Lending Resumption in a Reputational Model of Sovereign Debt, 36 Inter'l Econ. Rev. 365 (1995).

[26] See Eichengreen, supra note __, for a sketch of the history.

[27] The famous repudiations of contracts have almost always occurred in the United States during times of extreme stress: Lynch v. U.S., 292 U.S. 571 (1934), in which the U.S. government repudiated insurance policies sold to soldiers during World War I, and Perry v. United States, 294 U.S. 330 (1935) in which the U.S. repudiated the Gold Clause in treasury bills, were depression era. Most state repudiations after the early years of the Republic occurred during the turmoil in the wake of Jackson's war on the Bank, and, in the case of Southern states, during Reconstruction. Most of the states that defaulted in the 1840s eventually repaid in full, despite the lack of a legal remedy, apparently in order to persuade creditors to lend more to them. See William B. English, Understanding the Costs of Sovereign Default: American State Debts in the 1840's, 86 Amer. Econ. Rev. 259 (1996).

reason, judicial enforcement can be thought of as a way of augmenting the value of the trust fund. But if, as we assume, the government is a perfect agent, and the current generation has some degree of altruism for future generations, then the government will choose the most efficient instrument, or combination of instruments, for transferring to the future. But then if it chooses not to use one instrument – namely, compliance or full compliance with government contracts – then this particular instrument cannot be as good a way of making transfers as the other instruments are.[28]

When the court awards damages against the will of G2, G2 will respond by withdrawing value from the intergenerational trust fund, thus offsetting the transfer into that fund effected by the court. G2 will, to be vivid, reduce the funding of a university, or reduce the readiness of the military, or defer maintenance on government facilities, or exploit another wetland or forest. Because G2 cares about future generations, it will already have chosen the least cost package of instruments for transferring value to the trust fund. If compliance with a contract is not already in the package, it follows that it is less efficient than the other instruments. Judicial enforcement of government contracts is in this way futile, even worse than futile, because it forces the government to forgo an efficient form of transfer and engage in a less efficient form of transfer.[29] The future is harmed because it receives less wealth, and the present is harmed because it cares about the welfare of the future.

Consider the case of sovereign default on debt. Governments occasionally default on their debt. The reason is usually that a powerful shock – such as a war with another country – requires the government to sacrifice future credit for the sake of present survival.[30] It is hard to imagine domestic courts compelling a government in the throes of an emergency to pay its creditors.[31] If they did, surely the government would (if it did not ignore the courts entirely) sacrifice some other resource in order to make up for the deficit. It might exploit remaining natural resources, seize property from citizens, dismember the universities, or ruin the

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[28] Assumed is the government's ability to make incremental adjustments to the value of the transfer – one dollar more or less to the environment, the military, and so forth.

[29] One might ask why the political branches have priority, in the sense of being able to undo judicial transfers to future generations, while courts do not have the power to undo political branch transfers from future generations. It is theoretically possible that courts could enjoin the legislature from reducing the size of wilderness areas, for example. But I assume that conflicts between the judicial and political branches will ultimately be resolved in favor of the latter because the political branches are more sensitive to the immediate interests of the public. (It is possible that a broad-gauged application of equal protection doctrine to future generations, see R. George Wright, The Interests of Posterity in the Constitutional Scheme, 59 Cincinnati L. Rev. 113 (1990), would reverse this presumption, but it is hard to see how courts could enforce this doctrine given futility problems without acquiring dictatorial powers encompassing, among much else, taxing, borrowing, and spending powers.)

[30] See Eichengreen, supra note __.

[31] "The barons of the Exchequer cannot, as such, be conusant of the necessities of the state" (Lord Somers in Bankers' Case, 14 Howell, State Trials 1 (1812). Roosevelt was prepared to defy the Supreme Court if it ruled against him in the Gold Clause cases. See William E. Leuchtenburg, The Supreme Court Reborn 86-88 (1995).

currency by adopting inflationary policies. If, as we assume, the government has some altruism for future generations, then forcing it to pay its debts rather than transfer value in its preferred way, can only hurt future generations. Unless the court acquired dictatorial powers, took over the functions entrusted to the political branches of the government, and then dictated the distribution of resources to future generations, enforcement of the contract would be self-defeating.[32]

The futility argument rests on two main premises. The first is that welfare across generations is at stake, not some special moral or political value. If it were immoral for Congress to hold up contractors, then an award of damages could vindicate a moral ideal. But it is not immoral to hold up contractors as long as contractors understand that they take this risk, and indeed the academic and judicial discussions of government contract cases assume that the court should protect the welfare of the future, not a moral ideal.

The second is that courts are subject to institutional constraints. Courts cannot dictate everything the government does; they can punish the government only when it breaks a law. If a court tries to help the future by enforcing a government contract, the government can respond by hurting the future through some lawful instrument – reducing investment in the military, for example – over which courts have no control.

5. The "reverse futility" objection

A common but incorrect response to the futility argument is that there is futility in *not* enforcing government contracts as well. Let us call this the "reverse futility argument." Governments want to be able to make credible commitments, and they can do this only (or most effectively) if an independent third party – the judiciary – will impose a cost on the government if it violates its commitment. If a commitment mechanism is not available, governments must use less efficient mechanisms for accomplishing their goals: prepayment for a durable good, for example, rather than a superior executory contract. Because the future would benefit more from a contract than from the alternative mechanism, the future's courts should be willing to enforce contracts.

One should understand by now why this objection fails. If G2 wants G3 to be able to make credible commitments, G2 must comply with its contracts, and it

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[32] This example will call to mind Ricardian equivalence, according to which there is no difference between using taxes and budget deficits to fund projects: budget deficits just mean taxes later on and the present generation will adjust. See Robert J. Barro, Are Government Bonds Net Wealth?, 81 J. Pol. Econ. 1096 (1974). The Ricardian equivalence version of the argument advanced in this paper is that if courts enforce government contracts against the public interest, and the political branches do not adjust by reducing the trust fund, then citizens will adjust by bequeathing less wealth to their children. This view is discussed and criticized in Tyler Cowen and Derek Parfit, Against the Social Discount Rate, at 157-58. My argument avoids the very strong assumptions underlying Ricardian equivalence (on which see, e.g., B. Douglas Bernheim, A Neoclassical Perspective on Budget Deficits, 3 J. Econ. Perspectives 55, 63 (1989)) by asserting that the political branches adjust rather than citizens. Congress responds to judicial decisionmaking rather than citizens responding to government decisionmaking.

will, to the extent that such compliance efficiently benefits the future. But governments do other good things besides making commitments. They also preserve the environment and invest in technology. In certain circumstances a government benefits the future more by doing these good things (at the margin) than by complying with earlier commitments. A perfect government that wants to transfer value to the future in the most efficient way will choose the most efficient package of instruments for making this transfer – and that means some degree of compliance with prior commitments though not necessarily perfect compliance. A court that inserts itself into this process and imposes a cost on a government that tries to preserve the environment rather than comply with an earlier commitment, can only cause governments to choose a less efficient package of instruments for transferring value to the future, and thus to transfer less value to the future.

