PUBLIC TAKINGS OF PUBLIC CONTRACTS

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INTRODUCTION

This Article addresses the intersection of takings claims and breach-of-contract claims against the U.S. government. More specifically, the Article seeks to answer the following question: When the government has entered into a contractual relationship with a private party, and the government subsequently takes some action that impairs or destroys the value of the private party's contract expectancy, can the party sue the United States for breach of contract, or instead sue the government for a taking within the meaning of the Takings Clause of the Fifth Amendment, or sue under either or both theories?

The answer offered by this Article is that when a private party's claim against the government for monetary relief is based on a government action abrogating an interest in a public contract, the party should generally be limited to her contract remedies. If the private party prevails in her contract suit against the government, no takings claim should lie because the claimant has received the relief to which she is entitled based on her rights under the contract. On the other hand, if the private party's contract claim fails, no takings claim should lie because the asserted contract right affords no relief and the claimant cannot assert greater rights than she acquired under her contract with the government.

The only exception to this principle should be when the government has not merely impaired or destroyed the value of a contract interest but abrogated the contract-right holder's ability to pursue a judicial remedy or abolished the right altogether. In either circumstance, when the government has barred the contract-right holder from enforcing her contract right, the private party should be permitted to claim a taking.

This Article proceeds as follows. Part I explains why the topic is worth exploring. The next Part describes several recent and ongoing litigations involving this issue. Part III dissects what is at stake in the debate over whether a claim of this type should be framed as a contract claim, a takings claim, either, or both. Part IV lays out the divergent judicial points of view on this question. The final Part explains and seeks to justify the proposed answer.

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I. WHY THIS ISSUE IS IMPORTANT

There are several reasons why this topic is worth exploring. First, it presents an interesting and relatively substantial problem within the general topic of "entrenchment," a focus of the takings conference that inspired this *Vermont Law Review* symposium book.[1] Entrenchment deals with the question of how our legal system should mediate between individual entitlements and expectations and the operation of representative democracy. On the one hand, protecting entitlements and expectations serves both the interests of the individual citizen and society; on the other hand, the operation of representative democracy necessarily entails frequent readjustment of private interests in order to advance larger public interests.[2] The highly nuanced and qualified nature of the protection provided private property interests under the Takings Clause is perhaps the most familiar example of the law addressing an entrenchment problem. Achieving the appropriate balance between holding the government accountable for its contractual obligations and allowing adequate scope for the democratic process, even when it may incidentally affect vested interests based on contracts with the government, presents another.

Second, the issue is important because recent decisions of the courts with primary jurisdiction over breach-of-contract and takings claims against the United States, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit, reveal significant judicial confusion and disagreement over how to answer this question. Some decisions follow the viewpoint embraced in this Article, and indeed that position is probably consistent with the better reading of the weight of the relevant legal authority.[3] But some recent decisions, most notably the 2009 decision of the Federal Circuit in *Stockton East Water District v. United States*, advance quite a different view.[4] Under this alternative view, a contract-right holder should have the ability to challenge a government action adversely affecting

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1. *See generally* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 879 (2011) (developing a "typology of mechanisms for public entrenchment through private law and private rights").

2. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property.").

3. *See, e.g.*, Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (holding that no taking had occurred because the plaintiff retained the full range of available contract remedies).

4. Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1369 (Fed. Cir. 2009) (holding that a takings claim remained viable for two years of the contract where the plaintiff availed itself of the contract remedies but could not prove a breach).

a contract interest as *either* a breach of contract or as a taking.[5] This disagreement involves more than jurisprudential labels. Opening the government to liability for either a breach of contract or for a taking increases the likelihood that litigation against the government will be successful and that taxpayers will face greater financial liabilities. Potentially expanded taxpayer liabilities would not only have immediate fiscal implications for the federal government budget and taxpayers, but would also impede government policy initiatives over the long term. In addition, permitting claimants to frame challenges to government actions impairing or destroying public contract expectancies as either takings claims or contract claims threatens to complicate and increase the workloads of the courts.

Finally, the intersection of takings doctrine and public contract law appears worthy of attention because examining the overlap between the two doctrines may offer a pathway to a richer understanding of each doctrine. For example, an examination of how these two doctrines fit together necessarily involves analyzing how the so-called sovereign acts doctrine operates as a defense to government liability for breach of contract. This, in turn, leads to an analysis of the contemporary justifications, if any, for preserving this venerable doctrine. In addition, an examination of this intersection raises the question of whether a public contract interest should qualify as "property" within the meaning of the Takings Clause and, more generally, the issue of the proper definition of that term.

II. REPRESENTATIVE CASES

To illustrate the practical importance of this topic and to provide some real world context for the more abstract analysis that follows, it is useful to describe some of the kinds of cases that have involved alleged government takings of asserted private property rights based on public contracts.

