What a Difference a Contract Makes: Protecting Taxpayers from Changes in the Tax Code

Johnny Hutchinson

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WHAT A DIFFERENCE A CONTRACT MAKES:
PROTECTING TAXPAYERS FROM
CHANGES IN THE TAX CODE

[C]ontractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign.¹

Merely because the particular means by which the government chose to breach its duties under the contract were based on its powers to tax does not offer it a defense.²

I. INTRODUCTION

Tax legislation guarantees little.³ It is not a contract. Indeed, tax benefits flow from legislative grace. Although the government does not implicitly bind itself to taxpayers via legislation, could it do so explicitly?⁴ Could the government offer tax breaks as an expressed or implied benefit to a contract with a private party?

² Centex Corp. v. United States, 395 F.3d 1283, 1310 (Fed. Cir. 2005).
³ See United States v. Carlton, 512 U.S. 26, 33 (1994); cf. Nat'l R.R. Passenger Corp. v. Atchison, 470 U.S. 451, 465–66 (1985) ("Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise . . . . ' Policies, unlike contracts, are inherently subject to revision and repeal."). (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)).
⁴ There are several ways the government might do this. For instance, Professor Logue has suggested that a taxpayer could form a contract with the IRS via a private letter ruling (although its enforcement would be subject to the relevant tax legislation remaining the same). Kyle D. Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129 (1996). This Comment will focus on currently existing models of contract between the government and private citizens, where tax treatments are typically not
This Comment draws inspiration from a recent case, Centex Corporation v. United States, where the Federal Circuit upheld a sizeable damage award for the government's breach of a contract with Centex, an investment firm that agreed to help with the savings and loan ("S&L") bailout.\(^5\) The court held that the government promised to pay Centex for some of the liabilities of the failing S&Ls and promised Centex tax deductions notwithstanding this repayment. Usually, the Tax Code does not allow deductions for compensated losses.\(^6\) But the court held that taxpayers could "double-dip" in this narrow factual context. The Federal Circuit agreed that Centex could obtain damages when Congress passed legislation specifically eliminating this deduction after Centex agreed to buy the S&Ls.\(^7\)

Centex presents at least two big questions that this Comment tries to answer.

First, Centex succeeded on the theory of breach of the implied covenant of good faith and fair dealing.\(^8\) The trial court agreed that legislation substantially aimed at undoing an inducement to the S&L buyout contract violated this covenant. In other words, the tax treatments Centex received were an implied benefit to their contract with the government. But neither the trial court nor the Federal Circuit mentioned the parade of cases denying that tax benefits standing alone are guaranteed.\(^9\) This begs the question: could the government guarantee tax benefits in a contract?

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Savings and loans are a "federally-conceived and assisted system to provide citizens with affordable housing funds." Id. at 844 (citing H.R. Rep. No. 101-54 at 292 (1989)).

In the late 1970's and early 1980's, many S&Ls' portfolios were filled with long-term fixed-rate mortgages executed when interest rates were low. A combination of high interest rates and inflation then severely decreased the value of many S&Ls. Extensive deregulation ensued. The government lowered the accounting and capital reserve requirements, causing instability. However, because of the "realization" and "recognition" requirements of the Internal Revenue Code (Tax Code), the S&Ls could not take advantage of the losses until they sold or disposed of the loss assets. But, under the Tax Code as it existed in those days, the buyers of these assets could not take advantage of the old losses either. The consequence: no one wanted to buy the insolvent S&Ls. The government's response was to induce healthy organizations to buy out the failing S&Ls.


Second, should private parties who take tax benefits as part of a government contract do so at the peril of subsequent tax legislation? Centex convinced the court that such an arrangement would give the government an unfair advantage.

This Comment concludes that tax benefits may be the subject of or inducements to government contracts. Furthermore, this Comment concludes that even though enforcement of contractual rights depends on government intervention, and tax legislation is a uniquely sovereign power, private contractors need not fear specific, targeted tax legislation that takes away the benefits they have bargained for in contracts with Uncle Sam. They may obtain relief in damages from the government.

II. BACKGROUND

A. Congress’s Retroactive Tax Powers

The tax laws motivate. If Congress passes a tax benefit, taxpayers will take advantage. If the benefit gets rescinded later, be it retroactively or prospectively,11 taxpayers will cry “detrimental reliance.”

Such was the case in United States v. Carlton, the Supreme Court’s latest look at taxpayer reliance arguments.12 Congress had authorized estates to deduct losses from certain sales of securities.13 Mr. Carlton, the executor of an estate, accordingly purchased a large block of stock with estate funds and resold the stock.14 A few years later, Congress rescinded Mr. Carlton’s benefit by making the law retroactive.15 The Internal Revenue Service disallowed the deduction. Mr. Carlton appealed, conceding that the deduction he took was not allowed, but arguing that the retroactive law violated the Due Process Clause.

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10 To a degree, one can accuse this Comment of propping up, and then knocking down a “straw man” (“straw person,” or “straw” if you like). However, the court’s opinion in Centex ignored the analysis presented in this Comment. So this Comment, working a la an appellate court, sustains the result in Centex after analyzing it under Carlton.

11 Carlton, 512 U.S. at 33–34 ("Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

12 Id.

13 The provision was enacted in 1986, and allowed a deduction of half of the proceeds of "any sale of employer securities by the executor of an estate" to an employee stock ownership plan. 26 U.S.C. § 2057(b) (1986).