People who make the reverse futility objection probably make the assumption, barred for the moment, that the judiciary is more reliable in some way than the government is. This assumption is barred because for the moment the government is assumed to act as a perfect agent of the public. However, as section C argues, relaxing this assumption affects the argument very little.

B. Frictions and Intergenerational Equity

A critic of the argument so far will object that the current generation cannot instantly and continuously reduce the trust fund in order to offset the effect of an award of damages on a government contract. The busy political branches would not notice that a court had just awarded damages to a contractor, and even if they did, would not stop whatever they were doing in order to reduce the amount of wilderness set aside for future generations.

This objection has limited force. If courts enforce contracts that harm the current generation, then these harms will be felt as budget reductions or as more urgent problems that call for government intervention. With less money to spend on the present or more urgent things to spend it on, the government will spend less money on the future, and, because it is compelled to use an inefficient device for transferring value to the future, the joint welfare of present and future will decline. Although it is unclear as a theoretical matter how the government will spread the burden between present and future, it is clear that the future can be made no better off by judicial enforcement of a government contract. And all this is true even if the government and the public do not know about the court's behavior. Adjustment is automatic.

The critic might persist that there are always frictions, and courts can transfer value to the future in small increments. Perhaps if the government is not paying attention, it will find itself with too little money for the present after committing resources to the future, though it could just as well work out in the opposite direction. This objection raises two more points.

Initially, recall the earlier observation that the current generation already transfers value to the future. If the current generation does not seek to transfer resources to future generations, then there is no reason why the judiciary should

take it upon itself to make these transfers. This would be like the judiciary preventing abortions or punishing criminals or deregulating industries or redistributing wealth through low level fact-finding or law-making that the political branches cannot detect.

One might respond that courts are authorized by the Constitution and tradition to exercise independent moral judgment when making decisions. As long as judges can transfer some resources to the future, they should do so, because it is the right thing to do.

This brings us to the second point. The current level of intergenerational transfer is not clearly too low – certainly not low enough that the courts have a warrant to increase it against the will of the public. There are several reasons for thinking this. As noted above, there is a significant amount of "value leakage" from one generation to the next, and despite this value leakage, we observe additional transfers to the future.[33] Further, American history going back to the Civil War displays a succession of increasingly wealthy generations. Each generation enjoys a longer life expectancy, safer products, cleaner air and water, more convenient goods and services, more stable political institutions, and cheaper resources. Theories of intergenerational equity – which hold that the distribution of resources should be independent of the time of birth[34] – provide no reason for believing that the selfishness of the current generation exceeds that of the past, and thus for believing that future generations will do worse than the present.[35] The burden of proof lies with those who argue against the weight of history, and is heavy for those who want the courts to defy the political branches on the basis of a speculative injustice to the future.

C. Public Choice Concerns

The most implausible assumption made so far is that the government is a perfect agent for the contemporary generation, but this assumption turns out to be relatively unimportant.

If the government is not a perfect agent, how might its behavior change? Public choice theory describes various possibilities, but the common thread is the role of interest groups. Suppose, for example, that a court adopts a policy of

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[33] This point is frequently neglected; see Bruce Ackerman, Social Justice in the Liberal State 107-38, 168-227 (1980); John Rawls, A Theory of Justice 284-93 (1971); and the essays in Environmental Change and International Law (Edith Brown Weiss ed. 1992), Future Generations and International Law (Emmanuel Agius and Salvino Busuttil eds. 1998), and Justice Between Age Groups and Generations (Peter Laslett and James S. Fishkin eds. 1992).

[34] See Rawls, supra note __, Ackerman, supra note __.

[35] Cf. Richard A. Epstein, Justice Across Generations, 67 Tex. L. Rev. 1465 (1989); but see Wright, supra note __ (arguing that generosity toward the future has declined). I do not want to oversimplify this argument; there are many complexities (see, e.g., Stewart E. Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615, 635-39 (1985) (and citations therein); Stephen F. Williams, Running Out: The Problem of Exhaustible Resources, 7 J. Legal Studies 165 (1978)); I only want to stress the uncertainty of the case for intergenerational transfers, and urge that the burden of proof be shifted.

enforcing government contracts when interest group pressures account for the breach. As usual, we can identify two effects. First, in the current period the award transfers revenues from taxpayers to the victim of the breach, and as before, it is unlikely that the victim has a moral claim to this transfer. Second, the award signals that in future periods courts will prevent governments from violating contracts at the behest of interest groups. If this signal is credible, then interest groups will become less enthusiastic about lobbying the government to breach contracts. Because this policy would enable the government to commit itself not to breach at the prompting of interest groups, while at the same time permitting the government to breach contracts when required by the public interest, it might seem to augment the trust fund.

But interest group arguments such as this one does not affect our argument that government contract enforcement is futile. To see why, suppose G2 wants to violate a contract because of the influence of an interest group. If G2 must pay damages, then it can benefit the interest group by violating the contract and paying damages to the victims. The interest group receives the benefit it seeks, and the public must pay either out of current funds or the trust fund set aside to benefit future generations. The public must pay in one way or the other, but G2 benefits by acting consistently with the interest group's goals.[36]

There are two rejoinders to this argument. The first is that enforcement benefits the future: assets withdrawn from the trust fund to pay the victims of the breach have less value to a future government than the ability to commit itself to perform a contract or pay damages. If a judicial policy of deterring interest group motivated contract breaches reduces interest group influence, then future generations will enjoy a more responsive government, one that will choose mainly projects that maximize social welfare.

But if the current government can generate greater value for future governments by complying with contracts than by submitting to interest group pressure to breach, then it will comply with the contract in the absence of judicial compulsion and give the interest group different assets otherwise bound for the trust fund. Altruism for future generations drives the government to choose the most efficient instrument for enhancing the value of the trust fund. The judiciary need not play a role.

The second rejoinder is that contract damages operate as a tax on the interest group deal in which G2 promises to breach the contract, and consequently reduces the amount of interest group influence. But this argument assumes that the initial contract – the one which the interest group is paying G2 to breach – is unaffected by interest group activity. There is, however, no reason to assume that the government behaves in the public interest when it makes contracts but not when it breaches them.[37]

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[36] For a similar argument for takings jurisprudence, see Daniel A. Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. L. & Econ. 125 (1992); Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chic. L. Rev. 345 (2000).

[37] Fischel and Sykes, supra note __. Cf. Epstein, Toward a Revitalization, supra note __, at 719 ("to allow a state to repudiate its contracts unilaterally, however, is to invite the very abuses of

To understand this point, suppose that all government contracts have zero social value and are simply transfers from the public to politically connected firms. Suppose that firm 1 makes a contract with government 1; there is a new election one generation later; and then firm 2 bribes government 2 to break the contract with firm 1 and award that same contract to firm 2.