First, a good deal of pertinent litigation has arisen from Congress's tortured and so far unsuccessful efforts to deal with the challenge of safely disposing of spent nuclear fuel.[6] One of the major, initial obstacles to the development of nuclear power in the United States was the challenge of finding a safe, long-term repository for highly radioactive spent nuclear fuel. In 1982, Congress enacted the Nuclear Waste Policy Act in an attempt

5. *Id*. at 1368.

6. *See, e.g.*, Niagara Mohawk Power Corp. v. United States, 98 Fed. Cl. 313, 315–18 (2011); Boston Edison Co. v. United States, 64 Fed. Cl. 167, 169–70 (2005).

to address this problem.[7] The Act authorized the Secretary of Energy to enter into long-term contracts with private utilities pursuant to which the government assumed responsibility for dealing with the waste in exchange for prescribed payments from the utilities producing the waste.[8] The payments were intended to help defray the cost of creating a national waste repository.[9] Essentially, in order to encourage private utilities to construct nuclear plants, Congress agreed to cap the utilities' financial responsibility for addressing the waste issue and provided that taxpayers would bear all costs above the cap.[10]

The search for a suitable nuclear waste repository has been mired in technical and political difficulties ever since. In recent years, Yucca Mountain in Nevada emerged as the most promising potential site for the waste repository,[11] but residents of Nevada immediately opposed the project and continue to do so.[12] Barack Obama was elected president with a campaign pledge to abandon the project,[13] and in March 2010, the Department of Energy filed a motion with the Nuclear Regulatory Commission to withdraw its application for the project.[14] As a result of the government's failure to build a waste repository, it has not taken physical control of the waste as envisioned by the 1982 legislation. This failure left the utilities to store the waste at their own facilities at considerable expense and trouble. Despite the electric power industry's support for enactment of this arguably flawed legislation, utilities have cried foul as a result of the government's default and filed lawsuits against the United States.[15] Many of the lawsuits have included both contract claims asserting breaches of the contracts between the utilities and the Department of Energy relating to waste disposal, and takings claims based on the theory that the utilities suffered a taking of property interests in their contract expectancies.[16]

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7. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. §§ 10101–10226 (2006)).

8. 42 U.S.C. §§ 10155(b), 10156(a) (1983).

9. *Id.* § 10155(a)(5).

10. *Id.* § 10156(f)(5).

11. *Id.* §§ 10133, 10172(a)(1).

12. Charles de Saillan, *Disposal of Spent Nuclear Fuel in the United States and Europe: A Persistent Environmental Problem*, 34 HARV. ENVTL. L. REV. 461, 475 (2010) (citing ROBERT VANDENBOSCH & SUSANNE E. VANDENBOSCH, NUCLEAR WASTE STALEMATE 76–79 (2007)).

13. *Seek Safe Disposal of Nuclear Waste*, POLITIFACT, http://www.politifact.com/truth-o-meter/promises/obameter/promise/474/seek-safe-disposal-of-nuclear-waste-/ (last visited Apr. 19, 2012) ("Barack Obama believes that Yucca Mountain is not an option.").

14. Steve Tetreault, *DOE Asks to Halt Yucca Mountain*, LAS VEGAS REV.-J. (Mar. 3, 2010 11:07 AM), http://www.lvrj.com/news/nuclear-waste-blue-ribbon-panel-to-start-work-86253967.html.

15. *See supra* note 6 and accompanying text.

16. Some of the litigation arising from implementation of the Nuclear Waste Policy Act has

A second representative type of litigation involves contracts between the Bureau of Reclamation and private water districts, or individual water users, for the delivery of water for agricultural irrigation.[17] Several kinds of government actions, most notably regulatory constraints pursuant to the Endangered Species Act, have led to reductions in expected deliveries of water. These shortfalls resulted in lawsuits in which the water-rights holders have asserted both breaches of their water-delivery contracts and takings of asserted property rights based on the contracts.[18]

A third example involves the so-called *Winstar* line of cases that arose from enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[19] Congress adopted the legislation in the aftermath of the savings-and-loan crisis of the 1980s, which produced a large number of failing savings and loan institutions. In response to the crisis, federal regulators initially encouraged healthier institutions to step in and take over failing thrifts by authorizing them to use favorable accounting rules that made purchasing a failing savings-and-loan institution more financially attractive. Without this incentive, the taxpayers would have borne the losses from the thrifts that would have gone out of business. Subsequently, based on the conclusion that this regulatory action had been ill-advised, Congress adopted FIRREA and barred the continued use of this accounting practice, sending various previously profitable investments in savings and loans underwater based on their failure to adhere to the new capitalization requirements.[20] Many of the disappointed institutions sued, claiming a breach of their regulatory agreements with the government and a taking of their property rights based on their contracts.[21]

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involved claims that the government committed a per se physical taking of utilities' property by effectively forcing utilities to store nuclear waste at their plant sites. *See, e g.*, Omaha Pub. Power Dist. v. United States, 69 Fed. Cl. 237, 241–42 (2005). These claims related to the alleged taking of independent property rights are not relevant to the issue discussed in this Article.