14 The parties stipulated that Carlton bought the stock purely for tax reasons.

15 On December 22, 1987, Congress amended § 2057 to require that the stock to be sold be “directly owned” by the decedent “immediately before death.” As noted above, Mr. Carlton purchased the shares of stock after the decedent passed away. Carlton, 512 U.S. at 29.
The Supreme Court sustained the Service's position—that it could enforce Congress's retroactive tax legislation and that enforcement did not violate the Due Process Clause. The Court agreed with the Service despite the fact that retroactive tax legislation feels intuitively unfair. The Court has always been suspicious of reliance arguments pitted against retroactive taxes, holding early in the history of individual income taxation that:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process.¹⁶

The Court reviews Due Process challenges to tax legislation for whether the legislation is "unduly harsh and oppressive." This test is akin to the "rational basis" test the Supreme Court uses for all economic legislation.¹⁷ The Carlton court applied this test and upheld the Service's denial of the deduction. The Court held that the amendment to the Tax Code that prevented Mr. Carlton's benefit was rationally related to the legitimate goal of preventing transactions like the one in which Mr. Carlton had engaged.¹⁸ The Court held that the amendment was intended to clarify the Tax Code and to honor the original legislative purpose of the deduction.¹⁹ The Court thought it significant that the period of retroactivity was short and that Congress acted to correct its error promptly.²⁰

Mr. Carlton had argued differently. He asserted that the Due Process Clause protected his detrimental reliance on the unamended ver-

¹⁶ Id. at 33 (quoting Welch v. Henry, 305 U.S. 134, 146-47 (1938)).
¹⁷ Id. at 30. But see id. at 39, 40-41 (Scalia, J., concurring) (noting that depriving a taxpayer of some six hundred thousand dollars is probably harsh and oppressive under any standard, and chiding the majority for using an "exact" standard borrowed from New Deal-era review of economic legislation not in similar economic legislation cases, but instead in individual liberty cases, such as Roe v. Wade).
¹⁸ Id. at 31-32.
¹⁹ Id. at 32 ("Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally 'innocent' taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable."). The deduction was designed to "create an 'incentive for stockholders to sell their companies to their employees who helped them build the company rather than liquidate, sell to outsiders, or have the corporation redeem their shares on behalf of existing shareholders.'" Id. at 31 (citation omitted).
²⁰ Id. at 33.
sion of the statute. The Court disagreed. It expressed a willingness to uphold Due Process Clause challenges to tax legislation only when that legislation (retroactive or not) announced a "wholly new tax" and held that tax benefits are not guarantees.\(^{21}\)

The Court also held that preventing "significant and unanticipated revenue loss" is a legitimate purpose, especially when the prevention targets (rather than excuses) taxpayers like Mr. Carlton (who relied on an old benefit), rather than forcing innocent taxpayers to foot the bill.\(^{22}\) The Court expressed a willingness to protect detrimental reliance only in extreme cases, that is, when the regulation that disappoints the taxpayer cannot be rationally connected to a legitimate legislative purpose.\(^{23}\)

Like Mr. Carlton, the plaintiffs in \textit{Centex} complained of upset reliance interests. They bought the failing S&Ls thinking they could deduct the S&L’s built-in losses despite getting assistance payments for them. Puzzlingly, the Federal Circuit in \textit{Centex} did not mention \textit{Carlton} or similar cases.\(^{24}\) It instead ordered the government to pay compensation for Centex's upset reliance interests.

The \textit{Centex} court relied heavily on the Supreme Court’s 1996 opinion in \textit{United States v. Winstar},\(^ {25}\) another S&L bailout case. The court in \textit{Winstar} held that the government cannot use regulation to abrogate contractual promises of favorable tax treatment the government makes that induce taxpayers to invest.\(^ {26}\) The government let acquiring institutions count the excess of the purchase price over the failing S&Ls’ assets as “supervisory goodwill.” The acquirer could count this as capital toward meeting federal capital reserve requirements. When later legislation forbade this treatment, Winstar and several other acquiring institutions sued for contract damages.\(^ {27}\) The

\(^{21}\) Id. at 34 (citing United States v. Hemme, 476 U.S. 558, 568 (1986)).

\(^{22}\) Id. at 32.

\(^{23}\) See id. at 40 (Scalia, J., concurring) ("The reasoning the Court applies to uphold the statute in this case guarantees that all retroactive tax laws will henceforth be valid. To pass constitutional muster the retroactive and prospective aspects of the statute need only be 'rationally related to a legitimate legislative purpose.'") (citation omitted).

\(^{24}\) Nor did the court mention what was at one time the “politically dominant approach”—that taxpayers relying on particular tax treatments should be protected from retroactive legislation by grandfather clauses and other forms of “transition relief.” See Logue, supra note 4, at 1135 n.26 (citing Michael J. Graetz, \textit{Implementing a Progressive Consumption Tax}, 92 HARV. L. REV. 1575, 1650 (1979)).


\(^{26}\) Id. at 839.

\(^{27}\) For a good description of the case, see Daniel S. Goldberg, \textit{Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar Corp. on Retroactive Tax Legislation}, 14 AM. J. TAX POL’Y 1, 1–2 (1997), and Joshua I. Schwartz, \textit{The Status of the
court in *Winstar* discussed several unique facets of government contracts, explored below.

In both *Centex* (which followed *Winstar*) and *Carlton*, the plaintiff asked the Court to imply a promise of continuing tax benefits. In *Centex*, but not in *Carlton*, the plaintiff received relief. Perhaps the key distinguishing feature between *Centex* and *Carlton* is the presence of the contract in *Centex*. Thus the first key question for deciding cases like *Centex* is: does a government contract make a material difference?

**B. The Government as Contractor**

The above question is normally a mundane one. Without a contract, a private beneficiary can only enforce a noncontract promise if (and to the extent that) the beneficiary can fit the promisor's conduct within the special requirements of promissory estoppel or unjust enrichment. The beneficiary can compel the promisor to continue or pay damages only if able to show the right type of express promise or if able convince the court to imply one for restitution's sake. Superimposing a contract on the dealings of two private parties makes all the difference.

But the question becomes more intriguing when one swaps the U.S. government for one of the private parties. When the government is a party, *Carlton* and other cases foreclose "detrimental reliance"-type arguments unless Due Process is violated. Indeed, legal scholars have long noted that detrimental reliance arguments about a


28 See RESTATEMENT (SECOND) CONTRACTS § 90 (1981) (instructing that courts should enforce promises that the promisor should know will induce action or forbearance by the promisee, in justifiable reliance on the promise).

29 See id. § 4 cmt. b; Bloomgarden v. Coyer, 479 F.2d 201, 210–11 (D.C. Cir. 1973) ("The quasi-contract, as we have said, is not really a contract, but a legal obligation closely akin to a duty to make restitution . . . . Generally, in order to recover on a quasi-contractual claim, the plaintiff must show that the defendant was unjustly enriched at the plaintiff's expense, and that the circumstances were such that in good conscience the defendant should make restitution.").