In a world with no contract enforcement, the possibility that a future government will breach the contract reduces the value of the contract to firm 1. Indeed, with no friction firm 1 can expect government 2 to hold it up for the entire surplus of the contract, in which case no firm would enter a contract with the government. But because these contracts are assumed to be bad, this would be a good thing.

By contrast, in a world where courts do enforce contracts, firm 1 would want to enter the contract. Because this contract is bad, we shouldn't want courts to enforce this contract, or indeed any contract.[38] The intuition is that a contract is a valuable thing, but if the government is driven entirely by interest group deals, then it will award this valuable thing to an interest group, and not use it for the benefit of the public. If that is true, then the public is best off if the government is deprived of the ability to enter contracts.[39]

Let us consider a different public choice argument, namely, that rent-seeking would be greater if courts did not enforce contracts. If contracts are enforced, then the value of a contract is high, so firms will rent seek in order to procure government contracts. If contracts are not enforced, firms will not rent seek as much, but they will rent seek more often, every time there is an opportunity to breach. Which regime creates greater social cost? Neither; each regime will produce the same social cost, because firms compete away all the rents, whether they are high (if the contract is enforceable) or low (if the contract is not enforceable).[40]

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factional coalition that the contract clause was designed to prevent, for we can be sure that almost every repudiation will provide benefits to some groups at the expense of others.").

[38] This is essentially the argument made in Jonathan R. Macey, Winstar, Bureaucracy, and Public Choice, 6 S. Ct. Econ. Rev. 173 (1998); and Wickelgren, supra note __, except that Wickelgren emphasizes the countervailing hold up problem, which in his view justifies limited damages for breach of contract by the later government, because he thinks that it is meaningful for courts to maximize welfare across generations.

[39] To the inevitable reply – what about takings?, should uncompensated takings be permitted? – it is rarely observed that the just compensation rule assumes that the existing distribution of wealth is itself not in large part determined by interest group activity. If it were, then the uncompensated taking would not be as objectionable, because then it would appear to be a tax on the illegitimate interest group activity that determined property rights in the first place. Now the idea that ordinary government takings affect property that has been transferred to interest groups may or may not be plausible – I don't know. But it is surely plausible when we turn to government contracts – where there is no reason to believe that the original contract party is more innocent than the second contract party. In short, even if courts should force the government to pay for takings, it does not follow that they should force the government to pay when it breaches a government contract

[40] But see Fischel and Sykes, supra note __, at 342-44. They argue that each rule is superior in a particular context.

Yet another argument inspired by the magic dust of the public choice fairy is that courts can distinguish government contracts that are interest group transfers and those that are welfare maximizing, and they should enforce the second type of contract and not the first. Fischel and Sykes advance a more sophisticated version of this idea, according to which courts can divide government contracts broadly into suspect and non-suspect classes. Contracts for an aspect of the government's sovereignty are suspect and should not be enforced. Contracts for proprietary aspects are not suspect and should be enforced.

Neither of these assertions is persuasive. The first is beset by well known problems. Because all government contracts will involve some interest group activity, courts cannot police these contracts without taking the place of the legislature and executive and making independent judgments about which contracts are in the public interest and which are not.[41] The second fares no better. There is no reason to believe that one kind of contract or the other is more likely the result of interest group activity. Probably all government contracts help both the public and particular interest groups; just think of debt contracts, which can be used to raise funds for national defense or to make payments to political supporters.[42]

Finally, let us recall the reverse futility argument, which holds that it is futile not to enforce government contracts, because earlier generations will substitute to less efficient transfers to the future. There is a public choice version of the reverse futility argument. Suppose G1 wants to bind G2 to a military defense contract that benefits G1's supporters but not G2's. If courts at time 2 enforce this contract, then G1 will enter it. But if courts at time 2 do not enforce this contract, G1 will substitute to less efficient interest group deals. For example, it might pay partly in advance for large durable goods, aircraft carriers rather than destroyers, leaving G2 little choice but to pay the remainder and accept delivery.

The problem with the reverse futility argument is that although inefficient political transfers might be an unfortunate consequence of not enforcing government contracts, it remains the case that the court at time 2 cannot affect behavior at time 1 by choosing to enforce government contracts. If G1 believes that G2 will feel compelled to honor the contract in order to maintain good relations with contractors, then it will enter the contract; otherwise, it will not. But if G2 refuses to comply with the contract, judicial defiance can only make things worse. The benefit to G3 resulting from the availability of contracts rather than

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[41] Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review? 101 Yale L.J. 31 (1991); Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1994).

[42] Gillian Hadfield argues that enforcing government contracts prevents the government from singling out a particular person to bear the burden of a policy change. Hadfield, supra note __, at 527-28. And yet a contractor has a variety of means for protecting itself from breach – many more than an individual in the takings context to which Hadfield draws an analogy. The contractor can charge a premium, and use it to self-insure or purchase insurance, and it will have the proper incentives when the government's breach is caused by a change in circumstances rather than the desire to hold up the contractor. The concern about singling out does not add anything to the public choice arguments discussed above.

less efficient instruments for making interest group transfers will be offset by withdrawals from the trust fund.

In sum, public choice concerns do not justify judicial enforcement of government contracts. Although this conclusion rests on some empirical assumptions about the ability of courts to evaluate legislation – by contrast, with the assumption of perfect government the argument is axiomatic – these assumptions are reasonable.

D. Regulatory Agencies

The government is not a unitary body. Government contract disputes often arise when an agency – say, the Department of Defense – refuses to perform its side of a contract. Should a court force DOD to pay damages?

The futility argument depends on Congress' residual power to move resources between generations. Thus, if a court forced DOD to pay damages in defiance of the *current* Congress' wishes, Congress would adjust in a way that hurt the future. The future's gain – the ability of future DODs to make credible commitments – would be offset by a withdrawal from the trust fund. In theory, then, the court should defer to the current Congress' wishes.

As a practical matter, however, courts have no reliable method for ascertaining the desires of the current Congress except when Congress incorporates those desires in a statute. Thus, when Congress by statute breaches a regulatory agency's contract, the court should not award damages. When the agency breaches its own contract, and Congress remains silent, the Court should defer to the agency's authorizing statute, which is interpreted to permit the agency to enter contracts, and thus (by implication) pay damages if it breaches them.

