HERCULES, *WINSTAR*, AND THE SUPREME COURT'S CONSPICUOUS AND POTENTIALLY CONSEQUENTIAL ERROR

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I. THE SUPREME COURT'S ERROR

It is a fundamental principle of government contract law that the sovereign has not consented to suit for claims on contracts implied in law. The Tucker Act waiver of sovereign immunity established Court of Claims jurisdiction over claims founded upon "contracts express or implied," but, from the beginning, this grant for implied contracts has been restricted to contracts "implied in fact," barring claims founded on contracts "implied in law."[1] In *Hercules, Inc. v. United States*, the Supreme Court—in an opinion written by Chief Justice Rehnquist—enlarged this restriction by stating that "[e]ach material term or contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation."[2] Thus, even a claim on an express contract could not rely on a term implied by law.

Imposing this limitation and ruling out a basis implied-in-fact, the Court denied claims of implied warranty and indemnification, arising from an express contract, concluding the *Hercules* opinion in this way:

> Perhaps recognizing the weakness of their legal position, petitioners plead "simple fairness" . . . and ask us to "redress the unmistakable inequities." . . . But in any event we are constrained by our limited jurisdiction and may not entertain claims "based merely on equitable considerations."[3]

With this concluding thought, Chief Justice Rehnquist discredited the underpinnings in contract law for implied-in-law terms and discouraged trial forums from drawing the implication in fact that the government would want to treat its contracting partners equitably, in good faith, and with "simple fairness."

In *United States v. Winstar Corp.*, decided shortly after *Hercules*, the Supreme Court reaffirmed the long-standing "principle" that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[4] Chief Justice Rehnquist dissented, repeating his *Hercules* proposition:

> And the principal opinion's *reading of additional terms into the contract* so that the contract contains an unstated, additional promise to insure the promisee against

1. WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II, at 40 (1978).
2. 516 U.S. 417, 423 (1996).
3. *Id.* at 430.
4. 518 U.S. 839, 895 (1996).

> loss arising from the promised condition's nonoccurrence seems the very essence of *a promise implied in law*, *which is not even actionable under the Tucker Act*, rather than a promise implied in fact, which is.[5]

Hercules's extension of this limitation of Tucker Act jurisdiction is a conspicuous error. It is inconsistent with the Act's language and the intended constraint on claims founded upon implied-in-law "contracts." It is not supported by prior Supreme Court precedent—indeed it is expressly contradicted by that precedent, including the leading precedent cited in the *Hercules* decision. It threatens the application of the law of contracts to government contracts express or implied in fact, contrary to the *Winstar* principle. It dismisses fairness and equity, considerations that pervade the law of contracts. The *Hercules* proposition is either premised on a fundamental misunderstanding of the law of contracts or intended to free the sovereign from the operation of that law. As such, it is also a potentially consequential error, as evidenced by three controversial Federal Circuit decisions that have relied on it: *Agredano v. United States*,[6] *AT&T v. United States*,[7] and *Precision Pine & Timber v. United States*.[8]

This Article explains each of these contentions, beginning with a discussion of the *Hercules* decision and concluding with thoughts on what might be done about it.

II. THE *HERCULES* DECISION

In *Hercules*, contractors who produced Agent Orange for military use in Vietnam under an express contract with the government sought to recover the costs of defending and then settling third-party tort claims for health hazards and impacts of the toxic agent.[9] The government had required production "under authority of the Defense Production Act of 1950 (DPA) and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized [the contractor's] processing facilities."[10] Citing these facts, the contractors claimed the resulting costs based on an implied warranty or indemnification.[11] Given the express contracts upon which the claims were made, Tucker Act jurisdiction must have seemed secure, and relief possible, but that was not to be.

Rejecting the claims, the *Hercules* opinion noted that the Court had "repeatedly held that this jurisdiction extends only to contracts either express

5. *Id.* at 930 (Rehnquist, C.J., dissenting) (emphasis added) (citing *Hercules, Inc.*, 516 U.S. at 423).

6. 595 F.3d 1278 (Fed. Cir. 2010) (*Agredano II*); *see* discussion *infra* Part VI.A.

7. 124 F.3d 1471 (Fed. Cir. 1997) (*AT&T II*) (vacated on other grounds); *see* discussion *infra* Part VI.B.

8. 596 F.3d 817 (Fed. Cir. 2010) (*Precision Pine II*); *see* discussion *infra* Part VI.C.

9. *Hercules, Inc.*, 516 U.S. at 419.

10. *Id.* at 418.

11. *Id.* at 419.

or implied in fact, and not to claims on contracts implied in law."[12] To this established proposition, the Court elaborated that the Tucker Act also afforded no jurisdiction based on a term implied in law because "[e]ach material term or contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation."[13] Thus, the opinion instructed that the extraordinary "circumstances surrounding the contracting are only relevant to the extent that they help us deduce what the parties to the contract agreed to in fact."[14] Even where there is a contract "express or implied in fact," "simple fairness" and "merely [] equitable considerations" could not be "entertain[ed]" under the Tucker Act.[15]

The Agent Orange contractors relied on *United States v. Spearin*,[16] which the Court recognized as the "seminal case" for a breach of the implied warranty of government specifications.[17] Indeed one might have thought that, given the compelled production as well as the defective specifications in *Hercules*, the case followed a fortiori from *Spearin*. But without citation of authority, the Court held that the *Spearin* warranty covered only increased costs of performance, not third-party liability resulting from defective specifications.[18] The opinion stated that "it would be strange to conclude" that the United States agreed to contractual liability "because reimbursement through contract would provide a contractor with what is denied to it through tort law."[19] The claim for indemnification was similarly rejected: "[t]hese conditions here do not, we think, give rise to an implied-in-fact indemnity agreement."[20] The Court viewed the Anti-Deficiency Act, and the Contracting Officer's presumed knowledge of its prohibition against an "open-ended indemnity," "as strong evidence that the officer would not have provided, in fact, the contractual indemnification,"[21] notwithstanding the "equitable considerations" and "simple fairness."

On this basis, the Court rejected the claims, finding no basis in fact for a promise of relief and ruling out jurisdiction to consider an implied-in-law term to deal equitably and fairly with the egregious circumstances of the Agent Orange contracts.

The two dissenters did not challenge the majority's jurisdictional ruling, instead focusing on the contractors' right to establish an implied-in-fact basis in an evidentiary hearing before the Court of Federal Claims (COFC). Justice Breyer wrote: "The companies concede that the promises, or warranties, are not written explicitly in their contracts; but, the companies intended to

12. *Id.* at 423.
13. *Id.*
14. *Id.* at 426.
15. *Id.* at 430.
16. 248 U.S. 132 (1918).
17. *Hercules, Inc.*, 516 U.S. at 424.
18. *Id.* at 424–25.
19. *Id.* at 425.
20. *Id.* at 426.
21. *Id.* at 427–28.

prove certain background facts and legal circumstances, which, they say, will show that these promises, or warranties, are an *implicit* part of the bargain that the parties struck."[22] The dissent rejected, as unsupported and even contradicted by precedent, the majority's distinction that the *Spearin* warranty does not "extend . . . beyond performance to third party claims against the contractor": "*Spearin* itself does not make this distinction."[23] Moreover, the dissenters thought, the factual and legal circumstances "known at the time" "suggest that a government, *dealing in good faith with its contractors*, would have agreed to the 'implied' promise."[24] The dissent concluded with this prediction of possible consequences:

> The Court today unnecessarily restricts *Spearin* warranties, and lacking particular facts at this stage of the proceeding, it relies on statutory circumstances that are common to many Government contracts. I fear that the practical effect of disposing of the companies' claim at this stage of the proceeding will be to make it more difficult, in other cases even if not here, for courts to interpret Government contracts with an eye toward achieving the fair allocation of risks that the parties likely intended.[25]

Thus, although the decision's unfairness and factual preemptive-ness were obvious to the dissenters, apparently the jurisdictional error barring implied-in-law terms was not. Nonetheless, even unanswered in dissent, it remains an error, and a conspicuous one.

III. THE LACK OF PRECEDENTIAL SUPPORT FOR THE *HERCULES* RULE

For the extension of the jurisdictional constraint on implied-in-law contracts to implied-in-law terms in contracts express or implied in fact, the *Hercules* opinion offered only two curious and inadequate citations:

> *See*, *e.g.*, *Sutton*, *supra*, at 580–581 (refusing to recognize an implied agreement to pay the fair value of work because the term was not "express or implied in fact" in the Government contract for dredging services); *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 714–715, 716 (C.A.Fed.1988) (a *Spearin* warranty within an asbestos contract must be implied in fact).[26]

Sutton v. United States[27] does not stand for the proposition for which it was cited. Justice Brandeis's opinion makes clear that the contract for dredging services was expressly limited to the funds appropriated for it: the Secretary of War had no authority "to complete the improvement or to contract to expend more than the amount then appropriated."[28] The contractor was

22. *Id.* at 431 (Breyer, J., dissenting).
23. *Id.* at 438.
24. *Id.* at 441 (emphasis added).
25. *Id.*
26. *Id.* at 423 (majority op.).
27. 256 U.S. 575 (1921).
28. *Id.* at 578.

charged with notice of this constraint by law, and, further, there was "nothing in the contract indicating a purpose to bind the Government for any amount in excess of the appropriation. On the contrary, it limits to the amount of the appropriation the work which may be done."[29]

Because the government inspectors in *Sutton*, charged with measuring the work done against the appropriation, mistakenly led the contractor to do work in excess of the appropriation, Sutton asserted that the government was liable as upon "an implied contract for the fair value of the work performed."[30] Justice Brandeis gave his "short answer":

> [S]ince no official of the Government could have rendered it liable for this work by an express contract, none can by his acts or omissions create a valid contract implied in fact. The limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made.[31]

There was no "contract express or implied" upon which the claim rejected in *Sutton* was based.[32] *Sutton* turned on an explicit Anti-Deficiency Act authority issue, which precluded the existence of a contract.[33] Indeed, recently the Supreme Court cited *Sutton* as an example of "cases in which courts have rejected contractors' attempts to recover for amounts beyond the maximum appropriated by Congress for a particular purpose."[34]

In fact, the Chief Justice had no Supreme Court authority for his new jurisdictional rule, which is further evidenced by his citation of a Federal Circuit panel decision to characterize the duty in *Spearin* as one implied in fact, rather than law. It is true that, in 1988, the Federal Circuit's *Lopez v. A.C. & S., Inc.* decision stated that the *Spearin* warranty depended on a factual inference,[35] but the *Spearin* warranty had been around for seventy years without such jurisdictional probing. Instead, the Court of Claims and Federal Circuit panels had treated it as a rule of law, characterizing it as "this doctrine," this "well settled" rule, and this "well recognized" and "now familiar law."[36] The Court of Claims had stated that "this rule is well established."[37] Even the decisions cited in *Lopez* failed to support its jurisdictional concern. In *Ordnance Research, Inc. v. United States*, there was no "implication of fact,"[38] and *USA Petroleum Corp. v. United States* held that "the *Spearin*

29. *Id.* at 579.
30. *Id.* at 580.
31. *Id.*
32. *Id.* at 581.
33. *Id.* at 579.
34. Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2185 (2012).
35. 858 F.2d 712, 715 (Fed. Cir. 1988).
36. *See, e.g.*, Dewey Elecs. Corp. v. United States, 803 F.2d 650, 658 n.12 (Fed. Cir. 1986) ("this doctrine"); La Cross Garment Mfg. Co. v. United States, 432 F.2d 1377, 1384 (Ct. Cl. 1970) ("basic rule of liability"); L. W. Foster Sportswear Co., Inc. v. United States, 405 F.2d 1285, 1290 (Ct. Cl. 1969) ("now familiar law").
37. James A. Mann, Inc. v. United States, 535 F.2d 51, 61 (Ct. Cl. 1976).
38. *Lopez*, 858 F.2d at 715 (citing Ordnance Research, Inc. v. United States, 609 F.2d 462, 465 (Ct. Cl. 1979)).

doctrine" applied without regard to other clauses imposing specification-checking duties on the contractor.[39]

If the *Spearin* warranty was to be defined by reference to decisions below the Supreme Court, the Court of Claims decision in *Spearin*[40]—affirmed by the Supreme Court—would seem to have been the best reference. Exercising its Tucker Act jurisdiction, the Court of Claims relied on a "principle of law" to rule that the government was responsible for its specifications.[41] The court observed that "[c]ontractual relations bring certain legal responsibilities—some ascertainable from the language used, others which *the law implies* from the relationship of the parties" and "the contract is enforceable in law in all its legal aspects."[42] Under Federal Circuit rules, this Court of Claims decision was binding on subsequent Federal Circuit panels.[43] *Lopez* was thus a latter-day outlier, not a dependable citation for the *Hercules* proposition.

But the most obvious question about the Court's reliance on the Federal Circuit panel precedent in *Lopez* to characterize *Spearin* is why there was no attention to the Supreme Court decision in *Spearin* itself, which made clear that the warranty was implied in law. The failure to discuss Justice Brandeis's explicit analysis in *Spearin* is inexplicable.

In that seminal case, the Supreme Court held the government liable for defects in specifications.[44] There was no hesitation about jurisdiction and no search for a factual implication of consent. Instead, Justice Brandeis resolved the issue by reference to law:

> The *general rules of law* applicable to these facts are well settled. . . . [I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. . . . This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie v. United States*, 237 U.S. 234; *Hollerbach v. United States*, 233 U.S. 165, and *United States v. Utah &c. Stage Co.*, 199 U.S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.[45]

39. 821 F.2d 622, 624 (Fed. Cir. 1987), cited in *Lopez*, 858 F.2d at 715.

40. *See generally* Spearin v. United States, 51 Ct. Cl. 155 (1916).

41. *Id.* at 173–74.

42. *Id.* at 183 (emphasis added).

43. *See, e.g.*, S. Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (holding that Court of Claims decisions are considered binding precedent for the Federal Circuit); *see also* FED. CIR. R. 35(a)(1); FED. CIR. INTERNAL OPERATING P. 10.5.

44. United States v. Spearin, 248 U.S. 132, 136 (1918).

45. *Id.* at 135–36 (emphasis added). *Christie* was decided on "the legal aspects of the case." Christie v. United States, 237 U.S. 234, 242 (1915). *Hollerbach* and *Stage Co.* did construe the contracts and refer to "ascertaining the intention of the parties," but the method used was not to find a promise implied in fact, but rather to give the contract "a fair and just construction." Hollerbach v. United States, 233 U.S. 165, 171 (1914); United States v. Stage Co., 199 U.S. 414, 423 (1905). As stated in *Stage Co.*, "[t]he same *principles of right and justice* which prevail between individuals *should control in the constructions and carrying out of contracts* between the government and individuals." 199 U.S. at 423 (emphasis added).

Thus, the government's responsibility was a term the Supreme Court implied in the government contract by "general rules of law."[46]

Justice Brandeis's reliance on "rules of law" was underscored when he added in his *Spearin* opinion that "[n]either § 3477 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parole evidence rule, precludes reliance upon a *warranty implied by law*."[47] For this proposition Justice Brandeis relied on *Kellogg Bridge Co. v. Hamilton*, an early Supreme Court decision.[48] In *Kellogg Bridge*, the defendant, having partially performed a contract for the construction of a bridge, entered into an express contract for completion of the work by a subcontractor.[49] The subcontractor agreed to take over and pay the costs of the work done and materials furnished previously, assuming the work was suitable for its intended purpose.[50] There was no express promise or warranty, but the transferred work was defective and failed in the process of completion, causing delay and increased costs.[51] The Supreme Court opinion reviewed the "law" of implied warranties extensively and concluded that "these principles control": "[t]he law, therefore, implies a warranty that this [prior] work was reasonably suitable for such use as was contemplated by both parties."[52]

In *Spearin*, the Court—having added a warranty implied in law to an express contract—applied further rules of contract law to declare the consequences. There was no intimation of government agreement in fact; rather, these were plainly legal consequences:

> The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obligated to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself . . . but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach.[53]

Justice Brandeis's opinion thus implied further additional terms, drawn from rules of contract law, as the legal consequences of the government's breach of the warranty implied in law.

Until the *Hercules* decision, *Spearin*'s application of contract law to the government's contractual relationships was not in question. Indeed the official history of the Court of Claims makes this clear:

> [C]ases after the Tucker Act, as before, . . . tended to expound the law of contracts . . . *Spearin v. United States*, 51 Ct. Cl. 155 (1916), *aff'd*, 248 U.S. 132 (1918), may

46. *Spearin*, 248 U.S. at 135–36.
47. *Id.* at 137–38 (emphasis added).
48. *Id.* at 138 (citing Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884)).
49. *Kellogg Bridge Co.*, 110 U.S. at 108.
50. *Id.*
51. *Id.*
52. *Id.* at 117, 119.
53. *Spearin*, 248 U.S. at 138.

> be taken as representative. It is still an important precedent: Mr. Justice Brandeis' able affirming opinion is still cited and quoted.[54]

But not in *Hercules v. United States*.

IV. THE TUCKER ACT'S EXCLUSION OF THE LAW OF QUASI-CONTRACT AND EMBRACE OF THE LAW OF CONTRACTS

The Tucker Act waived sovereign immunity by granting to the Court of Claims

> jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[55]

In further evaluating Chief Justice Rehnquist's *Hercules* proposition that implying terms of law in actual contracts was not permitted by that Act, and his evident but unacknowledged disagreement with Justice Brandeis's *Spearin* opinion, it is important to review why the statutory language was read as distinguishing between contracts implied in fact and contracts implied in law in the first place. What was excluded from the Tucker Act waiver of immunity and why? The answer is found in the law of quasi-contracts.