30 See Jeremy A. Rabkin & Neal E. Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 216–17 n.71 (1987) (citing Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 (1984)). Cf. Schism v. United States, 316 F.3d 1259, 1274 (Fed. Cir. 2002) (discussing whether military recruiters formed an implied contract for medical benefits with soldiers, and noting that "courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel."). The courts have recognized an exception to the prohibition of estoppel only in extreme cases. See Rabkin & Devins, supra, at 217 n.75 (citing cases holding that active misleading by government officials and the complete absence of an effective remedy are at least required).
particular set of laws, particularly tax laws, are specious.\textsuperscript{31} This is true even though tax savings offered by Uncle Sam will entice the taxpayer more than a comparable promise from his fellow citizen. The only way a taxpayer can show that a tax treatment entitles him to a continuing expectation of that treatment is to prove the existence of a contract in some way protecting that promise.

The Constitution’s text does not grant the government contracting power.\textsuperscript{32} However, the Supreme Court implied contracting power from the Constitution soon after the states ratified it.\textsuperscript{33} Today, courts assume contracting authority even if the relevant statute is silent.\textsuperscript{34}

Courts apply traditional agency theory to the government’s ability to sign contracts.\textsuperscript{35} Government employees can bind the government so long as they act within the scope of their authority.\textsuperscript{36} Where possible, courts treat the government like any private contractor.\textsuperscript{37} The government is distinctly different in a few respects, which justifies different treatment. But both parties can still claim the major defenses from the common law.\textsuperscript{38}

The U.S. government is different from a private contractor because of both the ability of Congress to regulate and the constitutionally mandated space between Congress in Article I and agencies in Article II. Congress has the ability to direct the contracting power of agencies. The agencies only have power to contract if and to the extent Congress gives it to them.\textsuperscript{39} Thus, agencies contract subject to the whims of Congress. Congressional legislation could conceivably nullify obligations to which the contracting agency bound itself. Accordingly, the concept of “impossibility of performance” (as a principle of


\textsuperscript{33} Van Brocklin v. Tennessee, 117 U.S. 151 (1886); United States v. Tingey, 5 Pet. (30 U.S.) 131 (1831). The constitutional provisions most textually related to contract power are Article IV’s authorization of Congress to control the disposition of U.S. Government property and Article I’s authorization of Congress to pay the United States’ debts and to provide for the “general welfare.” U.S. Const. art. IV, § 3, cl. 2, art. I, § 8, cl.1.

\textsuperscript{34} United States v. Winstar, 518 U.S. 839, 891 n.36 (citing 1 R. Nash & J. Choinic, Federal Procurement Law 5 (3d ed. 1977)). Usually, though, statutes grant the agency the power to contract.

\textsuperscript{35} McBride & Touhey, supra note 32, § 17.20, at 2-17.

\textsuperscript{36} Id.

\textsuperscript{37} Id. § 1.20, at 1-1 (citing Cook v. United States, 91 U.S. 389, 398 (1875), for the “general rule” that when the U.S. government “comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”).

\textsuperscript{38} Winstar, 518 U.S. at 887.

\textsuperscript{39} See Rabkin & Devins, supra note 30, at 216.
the common law) is key to any study of government contracting power.

"Supervening government action" was one of the earliest examples of impossibility sufficient to excuse performance, recognized in 1536 by the English courts.\(^{40}\) The modern form of the doctrine has four requirements: (1) performance must be actually "impracticable,"\(^{41}\) (2) nonoccurrence of the event was a basic assumption of the parties,\(^{42}\) (3) the party claiming responsibility must not be responsible for its cause,\(^{43}\) and (4) the party claiming impossibility must not be held to a greater obligation than provided for in the contract.\(^{44}\) How does this doctrine change when one of the parties is the U.S. government?

Requirement (1) remains the same for private and government contractors. As for requirement (2), the majority view is that government nonintervention is a basic assumption of virtually all contracts.\(^{45}\) However, in *Winstar*, the Supreme Court effectively held that regulatory change in the tax area *when the government is a party to the contract* usually does not excuse performance by either party because of impossibility.

Justice Souter, writing for the plurality,\(^{46}\) noted that "the very fact that such a contract [was] made [with the government] at all is at odds with any assumption of regulatory stasis."\(^{47}\) Of course, this finding in *Winstar* was a factual one, and other cases will differ. But, under Souter's logic, all cases in which the government promises tax benefits will not permit the government to also mount an impossibility defense.

\(^{40}\) Abbott of Westminster v. Clerke, 73 Eng. Rep. 59 (K.B. 1536) (excusing performance on a contract to deliver wheat to a foreign country when delivery was made illegal by an act in that country). Specifically, the **Clerke** court stated, "Supervening governmental action prevents a party's performance by prohibiting it or imposing requirements that make it impossible, that party is excused." *Id.* at 63.

\(^{41}\) See 2 FARNSWORTH, supra note 8, § 9.6 n.19 (noting that "impossibility means not only strict impossibility but impracticability") (citation omitted).

\(^{42}\) Foreseeability (or not) is just one factor in this analysis. *Id.* § 9.6 n.51.

\(^{43}\) RESTATEMENT (SECOND) OF CONTRACTS, supra note 28, § 261.

\(^{44}\) 2 FARNSWORTH, supra note 8, § 9.5 n.3–4 (citing cases); *Id.* at § 9.6 (noting that the new version of the impossibility doctrine is based on an estimation of whether courts should depart from the usual rule that the promisor bears the risk of increased performance cost).

\(^{45}\) *Id.* § 262.

\(^{46}\) Courts attempting to construe *Winstar* typically follow the plurality opinion's reasoning, noting either that most other courts have done the same or that the plurality's opinion is "narrower" in scope than the concurring and dissenting opinions. See, e.g., Franklin Fed. Sav. Bank v. United States, 431 F.3d 1360, 1368 (Fed. Cir. 2005) (holding that the plurality's take was the narrower (i.e., more exacting) view because the plurality treated the unmistakability doctrine as a rule of law and required a clear statement shifting risk onto the government, and Justice Scalia's concurrence did not).

As for requirement (3), if Congress passed a law preventing performance, the government could no longer claim impossibility under the test for impossibility announced above. Courts, however, analyze these potentially disqualifying acts differently. Courts instead take account of the government’s dual roles as public sovereign and “private-ish” contractor. The Court in Winstar discussed these competing roles at some length. Here is an attempt to synthesize its views.