17. *See, e.g.*, Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379, 382 (2004); *see also* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005) (involving alleged takings and breach-of-contract claims based on the Bureau of Reclamation's reduction of water available for irrigation); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314–15 (2001) (involving an alleged taking of an asserted right based on a contract between the claimant and the California Department of Water Resources).

18. *Stockton*, 62 Fed. Cl. at 382–83; *Klamath*, 67 Fed. Cl. at 513–14.

19. *See* Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended 12 U.S.C. §§ 1833a–e, 3332–3352 (2006)); *see also* United States v. Winstar Corp., 518 U.S. 839, 858 (1996).

20. *Winstar Corp.*, 518 U.S. at 856–58.

21. *See, e.g.*, Winstar Corp. v. United States, 25 Cl. Ct. 541, 543 (1992) (alleging that exclusion of plaintiff corporations' supervisory goodwill under FIRREA violated their regulatory

III. DOES THE CONTRACT-VERSUS-TAKINGS DISTINCTION MATTER?

What difference does it make, apart from the legal labels attached to the different claims, whether a party sues for a taking instead of for a breach of contract? Generally speaking, a party can only recover once for an injury arising from a defendant's action, regardless of how many legal theories he or she might be able to assert in support of recovery.[22] Thus, a disappointed government contractor plainly cannot recover twice by suing under a takings theory and for breach of contract.[23] Accepting, however, that a claimant must ultimately rely on either a contract claim or a takings claim, there are important differences between the two types of claims.

First, there is a relatively trivial doctrinal distinction—which in some cases may actually turn out to have a good deal of financial significance—related to a claimant's ability to recover prejudgment interest as part of an award. Prejudgment interest is generally recoverable in a takings lawsuit against the United States, but is not typically recoverable in a contract action against the United States. The reason for this distinction is that a plaintiff who suffers a taking is constitutionally entitled to prejudgment interest in order to make her just compensation complete.[24] By contrast, interest is allowed on a contract claim only if the contract or an Act of Congress expressly provides for payment of such interest.[25] Given this distinction, a claimant generally will prefer to frame a case as involving a taking rather than a breach of contract because, everything else being equal, the total recovery is likely to be greater under a takings theory. It appears clear from the reported cases that the hope of obtaining prejudgment interest as part of a successful award has, in fact, motivated parties to assert takings claims instead of, or in addition to, contract claims.[26]

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agreements, constituting a breach of contract and, in the alternative, a taking of plaintiffs' contract rights); Statesman Savs. Holding Corp. v. United States, 26 Cl. Ct. 904, 906 (1992) (same).

22. United States v. Or. Lumber Co., 260 U.S. 290, 301 (1922) (noting that it is axiomatic that "one shall [not] be twice vexed for one and the same cause").

23. City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007) (holding that "there should not be double recovery, we should not commingle takings compensation and contract damages").

24. Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

25. 28 U.S.C. § 2516(a) (2006).

26. *See, e.g.*, Detroit Edison Co. v. United States, 56 Fed. Cl. 299, 303 (2003) (recognizing that plaintiff's brief "foreshadows" a potential tactic to receive "prejudgment interest" and "certain consequential damages on its takings claim" (citation omitted)); Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (noting that the plaintiff argued in its post-trial brief that it was entitled to interest on its damages under the Fifth Amendment); Coast Fed. Bank, FSB v. United States, 48 Fed. Cl. 402, 441–42 (2000) (agreeing with the plaintiff's argument that "were it granted compensation under the takings clause, it would also be entitled to prejudgment interest on that claim").

Second, there is a more significant and interesting distinction between these two types of claims: A contract claim is potentially barred by the so-called sovereign acts doctrine, whereas this defense is not available in a takings case. According to the Supreme Court's classic formulation of the sovereign acts doctrine in the 1925 *Horowitz* case: "[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the . . . contract resulting from its public and general acts as a sovereign."[27] Not only is a sovereign act not a valid basis for barring a takings claim, but a sovereign act can appropriately be viewed as an essential precondition for a valid takings claim. Under the so-called *Armstrong* principle, which has become the lodestar of modern takings doctrine: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[28] The "public burdens" referred to in *Armstrong* that support imposing takings liability are typically produced by the very kinds of general and public acts referenced in *Horowitz* as precluding liability in a contract case.