The law of quasi-contracts, or, as it is now known, the law of restitution, recognizes claims of unjust enrichment.[56] Such claims are not contractual in nature, although linked historically by terminology.[57] The term "contracts implied in law" was used at one time or another to refer to restitution concepts.[58] On the other hand, "[t]he notion of implied in fact contracts has evolved through the law of contracts, rather than the law of restitution," for the purpose of distinguishing express contracts.[59]

Although the Tucker Act and its predecessor enactments did not make this distinction explicit, and the legislative history was silent on the subject:

> [t]he term "contracts express or implied" had been in use for many years prior to the passage of the Court of Claims Act, and contracts implied in law were not considered to be true contracts. Congress in 1887, as well as 1855 and 1863, intended to allow suits based only on a consensual undertaking, rather than those based on unjust enrichment of the Government.[60]

54. COWEN ET AL., *supra* note 1, at 40–41.
55. 28 U.S.C. § 1491(a)(1).
56. *See generally* RESTATEMENT OF RESTITUTION (1937); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).
57. Donald A. Wall & Robert Childres, *The Law of Restitution and the Federal Government*, 66 N.W. U. L. REV. 587, 590–91 n.10 (1971).
58. *Id.* at 598.
59. *Id.* at 598 n.39.
60. *Id.* at 599.

This conclusion is clear from contemporaneous restatements of the common law and the early Supreme Court decisions interpreting the Court of Claims jurisdiction upon claims "founded upon . . . contracts, express or implied."[61]

A. *Nineteenth-Century Recognition of the Distinction Between Quasi-Contract and Contract*

The context of the exclusion of contracts implied in law is provided by James Barr Ames' *The History of Assumpsit*, published in 1888, a year after the Tucker Act enactment.[62] Ames was a professor and subsequently dean of Harvard Law School.[63] He has been recognized as a leading historian of the common law, including the law of quasi-contract.[64] In that regard, Ames has been identified as the first "to describe a law of unjust enrichment" and its distinction from the law of contracts.[65] Interestingly, he was a contemporary and an associate of Justices Brandeis and Holmes, who would later construe the Tucker Act contract jurisdiction.[66]

Ames reported "the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law."[67] *Indebitatus assumpsit* was "the origin of the common counts," in which "a definite bargain or agreement" was not required.[68] Ames concluded that the quasi-contract created by law is "no contract at all."[69] It was such quasi-contract actions, seeking restitution based on unjust enrichment and only the "pure fiction" of contract, to which the sovereign gave no consent in the Tucker Act.[70]

Another colleague of Dean Ames—and a Harvard Law School faculty member in the 1890s—was Samuel Williston, best known for his treatise on the law of contracts.[71] Williston "assimilated the Ames viewpoint" by deploring the confusion caused by the old terminology of implied-in-law contracts, urging that "the only possible way to satisfactory treatment of this branch of the law lies in ceasing to speak or think of such obligations as forming a part of the law of contracts."[72] Williston's treatise gives a good introduction to quasi-contract and its historical context:

> Until the early 20th century, the law was roughly divided coextensively with the forms of action known to the common law. Consequently, all rights that were

61. *Id.* at 590.
62. *See generally* J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53 (1888).
63. Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 303 (2005).
64. *Id.* at 303–04.
65. *Id.* at 306.
66. COWEN ET AL., *supra* note 1, at 40–41.
67. Ames, *supra* note 62, at 63.
68. *Id.* at 57–58.
69. *Id.* at 63.
70. *Id.* at 64.
71. Kull, *supra* note 63, at 309. *See generally* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS (4th ed. 2007).
72. Kull, *supra* note 63, at 309.

> enforced by the contractual actions of assumpsit, covenant, and debt were deemed to be based upon contract. Some of these rights, however, were created not by any promise or mutual assent of the parties, express or implied, but by the courts to prevent unfairness or injustice. These obligations, imposed upon defendants regardless of and occasionally in violation of his or her intention, came to be called "implied contracts." They are now generally known as "quasi-contracts." The use of the expression quasi-contract is particularly apropos; the phrase makes absolutely clear that the obligations are being treated "as if they were" contracts, implicitly suggesting that they are in fact not true contracts at all.[73]

Quasi-contracts were "imposed by a fiction of the law, to enable justice to be accomplished, even when no contract was intended by the parties."[74] Williston states that, "when a quasi-contract is involved, liability is determined by principles of equity and justice and the intent of the parties is immaterial."[75] Significantly, however, the treatise also makes clear that, "[i]n situations involving true contracts, the parties' rights are determined *by law* and by terms of the contract."[76]

B. *The Early Supreme Court Decisions*

From the beginning, the Supreme Court recognized that the contract jurisdiction of the Court of Claims depended on actual, not quasi, contracts. The Court's decisions established that the sovereign had not consented to suits founded upon the fictional implied-in-law contracts described by Professor Ames. At the same time, however, the Court's early decisions also established that, consistent with Professor Williston's proposition, the sovereign's obligations under true contracts, express or implied, could be determined by rules of contract law.

1. Rejection of Claims upon Quasi-Contracts

According to the Court of Claims' official history, the court had already exercised jurisdiction since 1855 "to hear and determine claims founded upon federal law, executive department regulations, or contracts express or implied."[77] The Supreme Court did not await the Tucker Act's passage in 1887 "to set down the limitation that the implied contracts cognizable in the Court of Claims were those implied in fact, not those implied in law."[78]

In *Gibbons v. United States*, the Supreme Court stated that "it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts."[79] Noting that "[t]he language of the statutes which confer jurisdiction upon the Court of Claims,

73. WILLISTON & LORD, *supra* note 71, § 1:6, at 41–42.
74. *Id.* at 43.
75. *Id.*
76. *Id.* (emphasis added).
77. COWEN ET AL., *supra* note 1, at 40.
78. *Id.*
79. 75 U.S. 269, 274 (1868).

excludes by the strongest implication demands against the government founded on torts," the Court ruled that jurisdiction to hold the government responsible on "an implied assumpsit" was "certainly" not conferred on the Court of Claims.[80]

In *Langford v. United States*, the Court, citing *Gibbons*, observed that "it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence."[81] Thus, it was said that the Court of Claims "has jurisdiction only in cases *ex contractu*, and an implied contract to pay does not arise where the officer of the government, asserting its ownership, commits a tort by taking forcible possession of the lands of an individual for public use."[82] Of the Court of Claims, the Supreme Court made clear that "the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains."[83]

Similar decisions defining the excluded jurisdiction followed. For example, in *Hill v. United States* the Court declared:

> [T]he settled distinction, in this respect, between contract and tort, [cannot] be evaded by framing the claim as upon an implied contract. . . . An action in the nature of assumpsit for the use and occupation of real estate will never lie *where there has been no relation of contract between parties*.[84]

In *Bigby v. United States*, the Court—with "no element of contract" before it—stated, "the Court has steadily adhered to the general rule that, without its consent given by some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees."[85] In *United States v. Berdan Fire-Arms Manufacturing Co.*, the claimant sought relief for unauthorized use of its patented invention.[86] The Court stated there was "nothing disclosing a contract, express or implied, and a mere infringement, which is only a tort, creates no cause of action cognizable in the Court of Claims."[87]

In *Coleman v. United States*, settlers in the Southwest being ousted by a land company whose title was allegedly obtained through a fraudulent survey retained lawyers to pursue litigation to vacate the fraudulent title.[88] The lawyers performed services and incurred expenses and, to facilitate their representation of the settlers, obtained permission of the attorney general to bring an action in the name of the United States.[89] Suit was filed. But the settlers declined to pay for the services when it appeared that the land would revert

80. *Id.* at 275–76.
81. 101 U.S. 341, 345 (1879).
82. *Id.* at 341.
83. *Id.* at 345.
84. 149 U.S. 593, 598 (1892) (emphasis added).
85. 188 U.S. 400, 407, 409 (1903).
86. 156 U.S. 552, 552–53 (1894).
87. *Id.* at 565–66.
88. 152 U.S. 96, 97 (1894).
89. *Id.*

to the government.[90] The government refused the lawyers' request for compensation even though the government appropriated the benefit and advantages of their labor and expenses and hired other attorneys.[91] Notwithstanding "the benefit and advantages" obtained, the Supreme Court affirmed the Court of Claims' dismissal, stating that "a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited."[92]

2. Implying Terms from Contract Law

While rejecting quasi-contracts, the Supreme Court from the beginning of the Court of Claims' jurisdiction repeatedly applied the law of contracts to true contracts, express or implied in fact—with the result that additional terms were implied by law, without question about the jurisdiction to do so.

As early as 1868, in *United States v. Speed*, the Supreme Court affirmed a Court of Claims decision holding that the United States had breached a contract by failing to deliver hogs that Speed was to slaughter, prepare, and package for Union troops.[93] When the government defended by contending that the contract did not require the furnishing of "any given number of hogs," the Court responded:

> Without entering into a discussion of the *general doctrine of the implication of mutual covenants*, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, *the law implies a duty* in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant.[94]

Speed is perhaps the first (but certainly not the last) decision that imposed on the sovereign an implied-in-law duty to cooperate in a government contract.

In *United States v. Bostwick*, decided in 1876, the claimant sought compensation for damage done to his property while the United States occupied the premises under a lease agreement.[95] The government agreed "to nothing in

90. *Id.* at 98.

91. *Id.* at 98–99.

92. *Id.* at 99 (acknowledging that "there may be a state of facts from which an implied contract or promise to pay for services rendered may be justly inferred," in which case the Court of Claims would have jurisdiction). Indeed the court frequently drew that "just" inference, implying that there were "contracts" in fact, some in circumstances that may have caused "confusion." *See, e.g.*, Johnston v. United States, 69 Ct. Cl. 728, 738 (1930); Atl. City R.R. Co. v. United States, 58 Ct. Cl. 215, 223 (1923). This led commentators unsuccessfully to recommend amending the Tucker Act jurisdictional grant to embrace unjust enrichment claims. Wall & Childres, *supra* note 57, at 593, 621. But this "confusion" did not raise doubts about the Court of Claims' application of contract law to the actual contracts of the government, as explained in the next subsection.

93. 75 U.S. 77, 84 (1868).

94. *Id.* (emphasis added).

95. 94 U.S. 53, 53 (1876).

express terms, except to pay rent and hold for one year."[96] However, the Supreme Court ruled that

> in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it. . . . [This] results from the relation of landlord and tenant between the parties which the contract creates.[97]

There was no search for or intimation of assent; instead the Court said broadly: "[t]he United States, when they contract with their citizens, are *controlled by the same laws* that govern the citizen in that behalf. *All obligations which would be implied against citizens under the same circumstances will be implied against them*."[98] Further, the Court explained that

> the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. *All depends upon the contract.* Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract.[99]

Thus, where there was a contract, the government was "answerable" in the Court of Claims for failure to observe implied obligations under contract law.[100]

United States v. Smith, also decided in 1876, involved an express contract to furnish materials and erect buildings, with no specified completion date and no power reserved to the government to direct a suspension.[101] The Court ruled that "the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this."[102] The Court added that "the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States [is] a party."[103] Thus, the government had an implied-in-law duty not to hinder performance of its contracts.

In *United States v. Behan*, the Court applied rules of contract law to determine the remedy for a breach of contract by the government.[104] Behan, a bondsman on a failed contract, continued the work under an informal agreement with an authorized government agent.[105] After Behan had incurred

96. *Id.* at 65.
97. *Id.* at 65–66. Not only did the Court add terms of landlord and tenant law, it rested the government's specific obligation on a Latin maxim: "*sic utere tuo ut alienum non laedas*" or "use your property in such a way that you do not damage others." *Id.* at 66.
98. *Id.* at 66 (emphasis added).
99. *Id.* at 69 (emphasis added).
100. *Id.* at 68–69.
101. 94 U.S. 214, 217 (1876).
102. *Id.*
103. *Id.*
104. 110 U.S. 338, 339–40 (1884).
105. *Id.*

large expenditures in preparing for and carrying on the work, the government abandoned the undertaking, and the work was stopped without Behan's fault.[106] The case came to the Supreme Court on appeal from "the rule of damages" adopted by the Court of Claims, with the government complaining that the proper rule restricted Behan to lost profits, which he was unable to prove.[107] The Supreme Court, like the Court of Claims, enforced implied-in-law terms to resolve the damages issue:

> The rule as stated in Speed's case is only one aspect of *the general rule*. . . . As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damages—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure.[108]

Certain of this rule of law, the Court, although citing legal texts and case law, stated that "[i]t is unnecessary to review the authorities on this subject."[109] Then, the Court observed that "when it is said in some of the books" that such a recovery is "as upon a *quantum meruit*," this meant that the "wrongful putting an end to a contract" is a breach of the contract for which the law allows "recovery of all damage which the injured party has sustained," including "to the extent of his actual loss and outlay fairly incurred."[110]

In *Clark v. United States*, the government argued that an oral contract for the use of a vessel, which stipulated for payment of its value if lost in the government's service, was void for violation of a statute requiring that all such contracts be properly executed in writing by an authorized government official.[111] Unfortunately, while in government service, the ship was wrecked, although through no negligence of the government captain and crew.[112] The Court of Claims dismissed the claim for the value of the ship and for its use for eight days before the loss occurred.[113] The Supreme Court agreed that the contract was void but declared this rule of law:

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. . . . The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.[114]

The contract was deemed "a simple bailment for hire," and the Court implied the obligations from the law of bailments.[115] This absolved the government

106. *Id.* at 342–43.
107. *Id.* at 342.
108. *Id.* at 345 (emphasis added).
109. *Id.* at 346.
110. *Id.* at 346–47.
111. 95 U.S. 539, 540 (1877).
112. *Id.*
113. *Id.*
114. *Id.* at 542.
115. *Id.*

of responsibility for loss of the vessel, there being no negligence, and restricted the claimant's recovery to the eight days of usage.[116] As if to emphasize its resort to implied-in-law terms to resolve the controversy, the Court concluded: "This is not only the common law, but the general law, on the subject."[117]

In none of the early cases where there were contractual relations was there a doubt about the Court of Claims' jurisdiction to enforce implied-in-law terms against the sovereign.

C. *Subsequent Supreme Court Decisions*

Subsequent Supreme Court decisions continued to make this distinction, drawn by the early decisions, between implied-in-law contracts and implied-in-law terms in actual contracts. It is unsurprising that Justices Brandeis and Holmes, who were active participants in many of these decisions, well understood the differing concepts as expounded by Dean Ames and Professor Williston. During their tenure on the Court, there were important decisions defining the Tucker Act contract jurisdiction.

The distinction is drawn in two Brandeis opinions issued on the same day in 1918. One was *Spearin*, where the law implied a warranty in an express contract,[118] and the other was *Tempel v. United States*, where there was no contract.[119] *Tempel* involved a suit for damages caused by the government's dredging of a navigable stream on which the claimant had riparian rights.[120] The fact that the government claimed the property right actually in question "prevent[ed] the court from assuming jurisdiction of the controversy."[121] Only if the government's claim of right was unfounded would the plaintiff's property right be violated, "but the cause of action therefor [sic], if any, is one sounding only in tort; and for such, the Tucker Act affords no remedy."[122]

In *Eastern Extension, Australia, & China Telegraph Co., Ltd. v. United States*, a decision joined in by both Holmes and Brandeis, the Court denied Court of Claims jurisdiction of a claim growing out of a treaty as one based upon principles of international law, not contract, drawing the line that it "must be sustained, if at all, as a quasi contract, as an obligation imposed by law independent of intention on the part of any officials to bind the government."[123]

Justice Brandeis followed up in *Merritt v. United States*, citing both *Tempel* and *Sutton* for the proposition that "[t]he Tucker Act does not give a right of action against the United States in those cases where, if the transaction were

116. *Id.* at 543.
117. *Id.* at 542–43.
118. United States v. Spearin, 248 U.S. 132, 137–38 (1918).
119. 248 U.S. 115, 124–27 (1918).
120. *Id.*
121. *Id.* at 130.
122. *Id.*
123. 251 U.S. 355, 363 (1920).

between private parties, recovery could be had upon a contract implied in law."[124] In *Merritt*, the government had reached settlement with the prime contractor that included a subcontractor's charges, but when it later learned that the subcontractor had been defrauded by the prime's representations about the settlement, the government extracted a repayment of $5,210.02 from the prime.[125] The subcontractor, considering that amount rightfully his, sued the United States. The Court held:

> Plaintiff cannot recover under the Tucker Act. . . . The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the latter for the khaki on any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received.[126]

Justice Brandeis noted that "[t]he practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts."[127]

It is noteworthy that Justice Brandeis also wrote the *Sutton* opinion, which was decided in 1921, shortly after his *Spearin* decision. It is impossible to believe that Brandeis intended *Sutton* to annul his "implied-in-law" addition of a warranty to the express contract in *Spearin*. As noted, the jurisdictional problem in *Sutton* was that the contract was expressly limited to the amount of the appropriation.[128] The opinion explained: "the work here in question was not done with the consent or at the request of the United States; for neither the government inspectors nor the Secretary of War had authority either to obligate the Government or accept voluntary services."[129] Then, referring to Ames' concept of unjust enrichment, Justice Brandeis wrote:

> There is no necessity to consider what may be the equitable rule where there is a claim of unjust enrichment through work done upon the land of another under a mistake of fact. . . . Nor need we consider whether the doctrine is ever applicable to transactions with the Government. For the right to sue the United States in the Court of Claims here involved must rest upon the existence of a contract express or implied in fact.[130]

But Justice Brandeis did grant some relief to Sutton—requiring that the government, when applying the appropriation, give priority to the uncompensated cost of the contractor's work over the government's cost of superintendence: "the expenses of superintendence incident to the [inspectors'] mistake should be borne by the Government; and the contractor should not be made to suffer by the depletion of the appropriation. The fund otherwise available for work actually performed should be applied to that

124. Merritt v. United States, 267 U.S. 338, 341 (1925).
125. *Id.* at 339.
126. *Id.* at 340–41.
127. *Id.* at 341.
128. Sutton v. United States, 256 U.S. 575, 579–80 (1921).
129. *Id.* at 580–81.
130. *Id.* at 581.

purpose."[131] Thus, in *Sutton* as in *Spearin*, the Supreme Court added a term to the authorized express contract in the interest of fairness.

