Note

Deena B. Bothello*

An Unequal Balance: Repudiation and Restitution in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*

In its decisions over the last several years, the United States Supreme Court has demonstrated an increasingly pronounced preference for protecting large-scale corporate financial interests. Employing such tools as a formalistic interpretation of contract law, and strict, narrow construction of contract language, the Court has sought to create a business arena in which financial expectations are certain and actors' preferences remain static. By redefining and reshaping existing contract law, the Court is actively altering both the environment in which transactions are perpetuated and the rights of those who are attempting to formalize their agreements.

The Court continues this trend in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*.[1] A decision expanding the availability of restitution, limiting the opportunity to raise a waiver defense, and redefining what constitutes action on the contract when the government is a contracting party. This Note examines *Mobil*, and the important implications arising from it. Part I recounts the essential facts of the case, describes

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* J.D., University of Oregon School of Law, 2002. Managing Editor, *Oregon Law Review,* 2001-2002. The author wishes to thank Professor Ralph James Mooney for his guidance with the article and for his mentorship throughout law school. The author also would like to thank her parents, Dean and Marsha Bothello, for their continued enthusiasm, understanding, and support.

[1] 530 U.S. 604 (2000).

the relevant contract law principles, and sets forth the Court's holding and rationale. Part II discusses the implications that arise from the alteration of established contract principles and from the expansion of actions affecting a contract. The Note concludes by addressing the long-term impact that a shift in doctrine will entail and by pointing to the potential transformation of law suggested by the decision.

I

THE MECHANICS OF *MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC. V. UNITED STATES*

A. The Facts

In 1981, two oil companies, Mobil Oil Southeast (Mobil) and Marathon Oil Company (Marathon) contracted with the United States government for renewable ten-year mineral exploration leases off the North Carolina coast.[2] In exchange for the leases, the companies paid $158 million in cash bonus payments, in addition to annual rental payments of approximately $250,000 per year.[3] The companies were allowed to develop any oil they found, with the government receiving development royalties. The leases were subject to existing statutes and regulations placing certain limitations on exploration and development.

Two laws in particular, the Outer Continental Shelf Lands Act (OCSLA)[4] and the Coastal Zone Management Act of 1972 (CZMA),[5] placed considerable restrictions on obtaining permission to explore and develop the area in question. Of particular relevance to the case was the requirement that the Department of the Interior must approve the companies' exploration plan within thirty days of submission.[6] Additionally, the state affected by the oil exploration had the right to object to the exploration plan, enacting additional statutory mechanisms for approval.[7]

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[2] *Id.* at 607.

[3] *Id.* at 609. The Court's description of the facts includes a discrepancy as to the actual amount of the up-front payment. The amount first appears as $156 million. Each subsequent reference is $158 million.

[4] 43 U.S.C. §§ 1331-1356 (1994 & Supp. III 1997).

[5] 16 U.S.C. §§ 1451-1465 (1994 & Supp. IV 1998).

[6] *Mobil*, 530 U.S. at 610.

[7] *Id.* The statutes place four primary restrictions on the contracted activity. First, the companies must submit, and the Department of Interior must approve, an exploration plan. The Interior can deny the plan if it finds that the plan would cause

In 1989, seven years after initially entering into the lease contracts, Mobil and Marathon created a memorandum of understanding in which they agreed to submit an initial draft of their exploration plan to the state and the Department of the Interior (the Interior).[8] The Interior promised that it would prepare an environmental report based on this draft and would suspend the annual lease payments until any state objections were overcome and the exploration plan finalized.[9] Ten months after receiving the initial draft, the Interior concluded that the companies' exploration plan would not have a significant environmental effect on marine or human life.[10] Thus, on August 20, 1990, both companies submitted their final exploration plan to the Interior.[11]

Two days earlier, on August 18, 1990, Congress enacted the Outer Banks Protection Act (OBPA) which prohibited the Interior from approving any exploration plan until four additional requirements were met.[12] Among these terms included a requirement that a newly formed review panel approve the plan and a prohibition against the approval of any new plans until October of 1991.[13]