Courts sometimes must account for the U.S. government’s sovereign duty to look after the general welfare. This duty to the public is more important than contractual obligations to individual parties. So, courts treat the government as having a split personality. If the government acts “as a contractor” and breaks its deal, its contract partner can sue it for breach. However, if the government acts “as a sovereign” to protect the public interest, its actions may not be timely regarded as a breach. 49

48 This assumes that the actions of one branch of the government (e.g., Congress) can be attributed to the other branches (e.g., executive agencies). Ignoring any comparisons from agency law, sometimes treating the government as a unitary whole may not make total sense. For instance, in the Centex case, the agency lobbied Congress not to abrogate the tax benefits the agency could extend to acquirers of the failing S&Ls. In fact, it is probably safe to assume that any time an agency other than the one that signed the contract undoes the contract by regulation, the agency that signed the contract will be upset. Furthermore, one could argue that treating the branches separately is a good thing. After all, separation of powers is a cornerstone principle in constitutional law. In this way, Congress’s ability to pass targeted regulations is a check on an agency’s temptation to sign contracts not in the public interest. However, courts have not treated the government this way. Plaintiffs must sue the United States, and the money does not come from the budget of the agency that signed the contract.

49 There are many other examples of ways courts treat the government differently from private parties. For instance, courts treat the government differently than private parties by allowing private parties to rely on government representations if the government has superior knowledge when the private party could not have found out differently through reasonable diligence. See MCBRIDE & TOUHEY, supra note 32, § 13.100, at 2-13. This rule is particularly important in construction contracts. The differences all turn on the government’s dual role as sovereign and contractor.

Also, the sovereign acts doctrine works conceptually as an “excuse from impossibility.” Usually, when a party causes the impossibility of its own performance, he cannot use it to excuse his performance (as the definition outlined above suggests).

50 See U.S. CONST. art. I, § 8, cl. 1. The following discussion centers on two government defenses—the sovereign acts defense and the unmistakability defense. I discuss the sovereign acts defense and unmistakability defense with some trepidation—the issue sharply divided the Supreme Court into four separate opinions in Winstar. Although Justice Souter’s plurality opinion (generally held to be the majority opinion) contends that the defenses are designed to put the government into the same position that a private party would enjoy, see Winstar, 518 U.S. at 896 (“The sovereign acts doctrine thus balances the Government’s need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government’s defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.”), the sovereign acts doctrine is still unique to the government.

51 See, e.g., Horowitz v. United States, 267 U.S. 458, 461 (1925) (“The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other.”).

52 Thus, any actions by the agency responsible for the contract that prevent its own per-
eign" (pursuant to its duty to look after the general welfare) and breaks its deal, its contract partner cannot sue. In this circumstance, the government's defense is known as the "sovereign acts" defense. Courts have distinguished between these two roles by looking at the scope of the government's alleged deal-breaking action.

Regulation "designed merely to eliminate an obligation that arose under one of the Government's contractual relationships," "legislation targeting a class of contracts to which [the government] is a party," or regulation that had the "substantial effect" of erecting legal barriers to the government's performance falls into the "government-as-contractor" category. Courts speak of these regulations as "targeted acts." If the government fails to perform due to a targeted act, contractors can sue for breach.

On the other hand, acts "as a sovereign" do not make the government liable. These are the "multifarious sovereign acts, needful for the public good [that] incidentally disable [the government] or the other party from performing one of the promised acts." The government cannot agree with its contract partners to not exercise sovereign power. Promises not to exercise a sovereign power get treated

formance usually entitle private contractors to damages. See McBride & Touhey, supra note 32, at 1-1. There will, of course, be difficulties at the margins about what constitutes the "contracting agency itself."

See Centex Corp. v. United States, 395 F.3d 1283, 1307 (Fed. Cir. 2005); Deming v. United States, 1 Ct. Cl. 190, 191 (1865) ("The United States as a contractor are not responsible for the United States as a lawgiver.").

Typically (but not exclusively) this is a piece of congressional legislation; acts by the other branches of government are likewise subject to the contractor-or-sovereign analysis. See Horowitz, 267 U.S. at 460 (citing Jones v. United States, 1 Ct. Cl. 383, 384 (1865)).

Id. at 1307 (quoting United States v. Winstar, 518 U.S. 839, 898 n.45 (1996)).

Winstar, 518 U.S. at 899 (describing an act as not "public and general" (and therefore not "sovereign") if it has the "substantial effect of releasing the Government from its contractual obligations").

Justice Scalia's opinion (joined by Justices Kennedy and Thomas) expressed the view that the sovereign acts doctrine is merely an echo of the unmistakability doctrine—both express a presumption that the government did not assume the risk of a change in its laws. Id. at 918–22 (Scalia, J., concurring). Chief Justice Rehnquist's opinion (joined by Justice Ginsburg) held that the sovereign acts doctrine requires a strict separation between the two roles of government and held that courts must pigeon-hole every government act into either "sovereign" or "contractor" categories.

Centex, 395 F.3d at 1305.

Winstar, 518 U.S. at 891 (quoting Horowitz, 267 U.S. at 461) ("Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.").

Id. at 921 (Scalia, J., concurring).

Id. at 881.
as promises to pay damages if the government does exercise that sovereign power.\textsuperscript{63}

But courts will not enforce the government's promise to exercise or not exercise a sovereign power or pay damages unless the promise is "unmistakably clear" from the contract.\textsuperscript{64} This "unmistakability defense" is another way that the government is treated differently from a private party. The \textit{Winstar} Court divided on whether to treat the requirement of unmistakability as a substantive requirement, or whether it was just a rule of construing government contracts. The plurality held that the government must make it clear that it is surrendering any sovereign power. The more "sovereign-ish" the power that the government surrenders, then the more likely it is that the unmistakability doctrine will apply. For example, the plurality said that in "humdrum supply contracts," it would not impose an unmistakability requirement on the government because of the practical difficulties it would pose.\textsuperscript{65}