Two subsequent decisions that cited *Sutton* also dealt with circumstances where there was no contract because of lack of authority. Both involved leases that were argued to commit the government beyond appropriation authority. In *Leiter v. United States*, the Treasury Department signed multiyear leases, subject to the availability of funds, with "no appropriations available for the payment of rent after the first fiscal year."[132] In an opinion by Justice Sanford, the Court, citing *Sutton*, held that, in so far as their terms extended beyond that year, the leases were in violation of the express provisions of the revised statutes, and thus executed without authority of law, they created no binding obligation against the United States after the first year.[133] The Court then added that

> to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, *making a new lease under the authority of such appropriation* for the subsequent year.[134]

A lump-sum appropriation for the next fiscal year—with no reference to these specific leases—was not sufficient to make the government liable for rent after the first year.[135]

Goodyear Tire & Rubber Co. v. United States also involved a multiyear lease subject to annual appropriation.[136] Notwithstanding an appropriation for the third fiscal year, the government did not renew the lease but announced its intention to "hold over" and pay rent only for the period of its occupancy.[137] However, under the common law of Ohio, such a holding over would have created a tenancy for the full year.[138] Goodyear sued for the unpaid rent, contending that "the United States became bound for the year by the act of holding over coupled with authority to lease the property contained in the appropriation act."[139] Justice Sanford, writing for the Court majority, relied on his *Leiter* decision to rule that the government had to "affirmatively continue the lease for that year, that is, in effect, make a new lease

131. *Id.*
132. 271 U.S. 204, 205 (1925).
133. *Id.* at 207.
134. *Id.* (emphasis added). *Leiter* and *Sutton* are cited in the GAO Redbook for the lack of authority to contract in advance or excess of line-item appropriations. 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 45, 52 (3d ed. 2006) ("A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery."). Justice Brandeis joined in the *Leiter* decision and its citation of his *Sutton* opinion.
135. *Leiter*, 271 U.S. at 208.
136. 276 U.S. 287, 288 (1928).
137. *Id.* at 291.
138. *Id.* at 288.
139. *Id.* at 292.

for the year."[140] Thus, there was no contract for a full year, express or implied in fact, and, citing *Sutton*, there could be no Tucker Act jurisdiction over a "contract" implied in law.[141]

Justice Holmes, dissenting with two colleagues, took a different view based on the lease that unquestionably existed:

> *One consequence of this contract by the law that governed it* and by the stipulation of the lessor was that if the lessee held over he held over for a year. I do not see how the United States could accept the contract and repudiate *the consequence*, . . . except in the event of there being no appropriation in which case the *paramount law of the United States would prevail*.[142]

Based on the express contract, Justice Holmes considered the government otherwise bound by "the legal consequence of its act."[143]

In 1931, Justice Holmes authored the Court's opinion in *Alabama v. United States*, where the claim was for the payment of a state tax on the United States' sale of hydroelectric power.[144] The government denied its obligation to pay the tax but demurred and sought dismissal based on lack of jurisdiction. Conceding that "[a] tax obligation is sometimes loosely spoken of as a debt" and "an action of debt or assumpsit may, under many circumstances, be brought for the recovery of a tax from a private party," the government argued that such "an action of assumpsit, does not bring the case within the jurisdiction of the Court of Claims."[145] The Supreme Court agreed, with Justice Holmes writing that the "contract" required by the Tucker Act "must be an actual one, and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law."[146]

For this jurisdictional rule, Justice Holmes relied on *Baltimore & Ohio Railroad Co. v. United States*,[147] which plainly also involved a situation where there was "no ground for asserting an actual contract."[148] In *Baltimore & Ohio Railroad Co.*, the Court, interpreting a comparable jurisdictional statute, relied on that statute's stated purpose of providing relief in cases of contracts "not [to] be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign."[149] The Court then illustrated situations where the "contract" test would not be met—a list where recovery could only be made based on Dean Ames' common law of *indebitatus assumpsit*, unjust enrichment, and quasi-contract not available under the Tucker Act.[150]

140. *Id.*
141. *Id.* at 293.
142. *Id.* at 294 (Holmes, J., dissenting) (emphasis added).
143. *Id.*
144. 282 U.S. 502, 505–06 (1931).
145. Brief for United States at 5, 7, Alabama v. United States, 282 U.S. 502 (1931) (No. 82).
146. *Alabama*, 282 U.S. at 506.
147. 261 U.S. 592 (1923).
148. *Alabama*, 282 U.S. at 506.
149. *Baltimore & Ohio R.R. Co.*, 261 U.S. at 598.
150. *Id.* at 598–99.

It is noteworthy that Justice Holmes earlier had joined in *Crocker v. United States*, a 1916 decision involving a Postal Service contract for mail satchels tainted by a fraudulent kickback scheme between a government official and the contractor's agents.[151] Although "the company was without actual knowledge of the corrupt arrangement," the company accepted and performed the contract, delivering the mail bags.[152] However, the Postmaster General, learning of the fraud after acceptance of the goods, rescinded the contract and refused to pay.[153] The trustee in bankruptcy for the contractor sued. The Court held that "no recovery could be had upon the contract with the Postmaster General, because it was tainted with fraud and rescinded by him on that ground. But this was not an obstacle to recovery upon a quantum valebat."[154] The Court's citation of *Clark v. United States* suggests that, without saying so, it derived a contract implied-in-fact from the delivery and acceptance of the goods and then, in the absence of an effective, untainted price, hypothesized an implied-in-law remedy for the value of the goods.[155] There being no proof of the value of the satchels, the Court allowed no recovery.[156] Interestingly, Justice Holmes joined in a dissent, "being of opinion that the case should be remanded for findings on the question of value."[157]

In sum, this collection of early twentieth-century Supreme Court decisions delineated the Tucker Act jurisdiction over claims founded upon contracts "express or implied," in a way that was consistent with the earlier decisions—such "contracts" had to be true contracts, not fictional ones implied in law, or quasi-contracts. But jurisdiction surely attached to claims upon true contracts, express or implied in fact, and no decision held that, once that jurisdiction attached to a claim upon an actual contract, the Court of Claims could not imply obligations based on the law of contracts. Indeed, as Justice Brandeis confirmed in *Lynch v. United States*, "[w]hen the United

> And so an agreement to pay for services rendered by the plaintiff will not be implied when they were rendered spontaneously, without request, as an act of kindness; when the plaintiff did not expect repayment, or under the circumstances did not have reason to entertain such expectation; when the defendant understood that the plaintiff would neither expect nor demand remuneration; when unusual expenses were incurred, without special request or previous notice, and without any intimation or suggestion that compensation would be looked for or made; when the defendant neither requested the services nor assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous; and when the circumstances account for the transaction on a ground more probable than that of a promise of recompense.

Id.

151. 240 U.S. 74, 75 (1916).
152. *Id.* at 81.
153. *Id.* at 75–79.
154. *Id.* at 81.
155. *See id.* (citing Clark v. United States, 95 U.S. 539 (1877)).
156. *Id.* at 82.
157. *Id.* (Holmes, J., dissenting).

States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[158] Consistent with that fundamental principle, where there were actual contract relations, the Supreme Court and the Court of Claims rendered judgments based on obligations implied from that contract law—without questioning jurisdiction to do so, until *Hercules v. United States*.

V. THE LAW OF CONTRACTS AND IMPLIED-IN-LAW TERMS

This principle that the United States is accountable under the law of contracts between private individuals means that its contracts may impose obligations that go beyond the particular promises exchanged.[159] The obligations derive from the basic nature of contracts and contract law. To understand this is to understand how Chief Justice Rehnquist's jurisdictional caveat in *Hercules*, in addition to lacking precedential support, is fundamentally flawed. Contracts "express or implied" are by definition infused with the law of contracts. "In sum, knowledge of much of the law of contracts is a prerequisite to an understanding of what a contract is."[160]

The Restatement (Second) of Contracts defines a "contract" as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[161] The word "contract" is thus "commonly and quite properly also used to refer to the resulting legal obligation, or to the entire resulting complex of legal relations."[162] Furthermore, "[a] term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations."[163] Such terms "often rest . . . on considerations of public policy rather than on manifestation of the intention of the parties."[164]

As Corbin points out in *Corbin on Contracts*, even these definitions understate "the complexity of the topic," which "involves judicial imposition of solutions to problems the parties have not addressed or which they have addressed in illegal or unconscionable ways."[165] As Corbin further explains:

> [A] contract establishes a relationship among the contracting parties that goes well beyond their express promises. The promise, or group of promises, or other bargain, is fleshed out by a social matrix that includes custom, trade usage, prior dealings of the parties, recognition of their social and economic roles, notions of decent behavior, basic assumptions shared, but unspoken by the parties, and other

158. 292 U.S. 571, 579 (1934).
159. Joseph M. Perillo, Calamari and Perillo on Contracts § 1.1 (6th ed. 2009).
160. *Id.*
161. Restatement (Second) of Contracts § 1 (1981).
162. *Id.* § 1 cmt. b.
163. *Id.* § 5(2).
164. *Id.* § 5 cmt. b ("contract terms supplied by law").
165. 1 Arthur Linton Corbin, Corbin on Contracts § 1.3, at 8 (rev. ed. 1993).

> factors, *most especially including rules of law*, in the context in which they find themselves.[166]

Thus, Corbin summarizes that "[t]he entire law of contracts plays a major role in determining the terms of the contract."[167]

The Restatement's many rules confirm Corbin's articulation. Indeed, one of those rules explicitly calls for a court to do what Chief Justice Rehnquist objected to in his *Winstar* dissent—the "reading of additional terms into the contract."[168] Section 204, entitled "Supplying an Omitted Essential Term," provides that, "[w]hen the parties to a bargain sufficiently defined to be a contract *have not agreed* with respect to a term which is essential to a determination of their rights and duties, a term which is *reasonable* in the circumstances is supplied by the court."[169]

The comments make it clear that section 204 contemplates "implied-in-law" terms based on justice and "fairness," considerations ruled out in *Hercules* as beyond the Tucker Act jurisdiction:

> This Section states a principle governing *the legal effect of a binding agreement*. The supplying of an omitted term is not technically interpretation, but the two are closely related; courts often speak of an "implied" term. In many common situations the principle has been elaborated in more detailed rules, applicable unless otherwise agreed.[170]
>
> . . .
>
> The process of supplying an omitted term has sometimes been disguised as a literal or a purposive reading of contract language directed to a situation other than the situation that arises. Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. . . . But *where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process*.[171]

As the Restatement explains in an introductory note, "rules of law must fill the gap when the parties have not provided for the situation which arises."[172]

Corbin states that "the total number of possible implied terms in contracts is unlimited."[173] The Restatement is the best source for a brief canvassing of these implied-in-law terms for the purpose of identifying potential

166. *Id.* § 1.3, at 10 (emphasis added).
167. *Id.*
168. United States v. Winstar Corp., 518 U.S. 839, 930 (1996) (Rehnquist, C.J., dissenting).
169. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).
170. *Id.* § 204 cmt. a (emphasis added).
171. *Id.* § 204 cmt. d (emphasis added).
172. *Id.* ch. 9, topic 5, intro. note, at 81. "In general, these rules are based on fundamental principles of fairness and justice." *Id.* ch. 10, topic 4, intro. note, at 193.
173. 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS §§ 24.3, 26.3 (rev. ed. 1998); *see also* PERILLO, *supra* note 159, §§ 3.14, 11.14; 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.16 (2d ed. 1998) (noting that the process by which a court supplies a term is commonly called "implication," and the resulting term is called an "implied term" (such terms are also called "implied-in-law terms")).

consequences of the conflict between the *Winstar* principle that the sovereign is accountable under the law of contracts and the *Hercules* rejection of terms implied in law. Indeed, the Supreme Court recognized the Restatement as the appropriate source for the contract law applicable to government contracts in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[174] decided shortly after *Winstar*, as has the Federal Circuit.[175]

Section 205 sets forth the "Duty of Good Faith and Fair Dealing": "*Every contract* imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[176] This is a lodestar of U.S. contract law, not stated as subject to defeasement by agreement. The Restatement comments define the obligation broadly:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.[177]
>
> . . .
>
> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[178]

The last of this catalogue, often seen and stated as an independent rule, is the duty to cooperate with and not to hinder the other party's performance.[179] These obligations are part of the contract as a matter of law, without expression or implication in fact of assent.[180]

Contractual obligations may also arise because of conditions implied in law. The duty of the obligor (to use the Restatement's term) may be subject to fulfillment of a condition, which may in turn be the duty of the obligee. Such a condition may arise in two ways, as stated in section 226: "An event may be made a condition either by agreement of the parties or by a term supplied by the court."[181] Comment c to this section explains that

174. 530 U.S. 604, 608 (2000).
175. *See, e.g.*, Malone v. United States, 849 F.2d 1441, 1445 (Fed. Cir. 1988).
176. Restatement (Second) of Contracts § 205 (emphasis added).
177. *Id.* § 205 cmt. a.
178. *Id.* § 205 cmt. d.
179. *See id.*
180. *See id.* § 205. "Some implied terms . . . may be immutable rules of law that cannot be dispensed with, even by agreement of the parties. The best known illustration of this category is 'the implied covenant' of good faith." Kniffin, *supra* note 173, § 26.1.
181. Restatement (Second) of Contracts § 226.

> [w]hen the parties have omitted a term that is essential to a determination of their rights and duties, the court may supply a term which is reasonable in the circumstances (§ 204). Where that term makes an event a condition, it is often described as a "constructive" (or "implied in law") condition.[182]

As noted in the comment, "[t]his serves to distinguish it from events which are made conditions by the agreement of the parties, either by their words or other conduct, and which are described as 'express' and as 'implied in fact' (inferred from fact) conditions."[183]

An implied-in-law term may also be required in cases of impracticability and frustration, which, "[u]nder the rationale of this Restatement," is "an omitted case, falling within a 'gap' in the contract."[184] In most cases, the obligor's duty is simply discharged, but in some instances, a party who has partially performed is entitled to recovery either "under the rule on part performances as agreed equivalents" and/or "in the form of a claim for restitution or expenses incurred in reliance."[185] Moreover, the Restatement explains that because "the case is properly regarded as an omitted one . . . if none of these techniques will suffice to do *substantial justice*, it is within the discretion of the court to supply an omitted essential term under the rule stated in § 204."[186] This is made explicit in section 272(2), where this rule of law is stated: "In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests."[187] An identical provision in Restatement section 158 deals with relief in the case of mistake, where a party has performed prior to discovery of the mistake.[188] As explained in comment c, this involves "supplying a term to avoid injustice" under "the rule stated in § 204."[189]

The Restatement's chapter 16, cross-referenced in sections 158 and 272, addresses the "judicial remedies" available for breach of contract.[190] These rules of law impose obligations on a party in breach—in other words, implied-in-law contract terms. It is interesting, in this connection, that, when Chief Justice Rehnquist in *Winstar* objected to "the principal opinion's reading of additional terms into the contract,"[191] Justice Souter responded by stating:

182. *Id.* § 226 cmt. c.
183. *Id.*
184. *Id.* ch. 11, intro. note, at 311.
185. *Id.*
186. *Id.* at 312.
187. *Id.* § 272(2).
188. *Id.* § 158.
189. *Id.* § 158 cmt. c. The Reporter notes with respect to this comment, "[f]or a discussion of the court's power to shape the remedy according to the circumstances of the case, see *National Presto Indus. v. United States*, 167 Ct. Cl. 749, 338 F.2d 99 (1964), cert. denied, 380 U.S. 962 (1965)." See discussion of this Court of Claims decision *infra* Part VI.B.5.
190. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, at 102 n.11.
191. United States v. Winstar Corp., 518 U.S. 839, 930 (Rehnquist, C.J., dissenting).

> Indeed, the dissent goes so far as to argue that our conclusion that damages are available for breach even where the parties did not specify a remedy in the contract depends upon a "reading of additional terms into the contract." . . . That, of course, is not the law; damages are always the default remedy for breach of contract. And we suspect that most Government contractors would be quite surprised by the dissent's conclusion that, where they have failed to require an express provision that damages will be available for breach, that remedy must be "implied in law" and therefore unavailable under the Tucker Act.[192]

Section 344 outlines the stated rules that "serve to protect" the "expectation interest," the "reliance interest," and the "restitution interest" of the nonbreaching party.[193] In addition, the comment to section 344 concludes by stating that "[t]he interests described in this Section are not inflexible limits on relief and in situations in which a court grants such relief as justice requires, the relief may not correspond precisely to any of these interests."[194] Such implied-in-law relief would also be authorized by section 204.[195]

The Restatement's treatment of the "restitution interest as a remedy for breach of contract," based on benefit conferred on the other party, has been controversial.[196] But it does not breach the distinction between contracts and quasi-contracts because it affords "restitutionary" remedies only where there are or have been actual contract relations.[197] Interestingly, in *Mobil Oil*, the Supreme Court ordered "restitution" in a case of government breach.[198] To avoid confusion, it has been suggested that this remedy should be recognized as supporting an alternative or back-up damages claim, based on a changed position in reliance on the contract rather than benefit conferred or unjust enrichment.[199]

All of these specific provisions of the Restatement serve to demonstrate how completely and thoroughly the *Hercules* exclusion of implied-in-law terms from Tucker Act jurisdiction rejects contract law itself. These rules of law are implied based on the very "equitable considerations" ruled out in the *Hercules* decision.[200] Where there are contractual relations, express or implied in fact, contract law imposes on the parties an overarching regime of good faith and fair dealing and calls for the courts to avoid inequitable results and to seek justice by adding implied-in-law terms. Thus, when the

192. *Id.* at 885–86 (plurality opinion).

193. RESTATEMENT (SECOND) OF CONTRACTS § 344.

194. *Id.* § 344 cmt. a.

195. *See id.*

196. Andrew Kull, *Rescission and Restitution*, 61 BUS. LAW. 569, 573, 581 (2006).

197. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. d (explaining that the provision is "concerned with the problems of restitution only to the extent that they arise in connection with contracts" and noting that "[i]n some cases a party's choice of the restitution interest is dictated by the fact that the agreement is not enforceable").

198. Mobil Oil Exploration & Prod. Se., Inc. v. United States, 530 U.S. 604, 623–24 (2000); *see also* Acme Process Equip. Co. v. United States, 347 F.2d 509, 534 (Ct. Cl. 1965) (finding an action on the contract), *rev'd on other grounds*, 385 U.S. 138 (1966).

199. Based on the recent drafts of the Restatement of Restitution, it appears that the American Law Institute has accepted this view. Kull, *supra* note 196, at 570.