Five weeks after the companies submitted their exploration plans, the Interior informed the state and the companies via letter that the exploration plan was "approvable in all respects."[14] The Interior's approval stated that the plan fully complied with the law and had only negligible effects on the environment.[15]

serious harm to life, property, the marine environment, or national security. The Interior must act on the plan within thirty days. Secondly, the companies must certify that their exploration plan is consistent with the coastal zone management program of each affected state, in order to obtain an exploratory well drilling permit. Three superceding bodies have authority to deny the permit under these conditions: the affected state, the Secretary of Commerce, and finally, the Interior. Thirdly, the companies must obtain a special permit if waste will be discharged into the ocean. Finally, upon successful exploration, the companies must obtain a development plan which is subject to the same approval hierarchy described above. *Id*. at 609-10.

[8] *Id.* at 611.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990) (repealed 1996).

[13] *Id.* The statute imposed four new requirements on exploratory activity. The statute created a review panel reporting to the Secretary of the Interior, the Secretary had to certify to Congress that he was adequately informed to make a decision regarding approval, Congress had to be in session for forty-five days before any plan could be approved, and no plan could be awarded until October 1991. *Id*.

[14] *Mobil*, 530 U.S. at 612.

[15] *Id.*

However, the Interior's letter cited the OBPA as prohibiting the Interior from officially granting approval of any exploration plan at that time.[16] Thus, it informed the companies that it would suspend the leases and retain the plan on file until the OBPA requirements were met.[17]

In November of 1990, the state objected to the companies' plan, citing insufficient information regarding the potential environmental impact of the exploration.[18] One month later, the companies requested that the Secretary of Commerce override the state's objection.[19] Eighteen months after the Interior suspended the leases, the Secretary of the Interior certified that he had adequate information to rule on the plans, but could not proceed further until the new panel submitted its recommendation.[20]

In October of 1992, the companies brought a breach of contract suit against the federal government, alleging the government repudiated its lease contracts by delaying its permission for the companies to begin oil exploration.[21] The Court of Federal Claims found for the oil companies, ruling that the government breached its general contractual obligation to follow the provisions of OCSLA and its specific obligation to approve an exploration plan within thirty days of its submission.[22] The court found that this action amounted to repudiation, entitling the companies to restitution. In addition, the court ordered a refund of the upfront cash payment the companies made to the government.[23] The Court of Appeals for the Federal Circuit reversed, holding that the state's objection to the companies' plan would have prevented exploration; the government's ultimate refusal and delay in considering the final plan, therefore, was not the cause of any failure to carry out the terms of the contract.[24] The Supreme Court granted certiorari to review the decision of the

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[16] *Id.*

[17] *Id.* at 612-13.

[18] *Id.* at 613.

[19] *Id.*

[20] *Id.* The review panel did not rule until 1994, finding inadequate information regarding specific environmental concerns. At that time, the Secretary of Commerce rejected the companies' override request and upheld North Carolina's objection. *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 613-14.

[24] *Id.* at 614.

Federal Circuit.[25]

B. Background Law

Contract law that governs contractual relationships between private individuals also defines the United States' rights and duties when it enters into a contractual obligation.[26] Thus, all pertinent common law doctrines and Restatements apply when analyzing the federal government's obligations as a contracting party.

Repudiation consists of an unequivocal indication by the repudiating party that it intends not to perform its contractual obligations.[27] It is a "statement of intention by the repudiator . . . as to what he will and will not do without regard to any acceptance or expression of will by the other party."[28] Repudiation is not an offer to make or rescind a contract.[29] Mere inaction does not constitute repudiation.[30] Further, repudiation does not occur if the promisor validly terminates the contract upon the occurrence of certain circumstances.[31] Unlike waiver, in which a party voluntarily relinquishes a known right, repudiation entails voluntarily committing an anticipatory breach.[32]

Repudiation of a contract may occur in two ways. First, a promisor can state to the promisee that it will commit a type of breach that would allow the promisee to bring a claim for total breach.[33] Alternatively, repudiation can occur through a "voluntary affirmative act" which renders the promisor either actually or apparently unable to perform without committing this type of breach.[34] For a statement to constitute repudiation, it must be "sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform."[35] An expression of doubt is not sufficient to constitute repudiation.[36] The promisor's

[25] *Id.*

[26] United States v. Winstar Corp., 518 U.S. 839, 895 (1996).