The difference in how the public nature of the government action affects government liability in a takings case, as opposed to a breach-of-contract case, is often highly significant in terms of case outcomes. Consider, for example, a scenario in which a private logging firm enters into a contract with the government allowing the firm to cut trees within a unit of the National Forest System. The government then discovers that the planned site of the logging includes valuable archeological resources that would be harmed by the logging operation, leading the government to cancel the timber contract. If the case is framed as a breach-of-contract action, the government's actions to protect important archeological resources might well qualify as a sovereign act that would preclude a claim of liability for breach of contract. By contrast, viewing the case as a takings case, the public nature of the government's actions to protect the archeological resource would not provide an argument for defeating the takings claim. Instead it would provide a basis for arguing that the government has imposed a "public burden" that justifies an assessment of financial liability under the Takings Clause. Whether the takings claim would ultimately succeed would depend, of course, on a nuanced analysis

27. Horowitz v. United States, 267 U.S. 458, 461 (1925) (citing Deming v. United States, 1 Ct. Cl. 190, 191 (1865); Jones v. United States, 1 Ct. Cl. 383, 384 (1865); Wilson v. United States, 11 Ct. Cl. 513, 520 (1875)).

28. Armstrong v. United States, 364 U.S. 40, 49 (1960).

of the facts of the particular case. Nonetheless, in terms of general theory on whether the government should or should not be held liable, framing the case as a breach-of-contract claim rather than a takings claim can make a great deal of difference.

Historically, there has not always been such a large conceptual divide between breach-of-contract claims against the government and takings claims under the Fifth Amendment. In other words, the takings and public contract doctrines were arguably more alike prior to the emergence of modern regulatory takings doctrine than they are today. Up until the Supreme Court's modern reformulation of takings doctrine, the takings doctrine included a "*Mugler* principle," named after the famous Supreme Court decision in *Mugler v. Kansas*. In that case, the Supreme Court rejected a takings claim based on a state law barring the operation of breweries in the state.[29] Under the *Mugler* principle, a police power regulation designed to protect the public health, safety, and morals does not constitute a taking.[30] The *Mugler* principle of takings doctrine substantially overlaps with, and indeed might be regarded as a mirror image of, the sovereign acts doctrine articulated in *Horowitz*. Under both doctrines, whether the claim was formulated as a contract claim or a takings claim, the public-regarding nature of the government action giving rise to the claim provided a basis for its defeat.

The Court's 1992 decision in *Lucas v. South Carolina Coastal Council*[31] launched a change in takings doctrine that has produced the current substantial disjunction between takings law and public contract law. In *Lucas*, the Supreme Court overturned the South Carolina Supreme Court's decision to reject a takings claim that was based on beach development restrictions imposed by the South Carolina Beachfront Management Act.[32] The South Carolina court, invoking *Mugler*, had said there was no taking because the legislation was designed to protect the public from "harm."[33] The U.S. Supreme Court rejected this reasoning and repudiated *Mugler* in the process. The Court reasoned that the goal of protecting the public from harm could not justify rejection of a takings claim, at least when the government action deprived the claimant of all economically viable use of the property.[34]

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29. Mugler v. Kansas, 123 U.S. 623 (1887).
30. *Id.* at 668–69.
31. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
32. *Id*. at 1032.
33. Lucas v. S. C. Coastal Council, 404 S.E.2d 895, 901–02 (S.C. 1991).
34. *Lucas*, 505 U.S. at 1027.

In the aftermath of *Lucas*, the Supreme Court has explained that the viability of a takings claim turns "in large part, albeit not exclusively" on the magnitude of the economic burden imposed on property owners by a public action.[35] At the same time, the public-regarding nature of the government action, far from being a bar to takings liability, is now better understood as a basis for finding liability. Hence the modern disjunction between takings doctrine and public contract law.

The divergence of public contract law and takings doctrine has helped fuel the current debate over whether a claimant can convert a takings claim into a contract claim and vice versa, as discussed below.

IV. DIVERGENT LEGAL VIEWPOINTS

The law is currently conflicted as to whether a party with a government contract can challenge a government action that impairs or destroys the value of the contract rights through a contract claim, a takings claim, or both.[36] Most of the recent pertinent decisions have been issued by either the U.S. Court of Federal Claims or the U.S. Court of Appeals for the Federal Circuit. One theory is that if the claim arises from a government action affecting a contract interest, then the claimant can only sue for a breach of contract. The second theory is that the claimant has the discretion to frame her claim as either a contract claim or a takings claim, or both. Both of these mutually exclusive theories cannot be correct.

The first theory, that contract law provides the exclusive avenue for relief, is supported by two lines of argument.[37] The first is that no takings claim should lie, because, if the claimant can sue for breach of contract and obtain a recovery under that theory, there is no need to consider a potentially duplicative takings claim—the claimant has received all he is entitled to as defined by the scope of the contract.[38] On the other hand, if the claimant's contract claim fails on the merits, there is no valid basis for a takings claim either. By asserting a takings claim, a party cannot claim an entitlement to greater rights than those conferred by the contract.[39]

Implicit in this reasoning is a particular understanding of whether and to what extent a contract expectancy based on a contract with the

35. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005).