200. Hercules, Inc. v. United States, 516 U.S. 417, 430 (1996).

Hercules opinion concluded with the thought that the contractor's pleas for "simple fairness" and the "redress" of "unmistakable inequities" "recogniz[ed] the weakness of their legal position," it betrayed a misunderstanding of, or resistance to, contract law.[201]

VI. THE POTENTIAL CONSEQUENCES OF THE *HERCULES* ERROR ON GOVERNMENT CONTRACT LAW

Because Tucker Act jurisprudence that developed before the *Hercules* decision is replete with these fundamental concepts of contract law, it seems plain that Chief Justice Rehnquist's erroneous jurisdictional limitations could have profound consequences. The mistaken propositions in *Hercules* strike at the heart of the *Winstar* principle that the government is accountable under "the law applicable to contracts between private individuals."[202] By eroding the rule of contract law and its foundations in fairness and justice, the *Hercules* precedent threatens to compromise the adjudication of government contract disputes. Indeed, its troubling consequences can already be seen in these controversial Federal Circuit decisions: *Agredano*, where *Hercules* precluded redress of egregious injustice;[203] *AT&T*, where *Hercules* ruled out consideration of remedies recognized in prior Tucker Act decisions;[204] and *Precision Pine & Timber*, where *Hercules* contributed to the convoluted recent history of the duty of good faith and fair dealing at the Federal Circuit.[205]

A. *Agredano v. United States*

If ever there was a case that cried out for justice in the form of an implied-in-law term to deal with an unanticipated and unconscionable development, it is *Agredano*, decided by the Federal Circuit in 2010.[206] The *Hercules* mistake stood in the way.

1. The Extraordinary Facts

Agredano's bizarre travail began when he purchased a 1987 Nissan from the U.S. Customs Service at an auction of forfeited vehicles.[207] The United States seized the car in January 2001 at the border with Mexico after an initial canine search indicated the presence of illegal narcotics concealed in the vehicle.[208] The Customs Service's physical search had revealed forty sealed bags of marijuana in the gas tank, which had been removed from the vehicle

201. *Id.*
202. United States v. Winstar Corp., 518 U.S. 838, 912 (1996).
203. *See generally Agredano II*, 595 F.3d 1278 (Fed. Cir. 2010).
204. *See generally AT&T II*, 124 F.3d 1471 (Fed. Cir. 1997) (vacated on other grounds).
205. *See generally Precision Pine II*, 596 F.3d 817 (Fed. Cir. 2010).
206. *See generally* Agredano v. United States (*Agredano I*), 82 Fed. Cl. 416 (2008), *rev'd*, *Agredano II*, 595 F.3d at 1278.
207. *Id.* at 421.
208. *Id.* at 432.

and placed in the trunk.[209] The Customs Service policy states that it must remove all drugs from vehicles prior to auction and sale, clearly to avoid selling vehicles with illegal narcotics in them.[210] A series of directives task Customs officers and agents "with the duty to identify and remove all contraband from vehicles that cross into the United States."[211] Unfortunately for Agredano, the Customs Service failed to remove all the illegal drugs in the 1987 Nissan.[212]

When Agredano attended the auction in September 2001, he was required to sign a bidder registration form stating that he "agree[d] to comply with the terms of sale contained in the sale catalog for this sale."[213] The catalog stated, "All merchandise is sold on an 'AS IS, WHERE IS' basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied or otherwise. Please bid from your personal observations."[214] A similar disclaimer, printed on a brochure advertising the auction, stated that vehicles offered at the auction would be sold "AS IS, WHERE IS," which "means that neither the U.S. Customs or [other entities involved] extend any warranties or promises of any kind regarding any aspect of the vehicle or its ability to operate, including but not limited to the vehicle's identity, previous ownership, physical condition, registration status, or ability to pass a smog certification."[215]

To the limited extent possible, Agredano personally observed the locked vehicle.[216] It appeared to be in good condition, including the interior. He observed that the gas tank had been removed, was in the trunk, and would have to be reinstalled.[217] He bought the Nissan with a $2600 bid.[218] Agredano had no concern that it might still have drugs in it because he "was buying it from the [U.S.] Government itself" and "they had equipment to check it."[219] On September 5, 2001, the Customs Service transferred title to "the property of the United States Government," certifying "that this is the first transfer of such vehicle in ordinary trade and commerce subsequent to acquisition thereof by the United States Government."[220]

Four and one-half months later, on January 24, 2002, while carrying merchandise on a business trip in Mexico, Agredano and an associate passed through a checkpoint where soldiers were inspecting vehicles.[221] The soldiers found a package under the upholstery and "started breaking up all of

209. *Id.* at 422, 433.
210. *Id.* at 438.
211. *Id.* at 437.
212. *Id.* at 444.
213. *Id.* at 422.
214. *Id.* at 435.
215. *Agredano II*, 595 F.3d 1278, 1279 (Fed. Cir. 2010).
216. *Agredano I*, 82 Fed. Cl. at 422.
217. *Id.*
218. *Id.* at 421.
219. *Id.* at 439.
220. *Id.* at 421–22.
221. *Id.* at 422–23.

the inside," finding "additional packages [of narcotics] in the upholstery, in the doors, and in the sides of the vehicle."[222] In the process, the car and the merchandise were destroyed.[223] The men were roughed up and handcuffed.[224] Once the search was complete, they were held overnight, incarcerated in a cell for twelve hours, and then taken to the penitentiary, where Agredano was placed in a general cell with eleven others, with no room to sleep and a hole in the floor as the bathroom facility.[225] He remained there for almost a month.[226] Eventually Agredano was transferred to another cell that contained around fifty people—he slept on the floor, imprisoned there for eleven months.[227]

Agredano was charged with drug trafficking and possession of drugs.[228] There ensued a series of hearings and appeals under Mexican procedures, mainly for the presentation of evidence by counsel.[229] At the time of his arrest, Agredano did not know how the marijuana came to be in his car, so his initial line of defense was that he was innocently on a business trip doing a printing job.[230] After some investigation, his attorney found evidence that the Nissan had previously been seized with drugs in it.[231] The U.S. Customs Service did not cooperate with the lawyer's efforts, and it took several Freedom of Information Act (FOIA) requests to obtain evidence of its prior seizure.[232] An inspection of the packages found by the Mexican soldiers showed that they were old and the drugs had rotted.[233]

At the "trial" on June 25, 2002, Agredano's counsel presented extensive evidence, including visual inspection, expert chemists' testimony, numerous witness statements, photographs, character witnesses, and evidence from the soldiers.[234] But the judge found Agredano guilty and sentenced him to five years in jail.[235] Adding to this Kafka-esque story, the Mexican judge found Agredano's defense—that the United States had failed to adequately inspect the vehicle before selling it—incredible because it "would constitute a violation of the laws of that country."[236] The judge also believed that the technology available to the U.S. authorities allowed effective inspection without having "to destroy a vehicle."[237]

222. *Id.* at 423.
223. *Id.* at 425.
224. *Id.* at 423.
225. *Id.*
226. *Id.*
227. *Id.* at 423–24.
228. *Id.* at 424.
229. *Id.* at 424–27.
230. *Id.* at 424.
231. *Id.*
232. *Id.* at 425.
233. *Id.* at 425–26.
234. *Id.* at 426.
235. *Id.*
236. *Id.*
237. *Id.*

From June 25 through September 17, 2002, Agredano appealed, but the appeal was rejected based on the conclusion that the judge below "had been able to correctly evaluate the evidence."[238] A final appeal before three judges ultimately succeeded, and Agredano was released on January 10, 2003, almost a year after his arrest.[239]

2. The Breach of Contract Action in the Court of Federal Claims

Agredano sued the United States for damages incurred in this awful misadventure—for the fair market value of the destroyed vehicle and merchandise, for attorney fees during the criminal proceedings in Mexico, for income lost during imprisonment, for medical expenses incurred and foreseeable, for psychiatric expenses incurred and foreseeable, and for emotional distress.[240] Among the various legal theories Agredano argued, the one that succeeded at the COFC was an implied warranty that Customs had done a thorough inspection and sold him a vehicle free of illegal drugs.[241]

The COFC cited *Hercules* as precluding a warranty implied in law and declared that the warranty, to be within its jurisdiction, had to be implied in fact.[242] Perhaps because the case presented an express contract within the Tucker Act jurisdiction, Chief Judge Hewitt articulated the jurisdictional bar in this cumbersome way: "The Court of Federal Claims has jurisdiction over implied-in-fact warranty contractual disputes only, not implied-in-law warranty contractual disputes."[243]

However, Judge Hewitt did find an implied-in-fact warranty, based on "the context of the sale," that the Customs Service had subjected the vehicle "to a reasonable search for contraband."[244] She relied on these circumstances of the sale to reject the government's argument that Agredano had not established "a mutual intent to agree to the asserted implied warranty":

> [A] stated goal of Customs' procedures regarding seized vehicles is to remove *all* contraband from a vehicle prior to sale. That goal is the actual standard that defendant set for itself. Defendant is responsible for "getting narcotics off the street and not giving it to the public." . . . Private individuals are barred from possessing illegal narcotics. It is the responsibility of defendant to seize "all" illegal narcotics from vehicles forfeited by private individuals. Defendant's conduct of the sale, in particular, the fact that defendant provided no warning about the possible presence of narcotics in vehicles, demonstrates defendant's own belief that it had successfully carried out its policy of removing *all* narcotics.[245]

238. *Id.* at 427.
239. *Id.*
240. *Id.* at 420, 427.
241. *See id.* at 437.
242. *Id.* at 430.
243. *Id.*
244. *Id.* at 437.
245. *Id.* at 437–39.

Agredano reasonably shared this view because "it is illegal for him to possess contraband."[246] In Judge Hewitt's view this "mutual and common expectation" that the vehicle was free of illegal substances was "the meeting of the minds."[247]

With respect to the "AS IS, WHERE IS" disclaimer, Judge Hewitt confirmed her earlier opinion that its "plain meaning" focused on "the construction, maintenance, and mechanical operation of the vehicle," and the presence of contraband was a problem "'not ordinarily associated with [the vehicle's ability to function for transportation].'"[248] Further, the "personal observation" suggested by the disclaimer would not have surfaced the drugs.[249] Thus, the COFC concluded that

> [t]he evidence at trial is consistent with the court's earlier holding that the "as is" clause does not preclude the existence of an implied-in-fact warranty . . . and demonstrates as well that, as a matter of fact, plaintiff could not reasonably have been expected to discover hidden narcotics in the Pathfinder.[250]

The court awarded Agredano $550,854 in damages for the trouble the government had caused him.[251]

3. The Federal Circuit Decision

The Federal Circuit panel confined the issue by stating that "[it] is undisputed that Customs made no express warranties regarding the vehicle, and the trial court appropriately determined that it did not have jurisdiction to entertain a claim that a warranty was implied-in-law."[252] The court approvingly noted the COFC's reliance on *Hercules* for this jurisdictional restriction.[253] The court made no mention of Justice Brandeis's implied-in-law warranty decision in *Spearin*, instead relying on *Lopez v. A.C. & S., Inc.* and erroneously stating that it "found implied warranties only where 'the circumstances strongly supported a factual inference that a warranty was implied.'"[254]

The Circuit's opinion then rejected the circumstances seen by Judge Hewitt as evidencing a "meeting of the minds." Without saying so, the court rigidly applied *Hercules*'s instruction that "circumstances surrounding the contracting are only relevant to the extent they help us deduce what the

246. *Id.* at 441.
247. *Id.* at 440.
248. *Id.* at 435 (alteration in original) (citation omitted). In her earlier opinion denying government motions, Judge Hewitt also noted that "[w]here possible, the court construes 'general [contract] provisions seeming to immunize the Government from paying damages due to its own breach or negligence . . . as not covering serious breaches, especially willful defaults, causing important loss." Agredano v. United States, 70 Fed. Cl. 564, 572 (2006) (citing Freedman v. United States, 320 F.2d 359, 366 (Ct. Cl. 1963)).
249. *Agredano I*, 82 Fed. Cl. at 422.
250. *Id.* at 437.
251. *Id.* at 452.
252. *Agredano II*, 595 F.3d 1278, 1281 (Fed. Cir. 2010).
253. *Id.*
254. *Id.* (citing Lopez v. A.C. & S., Inc., 858 F.2d 712, 715 (Fed. Cir. 1988)).

parties to the contract agreed to in fact."[255] The parties' shared belief that the vehicle was free of illegal drugs was founded on "an expectation that Customs had fulfilled its regulatory duty to remove any contraband from the vehicle before selling it."[256] But this duty did not provide a "contractual warranty" because, as the court explained:

> While Agredano is correct that the sale of the vehicle was a commercial transaction, not a regulatory function, the source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function and a failure to adequately perform this responsibility does not provide a contractual remedy.[257]

Apparently, the twain of regulation and contract could never meet in a factual inference of intent.

For this remarkable proposition of law, the court cited *D & N Bank v. United States*, which it quoted as stating that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations."[258] This citation was inapposite. To begin with, unlike *Agredano*, *D & N Bank* did not involve an agency "failure" to perform a regulatory function, or, for that matter, a function that was necessary to make an intended contract appropriate.[259] Moreover, and ironically, it was also erroneous because the court, like *Hercules*'s misreading of *Sutton*,[260] mistook a case where there was no contract with one where there was an unmistakable actual contract.

This distinction could not be clearer. *D & N Bank* itself explicitly drew this distinction. The question stated in *D & N Bank* was whether there was a contract at all. The Federal Circuit concluded that "all the evidence in this case shows that the government merely approved D & N's merger and did not enter into an express or implied-in-fact contract relating to the transaction."[261] D & N failed because it "essentially attempt[ed] to forgo the initial step for proving a breach of contract claim (namely, proving that a contract existed), skipping directly to a debate of the terms of the supposed contract."[262] In *Agredano*, the contract plainly existed; the debate was properly about the implied terms of the government's sale of the vehicle.[263]

The appellate panel also interpreted the express disclaimers as plainly showing that "Customs did not intend to make any warranty with regard to the vehicle. The meeting of the minds required to form an implied-in-fact warranty therefore could not have occurred."[264] Rejecting the COFC's inter-

255. Hercules, Inc. v. United States, 516 U.S. 417, 426 (1996).
256. *Agredano II*, 595 F.3d at 1281.
257. *Id.*
258. *Id.* (quoting D & N Bank v. United States, 331 F.3d 1374, 1378–79 (Fed. Cir. 2003)).
259. *Id.*
260. *See* discussion *supra* Part III.
261. *D & N Bank*, 331 F.3d at 1382.
262. *Id.* at 1381–82.
263. *Agredano II*, 595 F.3d at 1281.
264. *Id.*

pretation of the disclaimer because it "ignores the language of the brochure," the court ruled, "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed."[265]

Not only did the panel disregard the COFC finding of fact as to the parties' "meeting of the minds" (and thus the intended meaning), it did not follow the precedent of *Ozark Dam Constructors v. United States*, which noted that exculpation from "the harmful consequence of one's own negligence always presents a serious question of public policy" and rejected a literal reading "in light of public policy, and of the rational intention of the parties."[266] The panel might have also considered that its literal interpretation allowed the government to sell an illegal vehicle filled with drugs, without consequence, contrary to the Restatement's interpretive guidance to avoid unreasonable and unlawful terms. Nor did the panel even address the possibility of declining to enforce the Customs Service's disclaimer as an "unconscionable term," to serve "[t]he principle . . . of the prevention of oppression and unfair surprise."[267] This would have been a determination "as a matter of law," with the effect of "enlarg[ing] the liability of the offending party."[268] Apparently under the spell of *Hercules*, or just indifferent to simple unfairness, the court considered none of these principles of contract law.

And so Agredano, an unwitting victim of the shocking results of government failures in the preparation of the vehicle it sold to him, received no relief under the Tucker Act.

4. The Consequence of the *Hercules* Error

Justice Holmes once described the Tucker Act as "a great act of justice,"[269] yet justice was not done in Agredano's case. The Federal Circuit never discussed, or considered, justice.[270] Instead the court, relying on its own reading of a disclaimer and disregarding the trial court's finding of fact that both parties to the contract intended the vehicle to be drug free, concluded, in effect, that it was the government's unconscionable intent not to be contractually responsible for its failure to perform its special duty to make the vehicle suitable for sale. In the words of a prominent government contract academic, "[i]t seems inexplicable that this court—of all courts—could conclude that the proper allocation of risk here—either in this case or as a matter of precedent—should expose an individual to this

265. *Id.* at 1282.
266. 127 F. Supp. 187, 190–91 (Ct. Cl. 1955).
267. Restatement (Second) of Contracts § 208 cmt. b (1981).
268. *Id.* § 208 cmts. f–g.
269. United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915).
270. It is also troubling that the Department of Justice did not—to avoid injustice—simply settle Agredano's claim on a fair basis. This concern brings to mind Judge Plager's dissenting comment in *Schism v. United States*: "What I find most troubling is the insistence by the Government, represented before us by the Department of Justice, to define the Government's justice as a 'win' on any basis." 315 F.3d 1259, 1311 (Fed. Cir. 2002).

type of harm caused directly by government action (or inaction) without appropriate compensation."[271]

How could this have happened? It happened because of *Hercules, Inc. v. United States*, its conspicuous error about the Tucker Act jurisdiction, and its rejection of "simple fairness" and "equitable considerations" as factors to supply a needed term, on either an implied-in-law or implied-in-fact basis. Fairness, equity, common sense, and justice could and should have been considered in the interpretation of the disclaimer, as the COFC did when it looked behind the literal but general words to evidence of intent. But the more fundamental point is that the common law of contracts—holding the government accountable under *Winstar*—called for a term implied in law. As both the COFC and Federal Circuit decisions stated in setting the ground rules for their decisions, *Hercules* ruled that such an implied-in-law term was beyond their jurisdiction.[272]

Agredano was a quintessential case for an implied term to be supplied by the court under section 204 of the Restatement.[273] A contract that, because of the seller's failure, transferred an illegal vehicle with horrendous consequences for the unknowing buyer called for "judicial imposition of solutions to problems the parties have not addressed or which they have addressed in illegal or unconscionable ways."[274] The "rule of contract law" should have been used to "fill the gap where the parties have not provided for the situation that arises."[275] A term should have been supplied "to avoid injustice."[276] This did not happen because of the Supreme Court's conspicuous and consequential error in *Hercules*.