[27] 13 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON § 39:40 (4th ed. 2000) [hereinafter WILLISTON].

[28] 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1105 (1964).

[29] *Id.*

[30] WILLISTON, *supra* note 27, § 39:40.

[31] *Id.*

[32] *Id.* § 39:38.

[33] RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981).

[34] *Id.*

[35] *Id.* at cmt. b.

[36] *Id.*

repudiatory statement must be directed to a promisee of the contract.[37] If an injured party urges the repudiating party to continue to perform or to retract his repudiation, the legal effect of the repudiation does not change.[38]

Repudiation creates rights in the injured party to cease its own performance and to be compensated for the injury.[39] Repudiation may have three consequences: it excuses the non-occurrence of a condition, discharges duties under a contract, and allows for recovery of damages for total breach.[40] Repudiation only gives rise to damages for total breach if there is a breach with regard to the entirety of performance. A breach of partial performance would not give rise to such a remedy.[41]

Total breach only occurs if non-performance "so substantially impairs the value of the contract to the injured party at the time of the breach" as to allow the promisee to recover, in equity, damages based on its remaining rights to performance.[42] Corbin defines total breach as "a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end."[43] To determine if non-performance is so material as to constitute total breach, the court weighs the consequences in the specific case in light of the actual custom among contracting parties.[44]

Total breach gives rise to damages for all past, present, and future injuries.[45] When a breach occurs that entitles the injured party to damages for total breach, that party is entitled to restitution for any benefit it conferred upon the other party.[46] Repudiation allows for a restitution claim, even if it would not otherwise give rise to a claim of total breach.[47] Repudiation may result in the injured party refunding any money payments received.[48] Corbin notes that repudiation leads to the injured party's choice of remedy, either an action for actual damages resulting from

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[37] *Id.*
[38] RESTATEMENT (SECOND) OF CONTRACTS § 257 (1981).
[39] CORBIN, *supra* note 28, § 1105.
[40] RESTATEMENT (SECOND) OF CONTRACTS § 256 cmt. b. (1981).
[41] *Id.* § 243 cmt. b.
[42] *Id.* § 243.
[43] CORBIN, *supra* note 28, § 946.
[44] *Id.*
[45] *Id.*
[46] RESTATEMENT (SECOND) OF CONTRACTS § 373 (1981).
[47] *Id.* at cmt. a.
[48] CORBIN, *supra* note 28, § 1108.

non-performance or restitution for the amount of benefit conferred upon the repudiating party.[49]

An action for restitution arises from a material breach of such magnitude that it "would discharge the injured party from any further contractual duty on [its] own part."[50] Corbin notes that restitution "put[s] the injured party in as good a position as that occupied by [it] before the contract was made."[51] It serves to prevent one party from being unjustly enriched as a result of the breach. This contrasts with the recovery of contract damages, which results in putting the injured party where it would have been had the contract been fully performed.[52] Damages are meant to compensate for the equivalent of the promised performance whereas restitution is meant to repay monies rendered to restore the party to its previous legal position.[53]

A repudiation may be nullified if the injured party becomes aware that the statement constituting repudiation has been retracted.[54] A retraction must occur before the injured party changes its position in reliance on the repudiation, or before the injured party communicates that it believes the repudiation to be final.[55] If repudiation is nullified, the injured party may still bring an action for contract damages, although restitution may no longer be an available remedy.[56] Further, partial performance by the injured party affects the ability to recover restitution. If the injured party continues to perform duties on the contract after obtaining knowledge that the contract may be voidable on certain facts, that action affirms the contract and prevents recovery of a restitution award.[57]

C. Holding and Rationale

In an eight-to-one decision, the Supreme Court ruled that the government repudiated its contracts with Mobil and Marathon, and ordered the government to return the $158 million it had received under those contracts.[58] The Court stated that if the