As an aside, it is worth observing that regulatory agencies, like courts, should not try to maximize welfare across generations. This observation is not the same as the argument that the logic of discounting does not apply to future generations, and therefore the proper discount factor is 1 or something else unrelated to the discount factor for payoffs in the near future.[43] This argument usually ends with a plea for agencies to take greater account of the future, not less.[44] On the contrary, the correct view is that agencies should attach *no* weight to payoffs to be received by future generations in the absence of congressional authorization. The reason should now be familiar: if agencies did weigh future payoffs, then they would choose regulations that transfer value into the

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[43] See Thomas C. Schelling, Enforcing Rules on Oneself, 1 J.L. Econ. & Org. 357 (1985); R.M. Solow, Intergenerational Equity and Exhaustible Resources, 41 Rev. Econ. Studies 29 (1974); Tyler Cowen and Derek Parfit, Against the Social Discount Rate, in Justice Between Age Groups and Generations, supra note __ .

[44] Daniel A. Farber and Paul A. Hemmersbaugh, The Shadow of the Future: Discount Rates, Later Generations, and the Environment, 46 Vand. L. Rev. 267 (1993) (arguing that obligations toward future generations are ethical, not reducible to cost-benefit analysis); Richard L. Revesz, Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives, 99 Colum. L. Rev. 941 (1999) (similar).

intergenerational trust fund, and Congress would react by withdrawing an equal amount of value. Agencies, like courts, must defer to the social consensus on the treatment of the future, as reflected in Congressional choices.

Lastly, it should be mentioned that the critique applies to all three kinds of contract into which the government enters: procurement contracts, regulatory contracts, and debt contracts. The scholarly critiques of Winstar direct their attacks against government enforcement of regulatory contracts of the sort at issue in Winstar.[45] No one argues that courts should not compel the government to comply with debt and procurement contracts. But they should not, and indeed it is nearly impossibly to distinguish the three contracts: all concern the government raising money and spending money, and the government can certainly use debt contracts and its spending power to fund projects that it would otherwise implement directly through regulatory contracts.[46]

E. States

Should federal courts force state governments to comply with their contracts? If one takes state sovereignty seriously enough, the critique of judicial enforcement of government contracts applies to state governments because state governments in the federal system are sovereign just as the national government is.

A familiar argument holds that the federal government should restrict the behavior of states when that behavior has effects that spill over the borders with other states. The canonical example involves pollution regulation – each state has insufficient incentive to control air pollution that drifts across state lines – but it could just as well involve government contracts. When a state government decides whether to comply with a contract, it will account for the effect of the breach on the ability of future generations to enter favorable contracts, but it will discount to reflect migration. Of the future population that benefits from an earlier government's reputation for complying with a contract, a fraction will be immigrants from other states, and the earlier government has no incentive to perform marginal contracts when the reputational benefit is enjoyed in part by unidentified people who do not yet live in the state.[47]

The remedy – enforcement by federal courts of states' contractual obligations – is vulnerable to the futility argument that we applied to federal contracts. If federal courts compel states to make transfers to *state* intergenerational trust funds, the state legislatures might respond by withdrawing something else. When a state government is forced to comply with a contract, it

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[45] Dana and Koniak, supra note __, are most uncompromising here.

[46] A problem for Fischel and Sykes, as they recognize. See Fischel and Sykes, supra note __, at 347-48.

[47] There might also be spillovers to the federal government; see John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1974-75 (1983) (European creditors refused to lend money to the federal government after Mississippi repudiated an earlier debt).

will respond by investing less in education or preserving less wildlife. Its discounting for future generations because of migration cannot be eliminated unless the federal government took over all the functions of the state governments. Thus, one conjectures that for this reason federal courts should not enforce state government contracts. The federal government might be able to produce collective goods by taxing and regulating citizens directly, that is, independently of their state residence; but, although the matter is not free from doubt, it does not seem likely that it can benefit future generations by regulating state governments as long as these governments retain sufficient residual power.[48]

III. QUALIFICATIONS AND EXTENSIONS

A. Constitutionalism and the Enforcement of Statutes

Government contract adjudication is not the only judicial behavior that has an intergenerational dimension. So does the enforcement of statutes and constitutional rules. One might therefore argue that when a court enforces a statute, it violates the interests of the current generation, and G2 will respond by withdrawing value from the trust fund. And when a court strikes down a statute on constitutional grounds, it must violate the interests of the current generation, and G2 will respond by withdrawing value from the trust fund. If enforcing government contracts is futile, then enforcing statutes and constitutional rules is futile. But this conclusion can't be right, and therefore by reductio ad absurdum the critique of government contract enforcement must be wrong.

However, this argument is incorrect. Begin with the formal distinctions:

1. When a court enforces a government contract, it stays the hand of Congress at the behest of an earlier Congress.

2. When a court enforces a statute, it does not stay the hand of Congress at all.

3. When a court enforces the Constitution, it stays the hand of Congress at the behest of the constitutional assembly and the generation that ratified the Constitution.

Enforcing a statute, like enforcing a government contract, can interfere with the will of Congress if there is some political cost to repealing the statute. The better analogy is the entrenching statute, which can interfere with the will of Congress even if there is no such political cost, as long as the entrenchment is

[48] Thus, the much vilified eleventh amendment jurisprudence of the Rehnquist court might be defensible; but the issues are complex and best treated elsewhere.

successful – that is, cannot itself be repealed by a majority vote. But ordinary and entrenching statutes differ from government contracts in a crucial detail.

Recall that the futility argument addressed two separate consequences of an award of damages for breach of contract: (1) the payment to the victim of breach; and (2) the transfer to the trust fund. Enforcement of the entrenching statute might be futile with respect to (2), but (1) can no longer be dismissed. Imagine, for example, entrenching statutes that impose (constitutionally permissible) limits on abortion, or, alternatively, that fund abortion providers. A non-welfarist commitment to preserving the lives of fetuses, or to enhancing the reproductive freedom of women, is violated by repeal of one statute or the other. Thus, enforcement of a statute that repeals an entrenching statute could violate a moral commitment held by the public. By contrast, enforcement of a statute that breaches a government contract cannot violate a moral commitment. There is no moral violation if everyone understands that the government does not commit itself to comply with the contract – or that the government has no moral power to bind future governments. The victim of breach will be made worse off only to a morally trivial extent, for that victim knows in advance of the government's right to change its policy, can self-insure or refuse to take the contract in the first place, and (unless already impoverished) incurs a welfare loss less than the gains to others.[49]

This argument also applies to constitutional adjudication. The beneficiaries of constitutional enforcement at the time of adjudication might have a moral claim, regardless of the consequences for future welfare. Thus, the fact that the current legislature will adjust to a decision by withdrawing resources to the future does not count as an objection to enforcing the Constitution. In addition, constitutional decisions clarify social norms[50] and affect the balance of power between the different parts of the government – effects that have no analogy in government contract enforcement. Thus, the critiques of government contract enforcement, and the futility argument on which it is built, have, without further development, only ambiguous implications for constitutional analysis.[51]

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[49] My thesis that courts should not enforce government contracts depends, as I have stated, on the premise that government contracts are generally intended to enhance social welfare, and not (in themselves) to vindicate moral commitments. This assumption is much less plausible for statutes. One can, of course, imagine government contracts that accomplish the non-welfarist goals of statutes – for example, the government pays abortion providers to supply abortion services. My argument does not apply to such contracts, but I am not aware of cases involving them either.