36. Niagara Mohawk Power Corp. v. United States, 98 Fed. Cl. 313, 316 n.4 (2011) (highlighting the disparate views between judges in the Court of Federal Claims).

37. Franconia Assocs. v. United States, 61 Fed Cl. 718, 737–40 (2004).

38. *Id*. at 737–38.

39. *Id*.

government can qualify as "property" within the meaning of the Takings Clause. Specifically, this theory implies that the terms of the contract limit the nature and scope of the "property" interest that a contracting party can assert in a takings case.[40] This includes any limitations imposed by general contract law on the claimant's ability to sue successfully under a breach-of-contract theory. Thus, a claimant asserting a taking of a property interest based on a government action is barred from claiming an interference with a protected property interest for takings purposes if a breach-of-contract suit based on the same government action would be barred by the sovereign acts doctrine. This is true despite the fact that the sovereign acts doctrine does not formally apply in takings cases.[41] The sovereign acts doctrine is imported into takings law by virtue of the fact that the takings claim is based on an asserted contractual property right, including any limitations inherent in the contract remedy. As discussed below, this argument appears to be essentially sound and supports the conclusion that a party with a contract claim against the United States cannot freely convert it into a takings claim.

The second line of reasoning for why a party objecting to government interference with a contract cannot raise a takings claim is somewhat more obscure and ultimately less convincing. Rather than focusing on the nature of the asserted property interest at stake, the decisions articulating this approach focus instead on the character of the government action in entering into the contractual arrangement.[42] According to this argument, when the 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."[43] In entering into commercial contracts, the government is acting in a "proprietary" capacity rather than its "sovereign" capacity. Accordingly, legal claims arising from the government's contractual relations "must be directed at [the government] in its proprietary capacity and not in its sovereign capacity."[44] In other words, "interference

40. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 990–95 (2000) (discussing contracts as constitutionally protected property).

41. *See* Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1580–81 n.8 (Fed Cir.1997) (explaining that a plaintiff cannot assert a taking of a right based on a contract where the alleged impairment of the interest represented a "general, sovereign" act).

42. *See* Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (stating that the Takings Clause does not support a claim parallel to a contract claim because "the Government acts in its commercial or proprietary capacity in entering contracts").

43. Cooke v. United States, 91 U.S. 389, 398 (1875), *quoted in* Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct. Cl. 1978).

44. *Sun Oil*, 572 F.2d at 818.

with . . . contractual rights generally gives rise to a breach claim not a taking claim."[45]

Several judges, including Judge Jay Plager and Judge Charles Lettow, have recently expressed the view that the distinction between proprietary and sovereign actions is not particularly illuminating for the purpose of explaining why a government action abrogating a contract interest can or cannot be reframed as a takings claim.[46] Their observations appear well founded. The notion that a government action that is proprietary in nature cannot give rise to a takings claim seems nonsensical on its face. Under the broad reading of the term "public use" in the Takings Clause affirmed by the Supreme Court in *Kelo v. City of New London*, government plainly can exercise its eminent domain power to acquire properties that serve proprietary government functions.[47] If that is the case, then it logically follows that the proprietary nature of a government action cannot bar an inverse condemnation claim.[48]

On the other hand, it seems plain that a sovereign action can support a claim for breach of contract. The well-known Supreme Court *Winstar* case involved congressional legislation abrogating contractual agreements by the United States authorizing investors in failing savings-and-loan associations to utilize a particular financial accounting practice.[49] This legislation plainly involved the exercise of sovereign power rather than a proprietary government power.[50] But a majority of the Justices writing opinions in this splintered case agreed that the case was properly viewed as raising a breach-of-contract issue.[51] In sum, the proprietary versus sovereign distinction appears to offer no particular help in determining whether a challenge to government action impairing or destroying a contract right should be framed as a contract or a takings claim.

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45. *Id*.

46. Henry Hous. Ltd. P'ship v. United States, 95 Fed. Cl. 250, 255 (2010) (Lettow, J.) (describing the distinction as "not necessarily meaningful"); Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (Plager, J.) (describing the characterization of contract claims involving proprietary actions as "nothing more than a passing comment about government contract law").

47. Kelo v. City of New London, 545 U.S. 469, 484 (2005).

48. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles., 482 U.S. 304, 316 (1987) (describing the essential doctrinal equivalence of direct condemnation actions and inverse condemnation actions).

49. United States v. Winstar Corp., 518 U.S. 839, 847 (1996).

50. *Id*. (noting that the decision to enter into agreements was designed to preclude massive nation-wide defaults of ailing savings-and-loan institutions); *id*. at 889 n.34 (citing Veix v. Sixth Ward Building & Loan Ass'n of Newark, 310 U.S. 32, 38 (1940) (recognizing that thrift regulation is within the police power)).