B. *AT&T v. United States*

This controversial and widely followed case raised significant issues about relief under the Tucker Act where a fully performed contract is illegal because the government awarded it in violation of a statute.[277] Ultimately, the contractor's claim failed when the alleged illegality dissolved, but not until after the COFC raised the possibility of relief and a panel of the Federal Circuit cut it off, relying on *Hercules*.

271. Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 Am. U. L. Rev. 1067, 1114–15 (2011).

272. *See Agredano I*, 82 Fed. Cl. 416, 430 (2008); *see also Agredano II*, 595 F.3d 1278, 1281 (Fed. Cir. 2010).

273. *See* Restatement (Second) of Contracts § 204 (1981) ("Supplying an Omitted Term").

274. Corbin, *supra* note 165, § 1.3; *see also* Restatement (Second) of Contracts § 208.

275. Restatement (Second) of Contracts ch. 9, topic 5, intro. note, at 81.

276. *Id.* § 272(2).

277. AT&T v. United States (*AT&T I*), 32 Fed. Cl. 672, 673 (1995), *rev'd*, 124 F.3d 1471 (Fed. Cir. 1997) (*AT&T II*), *reh'g en banc granted and judgment vacated*, 136 F.3d 793 (Fed. Cir. 1998), *reh'g en banc*, 177 F.3d 1368 (Fed. Cir. 1999) (*AT&T III*), *remanded to* 48 Fed. Cl. 156 (2000) (*AT&T IV*), *aff'd*, 307 F.3d 1374 (Fed. Cir. 2002) (*AT&T V*), *cert. denied*, 540 U.S. 937 (2003).

1. Section 8118 and AT&T's Claim

Throughout the Cold War (and thereafter) the Department of Defense (DoD) has had a risk allocation policy for the development of major weapon systems that vacillated between cost reimbursement and fixed-price contracting.[278] The Eisenhower administration generally pursued a cost-reimbursement approach, imposing limited cost risk on contractors. The Kennedy administration, led by Defense Secretary McNamara, instituted a stricter regime of fixed-price contracting, famously (or infamously) known as Total Package Procurement.[279] Under this policy, contractors were required to assume the risk of fixed-price development contracts and even to price production before the completion of development. Contractor losses, program instability, and an era of claims and litigation resulted.[280] The MacNamara policy was recognized as a failure and generally rejected by subsequent administrations.[281] However, during the Reagan defense build-up in the 1980s, Navy Secretary Lehman returned to a practice of fixed-price development contracting.[282] Disapproving of this practice, Congress in 1987 and subsequent years included in the Annual Defense Appropriation Acts a provision imposing a precondition to the funding of a fixed-price contract for development of a major weapon system or subsystems.[283] The Acts, in section 8118, required a high-level DoD written determination that "program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties."[284]

In December 1987, the Navy awarded AT&T a fixed-price incentive-fee contract for research, development, and production of a ship-towed, undersea surveillance subsystem known as the reduced diameter array (RDA).[285] The multiyear contract was funded incrementally through an obligation of funds that drew upon appropriations subject to the statutory restriction on fixed-price contracting absent the required determination.[286] However, neither at the time of award nor during subsequent years of performance did the DoD make the determination required by section 8118.[287]

AT&T performed the contract but at a great loss.[288] AT&T sought some relief by asking the Navy not to exercise production options under the

278. *See AT&T II*, 124 F.3d at 1474–75.
279. *See id.* at 1475.
280. *See id.*
281. *See id.*
282. *Id.*
283. *Id.*
284. *Id.* at 1474 (quoting Department of Defense Appropriations Act of 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329–84).
285. *AT&T I*, 32 Fed. Cl. 672, 673 (1995).
286. *Id.* at 674.
287. *Id.* at 675.
288. *Id.* at 673. The Court of Federal Claims (COFC) noted:

contract.[289] The requests called attention to statutory and regulatory restraints on fixed-price R&D contracts and production contracts priced before the start of full-scale development. The Navy provided no relief and required performance. In a follow-up letter, AT&T stated that, because "the requisite statutory certification" was not obtained, "[i]t is clear that the RDA Contract was awarded in violation of the law."[290] Therefore, AT&T asserted that "[t]he law requires . . . remedial consideration through reformation of the existing agreement . . . or through recovery without regard to the original contract under the doctrine of *quantum meruit*."[291]

AT&T's multimillion-dollar claim under the Contract Disputes Act was denied.[292] Having successfully performed from an engineering and technical standpoint, AT&T appealed to the COFC for financial relief based on contract illegality resulting from the government's failure to comply with section 8118 as well as mutual mistake.[293]

2. The Pre-*Hercules* Precedents

The pre-*Hercules* precedents gave AT&T some reason to be confident of its claims' chances based on the government's failure to observe the restriction imposed by the Appropriation Acts. An abundance of precedents—some fairly recent, others dating back to the early years of Tucker Act jurisdiction—seemed to set a favorable environment, at least in theory.

On the claim for reformation of the contract price term, the case law seemed to say that, where a contract provision contravenes existing law, the contract may be rewritten by the court to replace the offending provision so as to conform to what the parties would have negotiated had they complied with the law. *Beta Systems, Inc. v. United States* is perhaps the leading example of reformation to correct a contract's incorporation of a price term not permitted by procurement regulations.[294] The Defense Acquisition Regulation intended an EPA clause to be a "fair measure of the economic situation actually confronting the contractor," and it was not.[295] The opinion explained that

> [t]he risk of uninten[ded] failure of a contract term to comply with a legal requirement does not fall solely on the contractor. If the BLS index that was selected does

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> Design of the [Reduced Diameter Array (RDA)] subsystem has been completed, demonstrated, and approved by the Navy. The first engineering development model has been delivered, as have substantial proportions of the secured engineering model, and delivery of the first production level RDA subsystem is imminent. The equipment AT & T has delivered under the RDA contract is currently in use by the Navy.

Id. at 674.

289. *Id.* at 675.
290. *Id.*
291. *Id.*
292. *Id.* at 676.
293. *AT&T IV*, 48 Fed. Cl. 156, 158 (2000).
294. *See* 838 F.2d 1179, 1186 (Fed. Cir. 1988).
295. *Id.* at 1184.

> not comply with DAR 3-404 . . . , even approximately, it is not controlling whether or not Beta or the government foresaw, or accepted the risk of failing to foresee, this defect in the index.[296]

The government could not enforce a clause that violated a regulation designed to protect the contractor, and the contract was reformed.[297]

In *Urban Data Systems, Inc. v. United States*, the Federal Circuit dealt with another illegal price term, a cost-plus-a-percentage-of-cost term barred by statute, and noted that the remaining parts of the contract were not invalid.[298] The express contract could not be sustained, but the court observed that Urban Data had acted in reliance on the contract, performance had been completed, and the supplies had been accepted by the government. Therefore, notwithstanding the contract's invalidity, the court held that Urban Data was entitled to reimbursement on a *quantum valebant* basis for the reasonable value in the market place of the supplies and service.[299] *Urban Data Systems* noted that prior Court of Claims decisions, also involving fully performed contracts invalidated because of illegal price terms, had granted *quantum meruit* relief.[300] In *Yosemite Park & Curry Co. v. United States*, the court held that "the plaintiff is entitled to a *quantum meruit* recovery for the reasonable value of the services received by the [government]."[301] *Cities Service Gas Co. v. United States* gave similar *quantum meruit* relief.[302] This prompted the court to comment in *Urban Data Systems* that

> the Court of Claims generally considered the question of recovery for any contract implied in fact—whether for services or goods—on a *quantum meruit* basis. . . . Here we deal with a contract implied-in-fact because the parties did have an actual agreement to supply and buy the paper.[303]

In *United States v. Amdahl Corp*., the Federal Circuit again addressed the question of relief for performance of an illegal contract.[304] In this case, the General Services Board of Contract Appeals found illegality in the award of a contract to Freddie Mac, revoked the General Services Administration (GSA) delegation of procurement authority, and ruled that the contract was "*void ab initio*."[305] Relying on *Urban Data Systems* and *Cities Service*, the court pointed out that the contractor was "not entirely without a remedy."[306] A failure to comply with statutory requirements rendered the contract a "nullity" or of "no effect," and "no damages can be awarded for

296. *Id.* at 1185–86.
297. *Id.* at 1186.
298. 699 F.2d 1147, 1154 (Fed. Cir. 1983).
299. *Id.*
300. *Id.* at 1147.
301. 582 F.2d 552, 554, 560 (Ct. Cl. 1978).
302. 500 F.2d 448, 457 (Ct. Cl. 1974).
303. *Urban Data Sys., Inc.*, 699 F.2d at 1154 n.8.
304. 786 F.2d 387, 391 (Fed. Cir. 1986).
305. *Id.* at 391, 393.
306. *Id.* at 392 (citing *Urban Data Sys., Inc.*, 699 F.2d at 1154; *Cities Serv. Gas Co.*, 500 F.2d at 457).

'breach' of a nullity."[307] On the other hand, the *Amdahl* opinion importantly said, "in many circumstances, *it would violate good conscience* to impose upon the contractor *all* economic loss from having entered an illegal contract."[308] The court found that this was the circumstance in *Amdahl*:

> Where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity. The contractor is not compensated *under* the contract, but rather under an implied-in-fact contract.[309]

Adding "principles of equity and justice" to "good conscience," the court in *Amdahl* quoted *Prestex, Inc. v. United States*, a Court of Claims decision:

> Even though a contract be unenforceable against the Government, because not properly advertised, *not authorized*, or *for some other reason*, it is only *fair and just* that the Government pay for goods or services rendered and accepted under it. In certain limited fact situations, therefore, the courts will grant *relief of a quasi-contractual nature* when the Government elects to rescind an invalid contract. No one would deny that *ordinary principles of equity and justice* preclude the United States from retaining the service, materials, and benefits and at the same time refusing to pay for them.[310]

Thus, the "equitable considerations" later ruled out in *Hercules* supported a restitutionary remedy in *Amdahl* based on an implied-in-fact contract, without proof or even discussion of a meeting of the minds for such implied-in-law relief.

In these cases granting *quantum meruit* relief, the opinions show little concern that such "quasi-contractual" and "equitable" relief overreached the Tucker Act. Of course, by the time of the *Urban Data Systems* and *Amdahl* decisions, the Restatement had endorsed restitutionary relief for breach of an actual contract. Where there were in fact contract relations, the law of contract damages thus acknowledged "benefits conferred" as a basis for relief.[311]

More important, however, were the prior Supreme Court precedents that paved the way for the Court of Claims and Federal Circuit decisions. *Amdahl* cited two of them. In *United States v. Mississippi Valley Co.*, a conflict of interest condoned by high-level government officials rendered the contract illegal and unenforceable, but the Court in a closing footnote indicated that "a recovery *quantum valebat* should be decreed . . . where one party to a transaction has received and retained tangible benefits from the other party."[312] The footnote relied on *Crocker v. United States*, which, as discussed previously, held that a contract "tainted by fraud and rescinded . . . on that ground" is

307. *Id.* at 393.
308. *Id.* (emphasis added).
309. *Id.*
310. *Id.* (quoting Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963) (emphasis added)).
311. Restatement (Second) of Contracts § 373 (1981).
312. 364 U.S. 520, 566 n.22 (1961), cited in *Amdahl Corp.*, 786 F.2d at 394.

"not an obstacle to a recovery upon a quantum valebat."[313] *Crocker* in turn cited another Supreme Court decision relied on in *Amdahl*—the 1877 ruling in *Clark v. United States*, also noted previously, which held that where a contract was made in violation of the statute of frauds and was "void," the contractor was entitled to recover the fair value of his property or services, "as upon an implied contract for a *quantum meruit*."[314]

With this array of precedents involving illegal contracts, AT&T must have believed that there would be support for its alternative theories based on the government's violation of section 8118.

3. The First Court of Federal Claims Decision

On February 7, 1995, a little over a year before the Supreme Court decided *Hercules*, the COFC issued its initial decision in *AT&T v. United States*.[315] The court set forth AT&T's alternative demands as a consequence of the Navy's failure to adhere to section 8118: "AT & T is asking for reformation of its contract to a cost-reimbursement, incentive-fee contract or, in the alternative, for a declaration holding the contract void with payment for benefits conferred to be allowed on a *quantum meruit* basis."[316]

The government objected initially that AT&T lacked standing, arguing that section 8118 was not for the benefit of defense contractors and afforded AT&T no enforceable rights.[317] The COFC rejected this argument: the law's "principal concern" is "to confine the use of fixed-price development contracts" and "to insure 'an equitable and sensible allocation of program risk between contracting parties.'"[318] Thus, the statute was intended for protection of both the government and contractors: "[q]uite plainly, then, the statute has more than the Government's own interests in mind."[319] Moreover, the court agreed that section 8118 "was intended to overcome, namely, the disproportionate allocation of pricing risk upon the contractor."[320] These were promising determinations for AT&T.

The COFC also recognized that reformation had been "invoked to rid a contract of a provision that contravenes existing law."[321] The court, citing *Beta Systems*, stated that "where a contract is illegal it may be rewritten by the court so as to conform to what the parties would have negotiated had they complied with the law."[322] Presuming the parties' intent to comply with the law, the COFC said such reformation "is akin to the power

313. 240 U.S. 74, 81–82 (1916); *see* discussion *supra* Part IV.C.
314. 95 U.S. 539, 542 (1877), cited in *Amdahl Corp.*, 786 F.2d at 394, and discussed *supra* Part IV.B.2.
315. *AT&T I*, 32 Fed. Cl. 672 (1995).
316. *Id.* at 677–78.
317. *Id.* at 678.
318. *Id.*
319. *Id.*
320. *Id.* at 681.
321. *Id.*
322. *Id.* at 682.

exercised by a court when supplying a missing term to an agreement otherwise sufficiently specific to be enforceable."[323]

These acknowledgments of reformation also sounded promising, but the COFC found a critical difference. Disregarding AT&T's concept that reformation of the price term would cure the contract's invalidity and make it viable, not void, the COFC declared that it had "no power to remake that which was never established in the first instance."[324] This proposition had a chicken-and-egg aspect to it but followed from the view that the AT&T contract was "void at law for want of power to make it."[325] So much for reformation at the COFC.

However, the court then addressed AT&T's alternative demand that the contract be "declared a nullity, and that in its place, we recognize the existence of an implied-in-fact contract with compensation to be awarded on a *quantum meruit* basis."[326] The government objected that "relief granted for benefits conferred under a void contract" could not "be rationalized on an implied-in-fact basis."[327] Instead the government moved to dismiss AT&T's alternative claim, stating that "any relief the court may afford under such circumstances is, in reality, relief granted under a contract implied-in-law, i.e., an unjust enrichment principle, and, as such, falls outside this court's authority under the Tucker Act."[328] The COFC, although recognizing "the analytical force" of the government's position, thought it was "squarely answered" in *Amdahl*.[329] The Federal Circuit had applied "the rule" allowing recovery upon an implied contract for *quantum meruit* or *quantum valebant* "where goods or services have been provided to the Government under a contract subsequently declared invalid."[330] The COFC pointed to *Amdahl*'s statement that "[t]he contractor is not compensated *under* the contract, but rather under an implied-in-fact contract."[331] The COFC cited the Restatement as supporting the avoidance of unjust enrichment and repeated the *Amdahl* concern about "good conscience."[332]

The COFC, in this way, endorsed AT&T's *quantum meruit* theory, denying the jurisdictional motion to dismiss, but said that factual questions remained whether AT&T was entitled to the relief it conceptualized: AT&T's position "encounters difficulties," and "[i]n the name of *quantum meruit*, we are asked to reconstitute an invalid losing contract into an enforceable and profitable one."[333] In addition, AT&T wanted to avoid "*all*

323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 683.
332. *Id.*
333. *Id.*

economic loss."[334] Resolution of these difficulties would require answers to a series of factual questions, by stipulation or through a trial.[335] However, before those factual proceedings, the COFC granted an interlocutory appeal, agreed to by the parties, certifying the conceptual issues whether (1) the contract was void because of the statutory violation and (2) if the contract was void, what relief was available within the jurisdiction of the court.[336]

4. The First Decision of the Federal Circuit

The action then moved to the Federal Circuit, where a panel majority disagreed that the section 8118 violation provided AT&T with a basis for relief.[337] The panel did agree that section 8118's requirement for an official written determination "operates as a constraint on the contracting process intended for the protection of both Government and contractor. We agree with the Court of Federal Claims on this point, and affirm its conclusion."[338]

The government argued that the contract was not void because the "restriction on the availability of funding is not tantamount to a lack of authority to contract."[339] The panel majority rejected this proposition, stating that "[t]he attempt by the Navy to obligate or expend funds for a contract not properly authorized by Congress is ineffective to either commit or make use of Federal dollars. . . . No valid contract was or could be entered into in face of the express congressional prohibition."[340] According to the panel majority, the contract was void ab initio, as the COFC had held.[341]

The panel majority then rejected the COFC's conclusion that "the consequence of its determination was to leave the parties with an implied-in-fact contract, with compensation to be awarded on a quantum meruit basis."[342] The panel majority declared that "[t]he concept of implied-in-fact contract is not for the purpose of salvaging an otherwise invalid contract."[343] There was no effort to address the Supreme Court's *Clark* decision or the other decisions that followed it. Instead, the opinion cited *Trauma Service Group v. United States*, a 1997 Federal Circuit decision that in turn cited *Hercules*, for the ostensibly limiting proposition that "[a]n implied-in-fact contract arises when, in the absence of an express contract, the parties' behavior leaves no doubt that what was intended was a contractual relation-

334. *Id.*
335. *Id.* at 684.
336. *See AT&T II*, 124 F.3d 1471, 1473 (Fed. Cir. 1997).
337. *Id.* at 1480.
338. *Id.* at 1478.
339. *Id.* To reverse the COFC's finding of contract voidness, the government cited *Clark* and *Urban Data Systems* as precedents holding contracts void based on statutory or regulatory violations because they "limited the very authority of the parties to enter into the contract, or expressly prohibited the contract altogether," but did not deal with the relief those decisions afforded. *Id.*
340. *Id.*
341. *Id.* at 1479.
342. *Id.*
343. *Id.*

ship permitted by law."[344] Even though the parties had intended a contract for the RDA system, and the government had accepted AT&T's performance, "the rubric" of an implied-in-fact contract was not deemed "appropriate."[345]

The decision then rejected the COFC's "announced" intention to grant *quantum meruit* relief:

> It is well established that the Court of Federal Claims does not have the power to grant *remedies generally characterized as those implied-in-law, that is, equity-based remedies*, as distinct from those based on actual contractual relationships. Quantum meruit is the name given to an implied-in-law remedy for unjust enrichment. As a general rule, it falls outside the scope of relief available through the Court of Federal Claims.[346]

Thus, the COFC not only lacked jurisdiction over claims upon contracts implied in law but also over claims for implied-in-law "remedies" in cases involving contracts implied in fact. *Quantum meruit*, "the name given to an implied-in-law remedy for unjust enrichment," could not be entertained.[347] For this further restriction, the opinion cited *Hercules*.