[50] See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chic. L. Rev. 877 (1996).

[51] There are related arguments in constitutional jurisprudence. For example, John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999), argues that limitations on money damages for constitutional violations reduces the cost of constitutional innovation, to the benefit of the future. But Jeffries' endorsement of injunctions – because they prevent future harms rather than compensate victims of past harms – is vulnerable to the futility argument, to the extent that he means to be making a claim about maximizing the welfare of society, as opposed to vindicating welfare-independent constitutional commitments.

B. Sovereign Immunity

Under the doctrine of sovereign immunity, courts cannot force the United States government to comply with the law. "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will."[52] If Congress enacts a law that breaches a contract, a court cannot order Congress to pay damages. Many commentators criticize sovereign immunity, and others defend it on public choice or democratic grounds.[53] A futility defense of sovereign immunity follows from our earlier argument, and there is no need to repeat that argument here. It is sufficient to recall that a court can do no good, and will probably do evil, by ordering a breaching G2 to pay damages. If G1 enters a contract, and G2 refuses to comply with it, then if a court orders it to pay damages anyway G2 will offset the transfer by withdrawing from the intergenerational trust fund.

It follows that if G1 enters the contract, and also passes a separate law that obliges the "government" to pay damages if it breaches the contract, the court should not force G2 to pay damages if it breaches the contract. The same is true for the Tucker Act, which purports to give courts jurisdiction over breach of contract claims against the federal government. The Tucker Act cannot bind future governments. When Congress breaches a contract, the court needs to reconcile two inconsistent statutes: an earlier statute, the Tucker Act, which permits contractors to sue the government for breach of contract, and the new statute, like FIRREA in the Winstar case, which breaches an earlier agreement and makes no provision for a remedy. Ordinary canons of statutory interpretation should resolve this issue, balancing the priority of one statute and the specificity of the other. However the court comes out, Congress should be able to correct errors by asserting sovereign immunity retroactively, or agreeing to pay damages in a private bill.[54]

When an agency (rather than Congress) breaches a contract, the court's task is simply to interpret the agency's authorizing statute.[55] Authorizing statutes usually permit, or are interpreted to permit, agencies to enter contracts but do not authorize agencies to breach without paying. Courts must decide whether these statutes are best interpreted to require the agencies to pay damages if they breach; if so, the Tucker Act supplies federal courts with jurisdiction over breach of contract suits. The difference between Congress and agencies is that Congress's breaches are themselves new laws, and the matter of compensation rests with the interpretation of those laws; the agencies' breaches are pursuant to an authorizing statute and that statute must be parsed on its own terms.

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[52] The Federalist No. 81 (Alexander Hamilton), in the Federalist Papers (Gary Wills ed. 1982).

[53] See, e.g., Krent, supra note __; Matthew Spitzer, An Economic Analysis of Sovereign Immunity in Tort, 50 So. Cal. L. Rev. 515 (1977); and see generally Hart and Wechsler's The Federal Courts and the Federal System 1001-07 (Richard H. Fallon et al. eds., 4th ed. 1996).

[54] The doctrinal difficulties with this claim are explored in Part IV.

[55] See supra note __.

What needs to be stressed in both cases is that Congress cannot waive sovereign immunity for future Congresses; it can waive it only for itself, which is the same thing as saying that it agrees to pay money to someone because of a moral or political, as opposed to legal, claim.[56] On this understanding, the notion of waiving sovereign immunity is trivial. Waiving sovereign immunity in the traditional sense – really, one government waiving the sovereign immunity of future governments – becomes impossible.

C. Corporations, Property Law, and the Dead Hand

One might think that the critique of judicial enforcement of government contracts would apply to contracts with corporations as well. The shareholders of a corporation constantly change identities just like the population under a government. If a past government cannot bind a current government, why should a past corporation be able to bind a current corporation?

The answer is that the shareholder is not the same as the citizen. Future shareholders purchase their rights from current shareholders; future citizens do not purchase their rights from current citizens. Because of this difference, there is no analogy to the intergenerational trust fund in the corporate context. If the corporation breaches, and a court compels it to pay damages, this act neither helps nor hurts future generations of shareholders, for it will be reflected in the price that the current generation charges them for its shares. It is impossible for managers to make intergenerational transfers to future shareholders through the corporation.[57]

There is an instructive analogy from private law. Property owners frequently must decide whether to divide their property into smaller interests. They might divide real property spatially, or extract security interests from real or personal property, or divide either forms of property temporally by creating time shares. There are benefits and costs in doing so. The benefit is that people might in the aggregate value smaller interests more than larger interests; the cost is that in the future people might find it hard to recombine divided property rights when it is valuable to do so.[58] Whatever these benefits and costs, the standard wisdom is that people who sell their property have the correct incentives to divide it, because buyers will pay more or less depending on whether the seller properly anticipates the cost of reaggregating interests. But this is not true when the owner donates rather than sells the property. Donors have other interests aside from altruism – they might want to maintain a family seat, for example – and so choose to divide

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[56] These arguments might apply to sovereign immunity generally. When Congress tries to bind itself to some other standard, as through an employment discrimination statute, the Court should not compel a later Congress to comply with that statute, and, as far as I know, no one has argued otherwise. See Eule, supra note __. A stickier problem arises if there is a political cost to repealing the statute, on which see Part IV.

[57] This point also applies to assignments of contract rights.

[58] See generally Thomas W. Merrill and Henry E. Smith, Optimal Standardization in the Law of Property: The Numerous Clauses Principle, 110 Yale L.J. 1 (2000).

property in a way that interferes with reaggregation of property interests, even when their behavior is value-maximizing for future generations.

The purchaser of property is like the purchaser of corporate shares; the donee of property is like the future citizen. Judicial skepticism about approving intergenerational donations parallels skepticism about enforcing government contracts.

D. A Note on Retroactivity

The retroactivity literature discusses changes of government policy such as a new tax regime replacing an old one. Although at an early stage some scholars argued that citizens should be protected from retroactive legislation, most scholars now agree that such protection would be unwise.[59] Almost all new legislation has retroactive effects, even if the statute is not formally retroactive, and compensation of people who relied on earlier legislation would reduce the incentive for citizens and firms to anticipate policy changes and invest accordingly.

As many scholars have observed, breach of a government contract is no different conceptually from a retroactive change of a law.[60] The "contract" is simply a law that provides a certain distribution of benefits like the original tax law; the "breach" is a new law that changes that distribution like the new tax law. Thus, the argument about hold up versus intergenerational opportunism can be reproduced. Striking down a retroactive statute is like enforcing a government contract: those who relied are protected from hold up but the earlier legislature is given greater ability to impose costs on later legislatures.