51. *Id*. at 924–37 (Rehnquist, C.J., & Ginsburg, J., dissenting).

Furthermore, an examination of the line of historical precedent supporting the proprietary-versus-sovereign distinction casts additional doubt on its modern relevance. The courts' conclusion that an alleged abrogation of a contract right could only be challenged through a breach-of-contract claim, and not under the Takings Clause, was partly rooted in now outmoded limitations on the scope of the jurisdiction of the U.S. Court of Federal Claims (formerly the U.S. Court of Claims). Originally adopted in the mid-nineteenth century, the Court of Claims Act of 1855—the predecessor to the Tucker Act—waived the sovereign immunity of the United States primarily with respect to contract claims.[52] Courts interpreting this early version of the Tucker Act concluded that it permitted suits against the United States based on express contracts as well as suits under the Takings Clause, on the theory that a government exercise of eminent domain represented an "implied contract" to pay just compensation.[53] While this theory permitted the vindication of certain takings claims, it created a logical embarrassment in the situation where a claimant sought to assert a taking of a contract right, because a promise cannot logically be implied when there is already an express contract. As the Supreme Court put it, "an express contract speaks for itself and leaves no place for implications."[54] The Court's solution to this dilemma was to conclude that a party challenging an impairment of a contract right was limited to contract remedies, and could not assert a takings claim.[55]

In 1887, Congress amended the Tucker Act to expressly authorize suits for monetary compensation against the United States based on "claims founded upon the Constitution."[56] For many years, the Supreme Court resisted this expanded jurisdiction, continuing to insist that takings claims

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52. Court of Claims Act of 1855, ch. 122, 10 Stat. 612; *see also* Deming v. United States, 1 Ct. Cl. 190, 191 (1865) ("In this court the United States can be held to no greater liability than other contractors in other courts.").

53. Johnson v. United States, 2 Ct. Cl. 391, 415 (1866) ("[I]t always has been held that a party might recover [under the Takings Clause] upon the implied contract as though the property had been acquired under an agreement of purchase, leaving the price undetermined.").

54. *See* Klebe v. United States, 263 U.S. 188, 192 (1923); *see also* Consol. Coal Co. v. United States, 60 Ct. Cl. 608, 626 (1925) (citing United States Bedding Co. v. United States, 266 U.S. 491 (1925)) (stating that the existence of an express contract logically excludes a claim for an implied contract necessary to support a takings claims).

55. *Klebe*, 263 U.S. at 191 ("[T]he circumstances may be such as to clearly rebut the existence of an implied contract, as here, where possession of the property was taken under an asserted claim of right to do so by virtue of an express contract." (citations omitted)); *see also* J.J. Henry Co. v. United States, 411 F.2d 1246, 1249 (Ct. Cl. 1969) (holding that a takings claim generally will not lie when there is an express contract).

56. Act of Mar. 3, 1887, Pub. L. No. 49-359, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1491(a)(1) (2006)).

should be viewed through the lens of an implied contract.[57] Eventually, in *Jacobs v. United States*,[58] and later and more explicitly in *United States v. Causby*,[59] the Supreme Court came to recognize that, under the revised version of the Tucker Act, "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear."[60]

This expansion of claims court jurisdiction eliminated the original judicial justification for characterizing claims under the Takings Clause as a species of implied contract claims. This development eliminated, in turn, the logical difficulty that originally persuaded the U.S. Court of Claims to refuse to recognize a takings claim as an alternative to a claim of breach of an express contract.[61] Because this logical difficulty was the foundation for the proprietary-versus-sovereign distinction in this context, it is apparent that the distinction can no longer serve as a defensible ground for explaining when a takings claim will or will not lie.

It is noteworthy that even decisions articulating that contract claims are the proper avenue for relief recognize an exception to this principle when the government has not merely interfered with contract performance but has precluded recovery altogether.[62] According to this view, if Congress enacts legislation stripping the courts of jurisdiction to hear a breach-of-contract suit, the total deprivation of the contract right, including the right to seek judicial relief, will support a takings claim.[63] This exception is consistent with the reasoning for why contracting parties should generally be required to seek relief against the government through breach claims rather than

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57. *See* Schillinger v. United States, 155 U.S. 163, 167, 168–69 (1894) ("[S]ome element of contractual liability must lie at the foundation of every action."); United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 335 (1920) ("The right to bring . . . suit . . . is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." (citations omitted)).

58. Jacobs v. United States, 290 U.S. 13, 16 (1933).

59. United States v. Causby, 328 U.S. 256 (1946).

60. *Id*. at 267.

61. Heinemann v. United States, 620 F.2d 874, 879 (Ct. Cl. 1980) (explaining that, under modern takings jurisprudence, a takings claimant need not demonstrate the existence of an implied contract or establish intent to take on the part of the government, and that the government cannot defeat the claim by mere assertion of a claim of right based upon an express contract).