The other Justices in \textit{Winstar} thought that unmistakability is simply a rule of construction. Justice Breyer, in his concurring opinion, opined that courts should simply be more deferential in construing government agreements when the exercise of a sovereign power might be at issue.\textsuperscript{66} Justice Scalia espoused the view that the unmistakability doctrine functions as a presumption. He said unmistakability means courts should presume that governments do not intend to surrender sovereign powers.\textsuperscript{67} Neither the Supreme Court nor the lower courts have taken any real steps to clear up the confusion in the years since the \textit{Winstar} decision in 1996, and the Federal Circuit has begun the thankless task of applying \textit{Winstar} and its reasoning to other cases.\textsuperscript{68}

As the preceding discussion indicates, courts struggle with how to deal with the government as a contractor. The courts in \textit{Centex} and \textit{Winstar} paid lip-service to the government's argument that tax regulation is always a sovereign act. But both courts held that the

\textsuperscript{63} Id. (citing Amino Bros. Co. v. United States, 372 F.2d 485, 491 (Ct. Cl. 1967)).
\textsuperscript{64} See id. (opinions of Souter, Stevens, Breyer, O'Connor, and Ginsburg, JJ., and Rehnquist, C.J.). But see id. at 910–18 (Breyer, J., concurring) (suggesting that the unmistakability doctrine was not intended to replace usual rules of contract construction and that a special policy reason must apply to justify deploying unmistakability); id. at 871–72 ("[S]overeign power...governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.").
\textsuperscript{65} Id. at 880.
\textsuperscript{66} Id. at 910–18 (Breyer, J., concurring).
\textsuperscript{67} Id. at 919–22 (Scalia, J., concurring). The parties are free to put on evidence to the contrary.
\textsuperscript{68} Schwartz, supra note 27, at 1181 (citing Cienaga Gardens v. United States, 162 F.3d 1123 (Fed. Cir. 1998)).
regulation that removed promised benefits was not sovereign. It was targeted. Therefore, the government had to pay damages. The next section of this Comment attempts to apply and elaborate on the principles discussed above.

III. ANALYSIS

The question for analysis, then, is: what are (and what should be) the relevant differences between Jerry Carlton and Centex Corporation? Carlton dictates the opposite result in Centex if tax regulation is always a sovereign act. Carlton, by holding that taxpayers rely on tax treatments at their peril, says that it is. In both cases, the government was trying to induce a particular behavior from the taxpayer. Two things must be true for Carlton to be distinguishable from Centex: the government must be able to promise tax benefits as an inducement to a contract, and there must be something about the government-private contractual relationship that entitles the government's contract partner to the relief denied to regular taxpayers.

Part A will discuss whether Congress should be able to promise tax benefits to taxpayers and whether tax legislation can ever be anything but a sovereign act. It will conclude that tax treatments are a proper subject of government promises, and that, under the right circumstances, courts (like the Federal Circuit in Centex) can conclude that tax legislation may be "targeted" rather than "sovereign," and thus entitle the private contractor to damages.

Assuming tax benefits are a proper subject of a promise, Part B will discuss whether private contractors should be entitled to damages. It will then consider whether the implied covenant of good faith and fair dealing—the key difference between Carlton and Centex—should be deployed to protect government contractors in a way that private contractors are not protected.

Part C will briefly review other proffered explanations for the result and analysis in Centex.

A. What Is So Special About Tax Promises?

There are limits to what the government can promise as consideration to private contractors. For instance, the President (and his agen-
cies) cannot offer funding to private parties, nor can agencies bind Congress to pass or not pass legislation.

Recall that the government induced Centex to buyout various S&Ls by offering Centex the prospect of taking account of the acquired S&Ls’ losses even after receiving assistance payments that recouped them. As in Centex, tax benefits will usually be inducements, rather than consideration (to the extent it makes a difference). If the only consideration the government gives is a legislative scheme, instead of signing a contract, the taxpayer can just take advantage of the legislative scheme, though the legislation will be no guarantee.

Even though agencies cannot bind Congress to legislate or to not legislate, courts have always had a special way of dealing with contractual promises to do something out of the control of the promisor. Promises that an uncontrollable condition will get fulfilled are treated as pledges of indemnification. Thus, explicit promises to legislate (or not) are construed as promises to indemnify if the promise gets broken and Congress legislates. Carlton holds that tax regulation itself is not a promise, but could the government be held to a promise if it used tax regulation to induce a taxpayer to contract with it or offered tax benefits as consideration?

On a theoretical level, the government can first argue that it should not be bound to the contracts it makes. Contracts are only worth the paper they are written on if and to the extent that the government (specifically the judicial branch) will enforce them. This argument has been used by commentators as a justification for refusal to enforce onerous terms for violating “public policy.” This Comment will not discuss the role of contractual enforcement by the judiciary to effectuate social and economic policy. But suffice it to say that it

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69 See Schism v. United States, 316 F.3d 1259, 1287–88 (Fed. Cir. 2002) (holding that the President lacks the authority to guarantee lifetime medical care to combat veterans because doing so would violate the separation of powers doctrine by giving the president the power of the purse, which is given exclusively to Congress by Article I, Section 8 of the Constitution).


71 Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (“Thus, we hold that as of late 1988 acquiring institutions had the legal right to deduct the built-in losses of acquired thrifts in FSLIC-assisted transactions, even if those losses were offset by assistance payments from FSLIC.”).

72 This Comment will not discuss this possibility at any great length. See supra note 4.

73 One such promise would be: “I promise the Browns will win the Super Bowl.” See Winstar, 518 U.S. at 869 (plurality opinion) (“Holmes’s example is famous: ‘in the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee.’”).

would be a strange day if the government were able to use illusory contracts and the power to procure its own impossibility to regulate. For many of the same reasons discussed below, no matter what policy objective would be furthered by using illusory contracts and suckering unwitting taxpayers, the damage from the concomitant policy message of untrustworthiness would far exceed the benefits.

A second way of asking whether the government can or should be bound to the contracts it makes deals with tax legislation specifically. Moreover, another way of phrasing the question of whether courts should be willing to imply promises not to change tax treatment is whether an act of tax legislation can ever be a "specific, targeted regulation" that would make the government liable for breaching an existing contractual obligation. If tax regulations are always sovereign acts, then promises of tax benefits could be undone at the stroke of a legislative pen, and courts would never be able to imply promises to continue present tax treatments. An agency could induce a contractor into an agreement via certain tax treatments. The government could then undo the benefits with regulation. Because the removal would be "sovereign," courts would excuse the government's non-performance. The contractors would be left to bear their increased costs.