This literature neglects the futility problem. If the court strikes down a retroactive statute, then the current government is harmed and the future is benefited if hold up would otherwise occur; thus, the current legislature will adjust by withdrawing resources from the trust fund. One might respond that a prohibition on retroactivity would protect other values; people cannot evade ordinary statutes as easily as they can avoid entering government contracts. But when this concern is not present, the futility argument weakens the case for prohibiting retroactive statutes.

IV. DOCTRINE

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[59] See Michael J. Graetz, Legal Transitions: The Case of Retroactivity in Tax Revision, 126 U. Pa. L. Rev. 47 (1977); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. (1986); Saul Levmore, The Case for Retroactive Taxation, 22 J. Legal Stud. 265 (1993); Daniel Shaviro, When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity (2000); but see J. Mark Ramsayer and Minoru Nakazato, Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow, 75 U. Va. L. Rev. (1989); Kyle Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129 (1996).

[60] E.g., Fischel & Sykes, supra note __, at 377. Puzzlingly, Fischel & Sykes agree with the scholarly consensus yet do not attempt to reconcile it with their own conclusion that certain government contracts should be enforced.

One interpretation of government contract doctrine – the "weak" interpretation discussed in Part I.A. – is benign. Congress retains the authority to decide whether to pay damages for breach of contract, but it has *delegated* the courts an advisory role. A court decides whether the plaintiff has a right under the common law of contract, or some version that takes account of the special role of the government, and then declares its judgment to Congress. Congress then decides whether to defer to the court or make its own decision on the merits.

This delegation interpretation was advanced by the Supreme Court in early cases on the Court of Claims, which Congress established in 1855 in order to divert the flood of private petitions to a body that could resolve claims against the government in an orderly way. Prior to the establishment of that court, and for a time afterward, Congress asserted its authority over claims against the U.S. government, including claims based on breach of contract.[61] In 1789 Congress had authorized the Treasury Department to review claims against the government with appeal to Congress. On a parallel track Congress accepted petitions for relief from private citizens, delegating them to committees or executive departments for recommendations as to their disposition. It was always understand that claims against the government for breach of contract are moral and political, not legal, and the 1855 law ratified this understanding by making the judgments of the Court of Claims reviewable by the Treasury Department. As a consequence, in the 1864 case of Gordon v. United States, the Supreme Court refused to accept jurisdiction of appeals from the Court of Claims, holding the Court of Claim's decisions were not final but instead subject to Congressional reversal. This would make the Supreme Court's rulings advisory, in violation of the "case or controversy" requirement of Article III of the Constitution.[62]

Over the next years Congress expanded the jurisdiction of the Court of Claims, reduced its advisory capacities, and appropriated money in advance for judgments, in the hope that the Court of Claims would seem less like an advisory body. These efforts met with success when the Supreme Court, noting in particular that the provision for Treasury Department review had been eliminated, held that the finality problem had been solved, and that the Supreme Court could now accept appeals.[63] The Tucker Act of 1887 brought together the earlier provisions in a statute that gave the Court of Claims jurisdiction over a range of disputes involving the U.S. government.

The system had broken down again by World War II, the result of Congress's inability to resist tinkering with the Court of Claims and its

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[61] The story is told in Floyd D. Shimomura, The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment, 45 La. L. Rev. 625 (1985), and I rely on his account throughout this paragraph and the next three paragraphs.

[62] Gordon v. United States, 69 U.S. 561 (1864). Justice Taney wrote a draft opinion that was lost, and then subsequently published as an appendix, 117 U.S. 697 (1885).

[63] See, e.g., United States v. O'Grady, 89 U.S. 641 (1874); Langford v. United States, 101 U.S. 341 (1879); United States v. Jones, 119 U.S. 477 (1886).

judgments.[64] In the 1950s Congress replaced annual lump sum appropriations with an "automatic" appropriation, and declared that the Court of Claims was an Article III court. In Glidden v. Zdanok, the Supreme Court acquiesced in this judgment. Justice Harlan made it plain in a plurality opinion that despite its Article III status the Court must rely on the "good faith" of Congress to appropriate money, which was an admission that Congress has the power not to pay judgments of the Court.[65] In 1977 Congress enacted a "permanent" appropriation to pay judgments.[66]

The Glidden case left unanswered important questions about the meaning of finality, and its role in prior cases like Gordon. In his appendix to Gordon, Justice Taney objected to Treasury Department review because it left the Court at the mercy of Congress:

> And when the Secretary [of the Treasury] asks for this appropriation [to pay a claim], the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate, and whether the appropriation will be made or not depends upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it.[67]

It was precisely such legislative meddling that led to the breakdown of the Claims system prior to World War II. But this legislative meddling was not due to Treasury Department review – that had been eliminated decades earlier. It was due to Congress' power to appropriate, which enabled Congress to refuse to pay judgments. Automatic or permanent appropriation does not solve this problem, because Congress retains the power to modify appropriations whenever it wishes. And although Harlan observed in Glidden that Congress almost always paid the Court of Claims' judgments, and seemed to think that this tradition was enough to guarantee that the Supreme Court's decisions would be final in fact if not in theory, this observation seems to acknowledge that Congress has the last word. Thus, Taney's concern – that an award of damages can be debated and refused by Congress – remained alive at the time of Glidden, and is alive today. Judgments

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[64] Congressional tinkering of this nature gave rise to Pocono Pines Hotel Co. v. United States, 73 C. Cl. 447 (1932), in which the Court of Claims ruled that Congress has the constitutional authority to refuse to appropriate money to pay a judgment.

[65] Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The Court of Claims is now an Article I court again, with appeal to the Federal Circuit, which is an Article III court.

[66] Prevailing plaintiffs in most government contract disputes have access to a permanent, indefinite appropriation known as the Judgment Fund. See 41 U.S.C. 612, 31 U.S.C. 1304. The Treasury Department pays the award from the Judgment Fund, and then sends a bill to the agency that entered the contract if there is one. In a case like Winstar, plaintiffs may have access to separate appropriations, such as that of the FDIC, which are augmented from time to time. A description can be found at the Treasury Departments website: www.fms.treas.gov/judgefund.

[67] Appendix, 117 U.S. at 702-03.

for money damages against the U.S. government are necessarily advisory because of Congress' appropriations power.

One is thus tempted to conclude that the benign interpretation is correct, and that Congress is free to accept or disregard the Court of Claims' advice – even after an appeal to the Supreme Court. Government contract jurisprudence is an exception to the Supreme Court's general refusal to render advisory opinions. If this is so, then courts do not enforce government contracts, and the futility argument advanced in this paper supports current practice. Academics should stop complaining about the Winstar decision and advice Congress not to pay the judgment.