[49] *Id.* § 1104.
[50] *Id.*
[51] *Id.* § 1107.
[52] *Id.*
[53] *Id*. § 990.
[54] RESTATEMENT (SECOND) OF CONTRACTS § 256 (1981).
[55] *Id.*
[56] *Id.* at cmt. a.
[57] RESTATEMENT (FIRST) OF RESTITUTION § 68 (1937).
[58] *Mobil*, 530 U.S. at 607.

government indicated it would break a promise under the contracts, through either words or actions, creating a substantial impairment of the contracts' value, then the government would be required to return all monies received, regardless of whether or not the contracts would have ultimately proved profitable to the companies.[59] The Court found that the passage of the intervening statute, OBPA, constituted a communication of intent to violate the contracts, and thus repudiated those contracts.[60] Further, the Court stated that incorporating the new statutes' procedures and requirements would substantially deprive the companies of the benefit of the contracts.[61] The Court also found that upon repudiation, restitution was the most appropriate remedy, thus entitling the companies to a refund of all monies paid on the contract.[62]

The majority addressed in turn each of the government's claims. In response to the claim that there was no breach of the lease contracts,[63] the Court pointed to the agreement's language stating that the contract was subject to OCSLA and all existing regulations concerning the statute, as well as "'all regulations issued . . . in the future which provide for the prevention of waste and the conservation' of Outer Continental Shelf resources, and 'all other applicable statutes and regulations.'"[64] The government claimed this provision gave it the authority to suspend the leases pursuant to a statutorily mandated delay.[65] The Court, however, rejected this argument. In construing the contract's language, the Court determined that because the contract specifically referenced existing regulations that were issued pursuant to OCSLA, then that same limitation must apply to any reference to future regulations.[66] Thus, the contract would not be subject to any future-enacted statutes or regulations unless they were passed directly pursuant to OCSLA, rendering it immune from OBPA.

As part of its argument, the government pointed to a regulation existing at the time of the contract, 30 CFR § 250.12(a)(iv),

59 *Id.* at 608.
60 *Id.* at 618.
61 *Id.*
62 *Id.*
63 *Id.* at 615.
64 *Id.*
65 *Id.*
66 *Id.* at 616.

which permitted the government to suspend leases for environmental analysis and which was passed pursuant to OCSLA.[67] However, the Court also dismissed this claim on policy grounds, seemingly in direct contradiction to the terms of the contract, stating that interpreting the regulation in this way would result in too far-reaching of an effect.[68] Through somewhat tenuous reasoning, the Court declared that incorporating authorized environmental analyses suspensions into future-enacted statutes would be too uncertain to enforce.[69] The Court stated that the contract language quoted above specifically excluded incorporation of any environmental analysis that would be required by future statutes, thus rendering the contracts impervious to OBPA.[70]

As a third argument within its no-contract-breach defense, the government looked to the language of OCSLA itself, which allows for the suspension of a lease "if there is a threat of serious, irreparable, or immediate harm or damage to life . . ., to property, to any mineral deposits . . ., or to the marine, coastal, or human environment."[71] The government claimed that this preexisting statutory term authorized a suspension of the lease contracts.[72] Rejecting this claim, the Court noted that the government's own letter to the companies asserted that the submitted exploration plan complied with all legal requirements.[73]

In concluding its discussion of the government's first claim, the Court addressed whether the requisite statements occurred to constitute a repudiation. It stated that enacted legislation is unequivocally a statement from the promisor to the promisee.[74] Even though legislation is addressed to the public at large, and repudiation requires a statement directed to the promisee, the Court notes that the promisee is a member of the public at large, and therefore included in the intended audience of the legislature's "statement."[75] Thus, when the federal government is a party to a contract, repudiation of that contract may rest on the enactment of new legislation.