Of course, this further restriction was inconsistent with *Winstar* and the rule that the government, where it contracts, is bound by contract law and the Restatement sections defining remedies available in cases involving actual contracts. It also ignored the numerous precedents prior to *Hercules*. The panel majority discussed only one of these—*Amdahl*—which it sought to distinguish on the ground that contracting authority was not at issue, even though the contract award was illegal and the GSA had pulled its delegation of procurement authority, declaring the contract void ab initio.[348] The majority explained away the relief granted in *Amdahl* in this way: "[w]hile it is true that the *Amdahl* court discussed the matter under the heading of quantum meruit, the circumstances of the case suggest it was more properly labeled equitable relief allowed under the Contract Disputes Act, 41 U.S.C. §§ 601–613, when a contract, express or implied-in-fact, is present."[349] This re-articulation did not acknowledge that the *Amdahl* court recognized that the illegal contract was "a nullity" and granted relief as a matter of "conscience," rather than a remedy to which the government had assented.[350]

344. *Id.* (citing Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997)).

345. *Id.* The opinion did acknowledge that "[i]t would appear that the Government is in possession of goods, the RDA equipment, originally manufactured and owned by AT & T. There is nothing to suggest that AT & T intended to make a gift of that equipment to the Government, and much to suggest the contrary." *Id.* at 1480. But, notwithstanding prior precedent, the panel drew no implication of a contract from these facts.

346. *Id.* at 1479 (emphasis added).

347. *Id.*

348. *Id.* (distinguishing United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986)).

349. *Id.*

350. *Id.* at 1480–81 (Newman, J., dissenting).

Judge Newman dissented from the majority's view that the failure to comply with section 8118 rendered the contract void, leaving AT&T without a contract.[351] She explained that

> those contracts that have been held void or invalid on the ground of a statutory or regulatory violation have been clearly illegal in a material aspect, in that they violated provisions explicitly limiting the authority of a party to enter into the contract, or expressly prohibiting the contract altogether. *E.g.*, *Clark v. United States*, 95 U.S. 539, 542, 24 L.Ed. 518 (1877) (unlawful for contracting officers to make contracts that violate the statute of frauds); *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1150 (Fed. Cir. 1983) (recovery based on implied-in-fact contract after contracts declared invalid because they contained pricing clauses in plain violation of statute).[352]

However, Judge Newman did not address the issue of *quantum meruit* relief for a void contract because "the contract was not illegal, and it was fully performed."[353]

5. The Consequence of the *Hercules* Error

The majority panel opinion in *AT&T* was subsequently vacated in response to a motion for rehearing en banc.[354] The en banc court did not reconsider whether and what kind of relief could be granted where the contract was rendered void by the statutory violation.[355] Rather, based principally on Judge Newman's view, the Federal Circuit ruled that failure to comply with section 8118 did not render the contract void, thereby mooting the second certified question about relief.[356] AT&T's claims were remanded to the COFC "for consideration of the question of relief, on the premise that the contract was not void *ab initio*"—or at least so Judge Newman thought.[357] On remand, however, the COFC did not reopen the question of reforming the price term or consider AT&T's alternative theories for relief. Instead, the COFC ruled that AT&T had failed to state a claim and dismissed the multicount complaint because "non-compliance with [section 8118] is not an actionable wrong" and afforded AT&T "no enforceable" protections.[358] A panel of the Federal Circuit affirmed this decision, with Judge Newman again dissenting.[359] Judge Newman noted that the en banc decision had explained that

> [w]hen a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct

351. *Id.* at 1480.
352. *Id.* at 1481.
353. *Id.* at 1482.
354. AT&T v. United States, 136 F.3d 793 (Fed. Cir. 1998).
355. *AT&T III*, 177 F.3d 1368, 1377 (Fed Cir. 1999) (en banc).
356. *Id.* (concluding that "although the parties discuss possible remedies, the issue of what relief may be available to AT & T is not before us, for the [COFC] did not consider AT & T's claims on the premise that the underlying contract was not void").
357. *AT&T V*, 307 F.3d 1374, 1382 (Fed. Cir. 2002) (Newman, J., dissenting).
358. *AT&T IV*, 48 Fed. Cl. 156, 160–61 (2000).
359. *AT&T V*, 307 F.3d at 1381–82.

> the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void *ab initio*.[360]

In contrast, the COFC "did not explain its conclusion that none of these grounds could apply," prompting Judge Newman to say that "AT&T has not yet had its day in court"[361]—a conclusion reminiscent of Justice Breyer's dissent in *Hercules*.

In sum, the AT&T litigation shows that the remedies suggested by prior precedents and envisioned as possible for AT&T would be unlikely in a court influenced by Chief Justice Rehnquist's *Hercules* opinion. Although the vacated initial Federal Circuit panel decision has no precedential value, its summary rejection of an implied-in-fact contract in place of the illegal contract and of the implied-in-law *quantum meruit* remedy casts doubt on the availability of meaningful relief where contracts, though performed, fail because of illegality. The fact that two judges of the Federal Circuit thought that *Hercules* barred relief shows its potential consequence. One wonders whether, under *Hercules*, authority still resides in the earlier precedents like *Clark*, *Urban Data Systems*, and *Amdahl*, where the Tucker Act courts acted as a matter of conscience and good faith to provide relief.

The unexplained dismissal of AT&T's mutual mistake claim also casts doubt on other precedents. In *National Presto Industries, Inc. v. United States*, the Court of Claims rejected as "too facile" the concept that the fixed-price contract allocated all risk on the contractor.[362] Instead, the court asked what the government would have done if it had known of the mutual mistake and concluded that, given the benefit received from the contractor's performance, the government would have agreed to assume some of the loss.[363] In *AT&T*, a stronger inference could have been drawn from section 8118, which evidenced Congress's intent to "permit[] an equitable and sensible allocation of program risk."[364] In *National Presto*, the court decided—in the interest of "justice"—to "formulate and apply a rule" it considered "fair," which was "to halve the loss" and hold the government "responsible for an equal portion,"[365] thus anticipating sections 158 and 204 of the Restatement.[366] The opinion expressed the general jurisprudential view, beyond the specific facts of *National Presto*, that the court "can and should proceed under the Tucker Act, now as in the past, to develop and establish just and practical principles of contract law for the Federal Government."[367] Unfortunately, this judicial role would appear to be foreclosed by the constraints of the *Hercules* error.

360. *Id.* at 1382 (Newman, J., dissenting) (citing *AT&T III*, 177 F.3d at 1376).
361. *Id.* at 1383.
362. 338 F.2d 99, 109 (Ct. Cl. 1964).
363. *Id.* at 103.
364. *AT&T II*, 124 F.3d 1471, 1474 (Fed. Cir. 1997) (quoting Department of Defense Appropriations Act of 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329–84).
365. 338 F.2d at 111–12.
366. *See supra* text accompanying notes 187 and 189.
367. 338 F.2d at 111.

C. *Precision Pine & Timber, Inc. v. United States*[368]

The most significant implied-in-law term in contract law is, of course, the duty of good faith and fair dealing, set forth in section 205 of the Restatement: "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[369] The Department of Justice (DoJ) has not persuaded the courts that this implied-in-law term is not imposed on the government or not enforceable under the Tucker Act jurisdiction.[370] Notwithstanding *Hercules*, the government appears to have conceptually conceded the point.

Indeed, in *Centex Corp. v. United States*, a decision involving Congress's repudiation of a contractually promised tax benefit, the Federal Circuit confirmed that this implied-in-law duty "applies to the government just as it does to private parties."[371] The court made no mention of *Hercules*'s erroneous barring of implied-in-law terms. The *Centex* decision, citing section 205 and *Malone v. United States*,[372] confirmed the broad reach of this duty: "[t]he covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract."[373]

Instead, the DoJ has waged a campaign to undermine this implied-in-law duty as it applies to the government. In a series of cases, the government has set about to establish rigid rules and onerous burdens for proving its violation of this basic duty.[374] The *Centex* panel found that the tax legislation in question "specifically targeted" and "reappropriate[d]" a contract right or benefit that the government had promised, and therefore did not involve "the exercise of a sovereign power."[375] The government's lawyers subsequently argued that these findings established the tests of a breach of the duty of good faith and fair dealing. These *Centex* findings thus became the seeds of a controversial victory in *Precision Pine & Timber, Inc. v. United States*, even though it involved different allegations of unreasonable suspensions of contract performance caused by the contracting agency.[376]

368. 50 Fed. Cl. 35 (2001) (*Precision Pine I*), *rev'd*, 596 F.3d 817 (Fed. Cir. 2010) (*Precision Pine II*), *cert. denied*, 131 S. Ct. 997 (2011).

369. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

370. *See Precision Pine I*, 50 Fed. Cl. at 56.

371. 395 F.3d 1283, 1304 (Fed. Cir. 2005).

372. 849 F.2d 1441 (Fed. Cir. 1988).

373. *Centex Corp.*, 395 F.3d at 1304.

374. Its first victory was the controversial panel decision in *Am-Pro Protective Agency v. United States*, which held that the government, unlike private parties under the law of contracts, could only violate the duty if it acted in subjective bad faith, maliciously, with specific intent to injure the other party, a standard not appearing in section 205. 281 F.3d 1234, 1239–40 (Fed. Cir. 2001). The subsequent panel decision in *Centex* did not acknowledge this extreme scienter requirement or refer to the *Am-Pro* panel decision. Nor did *Precision Pine*. *See Precision Pine II*, 596 F.3d 817, 829 (Fed. Cir. 2010).

375. *Centex Corp.*, 395 F.3d at 1308, 1311.

376. *Precision Pine II*, 596 F.3d at 828–30.

The Court of Federal Claims—deciding before the *Centex* decision—rejected the government's "assault on the implied duties" and found a "classic" breach of the implied duty to cooperate and not to hinder.[377] However, a panel of the Federal Circuit—deciding after *Centex*—reversed, relying also on *Hercules*.[378] This *Precision Pine* decision, considered by many to be erroneous,[379] mired the duty of good faith and fair dealing in confusion at the Federal Circuit.

1. The Decision of the Court of Federal Claims

Precision Pine presented the question whether the government breached timber sales contracts by unreasonably suspending harvesting by the purchaser-contractor.[380] The suspensions were necessitated by a federal district court order, issued because the contracting agency, the Forest Service, had failed to submit Land and Resource Management Plans (LRMPs) for consultation with the Fish and Wildlife Service (FWS) as required by the Endangered Species Act (ESA).[381] A contract clause gave the Forest Service the right to suspend harvesting to comply with a court order or to prevent environmental degradation.[382] However, the plaintiff maintained that "the unreasonable failure of the Forest Service to submit its LRMPs to the FWS for consultation under section 7 of the ESA resulted in a wrongful suspension that constituted a breach of the implied duty not to hinder."[383]

It was "undisputed that the Tucker Act covers the implied duties to cooperate and not to hinder contracts," and the "right to suspend . . . is not only qualified by its own terms, but also by implied duties."[384] Furthermore, the court went on to say, "there can be little doubt that the implied duties to cooperate and not to hinder are read into contracts with the Federal Government and are binding on the parties as if they were expressly written into the contract."[385] The court stated that Precision Pine's allegation that the government unreasonably caused a delay in contract performance is "a classic breach of implied duty action, albeit with the additional twist that the

377. *Precision Pine I*, 50 Fed. Cl. 35, 54, 63 (Fed. Cl. 2001).
378. *Precision Pine II*, 596 F.3d at 829–30.
379. *See, e.g.*, Ralph C. Nash Jr., *Postscript: Breach of the Duty of Good Faith and Fair Dealing*, 24 NASH & CIBINIC REP. ¶ 22 (May 2010); Stuart B. Nibley & Jade Totman, *Let the Government Contract: The Sovereign Has the Right, and Good Reason, to Shed Its Sovereignty When It Contracts*, 42 PUB. CONT. L.J. 1, 26–32 (2012).
380. *Precision Pine I*, 50 Fed. Cl. at 57.
381. *Id.* at 48.
382. *Id.* at 59.
383. *Id.* at 60.
384. *Id.* at 56, 59.
385. *Id.* at 54. The court cited two Court of Claims decisions, *Kehm Corp. v. United States*, 119 Ct. Cl. 454, 469 (1950), and *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 96 (1947), as well as section 205, for the proposition that the "government is liable for delays caused by it even in the absence of an express contractual provision." *Id.*

unreasonable delay caused by the Government's conduct had significance insofar as the conduct was contrary to its statutory duty."[386]

The government argued that the action should be dismissed for failure to state a claim because "the contract did not explicitly incorporate a duty to abide by the terms of the [statute] and its implementing regulations."[387] For this proposition, the government relied on *Smithson v. United States*, which affirmed the dismissal of breach claims that the agency violated regulations generally referenced, but not incorporated, in the contract.[388] The COFC rejected this argument: "reliance on *Smithson* is misplaced when it is used to require that a statute must be incorporated in a contract in order to determine whether the failure to do an act, contrary to a statute, can in a particular instance cause a breach of an implied duty."[389] Unlike the *Smithson* circumstance, the Forest Service's failure to submit LRMPs for consultation as required was "directly tied" to the administration of the contracts, and "there is no implicit sovereign immunity difficulty . . . because it is undisputed that the Tucker Act covers the implied duties to cooperate and not to hinder contracts."[390] Indeed, the COFC added:

> [I]t would be odd that a breach of an implied duty claim against the Government could lie if the breach was caused by an act (or failure to act) that was legal, but the Government could escape contract liability if the breach were caused by an act (or failure to act) that was contrary to law.[391]

Furthermore, the COFC noted that *Smithson* was "not called upon to decide whether the act which supposedly violated a statute was unreasonable or wrongful."[392] Because *Precision Pine* alleged that the Forest Service's failure was "beyond the reasonable scope of actions contemplated by the putative exculpatory provisions of the contracts (and because Plaintiff does not and need not incorporate the ESA into the contract), the complaint is outside the scope of the holding in *Smithson*."[393] The "unreasonableness" of the contracting agency's failure to consult was thus deemed "squarely before [the] Court to decide."[394] The opinion acknowledged that the Forest Service was entitled to exercise its suspension right "provided that the reasonable expectations of the parties at the time of the contract were maintained," but "when the Government unjustifiably and unreasonably failed to comply with pre-existing duties that relate directly to the performance of the

386. *Id.*
387. *Id.* at 53. The relationship of this argument to *Hercules* is evident.
388. 847 F.2d 791, 795 (Fed. Cir. 1988).
389. *Precision Pine I*, 50 Fed. Cl. at 63.
390. *Id.* at 56.
391. *Id.* at 55.
392. *Id.* at 63.
393. *Id.* at 55.
394. *Id.* at 63. The court granted Precision Pine's motion for summary judgment on liability. *Id.* at 74. Almost seven years later, after extended damages proceedings, the COFC awarded $3,343,712 in breach damages. Precision Pine & Timber, Inc. v. United States, 81 Fed. Cl. 733, 740 (2008).

contracts," the resulting suspension was unreasonable and a breach of the duty to cooperate and not to hinder.[395]

The court also found that another "fundamental expectation" arose from language in contract clause CT 6.25, which referenced "measures needed to protect [threatened or endangered species under the ESA]."[396] The COFC viewed this reference as a "representation" or "warranty" for which the Forest Service had no "reasonable basis" "since it had not consulted with the FWS as it was required to do by statute."[397]

2. The Decision of the Federal Circuit

The government pressed its "assault on the implied duties" on appeal.[398] By the time the *Precision Pine* appeal arrived at the Federal Circuit, *Centex* had been decided and the DoJ deployed it to upset the COFC decision.[399] The government also summoned *Hercules*'s erroneous proposition to argue that, even within an express contract, government accountability under the implied-in-law duty depended on breach of undertakings it had actually agreed to in the contract.[400] A panel of the Federal Circuit responded favorably.[401]

a. The Implied Warranty

The panel chose to address first the COFC's ruling that the CT 6.25 statement regarding protective measures constituted a warranty. This was easily reversed because the Federal Circuit had already ruled that the "identically-worded" standard form clause as it appeared in another timber sales contract did not constitute a warranty of compliance with ESA.[402] In *Scott Timber Co. v. United States*, the Federal Circuit panel had noted that the clause did not make an explicit warranty and rejected an implied warranty, approving the COFC's reliance on *Hercules*:

> An implied warranty concerning the adequacy of the Forest Service's design of the sales must be "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from the conduct of the parties, showing, in the light of the surrounding circumstances, their tacit understanding."[403]

For this purpose, the *Precision Pine* panel thus explicitly adhered to the prior precedent in *Scott Timber*: "[a]s this court did in *Scott Timber*, we conclude that this language in CT 6.25 disclaims any explicit or implicit suggestion

395. *Precision Pine I*, 50 Fed. Cl. at 64.
396. *Id.* at 65 (alteration in original).
397. *Id.*
398. *Id.* at 63.
399. *Precision Pine II*, 596 F.3d 817, 830–31 (Fed. Cir. 2010).
400. *Id.* at 830.
401. *Id.*
402. *Id.* at 826.
403. Scott Timber Co. v. United States (*Scott Timber I*), 333 F.3d 1358, 1370 (Fed. Cir. 2003) (citing Hercules, Inc. v. United States, 516 U.S. 417, 424 (1996)).

that the listed 'special measures' are complete, unchanging, or assured to be adequate."[404] The *Precision Pine* panel never discussed the COFC's concern that the Forest Service, while referring to protective measures in CT 6.25, failed to disclose that, as it knew, it had not taken measures required by statute.[405] "Nor [did the panel] read CT 6.25 to incorporate the requirements of the ESA."[406] Relying on *Smithson*, the panel declined to hold that "the contract's passing reference" to the ESA created an additional "set of obligations" by "mere implication."[407]

b. The Implied Duties

The government's attack on the implied duties had three thrusts. First, the government sought to bury the duties to cooperate and not hinder and the prior case law adopting the unreasonableness standard under the duty of good faith and fair dealing and the new more onerous standards it derived from *Centex*. Second, the government postulated that the suspension in *Precision Pine* had to pass the "specific targeting" test to be a breach of section 205.[408] Third, the government drew upon *Centex*'s additional finding that Congress "re-appropriated" a contract right or benefit that the government had promised—to create a further element of proof to satisfy section 205. Thus, "re-appropriation" meant that the test of the suspension and its duration was not whether they were "unreasonable," but whether the act or failure to act abrogated a term of the contract to which the sovereign had assented.[409] The relationship of this proposition to the error in *Hercules*—and its related instruction that the "circumstances surrounding the contracting are only relevant to the extent that they help us deduce what the parties to the contract agreed to in fact"—is unmistakable.[410] It is therefore not surprising that the *Precision Pine* panel cited *Hercules* in support of its controversial ruling.