62. Castle v. United States, 48 Fed. Cl. 187, 218 (2000) (citing Lynch v. United States, 292 U.S. 571 (1934)). *Lynch* stands for the "basic" principle that "a litigant to whom a contract remedy is available has not been deprived of the rights conferred on him by contract." *Id.* But a takings claim is proper if the contract right is "abrogated by [retroactive] statute, leaving that plaintiff without recourse to a breach of contract claim." *Id.*

63. *Id.*; *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that sovereign immunity barred plaintiff's recovery and therefore the government was liable for a taking).

takings claims: If the claimant can seek relief for breach of contract in accordance with the terms of the contract and general precepts of contract law, then the party has no basis for claiming that he has lost any protected interest. By contrast, if the government has not only impaired the contract interest but deprived the party of her contract remedy, then the party's protected interests have been destroyed and allowing the takings claim to go forward is necessary to protect those interests.

Under a second, alternative theory currently embraced by some judges on the claims court and the Federal Circuit, there should be no barrier to a claimant reframing a breach-of-contract claim as an alleged taking of a contract interest. These rulings rest heavily on a narrow interpretation of the Supreme Court's 1934 decision in *Lynch v. United States*, in which the Court explicitly characterized contracts as "property" for the purpose of the Takings Clause.[64] In *Lynch*, the Court addressed whether federal legislation absolving the United States of liability on a set of government insurance policies constituted a taking of the claimant's property rights in their insurance contracts.[65] The Court said a taking had indeed occurred in this circumstance.[66] Armed with the premise provided by *Lynch* that contracts are "property," courts embracing this theory say that alleged takings of property rights based on contracts should be handled in the same fashion as any other takings claims, ignoring the contractual context from which these types of claims arise.[67]

V. WHICH SIDE HAS THE BETTER ARGUMENT?

Is a government action that impairs or destroys a government contract with a private party subject to challenge only as a breach of contract? Or should it also be subject to challenge in the alternative as a taking? The first alternative appears to represent the better view.

The clearest and most straightforward justification for this conclusion is that allowing a claimant to freely convert a breach-of-contract claim into a takings claim would effectively nullify the sovereign acts defense. A claimant could avoid the sovereign acts defense in every case simply by asserting that,

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64. *Lynch*, 292 U.S. at 579 ("Valid contracts are property. . . . Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.").

65. *Id.* at 574–75.

66. *Id*. at 580 (holding that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States").

67. *See*, *e.g.*, Consol. Edison Co. v. United States, 67 Fed. Cl. 285, 291–92 (2005) (holding that contract rights are cognizable under the Takings Clause and that plaintiff could pursue a takings claim despite the fact that the court had already found the government liable for partial breach of contract).

rather than suffering a breach of contract, she has suffered a taking of her property interest in her contract. The reason, of course, is that the sovereign acts defense is available to the government in a breach-of-contract case but not a takings case. Thus, in order to preserve the sovereign acts doctrine, it is imperative to recognize and enforce the distinction between contract claims and takings claims.

Of course, this analysis only goes so far because it begs the question of whether the sovereign acts doctrine serves a useful purpose and is worth preserving. The most persuasive justification for the sovereign acts defense is that it allows the government—and the public it serves—to have the benefit of the same impossibility defense to a breach-of-contract claim that a private party can assert.[68] When some sovereign action, such as the adoption of a new law or policy, prevents the execution of a contract between two private parties, the defaulting party can defend against a breach-of-contract claim on the ground that the government measure made performance impossible.[69] To place the government on par with private parties, it must be allowed to assert an impossibility defense on the same terms that a private party could. To accomplish this objective, as the Supreme Court explained in its seminal *Horowitz* decision, the courts must distinguish between government actions in the role of contractor and in the role of sovereign.[70] Acting in its role as contractor, the government is liable for breach of contract on the same terms as any party; for example, the government plainly cannot escape its contractual obligations simply because a contracting officer concludes that the government erred in failing to bargain for better terms. On the other hand, where the contract impairment is simply the unintended and incidental byproduct of some sovereign action, the government, as contractor, should be able to raise an impossibility defense on the same terms that a private party could in the same circumstances.

The basic test for whether a government action is sovereign is whether the action is "public and general." In other words, the purpose of the government action must be to address some public problem, rather than to alter the terms of a specific contract with a private party. Additionally, the government action must apply broadly, rather than simply to the claimant

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68. *See*, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 261 (2010) (discharge by supervening impracticability).

69. *See*, *e.g.*, *id.* § 264 (prevention by government regulation or order).