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67 *Id.*
68 *Id.* at 616-17.
69 *Id.* at 617.
70 *Id.*
71 43 U.S.C. § 1334(a)(1) (1994).
72 *Mobil*, 530 U.S. at 616.
73 *Id.*
74 *Id.* at 619.
75 *Id.*

After finding that the government breached its contracts, the Court then addressed the government's second claim, that the breach was not material enough to constitute a repudiation. The government contended that the contract term requiring a thirty-day approval period for the exploration plan was not so essential a part of the agreement that lack of compliance amounted to material breach.[76] The Court responded, however, that the companies, as contracting parties, expected no significant deviation from the agreed upon terms.[77] Accordingly, the enjoyment of the rights flowing from the contract hinged upon compliance with the time limitation.[78] Violating such a limitation constituted breach of one of the contracts' material conditions, depriving the companies of their agreements' benefits.[79] Thus, the Court found that through legislation delaying the contracts' performance, the government issued a direct statement of intent to materially breach the contracts, resulting in a repudiation.[80]

The government's final two claims concerned the requested remedy. First, the government claimed that the companies waived their rights to restitution by continuing to perform under the contracts after the government repudiated.[81] In supporting its claim, the government pointed to three of the companies' acts: the companies submitted their final exploration plan two days after OBPA became law, the companies asked the government to overturn North Carolina's objection, and the companies received a suspension of the leases.[82] The Court dismisses the latter two actions as insufficient to amount to performance.[83] In addressing the fact that the plans were submitted after the new law was enacted, the Court attempted to clarify what performance is required to constitute a waiver. According to the Court, not only must the companies (the promisee) perform but the government (promisor) must perform as well.[84] Thus, following this reasoning, partial performance must be bilateral to constitute a waiver.

Finally, the government claimed that its repudiation of the

[76] *Id.* at 620.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 621.
[81] *Id.* at 621-22.
[82] *Id.* at 622.
[83] *Id.* at 623.
[84] *Id.*

contracts caused no actual damage.[85] The Court stated that actual damage is immaterial in the case of repudiation in that repudiation gives rise to the right to repayment of all monies transferred and does not measure actual damages on the contract.[86] Thus, the Court ordered a restitution award consisting of the entire $158 million paid to the government.[87]

Justice Stevens, the lone dissenter in the case, found that the government did breach its contractual obligation, but did not repudiate the contract.[88] He emphasized that the Court should consider the entire relationship of the contracting parties.[89] Stevens noted that the delay of approval did constitute breach, but that the risks of entering into the contract were abundantly apparent before the contract was formed.[90] He argued that the delay did not result in a total breach destroying the essence of the contract.[91] Stevens found little evidence of repudiation, noting that the leases were suspended and not cancelled, thus illustrating an expression of the government's intent to continue future performance of its obligation.[92] He was also persuaded by the companies' actions, in particular the submission of the plans *after* the offending legislation was enacted, to illustrate an absence of a full repudiation at the time of statutory enactment, the time the alleged statement would have occurred.[93] Thus, in the absence of a repudiation, Stevens maintained that the companies were entitled only to the contract damages caused by the delay in the exploration's implementation.[94]

Given that both sides' actions surrounding the alleged repudiation could indicate merely a breach of a contract term, Justice Stevens found the restitution remedy too generous.[95] Justice Stevens emphasized the equitable nature of restitution, stating that the Court should award restitution only if it is just to do so in light of the totality of the circumstances.[96] Here, given the com-

[85] *Id.* at 623-24.
[86] *Id.* at 624.
[87] *Id.*
[88] *Id.* at 624-25 (Stevens, J., dissenting).
[89] *Id.* at 625 (Stevens, J., dissenting).
[90] *Id.* at 626 (Stevens, J., dissenting).
[91] *Id.* at 636 (Stevens, J., dissenting).
[92] *Id.* (Stevens, J., dissenting).
[93] *Id.* at 632 (Stevens, J., dissenting).
[94] *Id.* at 625 (Stevens, J., dissenting).
[95] *Id.* at 639 (Stevens, J., dissenting).
[96] *Id.* at 630 (Stevens, J., dissenting).

panies' actions, the knowledge of the risk incurred, and the actual effect of extending the approval period beyond thirty days, Justice Stevens asserted that the most appropriate remedy was actual damages on the contract arising from the delay.[97]