In addressing the implied promise argument, courts should be skeptical about whether any legislation can ever be "targeted." The legislative process ensures that targeted legislation will almost certainly fail. Every bill must pass through a gauntlet of competing interests. The result: bills are almost uniformly broadly worded and broadly conceptualized to appease the many concerned parties. However, public policy solutions come most quickly where the public perceives injustice and where a targeted fix is easy. Tax benefits received "unjustly" form an easy rallying point for political opposition. For such tax treatments, all Congress needs to do is abrogate the provisions providing for it. Public policy moves in such small changes, and so it is clear that some legislation will be, as an empirical matter, "targeted."
But the position that no legislation is targeted proves too much. Most political scientists would agree that all public policy (targeted or not) requires evidence of a problem to give the issue salience. Under this theory, all legislation would be targeted if the contractual benefit was a problem and the legislation in some way fixed it.

Even if one accepts that some legislation can be targeted, tax legislation is the least likely suspect. The power to tax and raise revenue is the quintessential public act. The tax power received protection under the "reserved powers" doctrine in very early case law on the subject. Indeed, as one commentator has noted:

Tax legislation, however, is the sovereign power most likely to be viewed as a reserved power of the sovereign and therefore subject to future change. Establishing that the risk and burden of future change has been assumed by the government likely will prove to be no easy task.

Also, the *Winstar* plurality cited several examples of cases where powers far more trivial than revenue-raising were held to be performance-excusing "sovereign powers." This included a case in which the ability to grant navigational easements in a tributary of the Arkansas River was held a sovereign power. The Court also reaffirmed the self-evident proposition that the tax power is sovereign. In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court held that even the taxing authority of Native American tribes was a sovereign act.

The apparently bright line drawn thus far dims when one asks: should the government be allowed to use tax regulation as a ruse to breach deals that were legal when the government made them? The answer plainly is "no." The sovereign acts defense was not intended to give the government an excuse to be nasty.

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78 See Goldberg, *supra* note 27, at 18 n.45 (citing Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 446 (1862)). The reserved powers doctrine holds that a state may not contract away essential aspects of its sovereignty. See *Stone v. Mississippi*, 101 U.S. 814, 817 (1880) (holding that a state cannot contract away its police power).


81 455 U.S. 130, 148 (1982).

82 The *Winstar* plurality lamely distinguished these cases as instances where the plaintiffs sought an injunction instead of damages. *Winstar*, 518 U.S. at 881.

83 Strangely, where the justices came out in *Winstar* turned basically on what they thought of a famous aphorism by Justice Holmes: "[M]en must turn square corners when they deal with the government." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). Accepting this as a proposition of law, the phrase refers only to the contractor's compliance with the explicit terms of the deal. For example, the plaintiffs in *Winstar* and *Centex* indeed "turned square corners" (the Government did not counterclaim for breach in either case), but they were still deprived of the benefit of their bargain.
in *Winstar* held that the purpose of the sovereign acts doctrine was to put the government in the same position it would occupy as a private party.\(^8^4\) The doctrine is not designed to give the government a special power to repudiate its deals.

The sovereign acts doctrine instead was simply designed as recognition that the government's powers in contracting and regulating should be thought of as separate and that every action by the government should be categorized into its appropriate part.\(^8^5\) In the parlance of impossibility, recall that a party can not claim impossibility as an excuse if its own acts caused the impossibility.\(^8^6\) The sovereign acts doctrine is just designed to recognize that acts that are sufficiently public and general prevent private parties who contract with the government from claiming impossibility. The sovereign acts doctrine also honors the principle that generality in legislation can sometimes be a good thing—generality can indicate that the statute at issue has not been passed to try to burden the few over the many.\(^8^7\)

None of these principles would be honored by a court refusing to find an implied promise of a tax treatment simply because the treatment is a tax regulation. Congress must be free to pass tax legislation when it pleases. But when it crosses the line into the realm of substantially eliminating governmental contractual obligations, then courts should be willing to enforce implied promises not to change the law. Acts that specifically abrogate contractual duties should not excuse performance, and the government bears the risk of these acts.\(^8^8\)

Although the political process militates toward generality, courts should not be fearful of the unique nature of tax legislation. Tax benefits should be treated no differently from any other consideration the government can offer. Although *Carlton* provides that tax regulation itself is not a promise, courts should be willing to imply a promise of

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\(^8^4\) *Winstar*, 518 U.S. at 892 ("[T]he key to [the sovereign acts doctrine's] proper scope is... to put the Government in the same position that it would have enjoyed as a private contractor...").

\(^8^5\) See id. at 895.

\(^8^6\) *Restatement (Second) of Contracts*, supra note 28, § 261; 2 Farnsworth, *supra* note 8, § 9.6 at 551.

\(^8^7\) *Winstar*, 518 U.S. 839, 896. The opposite, however, can sometimes be true, and generality in legislation can be a window to abuse. Those enforcing general statutes have wide and potentially discriminatory discretion. Courts may strike down overly general statutes if they are too vague, but those dangers are not really implicated here. See, e.g., Chicago v. Morales, 527 U.S. 41, 61–62 (1998) (holding Chicago's Gang Congregation Ordinance unconstitutionally vague because, in part, it gave police officers too much discretion to enforce the statute).

\(^8^8\) See, e.g., Sunswick Corp. v. United States, 75 F. Supp. 221 (1948) (holding that the government had to pay plaintiff construction companies' increased costs when the U.S. wage boards ordered a wage increase).
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tax treatments and the appropriate measure of damages from breaking it.

B. What Is So Special About Government Contracts?

Based on the analysis of the previous section, although tax legislation bears the hallmarks of a sovereign act, if it is directed at relieving the government of its contractual obligations, courts should be willing to imply a promise of those benefits. But why should the presence of a contract make this an acceptable result?

After all, the rationale for not granting taxpayers like Jerry Carlton relief makes sense. Private investors face risks when they invest money. Changes in tax laws are one of them. Requiring the government (instead of the investor) to bear the costs of these risks is inefficient (for the same reasons all other types of insurance are inefficient—they insulate the consumer from the costs of their actions). Usually, the government does not promise to insure against them. Furthermore, legislation, even tax legislation, is "simply not a contract" in a formal sense.

Why, then, should courts be willing to imply a term guaranteeing benefits? Why create the opposite result for taxpayers just because they have signed a contract with the government?