The problem is that even if the Supreme Court would not try to force Congress to comply with a contract or pay damages (for example, by ordering a government official to refrain from behavior in violation of a contract right or issuing a writ of mandamus to a disbursement officer),[68] the Court might still regard Congress' behavior as unlawful, a violation of the Constitution, and be unafraid of saying so.[69] If Congress refused to appropriate funds to pay damages, or took the more radical step of repealing the Tucker Act with respect to the law in question, the Court might hold that Congress has expropriated a vested contract right in violation of the takings clause,[70] or legislated retroactively in violation of the due process clause.[71] Despite the absence of a judicial order to pay money such as a writ of mandamus, Congress might feel compelled to pay damages, for any number of reasons, including: (1) a conscientious desire to obey the law; (2) a fear that if it did not obey the law as declared by the judiciary, its legitimacy would decline in the eyes of the public or important political actors; or (3) a fear that if it did not obey the law, the Court would retaliate – this is one possible interpretation of Harlan's argument – and withdraw jurisdiction of appeals from the Court of Claims, on the ground that it can no longer regard the judgments as final. Then the government claims system, finally in working order after decades of crisis, might collapse.

In order to avoid these costs, Congress might comply with a contract or pay damages, rather than choose a better instrument for transferring value to the trust fund, resulting in the bad outcome described in the futility argument.

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[68] This would be consistent with the Court's practice of not always providing remedies to victims of constitutional violations. See Jeffries, supra note __.

[69] See the Gold Clause cases, e.g., Perry v. United States, 294 U.S. 330, 351 (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.") – this was for public debt however, which has special constitutional provisions: Congress's power to borrow money, and section 3 of fourteenth amendment. On the other hand, the Court has been reluctant to enforce state debt contracts. See Ann Woolhander, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 113-25 (1997).

[70] Lynch v. United States, 292 U.S. 571 (1934); cf. First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 316 n.9 (1987).

[71] See Eastern Enterprises v. Apfel, 524 U.S. 498, 532-37 (1998).

Because these costs are imposed by the Supreme Court, only that Court has the power to eliminate them and hence the futility outcome. How might it do that?

Initially, we must deal with the possibility that the Court is, or feels, constitutionally compelled to enforce government contracts. If this is the case, then it will enforce government contracts even if persuaded by the futility argument that their enforcement is not in the public interest. The futility objection must be directed to the Constitution itself rather than judicial practice. One would need to argue that the Constitution should be amended to prohibit courts from taking jurisdiction of government contracts. Despite precedent in this area – the Eleventh Amendment – this does not seem to be in the cards, and thus is not worth discussing.

If, on the other hand, the Court has constitutional authority over government contract enforcement – that is, if it can decide whether to enforce government contracts or not – then one can finally argue that the Court should take account of the futility argument, and refrain from formally holding that the government has breached a contract when it is that government's intention to breach the contract and not pay damages.

How can the Court determine what the government's intention is? In the simplest case the government's intention is embodied in a statute. If Congress expressly repudiates the Tucker Act's waiver of sovereign immunity with respect to a statute like FIRREA, or announces that it will not appropriate money to pay damages, that statutory declaration might be a sufficient indication to the Court of Congress' intentions. The Court should not try to enforce government contracts by subsequently holding that these behaviors are unconstitutional. It would need to resist the temptation to extend precedents involving takings and state government contracts.[72]

But this might not be enough. Political costs might deter Congress from overtly breaching a government contract – by repudiating a waiver of sovereign immunity, or announcing that it will not appropriate money to pay damages – even when it believes that compliance with the government contract is not the best way to transfer value to the trust fund. In such cases judicial enforcement of a government contract – in the sense of the Court announcing that the government has breached but not trying to compel payment of damages – can still result in the undesirable behavior identified by the futility argument. Congress would pay the damages and withdraw from the trust fund.

One solution to this problem would be for the Court to determine Congress' intentions in the absence of their expression in the statute; in jargon, to determine whether a statute implicitly compensates, or refuses to compensate, the victims of the breach. The Winstar plurality engages in just this reasoning, although it concludes that Congress did not intend in FIRREA to refuse to pay damages. A more aggressive reading of the statute that took account of the political costs of openly expressing such an intention might have reached the opposite result.

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[72] See supra notes __.

Another solution would be the radical step of withdrawing federal jurisdiction of appeals from the Court of Claims. Recall that Congress has the proper incentives to perform or breach a contract. A traditional court is not needed in the claims process unless there is some as yet unidentified problem with using a subordinate legislative or executive body to process claims. Thus, although withdrawing appellate jurisdiction might damage the claims process in the short run, eventually the process could be reestablished within one of the political branches.

Withdrawing appellate jurisdiction would be a radical remedy but would not be without precedent. It would be radical because it would involve repudiating not only the Tucker Act as unconstitutional, but possibly also other statutes that make Congress liable for violating the law, although there are many distinctions between these statutes and the Tucker Act.[73] Yet doctrine supports this approach, as we have seen. Because Congress has authority over appropriations, judicial orders to pay damages cannot be final. If they are not final, they are advisory, and so these judicial orders conflict with the Court's traditional aversion to rendering advisory opinions.[74] Entrenchment doctrine lends parallel support to this line of thinking: enforcing a government contract is similar to enforcing a law that prohibits its own repeal, something that courts have never been willing to do.[75] But all of these arguments are more subtle than they appear at first sight, and involve jurisprudential complexities that the Supreme Court has long avoided; thus it is unlikely that Supreme Court will withdraw federal jurisdiction over appeals from the Court of Claims.

A third solution, and the most practical, is that of making it hard for the government to lose breach of contract cases. The two most important doctrines for this purpose are the unmistakability doctrine and the sovereign acts doctrine. Both were discussed in Winstar, so we can discuss these doctrines in the context of that case.

Start with the unmistakability doctrine. The plurality opinion said that when the Bank Board promised to permit the thrifts to use the accounting gimmick, it implied that the U.S. government would pay damages if the law changed.[76] Thus, to avoid paying damages next time it breaches a contract,

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[73] The Congressional Accountability Act, for example, gives employees claims against members of Congress, not Congress itself. The Federal Tort Claims Act also does not clearly give claimants a remedy against Congress.

[74] See David P. Currie, Federal Courts: Cases and Materials 9 & n.1 (4th ed. 1990).