II

IMPLICATIONS

Little commentary has yet appeared on *Mobil*, though it has been cited as an example of the Court's increasingly pro-business tenor[98] and its inability to adjudicate matters of environmental law correctly.[99] Likewise, few decisions have cited to it, although those that have rely upon the case as a fundamental axiom. The Court of Appeals for the Federal Circuit reversed a summary judgment ruling in the government's favor, finding that two military veterans were entitled to bring a breach of contract claim for free lifetime medical care.[100] The court cited *Mobil* as authority for its holding that the passage of a statute requiring the veterans to use Medicare was a breach of an implied-in-fact contract.[101] The Court of Federal Claims cited *Mobil* in *Glass v. United States*[102] for the theory that a party contracting with the government is entitled to restitution regardless of whether the government contract would have resulted in financial gain. In *Glass*, the court found that the government's passage of legislation that affected a mortgage corporation's ability to meet its regulatory capital requirements constituted a breach of a contractual promise.[103] More recently, the Court of Federal Claims, in finding in favor of the Alaska Pulp Corporation, again turned to *Mobil* for the proposition that the government may repudiate a contract via statute and that the contract's viability does not affect the government's liability for breach.[104]

The Court's rationale in *Mobil* subtly alters certain areas of

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[97] *Id.* at 639 (Stevens, J., dissenting).

[98] Barbara K. Bucholtz, *Private Sector Issues in a Public Sector Retro-lution: The Court's Business-Related Decisions in the October 1999 Term*, 36 TULSA L.J. 153 (2000).

[99] Robin Kundis Craig, Mobil Oil Exploration*, Environmental Protection, and Contract Repudiation: It's Time to Recognize the Public Trust in the Outer Continental Shelf*, 30 ENVTL. L. REP. 11104 (2000).

[100] Schism v. United States, 239 F.3d 1280, 1291 (Fed. Cir. 2001).

[101] *Id.* at 1290.

[102] 47 Fed. Cl. 316, 325 (2000).

[103] *Id.*

[104] Alaska Pulp Corp., Inc. v. United States, 48 Fed. Cl. 655, 659 (2001).

established contract law, redefining, in part, the principles of restitution and of partial performance constituting a waiver. The Court narrows the applicability of partial performance by imposing an additional requirement of bilateral performance. Further, the Court alters the function of the restitution remedy, with a more pronounced change in the balance of wealth distribution arising from its use. Additionally, the Court's rationale transforms the nature of the United States as a contracting party. By expanding what constitutes an action on the contract, the Court reconceptualizes the relationship between the government and the governed, impacting the very nature of law itself.

In *Mobil*, the Court alters the requirements for performance sufficient to reaffirm a contract and thus preclude the recovery of restitution. The Restatement of Restitution provides that "if *a person* continues to perform a contract after knowing facts which make it voidable, it would be inferred that he affirms the contract and hence . . . would not be entitled subsequently . . . to obtain restitution."[105] Likewise, bringing an action that is valid only if the transaction is binding also affirms a contract and prevents recovery of restitution. Thus, only unilateral action is required to reaffirm a contract; the action of one party is sufficient. However, the Court, in one sentence, seemingly redefines the nature of the action required by stating, "[t]he performance question, however, is not just about what the oil companies did or requested, but also about what they actually received from the Government."[106] Following this analysis, to successfully reaffirm a contract, action must be bilateral. Performance by one party is not enough to affirm a contract. Rather, an exchange of performance must ensue before a contract is affirmed and a restitution remedy precluded. The Court offers no apparent support or discussion for this change in doctrine, stating simply that it must be so.

By requiring bilateral performance to affirm a contract, the Court narrows the doctrine's potential applicability, hampering those seeking to repudiate a contract effectively. If a non-repudiating party continues to perform, rather than doing so at its own risk, it remains fully entitled to restitution so long as it does not inspire the repudiating party to, in fact, revoke its repudiation and resume actions on the contract. Therefore, unilateral per-

105 Restatement (First) of Restitution § 68 cmt. b. (1937) (emphasis added).
106 *Mobil*, 530 U.S. at 622.

formance is never sufficient to affirm a contract; only an effective resumption of the entirety of the original contract's obligations may prevent the invocation of the restitution remedy. Thus, by limiting a party's ability to allege waiver as a defense to restitution, parties are entitled to resume their pre-contractual legal position, even if they have significantly performed on the contract with the full knowledge that the other party may refuse to perform. Changing the doctrine in this way would seemingly encourage bad faith actors who may wish to obtain some of the contract's benefits, with the full knowledge that performance will not be reciprocal and that any subsequent obligations they may incur will be effectively erased through the remedy of restitution.