One potential reason for implying such a term would be to compensate for unequal bargaining power. Courts are always sensitive to inequality in bargaining power between contracting parties. The court's vigilance over unconscionable terms of the contract is proportional to the inequality of bargaining power. No entity has more bargaining power than the U.S. government. Private contracts typically exist at the mercy of the governing law in the jurisdiction where the contract is consummated. Obviously, the ability to influence those laws benefits private parties. Things are a step worse when the contractor is the lawmaker itself.

Under any definition of "bargaining power," the government has more of it than even the largest commercial entities. The govern-

90 Id.
91 Goldberg, supra note 27, at 14–15.
92 See 1 FARNSWORTH, supra note 8, § 4.28 (citing cases).
93 See Gene Ming Lee, Note, A Case for Fairness in Public Works Contracting, 65 FORD. L. REV. 1075, 1097 (1996) (citing the example of construction contracts, and noting that the government is loath to allow a variance from the material terms of the contract because it might open the door to challenges by competing bidders for the contract).
ment includes terms in its contracts covering risk allocation (including the risk of subsequent changes in the law) and methods of dispute resolution.94

However, courts have not been receptive to theories based on unconscionability/unequal bargaining power in government contracts. While the government is treated like a private party when possible, and undoubtedly has all the leverage of the Federal Reserve, courts have held that those private parties who seek government contracts are also more sophisticated, offsetting the government's advantage.

Similarly, courts like Centex that want to imply a promise to pay damages face a difficult challenge from Carlton at the level of policy. The Supreme Court in Carlton held that taxpayers who relied on a tax benefit must help repay the costs of the tax benefits that get undone by later regulations. But, if taxpayers have signed a deal with the government, the government must now cover the repayment.95 The private taxpayers that went further in the "wrong direction" (as evinced by later regulation that undoes the prior tax benefit) by signing a contract are given more leeway than those who merely relied on the statute.

The key distinction, and the one that stands the best chance of verifying the Centex result, is that Congress did make a pledge in Centex not made in Carlton. The line of cases leading up to Carlton stands for the idea that courts recognize Congress's almost limitless power to impose retroactive taxation.96 However, those same cases indicate that courts will hold the government accountable for regulation that disappoints particularly weighty reliance interests.97

When a taxpayer executes a contract with the government after being induced by a particular tax result, the taxpayer exhibits one of the weightier forms of reliance found in the law, by actually signing a contract and agreeing to be bound to a performance of their own in exchange for tax benefits. As referred to earlier, because the contract-signer (Centex) went further in the "wrong direction" compared to the

94 See id. (noting that agencies prefer to allocate all the risks in a contract with the government upon the private contracting party). For example, in run-of-the-mill construction and procurement contracts, the government awards the contract to the lowest bidder. It has the effect of reducing negotiations to one term: price. The other terms are effectively non-negotiable. Granted, the dangers in contracts promising tax benefits may not be as bad as construction contracts.

95 Cf. Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that it is a constitutional mandate that the government not impose burdens on individual taxpayers that in fairness should be borne by all taxpayers).

96 Goldberg, supra note 27, at 10 (citing Saul Levmore, The Case for Retroactive Taxation, 22 J. LEG. STUD. 265, 270 (1993)).

97 Id. at 31 (citing Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 HARV. L. REV. 692, 694–95 (1960)).
normal taxpayer (Jerry Carlton), the contract-signer has a much stronger reliance interest. As such, courts should act to reasonably protect the taxpayer/contractor's reliance interests.

The existence of a contract also binds the government, as a whole, to the implicit terms courts will read into all contracts. The implied covenant of good faith and fair dealing is one of those implied terms. The government is bound, like other parties, to the implied covenant of good faith and fair dealing.98 Key to the argument against relieving the Carltons of the world is that the government does not usually promise to insure against market risks like changes in tax law. When the government does, the policies supporting contractual enforcement apply. And whether the implied covenant of good faith and fair dealing should be deployed to protect a party from tax regulations involves a question of policy.99 Looking to the doctrine's history and purpose answers that policy question.

The implied covenant of good faith and fair dealing functions as an implicit term in every contract. Judge Easterbrook has described it as "a compact reference to an implied undertaking not to take opportunist advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties."100 It is not a requirement that one party extend a helping hand to the other.101 Courts will apply it to the government102 and other parties that have substantial bargaining power.103 Justice Cardozo's opinion in a celebrated early case describing the doctrine held that "we are not to suppose that one party was to be placed at the mercy of the other."104

Granting the government the power to renege on its deals via regulation would do just that. There are many policies behind holding the

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100 Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (1990). A basic assumption of contracting parties is that both parties will honor the contract. This is evident from the very existence of the contract.
101 Id. at 1358 (holding that the district judge erred in holding that a bank's decision not to extend additional credit to the shoe company until it filed for bankruptcy was "inequitable").
102 See Rumsfeld, 329 F.3d at 1330.
government to its bargains. First, the government should strive to be legitimate in the eyes of its constituents. Private parties face only the threat of negative consumer reaction and loss of market share if they are unreliable contracting partners. But the government faces potential political reprisal and (in tax legislation) increased administrative costs to enforce the Tax Code. The government likewise has an interest in being a reliable contracting partner because it depends upon the work of private contracting partners to carry out many of its day-to-day activities. Predictability has a value. If the government is seen as unreliable, it will have to pay higher prices (essentially "renew insurance"). Courts have long recognized this; even during the greatest economic crisis in the country's history (the Great Depression), the Supreme Court required the government to fulfill its contractual obligations to debtors.

The policies behind requiring the government to honor its contractual obligations are inversely proportional to the policies behind the sovereign acts defense: the more targeted a piece of legislation, the more acute becomes the harm from violating the policies behind requiring the government to be bound by its own contracts. The more committed the taxpayer was from the outset (contract (Centex) vs. conduct-in-reliance (Carlton)), the greater his reliance interest, and the more the subsequent removal destroys the benefit of his bargain. Thus, courts should be more willing to force the government to bear the risk of the contractor's increased costs resulting from change in the tax laws. And the more general the tax legislation, the more likely it is motivated by a legitimate desire to raise revenue.