The Federal Circuit panel adopted all of these government arguments, beginning by abandoning the established duty-to-cooperate and not-to-hinder standards under cover of the duty of good faith and fair dealing. The panel made this transition casually: "[t]he issue on appeal is whether the Forest Service breached the implied duty of good faith and fair dealing, which the trial court also termed the implied duty not to hinder and the implied duty to cooperate."[411] Thereafter, the panel discussed only the duty of good faith and fair dealing, without reference to the specific duty to cooper-

404. *Precision Pine II*, 596 F.3d at 827.
405. *See Precision Pine I*, 50 Fed. Cl. 35, 67 (2001).
406. *Precision Pine II*, 596 F.3d at 826.
407. *Id.*
408. *Id.* at 829.
409. *Id.* at 831.
410. Hercules, Inc. v. United States, 516 U.S. 417, 426 (1996).
411. *Precision Pine II*, 596 F.3d at 827. The panel noted that "[b]oth the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing." *Id.* at 820 n.1.

ate and not to hinder. There was no acknowledgment of numerous, presumably binding Court of Claims and Federal Circuit precedents holding that "unreasonable" delays caused by the government violated those duties—including the specific decisions relied on by the COFC.[412]

The *Precision Pine* panel—having relied on *Scott Timber* to overturn the warranty decision—inexplicably ignored the same decision's "reasonableness" analysis of the implied duties. As stated in *Scott Timber*:

> [T]he Court of Federal Claims correctly found that "clause C6.01 does not authorize the Forest Service to indefinitely or permanently suspend the contracts." . . . Therefore, in order for the prolonged suspensions in this case to be considered a breach of the C6.01 contracts, "the [c]ourt must determine whether the suspensions were reasonable."[413]

In contrast, and without acknowledging the contrast, the *Precision Pine* panel declared that the C6.01 suspension right could not be abused because the government did not guarantee the contractor a right to "uninterrupted contract performance."[414] Thus, unreasonable exercise of its suspension right did not violate the new tests announced by the *Precision Pine* panel:

> Cases in which the government has been found to violate the implied duty of good faith and fair dealing typically involve some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract. . . . The government may be liable for damages when the subsequent government action is specifically designed to re-appropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract.[415]

For this new definition of the duty, the panel cited *Centex* and another decision involving "specifically targeted" legislation, which it described as "prototypical examples of this modus operandi."[416]

The panel concluded that there were "no similar indicia of a governmental bait-and-switch or double crossing" in *Precision Pine*, in part because the Forest Service's actions were not "specifically targeted" at the contract.[417] There was "evidence the Forest Service failed to cooperate," but "that failure was in the context of . . . the Forest Service's consultations with the Fish and Wildlife Service."[418] Though Precision Pine was "unquestionably affected," "the fact that the Forest Service violated its obligations under the ESA to the Fish and Wildlife Service, an unrelated third party, does not mean the Forest

412. *See id.* at 827–30.
413. *Scott Timber I*, 333 F.3d 1358, 1368 (Fed. Cir. 2003) (quoting Scott Timber Co. v. United States, 40 Fed. Cl. 492, 502 (1998)).
414. *Precision Pine II*, 596 F.3d at 830.
415. *Id.* at 829.
416. *Id.* (citing First Nat'l Bank v. United States, 431 F.3d 1342 (Fed. Cir. 2005)).
417. *Id.*
418. *Id.* at 830.

Service violated its duties to Precision Pine under the timber contracts, to whom these statutory duties were not owed."[419]

In this regard, the *Precision Pine* panel again contradicted, without explanation, the prior Federal Circuit decision in *Scott Timber* by failing to acknowledge its holding relating the statutory violations to the implied duties. *Scott Timber* held that

> [w]hile the violation of statutory obligations does not establish a breach of contract unless these statutory obligations are incorporated into the contract at issue, *see Smithson v. United States*, 847 F.2d 791, 794–95 (Fed. Cir. 1988), these violations may nonetheless serve as a factor in a reasonableness analysis. . . . Although violations of statutory obligations not incorporated into the contract cannot constitute, by themselves, a breach of contract, this court finds that the requirements under the ESA can be considered as a factor in the analysis of whether the suspensions were reasonable, which is a question of fact.[420]

Even more remarkably, for this holding, *Scott Timber* cited approvingly the very COFC decision later under review in *Precision Pine*.[421] Thus, on this crucial point, *Scott Timber* had actually sustained the ruling below in *Precision Pine*. But the panel reversed, without explanation or even acknowledgment of this extraordinary circumstance.

The *Precision Pine* panel also concluded that the duty was not violated because the contracting agency's action (or inaction) "did not reappropriate any 'benefit' guaranteed by the contracts," again relying on the *Centex* finding as a test under section 205.[422] Resistance to implied-in-law terms became apparent when the panel explained its "re-appropriation" requirement and cited the *Hercules* error:

> Although the implied duty of good faith and fair dealing attaches to every contract, *what* that duty entails depends in part on what the contract promises (or disclaims). Accordingly, we examine what the contracts say and the circumstances of this case. *See Hercules*, 516 U.S. at 424–25 . . . (explaining that a party asserting an implied warranty "must establish that, based on the circumstances at the time of contracting, there was an implied agreement between the parties to provide the undertakings the petitioners allege").[423]

Having ruled out any guarantee, the *Precision Pine* opinion concluded that "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract."[424] Put another way, this fundamental implied-in-law contract term, though present in "every contract," would have no force and effect without breach of a specific "undertaking" the government assented to in the express contract.

419. *Id.*
420. *Scott Timber I*, 333 F.3d 1358, 1369 (Fed. Cir. 2003).
421. *Id.* (citing *Precision Pine I*, 50 Fed. Cl. 35, 63 (2001) ("reliance on *Smithson* is misplaced")).
422. *Precision Pine II*, 596 F.3d at 829.
423. *Id.* at 830.
424. *Id.* at 831.

3. The Consequence of the *Hercules* Error

One can readily see that the DoJ combined the error in *Hercules* with the *Centex* findings of "specific targeting" and "re-appropriation," not expressly to eliminate the implied-in-law duty, but potentially to eviscerate it.

Precision Pine created an improbable and confused state of law for government contract trial forums and future Federal Circuit panels to ponder. If a breach depends on specific targeting to abrogate a specific bargained-for or agreed-to-expressly (or in fact) duty, one that passes the erroneous *Hercules* test, the implied-in-law duty is redundant and unnecessary.[425] *Precision Pine*'s redefinition cannot be squared with the "reasonableness" tests repeatedly applied in prior Court of Claims and Federal Circuit decisions establishing Tucker Act law.[426] There is no mention of "specific targeting," "reappropriation," "double-cross," or "bait-and-switch" in these prototypical and, one would have thought, binding precedents or in Restatement section 205, which instead cites violations of "community standards of decency, fairness or reasonableness."[427]

Based on this radical deviation from "classic" implied duty law, the DoJ pressed its *Precision Pine* advantage. The government's lawyers, as observed by the COFC in *Fireman's Fund Insurance Co. v. United States*, "trumpeted" the *Precision Pine* decision "as a *deus ex machina*" allowing escape from "all claims involving Government-caused delay."[428] This refrain has been given a mixed reception at the COFC. For example, in *Fireman's Fund*, the court, "mindful that the precedent of the Federal Circuit governs," concluded that "*Precision Pine* does not foreclose consideration of whether the Corps breached its contractual duty of good faith and fair dealing based on the standards set forth in *Malone* and its progeny . . . the facts giving rise to *Precision Pine*'s holding are sufficiently distinguishable from this case."[429] Other COFC decisions have hewed to the *Precision Pine* redefinition. For example, in *Metcalf Construction Co., Inc. v. United States*, involving allegedly unreasonable government administration of a contract to build military housing, the COFC rejected breach claims lacking proof that the gov-

425. *See* RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. b (1981) ("Non-performance of a duty . . . is imposed by a promise stated in the agreement *or* by a term supplied by the court (§ 204), as in the case of the duty of good faith and fair dealing (§ 205).") (emphasis added).

426. *See, e.g.*, C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1542 (Fed. Cir. 1993) ("avoid actions that unreasonably cause delay"). *See generally* Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (interference with other party's performance violates obligation of good faith); Essex Electro Eng'rs v. United States, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (not "do anything that will hinder or delay the other party in performance"); Peter Kiewit Sons' Co. v. United States, 138 Ct. Cl. 668, 674–75 (1957) (not "willfully or negligently interfere" with contractor's performance); Kehm Corp. v. United States, 93 F. Supp. 620, 623 (1950); George H. Fuller Co. v. United States, 69 F. Supp. 409, 412 (Ct. Cl. 1947) (government is liable for delays caused by it even in the absence of an express contract clause); United States v. Speed, 75 U.S. 77 (1868) (*see* discussion *supra* Part IV.B.2).

427. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

428. 92 Fed. Cl. 598, 676 (2010).

429. *Id.* at 678.

ernment actions or inactions were specifically designed to reappropriate benefits promised by the contract.[430]

This precedential confusion surfaced at the Federal Circuit when another *Scott Timber* case came before a panel of the court. *Scott Timber II* involved different timber sales but, like *Scott Timber I*, arose from Forest Service resistance to ESA requirements that precipitated an injunction and protracted suspension of harvesting.[431] As noted previously, *Scott Timber I* held that the implied duty was breached by an "unreasonable" suspension and that the Forest Service's failure to perform its statutory obligations, while not itself a contract breach, should be considered in the "reasonableness" analysis of the government's delay of contract performance.[432] Disregarding this precedent, the *Scott Timber II* panel majority ruled that the "issue is directly controlled by *Precision Pine* & *Timber*."[433]

A dissenter called out the majority on the irreconcilability of *Precision Pine* and *Scott Timber I*: "[b]oth *Scott I* and *Precision Pine* articulate a standard to be applied with regards to the implied duty of good faith and fair dealing in the context of the relevant contract provision, and the two are squarely opposed."[434] The panel majority contended that the precedents were "easily reconcilable" because *Scott Timber I*'s suspension came after the court order had "expired," and thereafter was continued to prevent "environmental degradation," whereas *Precision Pine*'s suspension was pursuant to court order.[435] The majority contrasted *Scott Timber II*:

> Significantly, here, as in *Precision Pine*, the obligation to comply with the injunction is not owed to the timber company but to the court that issued the injunction and the party that sought the injunction. There is no basis for redefining the concept of good faith and fair dealing to include a requirement of diligence in complying with obligations imposed by another tribunal in a separate case.[436]

The dissenter rejected this as "a distinction without a difference" because the contracting agency was "required by statute to suspend affected timber sales" for environmental causes, whether by court order or not.[437] In fact, the majority's distinction had an additional flaw: the injunction in *Scott Timber I* had

430. 107 Fed. Cl. 786, 793–95 (2012).

431. *See generally* Scott Timber Co. v. United States (*Scott Timber II*), 692 F.3d 1365 (Fed. Cir. 2012).

432. *Scott Timber I*, 333 F.3d 1358, 1369 (Fed. Cir. 2003).

433. *Scott Timber II*, 692 F.3d at 1374.

434. *Id.* at 1381 (Wallach, J., dissenting).

435. *Id.* at 1375 & n.4 (majority op.).

436. *Id.* at 1375.

437. *Id.* at 1381 (Wallach, J., dissenting). "[T]herefore this court should take the case en banc to resolve the conflict the two cases present or the panel should hold that *Scott I* is the earlier, and therefore precedential, decision over *Precision Pine*." *Id.* at 1379. Judge Wallach, a recent appointee, cited the court's rule of precedence. *Id.* at 1382 n.5 (citing Newell Cos. Inc. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988) ("[P]rior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *[e]n banc*."); *see also* Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1309 (Fed. Cir. 2008) (prior panel precedent cannot be overruled or avoided except en banc)).

hardly "expired"; it had been replaced by the Forest Service's representation to the district court that harvesting would be suspended pending completion of the required ESA consultations.[438] Despite the dissent, the Federal Circuit declined to rehear *Scott Timber II* en banc,[439] and so the ambiguity persisted.

The majority's distinction, by placing the "specific targeting" requirement in the context of the court order, appeared to suggest that *Precision Pine*'s reach might be limited. However, when, in the next chapter of this extraordinary history, the appeal from the COFC decision in *Metcalf Construction* surfaced before another panel of the Federal Circuit,[440] the government's lawyers were not ready to accept that suggestion. Undeterred, the DoJ, citing *Hercules*, *Agredano*, *Centex*, and *Malone*, insisted that "[t]his Court's decision in *Precision Pine* did not work a fundamental change in contract law. . . . On the contrary, *Precision Pine* is based on long-established principles of contract law regarding implied duties."[441] The government's brief continued, focusing on the *Centex* standard: "[r]ecognizing that *Centex* articulated the appropriate standard for determining whether Government conduct violates the implied duty of good faith and fair dealing, this Court has applied that standard in other cases, such as *Precision Pine* and *Scott Timber*."[442] The government also rejected "Metcalf's contention that the appropriate standard is based upon the facts of a particular case" and expediently dropped its advocacy of *Hercules*'s barring of implied-in-law terms, by stating that

> the facts of a particular case do not mandate the use of a different standard for determining a breach of the implied duty of good faith and fair dealing, which is *a doctrine of the common law of contracts*. It is axiomatic that precedent "need not be directly on point, but must provide a '*governing legal principle*' and articulate specific considerations for lower courts to follow when applying the [relevant] precedent."[443]

Centex and *Precision Pine* were to be "followed," not caveated by factual implication.

The Federal Circuit panel in *Metcalf* took a different view of these precedents. However, the *Metcalf* panel did not address whether *Precision Pine* was erroneous. Instead, unlike the government and the COFC, the panel did not read *Precision Pine* as "impos[ing] a specific-targeting requirement applicable across the board or in this case."[444] To limit *Precision Pine*, the *Metcalf* panel jettisoned some of its broad language:

438. *See Scott Timber I*, 333 F.3d 1358, 1361 (Fed. Cir. 2003); Scott Timber Co. v. United States, 40 Fed. Cl. 492, 496 (Fed. Cl. 1998) (Forest Service "representation to the court").

439. *Scott Timber II*, 692 F.3d at 1382.

440. *See generally* Metcalf Constr. Co. v. United States, 742 F.3d 984 (Fed. Cir. 2014).

441. Brief of Defendant-Appellee at 23, Metcalf Constr. Co., Inc. v. United States, 742 F.3d 984 (Fed. Cir. 2014) (No. 2013-5041).

442. *Id.* at 24. The government's reference was to *Scott Timber II*; the brief did not acknowledge *Scott Timber I*.

443. *Id.* (emphasis added).

444. *Metcalf Constr. Co.*, 742 F.3d at 993.

> The trial court misread *Precision Pine*. . . . The passage cited by the trial court, after saying as a descriptive matter that cases of breach "typically involve some variation on the old bait-and-switch" . . . says that the government "*may* be liable"—not that it is liable *only*—where a subsequent government action is "specifically designed to reappropriate the benefits the other party expected to obtain from the transaction."[445]

Thus, *Metcalf* explained, *Precision Pine* did not hold that "proof of specific targeting was a requirement for a showing of breach"—what it said applied "in that case" "where the challenged conduct" involved enforcement and compliance with the injunction.[446] *Metcalf* further explained that a "specific targeting" test was required because the suspension clause, including specifically the court-order provision, meant there was no guarantee of uninterrupted performance, presenting a "context in which the more general bargain-impairment grounds for breach of the duty were unavailable."[447] *Metcalf* observed that the injunction presented a "kind of dual-authority circumstance."[448]

The *Metcalf* panel also rejected the "reappropriation" standard that the government drew "from another statement in *Precision Pine*—that the duty 'cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions.' "[449] In a "valiant effort to parse" this language,[450] the *Metcalf* panel, recognizing that "in one sense any 'implied' duty 'expands' the 'express' duties," held that the *Precision Pine* "formulation" means simply that "[t]he implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value."[451] As interpreted, *Precision Pine* meant no more than the Restatement section 205 formulations that capture the duty's focus on "faithfulness to any agreed common purpose and consistency with the justified expectations of the other party."[452] This standard, not the specific terms agreed to, "helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance"; some conduct, such as the "subterfuges and evasions" in *Malone*, "may require little reference to the particular contract."[453] Thus, *Metcalf* held that the government's "more constraining" (though plain) reading of *Precision*

445. *Id.* A leading observer commented that "this parsing of *Precision Pine* is overly generous in giving credence to language of the panel that wrote that decision, which clearly misstates prior law." Ralph C. Nash Jr., *Postscript V: Breach of the Duty of Good Faith and Fair Dealing*, 28 NASH & CIBINIC REP. ¶ 16 (Mar. 2014) [hereinafter *Postscript V*].
446. *Metcalf Constr. Co.*, 742 F.3d at 993.
447. *Id.*
448. *Id.*
449. *Id.* at 993–94.
450. *Postscript V*, *supra* note 445, at 47.
451. *Metcalf Constr. Co.*, 742 F.3d at 991.
452. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).
453. *Metcalf Constr. Co.*, 742 F.3d at 985, 991.