70. Horowitz v. United States, 267 U.S. 458, 461 (1925) (citing Deming v. United States, 1 Ct. Cl. 190, 191, (1865); Jones v. United States, 1 Ct. Cl. 383, 384 (1865); Wilson v. United States, 11 Ct. Cl. 513, 520 (1875)).

alone.[71] Implementation of the Endangered Species Act (ESA) provides a good example of a sovereign act that has been the focus of several recent cases.[72] As a result of the ESA mandate to protect species, for example, restrictions have been placed on water users' contractual rights to divert water for private consumption. However, the ESA is a federal statute that results in restrictions on public and private development activities throughout the nation. Accordingly, the courts have had no difficulty concluding that implementation of the ESA, in relation to a specific federal contractor, represents a general and public measure. Therefore, these courts have concluded that a breach-of-contract claim based on an ESA restriction is barred by the sovereign acts doctrine.[73] While distinguishing between government acting in its role as contractor and in its role as sovereign can occasionally pose difficult line-drawing problems,[74] the basic nature and purpose of the sovereign acts inquiry is fairly straightforward.

A judicial debate is currently underway on the issue of how the government goes about proving that a sovereign act has actually rendered contract performance impossible. In the recent decision in *Stockton East*, Judge Jay Plager, speaking for the panel majority, suggested that identifying a sovereign act is only the starting point of the analysis. He stated that the government bears an additional burden of demonstrating that it was impossible for the government to carry out its sovereign objectives in any alternative fashion that would have avoided impairing the contract.[75] This interpretation of the sovereign acts doctrine seems plainly mistaken. It conflicts with prior Federal Circuit precedent involving the sovereign acts defense,[76] and was also disputed by the dissenting judge in *Stockton East*.[77] In a case involving two private parties, where the government has taken some step that precludes execution of the contract, the only question that has to be

71. *Horowitz*, 267 U.S. at 461.

72. *See* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 536–37 (2005); Casitas Mun. Water Dist. v. United States, 72 Fed. Cl. 746, 753–55 (2006).

73. *Casitas*, 72 Fed. Cl. at 753–55.

74. *See* Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1365–68 (Fed. Cir. 2009) (holding that the sovereign acts defense was not available to the Bureau of Reclamation because its actions pursuant to the Central Valley Project Improvement Act were not sufficiently "public and general").

75. *Id.* (holding that the government failed to demonstrate impossibility because it had discretion to choose an alternative solution by taking water from other users with Bureau of Reclamation water-supply contracts).

76. *Casitas*, 72 Fed. Cl. at 755 (2006) (holding that discretionary options do not change the sovereign character of the act).

77. Stockton E. Water Dist. v. United States, 638 F.3d 781, 785 (Fed. Cir. 2011) (Gajarsa, J., dissenting) (noting an improper conflation of sovereign acts and impossibility defenses in the majority's order denying rehearing in part).

answered to determine whether the impossibility defense applies is whether the government has taken an action that precludes execution of the contract. The courts do not engage in a further inquiry into whether the sovereign, instead of pursuing its goal in the fashion that it chose, might have pursued its goal through some other method. Given that the purpose of the sovereign acts doctrine is to allow the government to assert an impossibility defense on the same terms as a private party, the same analysis should apply when the government is the defendant. The government as contractor should not be forced to bear the additional burden of demonstrating that it was impossible for the government as sovereign to pursue its objectives through some alternative method that would not have impaired contract performance.

Moreover, *Lynch* arguably does not bear the weight that has been loaded onto it by those judges who embrace the notion that contracts and takings cases should be viewed as fungible in this context. *Lynch* did not involve a typical situation where the government was subjected to suit for a an alleged breach of contract. Rather, in *Lynch* the government retroactively destroyed the contract right itself and, at the very least, cut off the plaintiff's ability to seek recourse for the vindication of a vested right.[78] Arguably, *Lynch* represents an exceptional set of circumstances.[79] For the reasons discussed above, the fact that total elimination of a contract right can properly be regarded as a taking of the contract interest does necessarily mean that a claimant should have the option of reframing a straightforward breach-of-contract claim as a takings claim. So long as the claimant who asserts an impairment of her contract interest can pursue a traditional contract remedy in accordance with the terms of the contract and general contract law, there is no taking.

CONCLUSION

When the U.S. Court of Appeals for the Federal Circuit or the Supreme Court has the opportunity to revisit the relationship between breach-of-contract and takings claims against the United States, they should clarify that the default remedy is a breach-of-contract claim and a takings claim is available only if the government has completely abrogated the contract remedy. This resolution recognizes and affirms the continued viability of the traditional sovereign acts defense to breach-of-contract claims, and would cut off claimants' endless tactical efforts to convert breach-of-contract claims into takings claims in order to avoid this defense.

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78. Lynch v. United States, 292 U.S. 571, 575 (1933).

79. *Cf.* Merrill, *supra* note 40, at 995 (suggesting that *Lynch* represents a case of "arbitrary or oppressive [government acts] depriving individuals of their contract rights against the government").