Furthermore, regulation removing prior tax benefits in violation of a contract is a double whammy. The government thus commits two inefficiencies: reneging on a tax benefit and breaking the sanctity of contracts. To be sure, sometimes breaching an agreement is the more efficient choice. But as a general rule, reliability (and the specter of damages for unreliability) increases efficiency. These poli-

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105 See Goldberg, supra note 27, at 7 ("Enforcement of a tax system that is viewed as unfair will require a good deal of coercive governmental power, which will increase administrative costs.").

106 This figure is known as the "risk premium." See id. at 6.


108 See Goldberg, supra note 27, at 6 ("Creating uncertainty in the amount of the subsidy, such as by making a periodic subsidy uncertain in duration and subject to removal by legislative whim, is economically inefficient because it requires the government to compensate prospective recipients of the subsidy by including a risk premium in the subsidy.").

cies have been apparent since the founding of the U.S. As Alexander Hamilton said, when speaking on the public debt of the United States:

[T]he established rules of morality and justice are applicable to nations as well as to individuals; that the former as well as the latter are bound to keep their promises; to fulfill their engagements with respect to the rights of property which others have acquired under contracts with them. Without this there is an end of all distinct ideas of right or wrong, justice or injustice, in relation to society or government. There can be no such thing as rights, no such thing as property or liberty; all the boasted advantages of a constitution of government vanish into air.\footnote{110}{ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 13–14 (Henry Cabot Lodge ed. 1904), available at http://oll.libertyfund.org/EBooks/Hamilton_0249.03.pdf (last visited Mar. 28, 2007).

Because tax legislation is not a promise, the government is under no obligation (save what remains of the “harsh and oppressive” standard) to be fair to individual taxpayers.\footnote{111}{See supra Section II.A.} If we can agree that the government should be treated like a private party whenever possible, then (for the same reasons) it should be treated like a private party by not being allowed to explicitly prevent performance of its own deal. So, when targeted regulation succeeds, the implied covenant of good faith and fair dealing should extend to prohibit legislation withdrawing tax benefits promised by the government. This is not a consequence of the tax laws or of constitutional constraints on them. Rather, it flows from the idea that the government should not get to be a dishonest contractor. Regulations that specifically abrogate contracts, like those at issue in the Centex contract, should give private taxpayers/contractees a right to damages.

The relationship among Carlton, Centex, and the sovereign acts doctrine can be summarized thus:
C. Epilogue: Was Something Else Going on in Centex?

Carlton says things about the importance of tax legislation that cannot be ignored in deciding whether an instance of tax legislation is a targeted act, regardless of a contract’s presence. What might explain Centex’s reticence?

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<th>When a Contract Exists</th>
<th>When No Contract Exists</th>
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<td>Targeted regulation</td>
<td>Protection only if law is harsh and oppressive</td>
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<tr>
<td>Sovereign regulation</td>
<td>All other regulation</td>
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<tr>
<td>Implied covenant of good faith and fair dealing</td>
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Comparatively smaller scope of protection

Full scope of regulatory action

Likelihood of excuse

Full scope of regulatory action

Likelihood of excuse
For one, some commentators have argued that Carlton-type cases in the future should be decided under a Centex/Winstar rationale. They have noted that government tax subsidies will only work well if they can be guaranteed.112 This is because if a taxpayer "gets burned," the government will have to offer more to get the taxpayer to invest in the future.113 They argue that the government should protect the expectations of taxpayers, contract or not.

Other commentators, however, have explained any "disengagement" by the Centex court as resulting from a broad interpretation of Winstar:

[I]n [S&L cases], the Court of Federal Claims has . . . adopted a position that the basic questions of liability were settled by the Supreme Court in Winstar and that what remains to be done primarily is to calculate damages and secondarily to address some collateral issues as to which parties are entitled to receive them.114

Thus, what one may see in Centex is not the result of careful exegesis of existing precedent at the confluence of tax and constitutional law. Instead, it is a court finding repose in an interpretation from the nation's highest court. The Centex court embraced the jurisprudential respite that Winstar provided in a highly similar factual context. Using Winstar as a shortcut is understandable because of the high number of S&Ls cases, the amount of money involved, and the complexity of the deals at issue. Indeed, S&L litigation is something of a growth industry. As of July 31, 2000, $1.158 billion has been handed out in settlements or court judgments in "goodwill" (Winstar-type) cases alone.115

Future courts, however, should be careful to consider the special role of tax legislation and its role atop the list of historically sovereign powers. Tax laws are especially likely to sweep broadly and are more likely than other regulations to address important questions of national fiscal policy. In some cases, the challenged tax regulation will appear to address such an important question. But it may relieve the government of its obligation to perform under some of its contracts. The reliance of taxpayers on government tax treatments may have been the very problem that gave rise to the regulation.

112 See, e.g., Logue, supra note 4.
113 Id. at 1139.
114 Schwartz, supra note 27, at 1181.
Because tax treatments that are seen as unfair may have been the genesis of the regulation, courts are left to decide which is more important: correcting "erroneous" tax treatments or protecting the sanctity of government contracts. To make this choice, courts should consider the competing policies outlined above and decide where the challenged regulation lies: excusable problem-solving by the government or reactionary relief, entitling the contractors to damages from an implied promise not to change the law.

IV. CONCLUSION

Congress can usually change its mind and impose retroactive taxes on the general populus without fearing reprisal. Sometimes, it promises tax benefits to private parties. There is something special about tax legislation, which might seem to suggest that the government should be able to remove promised tax benefits in all circumstances. This argument, however, cuts both ways. Tax legislation is also special in its ability to induce particular behaviors. Taxpayers may find tax benefits so attractive that they assent to contracts with the government.

In that event, what one hand of the government gives, the other hand cannot and should not be able to take away via regulation, if that regulation substantially excuses nonperformance by the government. Centex fell into this latter category. While it is true that private parties cannot hold Congress to its "promises" not to tax, they can do so when those promises are memorialized in a contract and the government specifically seeks to absolve itself of the duties that the contract requires. Thus, the two quotes that open this Comment are not the paradox they seem. While Congress's power to raise revenue through tax is and should be broad, its breadth should not swallow the duty to honor contracts that are just as vital to the nation's health. No matter how full the treasury coffers become, they cannot hold enough to pay the price for a government that cannot be trusted to contract faithfully.

JOHNNY HUTCHINSON†

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