The Court expands restitution's reach in other areas of its opinion as well. In so doing, the Court enhances the risks entailed in an arms-length, fully informed business transaction, and increases its own capability of directing the contracting parties' relative wealth. The Restatements note that the courts have the ability to award restitution upon repudiation, even in response to losing contracts.[107] The restitution remedy is valuable in several respects. If a contract is rendered worthless, innocent parties can recover their sunk costs on the contract and begin anew elsewhere. Such a remedy also allows for greater certainty between contracting parties. However, restitution is an equitable remedy, greatly impacting the distribution of wealth between the parties. Courts, therefore, should carefully examine what they are granting when they bestow an equitable restitution award. The potential for windfall is high and the remedy's invocation often requires a highly subjective interpretation as to what constitutes a contract's destruction.

In *Mobil*, the Court, rather than limiting restitution's function to that of an equitable attempt at preventing unjust enrichment, uses it to wipe a troubled, and somewhat convoluted, slate clean. In this case, not only does restitution serve to compensate the injured party to an allegedly repudiated contract, but it also restores two fully informed businesses to the position they were in before a very bad business deal went sour. The companies were fully aware of the fact that exploration in the Outer Banks area was difficult, uncertain, and subject to numerous existing statutory environmental delays. Further, the contract itself was contingent upon the affected state's approval. North Carolina had

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[107] *See*, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 373 (1981).

already objected to the plan, as they were allowed to do under the contract, suggesting that long delays were imminent, regardless of the effect of any intervening legislation. The awareness of the risks involved before entering into the contract and the existence of other delays, deriving from the actual agreement's terms, suggest that if any damage award were justified, contract damages for the actual contract's breach would be sufficient for damages caused by any additional delay required for environmental analysis.

In justifying its restitution award, the Court analogizes the repayment of the corporations' money to that of a refund given to a purchaser of a lottery ticket not received, even if the ticket may have been a losing one.[108] This analogy, however, fails to adequately encompass the true nature of the contract transaction in the case. The analogy suggests that entering into a large-scale contractual agreement is akin to playing a game of chance with astronomical odds. Although every contract involves a certain level of uncertainty and risk, the parties enter into it assuming they would not be better off taking their money to the nearest racetrack. Further, and perhaps more importantly, the analogy also fails to recognize the scope of the agreement. The purchase of a lottery ticket from a merchant and the subsequent refunding of that money is a strikingly different transaction from a detailed agreement for mineral exploration resulting in the transfer of $158 million. In finding that restitution is appropriate upon alleged nonperformance, even though performance may be financially disadvantageous to the non-repudiating party, the Court gives a virtual windfall to the companies and, through its equity power, rescues the businesses from financial losses stemming from a potentially imprudent business deal.

In this sense, restitution operates less as an attempt at making the party whole, but more as a punishment to the repudiating party. Here, the government, is, in effect, being penalized for following its bureaucracy. The Court is punishing the government for enacting congressional legislation. Thus, the judiciary, through its equitable power, is in a position to penalize Congress for acting pursuant to its constitutional mandate and enacting legislation that seeks to address a constituent concern by protecting national resources. Imposing a restitution remedy in this case ignores expanded notions of both business propriety and govern-

[108] *Mobil*, 530 U.S. at 624.

mental legislation that may recognize such values. Thus, the Court's expansion of restitution serves to protect traditional corporate financial interests at the expense of valuing not only legislative autonomy, but also environmental concerns.

In addition to expanding certain contract law doctrines, the Court's decision transforms the nature of the government as a contracting party. Whereas the Court's treatment of restitution affects the distribution of wealth between parties, the Court's finding of a repudiation in this case greatly impacts the distribution of power not only between contracting entities, but on a larger, societal scale as well. The Court's rationale impacts the relationship between governmental actors and the government, and, in addition, alters the nature of legislative action as it relates to governance.