[75] The Winstar plurality distinguished entrenchment on the ground that Congress is permitted to violate the contract as along as it pays damages. Winstar, 518 U.S. at 872-873. But it is hard to imagine the court enforcing the analogous entrenching statute, which would forbid repeal of a law – say a tax reduction – in the absence of a large payment to a third party. For other cases discussing this parallel, see Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 135 (1810); United States Trust Co. v. New Jersey, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

[76] Winstar, 518 U.S. at 868-69: "We read [the Bank Board's] promise as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurence." In other words, the Bank Board acting on behalf of the U.S. government did not promise to make a payment to the thrifts if the law changed; but because if they were a private party, they would be

Congress and its agents must explicitly reject this judicially created implication. The unmistakability doctrine has thus been reversed. While in past cases *plaintiffs* had to show that the *waiver* of sovereign immunity was unmistakable, after Winstar the *government* must show that the *retention* of sovereign immunity was unmistakable. If the Supreme Court has second thoughts about Winstar, then it might want to turn back the clock on the unmistakability doctrine.

A future Supreme Court could draw on plenty of materials for this purpose. Between the Civil War and the mid-1970s,[77] the Supreme Court wielded the unmistakability doctrine with great severity. For example, in the Delaware Railroad Tax case[78] the Court held that a new tax on railroads did not violate a specific railroad charter that specified the taxes to be paid under that charter. In Vicksburg et al. v. Dennis[79] the Court held that a law taxing a railroad during the construction of the road did not breach a promise not to tax the railroad company "until ten years after the completion of the road," because the language prohibiting a tax did not cover the period of construction. By requiring great specificity in the charter or contract, the Court taxes the ingenuity of the early legislature, which will then frequently leave inadvertent loopholes in the contract that future legislatures can exploit.

The problem with the unmistakability cases is that they vest the past Congress with the authority to determine whether the future Congress must pay damages. All that is necessary is for the past Congress to express itself unmistakably. It might be hard to do this, but the fact remains that the early Congress *wants* to bind the later Congress—that is the essence of intergenerational opportunism. To free the later legislature from the bond of the earlier statute, the Court must constantly increase its strictness in response to increasing legislative exactness, resulting in doctrinal tensions that might be unsustainable.

A more promising way to handle this problem is the sovereign acts doctrine, which denies a remedy to the victim of a government breach that is a public and general law, or a law governing health and morals. This doctrine puts the emphasis on the autonomy of the later Congress rather than on the intentions of the earlier Congress. For example, the Court held that a law opening the cattle slaughter market to competition did not violate an earlier exclusive charter, because an earlier government cannot bind a later government in the area of public health and morals.[80] And in another case the Court held that a silk embargo ordered by the U.S. government did not violate a silk procurement contract because of the public and general nature of the embargo order.[81]

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required to pay damages, the Court is going to pretend that their promise included a promise to pay money if the law changes.

[77] 431 U.S. 1 (1976).

[78] 85 U.S. 206 (1873).

[79] 116 U.S. 665 (1885).

[80] Butcher's Union Slaughterhouse and Livestock Landing Co. v. Crescent Livestock Landing and Slaughterhouse Landing Co.111 U.S. 746 (1883).

[81] Horowitz, 267 U.S. 458 (1924); the two seminal Court of Claims cases on this point are Deming v. United States, 1 Ct. Cl. 190 (1865), and Jones v. United States, 1 Ct. Cl. 383 (1865).

The Winstar plurality rejected the application of the sovereign acts doctrine because FIRREA was not, in its view, "public and general" and, even if it was, the earlier Congress, through the Bank Board, had promised to incur the risk of a change in government policy. The confusion here, as the plurality acknowledged, is that FIRREA was enacted both for a public and general purpose – it overhauled the thrift regulation system – and with the knowledge that it would violate the thrift contracts. Of course, nearly all public and general acts will interfere with prior contracts, and Congress must always know that, for even if members otherwise would not know of particular violations, the victims will surely bring them to their attention. The Court might in future cases extract itself from this morass by reading Winstar to insist on generalized rule of law concerns – individuals should not be picked on by hostile legislators – rather than as condemnation of general laws that happen to violate government contracts.

As to the second point, in arguing that the government bore the risk of a regulatory change, the Court drew an analogy to the private contract law doctrine of impossibility. Under that doctrine, a party can avoid paying damages for breach of contract if it did not bear the risk of a supervening, generally unexpected, event. The court said that the government bore the risk of a regulatory change; that is why the impossibility doctrine does not apply; and that is why the sovereign acts doctrine does not come into play. Sovereign acts excuse the payment of damages only if the government does not bear the risk of them.

The problem with this analysis is by now familiar. The court conflates two separate governments: G1, which entered the contract through its agent; and G2, which decided to breach the contract through FIRREA. The common law impossibility doctrine, by contrast, assumes that the two intertemporal parties are the same, and thus that a single party through time can act like an insurance company and pay some amount of money if an unavoidable risk occurs. The impossibility doctrine directs the court to discover which of the two parties agreed to bear the risk. But this has no bearing on government contracts, which earlier governments can use to impose costs on later governments, which are not compensated with a risk premium. And it interferes with the purpose of the sovereign acts doctrine, which is to release later governments from the commitments of earlier governments, regardless of the intentions of the earlier governments, when police powers or other large questions of public policy are at stake.

CONCLUSION

If events similar to those underlying the S&L litigation had occurred in the early nineteenth century, the people with the breach of contract complaint would not have sued but would have petitioned Congress for redress. Congress had a good record for complying with contracts,[82] and in all likelihood would voluntarily have paid the complainants damages in order to maintain the

[82] See supra note __.

reputation of the government for keeping its promises. But Congress would have weighed the value of its ability to make credible commitments, against the $30 billion payment, and would have properly refused to pay if it believed that the money had a better use. The judiciary would have been uninvolved.

Over many decades Congress has tried to delegate contract disputes to the federal courts. If it has nonetheless retained the political authority to pay damages or not as it wishes, then this delegation has done no harm, and, by streamlining case processing, some good. Contrary to the suggestions of commentators, the Court should not try to compel Congress to pay damages if it refuses to perform. But if Congress now incurs a political cost when it refuses to appropriate money to pay damages ordered by a federal court, then this cost is a harm for all generations, current and future. The Court should either disclaim appellate jurisdiction or find a breach of contract only in the narrowest of circumstances.

> The critique advanced in this article applies to government contract disputes, but it has larger implications for the relationship between Congress and the courts. The simple idea is that when courts defy Congress in the hope of maximizing welfare across generations – and that is all that deterring hold up can do – Congress, because it retains the residual power to control unrelated areas of policy, and because it does not count future welfare as much as current welfare, will undermine the judicial decision in a way that makes everyone worse off then if the judiciary had deferred to Congress. This idea, which stresses the inherent limitations of judicial enforcement against the government as opposed to private parties, might stand behind the idea of sovereign immunity, which has fared so poorly in the academic journals. Judicial power is limited not so much because the legislative and executive branches are free to disobey courts – on the contrary, to all appearances the political costs of refusing to comply with a judicial order would be high. Judicial power is limited because courts' efforts to compel the political branches to promote welfare along one dimension, are too easily undermined by offsetting behavior along other policy dimensions, behavior that is invisible to courts and outside their control.

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