Pine that "there was no breach of the implied duty because 'Metcalf cannot identify a contract provision that the Navy's inspection process violated' . . . goes too far: a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract."[454]

The *Metcalf* decision came as a relief to many Federal Circuit observers. As a leading commentator stated, *Metcalf* "clarified the law that had been muddied by prior decisions and restores the implied duty of good faith and fair dealing to the central place it has held in the contracting process."[455] However, although the *Metcalf* decision confined *Precision Pine*, it also left that questionable precedent standing. This was understandable because, to resolve the *Metcalf* case, it was not necessary to confront and correct *Precision Pine*, only to limit its implications. Moreover, under the court rules, the *Metcalf* panel was bound by prior panel precedent.[456] Similarly, the *Metcalf* panel chose not to referee the disagreement within the *Scott Timber II* panel about the reconcilability of *Scott Timber I* and *Precision Pine*, accepting the majority's "court-order" distinction in a brief footnote without testing it.[457] For the *Metcalf* panel, the better part of valor was containment of *Precision Pine* with a reading that explained it as an exception to the "general standards."[458] Unfortunately, this did not eliminate all the confusion created by *Precision Pine*. The *Metcalf* construct contained, but also in a sense justified, *Precision Pine*, leaving some loose and ambiguous ends, including its reliance on the *Hercules* error to limit the implied-in-law duties.

To begin with, *Precision Pine*'s "specific targeting" and "reappropriation" tests were justified in part because "'the contracts expressly qualified' the benefit of timber harvesting," giving "no guarantee that . . . performance would proceed uninterrupted."[459] But the same could be said of any contract with a suspension clause. And a similar rationale could apply to any provision that gives the government discretion to affect contract terms, a circumstance explicitly covered by the Restatement: such a power eliminates any "guarantee," but under section 205 an abuse of it is a breach of the implied-in-law duty.[460] This justification for *Precision Pine* may, in the absence of a specific undertaking, discard the justified expectation that a party will not exercise its contractual discretion unreasonably.

The *Metcalf* construct turns to the particular "court order" subparagraph of the suspension clause, which "made clear that the contract bargain did not include limits on the timing of the government's compliance with an

454. *Id.* at 994.

455. *Postscript V*, *supra* note 445, at 48.

456. *See* FED. R. APP. P. 35(a). *See generally* James J. Gallagher et al., *En Banc Consideration of Government Contract Issues at the U.S. Court of Appeals for the Federal Circuit*, 42 PUB. CONT. L.J. 107 (2012).

457. *Metcalf Constr. Co.*, 742 F.3d at 992 n.1.

458. *See id.*

459. *Id.* at 991–92 (quoting *Precision Pine II*, 596 F.3d 817, 829 (Fed. Cir. 2010)).

460. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981) ("abuse of a power to specify terms").

obligation imposed by the court."[461] *Metcalf* describes the court-order clause as involving "the kind of dual-authority circumstances that gave rise to the 'specifically targeted' formulation . . . in *Precision Pine*."[462] This "protects against use of the implied contract duty to trench on the authority of other government entities or on responsibilities imposed on the contracting agency independent of contracts."[463] But the allegations in these timber sale contracts (and the facts found by the COFC) focus on the contracting agency's failures to meet those responsibilities, which precipitated as well as protracted the injunctions.[464] The *Metcalf* rationale does not look behind the court order to determine its causes.

One has to question whether *Metcalf*'s "dual authority" rationale for *Precision Pine* vitiates the implied-in-law duty where the contract performance is delayed by the contracting agency's lack of diligence or willful disregard of statutory obligations. A contracting agency's failure to comply with statutory obligations is hardly "an exercise of sovereign power," and remedying its contractual impact would not seem to trench on those responsibilities or the authority of other sovereign agencies, only on the failure to meet the requirements. Conscientious, regular observation of statutory duties, often presumed by the courts,[465] would seem to be a "justified expectation" of contractual parties under the implied-in-law duty.[466]

Moreover, *Metcalf*'s finesse of the precedential issue between *Scott Timber I* and *Precision Pine* amplifies the ambiguity whether the "dual-authority circumstances" extend to delays caused by a contracting agency's violation of, rather than its compliance with, "responsibilities imposed on the contracting agency independent of contracts."[467] In *Precision Pine*, the government argued to the COFC that, absent a contractual guarantee of compliance, a contract delay caused by the contracting agency's statutory violation was not remediable. The COFC rejected this argument by holding that such a violation should appropriately be taken into account in applying the general standard of reasonableness under the implied-in-law duty.[468] In *Scott Timber I*, a Federal Circuit panel took the same position, relying explicitly on the COFC decision in *Precision Pine*.[469] Subsequently, in a dubious turn of events, the Federal Circuit panel in *Precision Pine* reversed, finding no contractual guarantee of compliance and imposing the "specific targeting" and

461. *See Metcalf Constr. Co.*, 742 F.3d at 992.
462. *Id.* at 993.
463. *Id.*
464. *See Precision Pine II*, 596 F.3d at 823.
465. *See, e.g.*, United States v. Chem. Found., 272 U.S. 1, 14–15 (1926) ("[P]resumption of regularity supports the official acts of public officers and . . . courts presume that they have properly discharged their official duties.").
466. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).
467. *Metcalf Constr. Co.*, 742 F.3d at 993.
468. *Precision Pine I*, 50 Fed. Cl. 35, 54–57, 63 (2001).
469. *See Scott Timber I*, 333 F.3d 1358, 1369 (Fed. Cir. 2003).

"reappropriation" requirements, while relying on *Hercules* for support.[470] *Metcalf* fails to address this extraordinary conflict in the precedents.

Metcalf notes with apparent approval that "*Precision Pine* borrowed its reference to specific targeting" from *Centex* but does not also note that the complaint in *Centex* was about *compliance* with, not noncompliance with, "responsibilities imposed" by Congress.[471] Nor does *Metcalf* examine or clarify whether, as *Centex*'s plain language seems to state, the *Centex* panel intended and used the "specific targeting" and "reappropriat[ion]" standards only to reject the government's sovereign defense, not to determine whether there was a breach of the duty of good faith and fair dealing.[472] If this was the thinking of the *Centex* panel, *Precision Pine*'s "borrowing" was a misappropriation. *Metcalf*'s construct for containing but justifying *Precision Pine* begs this question and at the same time remands Metcalf's claim for reconsideration under "the familiar broader standards reflected in the passages from *Centex* and *Malone*."[473]

The panel-dependent twists and turns of these five Federal Circuit decisions—*Scott Timber I*, *Centex*, *Precision Pine*, *Scott Timber II*, and *Metcalf*—have subjected the implied-in-law duty of good faith and fair dealing to an odyssey of sorts. There is little overlap of judges in the five panels, so it is difficult to anticipate how the en banc court, unbound by prior panel decisions, would resolve their differences.[474] The only significant indicator is that the author of the *Centex* decision, the odyssey's source, also joined in *Scott Timber I*, which suggests that the *Centex* panel did not intend the "borrowing" in *Precision Pine*.[475]

Even so, the Federal Circuit judges, in the interest of comity within the court, might be content to leave the *Metcalf* compromise—containment but justification of *Precision Pine*—in place.[476] It is predictable, however, that in an en banc proceeding (or should "dual authority" ambiguities

470. *Precision Pine II*, 596 F.3d 817, 829 (Fed. Cir. 2010).

471. *Metcalf Constr. Co.*, 742 F.3d at 993.

472. *See* Centex Corp. v. United States, 395 F.3d 1283, 1311 (Fed. Cir. 2005) ("[T]he government action . . . did not involve the exercise of a sovereign power, because it was designed specifically to allow the government to reappropriate the profits that the plaintiff expected to obtain from the acquisition transaction, thereby abrogating the government's obligations under the contract.").

473. *Metcalf Constr. Co.*, 742 F.3d at 994.

474. *See* Ralph C. Nash, *The Express/Implied Contract Relationship: What Is the Rule?*, 28 NASH & CIBINIC REP. ¶ 25 (May 2014) (suggesting that these cases and others are "Crying for an En Banc Decision"). Professor Nash adds *Bell/Heery*, *a Joint Venture v. United States*, 739 F.3d 1324 (Fed. Cir. 2014), and *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168 (Fed. Cir. 2014), to the decisions offering different articulations of the *Precision Pine* "reappropriation" test. Nash, *supra*.

475. *See Centex Corp.*, 395 F.3d at 1287 (authored by Judge Bryson); *Scott Timber I*, 333 F.3d 1358, 1360 (Fed. Cir. 2003) (joined by Judge Bryson).

476. For an interesting article on the problematic "panel-dependency" of decision making at the Federal Circuit and "the premium on cooperative behavior amongst the judges," which discourages en banc review, see Jeremy W. Bock, *Restructuring the Federal Circuit*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 197, 222 (2014). While this article focuses on patent decisions at the Federal Circuit, it may also have relevance to contract decisions.

arise before future panels), there would be disagreement, and the erroneous *Hercules* decision would continue to confuse the issue.

VII. CONCLUSION: WHAT MIGHT BE DONE ABOUT THE *HERCULES* ERROR

It would have been better had Chief Justice Rehnquist and his colleagues denied the Agent Orange contractors' claims on a basis less disruptive of Tucker Act jurisdiction and law. The Supreme Court might have, for example, relied on the government contractor defense established in *Boyle v. United Technologies*[477] to rule that, because the law provides government contractors protection from third-party liability, there was no basis for an implied-in-law damages remedy.[478]

A resolution on a narrower, more case-specific basis would not have threatened the law of federal contracts as have *Hercules*'s error and its attendant instructions and admonitions. The prohibition against implied-in-law terms in actual contracts is contrary to the Tucker Act's plain language and to precedents, understandings, and practice long observed under the Act, indeed to this day. *Hercules* sprung it after over a century of Tucker Act precedents implying terms of law. The instruction that the "circumstances of the contracting" are only "relevant" if they "help us deduce what the parties to the contract agreed to in fact" blindfolds judges from considering evidence of community standards, reasonable conduct, and justified expectations.[479] *Hercules*'s concluding admonition against entertaining "simple fairness" and "equitable considerations" shuts out factors that inhere in contract law.[480] These are strange messages *Hercules* sends to courts long thought to be responsible for the "conscience" of the government.[481]

It is also a curious part of this history that *Hercules* declared these constraints on the exercise of Tucker Act jurisdiction in the same Supreme Court term as the *Winstar* decision. This contemporaneous decision reaffirmed the existing principle of many prior precedents that the government, as a contracting party, is accountable under the law of contracts, just as a private citizen would be. *Hercules* and *Winstar* plainly conflict on this fundamental point.

It may well be unlikely that this conflict between *Hercules* and *Winstar*—or the error in *Hercules*—will be squarely addressed or resolved. The *Hercules*

477. 487 U.S. 500, 512 (1988).

478. The Federal Circuit had taken the position that the availability of this defense cut off Hercules's possibility of proving causation of damages, even though *Boyle* was decided after the Agent Orange settlements. This was the issue on which certiorari was granted; however, the majority ignored it and resolved the merits, while the dissenters considered the Circuit's "causation" resolution as problematic "hindsight." Hercules, Inc. v. United States, 516 U.S. 417, 433–36 (1996).

479. *Id.* at 426, 429.

480. *Id.* at 430.

481. COWEN ET AL., *supra* note 1, at 171.

precedent may hang around and have an insidious effect, undermining the *Winstar* principle at the Federal Circuit. *Hercules* will be useful to the DoJ, as it has been, to create boundaries on government accountability by thwarting claims upon actual contracts based on standards of reasonableness, fairness, equitable considerations, and rules of law—all of which are underpinnings of contractual justice. This will place the burden of precedential ambiguity on the government contract trial forums, as well as Federal Circuit panels.

But this Article has not been written merely to describe this unfortunate situation and foresee this undesirable outcome. Its purpose is not only to expose as palpably erroneous the statement in *Hercules* that the Tucker Act jurisdictional bar of claims upon "contracts" implied-in-law extends to "[e]ach material term or contractual obligation, as well as the contract as a whole."[482] Nor is its purpose merely to expose this broad statement's incompatibility with the fundamental rule of contract law reaffirmed in the *Winstar* decision. So far, it appears that the error is putting the fundamental rule at risk. There is, of course, good reason simply to declare the language of the *Hercules* decision in error, but that may not be the way of the federal judicial system. However, a practical approach may be to put the decision in the context of prior and subsequent Supreme Court decisions, and, in that way, limit the precedential effect of its language.

Hercules's language should be read in combination with prior Supreme Court precedents, which it does not profess to overturn.[483] As early as 1876, the Supreme Court spelled out clearly that "[t]he United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."[484] The *Hercules* language must also be measured by subsequent Supreme Court decisions. Within eight months of the *Hercules* decision, the Supreme Court reaffirmed the principle of government accountability under contract law in *Winstar*.[485] In addition, Chief Justice Rehnquist's dissent, based on *Hercules*'s language barring implied-in-law terms, was rejected—indeed, explicitly brushed aside in the principal opinion.[486] *Winstar*'s endorsement of the conflicting principle and these accompanying comments suggest strongly that the purported *Hercules* concept that implied-in-law

482. *Hercules, Inc.*, 516 U.S. at 423.

483. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134, 138 (2008), the Supreme Court limited the effect of language in *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002), dealing with the Tucker Act statute of limitations, in favor of the "older" interpretation in *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887). The Court declined "to reject or overturn" these nineteenth-century decisions, not wishing to "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." *John R. Sand & Gravel Co.*, 552 U.S. at 138–39.

484. United States v. Bostwick, 94 U.S. 53, 66 (1876).

485. *See* United States v. Winstar Corp., 518 U.S. 839, 840 (1996).

486. *Id.* at 884–86 (Rehnquist, C.J., dissenting).

terms may not be entertained was not considered a binding or encompassing limit of Tucker Act contract jurisdiction. It is also relevant that, in practice before the Federal Circuit subsequent to *Hercules*, the government has acknowledged implied-in-law terms and has been held accountable under them.[487]

To harmonize the Supreme Court precedents, the *Hercules* language might be given a construction limited to its unusual circumstances—that the Agent Orange contractors' claims posed extraordinary, undefined risks to the public fisc and raised Anti-Deficiency Act issues.[488] This construction would square the *Hercules* language with the sole Supreme Court precedent cited in support, *Sutton v. United States*,[489] and would preclude consideration of an implied-in-law term only where it would conflict with "a paramount law of the United States."[490] Otherwise, the language—taken literally and out of context—threatens to re-immunize the sovereign from the operation of contract law.

Responsibility for addressing and repairing this fracture in Tucker Act law lies with the en banc Federal Circuit. It is true that the court's panels have been slow to come to grips with the *Winstar* principle,[491] but that foundational principle is under "assault" by the government's lawyers based on the *Hercules* error, and something must be done to defend it.

Some hope may be derived from the Federal Circuit's en banc action in throwing out as erroneous the long-standing but unjust rule barring Tucker Act jurisdiction of cases involving certain Non-Appropriated Fund Instrumentalities (NAFIs).[492] The court abrogated this rule even though it had passed both congressional and Supreme Court review without revision and had been in place for over sixty years.[493] The *Hercules/Winstar* tension should be easier to remedy as it only requires review and sorting out of an isolated and conspicuous anomaly in the Supreme Court's Tucker Act precedents, not the overturning of a rule consistently applied for decades, accomplished in *Slattery*. Such harmonizing is more compelling because, whereas

487. *See, e.g.*, Metcalf Constr. Co. v. United States, 742 F.3d 984, 993 (Fed. Cir. 2014); Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005).

488. Hercules, Inc. v. United States, 516 U.S. 417, 427–29 (1996).

489. *Id.* at 423 (citing Sutton v. United States, 256 U.S. 575, 580–81 (1921)).

490. *See* Goodyear Tire & Rubber Co., Inc. v. United States, 276 U.S. 287, 294 (1928) (Holmes, J., dissenting).

491. *See, e.g.*, W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 PUB. CONT. L.J. 677, 678–79, 688, 703, 705 (2003) (discussing four decisions); Nibley & Totman, *supra* note 379, at 25; Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 686 (2012); Frederick W. Claybrook Jr., *It's Patent That "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What* Phillips *Portends for Contract Interpretation*, 16 FED. CIR. B.J. 91, 120–21 (2006).

492. *See* Slattery v. United States, 635 F.3d 1298, 1321 (Fed. Cir. 2011); *see also* W. Stanfield Johnson, *The Federal Circuit's Abrogation of the NAFI Doctrine: An En Banc Message with Implications for Other Jurisdictional Challenges?*, 42 PUB. CONT. L.J. 43, 44–45 (2012).

493. Johnson, *supra* note 492, at 44.

the NAFI issue involved a limited class of cases, the issue posed by the *Hercules* error potentially affects the core of the Tucker Act contract jurisdiction and jurisprudence.

Authority for restraining *Hercules* may be gained from the same Supreme Court principles relied on in *Slattery*. In *United States v. Mitchell*, the Court observed that "[g]overnment liability in contract is viewed as perhaps 'the widest and most unequivocal waiver of federal immunity from suit'"[494]—an observation that contrasts with Chief Justice Rehnquist's concluding apology that "we are constrained by our limited jurisdiction."[495] The Federal Circuit's extraordinary en banc action in *Slattery* rested on this rule drawn from *Mitchell*: "[w]e affirm the guidance of *Mitchell* . . . that '[i]f a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit'; exceptions require an unambiguous statement by Congress."[496] There is no "unambiguous statement" in the Tucker Act barring implied-in-law terms in "contracts" within its jurisdictional grant.

If the judges of the Federal Circuit are true to their en banc affirmation of the Supreme Court decision in *Mitchell*, they will be able to protect Tucker Act law from the potential consequences of the conspicuous error in *Hercules v. United States*.

494. 463 U.S. 206, 215 (1983).

495. Hercules, Inc. v. United States, 516 U.S. 417, 430 (1996).

496. *Slattery*, 635 F.3d at 1320–21 (citing Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019 (1984)) (requiring "'[an] unambiguous intention to withdraw the Tucker Act remedy'")).