Crucial to finding that the government repudiated its contract was the Court's determination that congressional legislation may be viewed as directed statements to particular entities sufficient to alter the contracting parties' rights and obligations. Once again, for a finding that is so pivotal to the outcome of the case, the Court supplies very little discussion as to its rationale. On its face, a few possible arguments in favor of such a finding may appear compelling. Legislative enactments are pronouncements made by a contracting entity. Viewing them as such facilitates communication between the contracting parties, a likely issue given the potential unwieldiness of interacting with the United States government in a contractual transaction. Further, legislation may arguably embody the entity's current position and viewpoint regarding its own obligations, and the obligations of parties with whom it may contract, concerning particular areas of law.

The Court, however, supplies none of these rationales as potential support for its finding that legislation may be an individualized statement. It gives little justification, stating only that if the members of Congress and the President are involved, then it is "unequivocally" a statement by the obligor to the obligee.[109] This assertion is less than compelling and begs troubling questions regarding the scope of the entity's activity. Regardless of any rationale advanced, however, treating legislation as individualized speech creates disconcerting implications regarding both the nature of government in its role as a contracting entity and

[109] *Id.* at 619.

the underlying nature of legislation and its impact on all those within its purview.

The Court's blanket assertion that presidential and congressional involvement in legislation transforms the enactment into a directed statement works counter to the argument the Court is trying to establish. Reference to the numerous individuals whose participation comprises a governmental act illustrates the enormity of scale and difficulty in precisely defining the government's identity as obligor. The fractured nature of the parts composing the whole of the entity suggest a highly probable lack of cognizance by the governmental actor, casting doubt on the wisdom of giving the enactment legal effect as a statement. Legislation operating as a statement repudiating a particular contract would seemingly require the government-actor's cognizance of the existence and relative position of the promisee, its own identity as promisor to an existing contract, and an awareness that it has made a statement directly relating and pertaining to the existing contract. This reality belies the suggestion that a legislative enactment could therefore qualify as any kind of cognizant, directed statement aimed at one entity who is a party to a governmental contract.[110]

In addition to creating troubling implications for what may constitute action on the contract, viewing legislation as a directed statement redefines the function of federal legislation and the role of those governed by it. Conceptualizing legislation as directed speech creates a distinction between law as a tool of governance versus law as a tool of communication. When law's communicatory value outweighs its value as a mode of governance, questions arise as to the nature of law itself and its impact on individual entities within its jurisdiction.

Arguably, federal legislation does have some communicative value in enlightening and imparting national mores and values. However, such a function differs from the use of federal legislation as directed communication. When law becomes individualized speech, the nature of law changes from that of a function of order and justice to a means of facilitating particular transactions. All those within the government's jurisdiction, then, be-

[110] Following this analysis to its logical conclusion calls into question whether contract law governing private individuals should ever apply to the United States government when it is acting as a party to a contract. However, a discussion of this matter is outside the scope of this Note.

come subject to mere statements primarily meant to impact one individualized party. The true intended audience of governmental statements becomes unclear, weakening their authority as law. If law becomes a conversation, rather than a mandate, increased avenues develop for the governed entities under the law, creating new potential causes of action against the government, and increasing the power of stronger societal groups at the expense of those without the ability to provoke or procure directed legislative pronouncements.

Conclusion

In *Mobil*, the Court increases its own power to control the relative wealth of contracting parties by expanding the opportunity for the recovery of restitution and limiting the parties' ability to invoke waiver as a defense to that claim. Further, by assuming a greater role in the determination of entitlements, the Court empowers stronger contracting parties by increasing the types of actions that may affect contractual rights and duties. In shifting the balance of power to stronger, cash-rich entities, the Court redefines the relationship between the government and the parties contracting with it. In so doing, the Court transforms the nature of the relationship between the government and all entities beneath it. By strengthening the communicative nature of legislation, the Court distills constitutionally granted enactments into fragmentary, isolated commentary on individualized contractual obligations, thus turning governance into a financially motivated bargaining tool.