Government Estoppel: The Search for Constitutional Limits

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I. INTRODUCTION

When one person has placed reasonable reliance on a statement or conduct of a second person, equitable estoppel will prevent the second person from contradicting the statement or repudiating the conduct, even if the statement is false, in order to prevent injustice to the person who relied on it.\textsuperscript{1} Equitable estoppel is based upon "the principle that no one shall be permitted to found any claim upon his [or her] own inequity or take advantage of his [or her] own wrong."\textsuperscript{2}

It is "well-settled that the Government may not be estopped on the same terms as any other litigant."\textsuperscript{3} Grounds for limiting estoppel of the government (government estoppel) include: (1) sovereign immunity;\textsuperscript{4} (2) the separation of powers theory, under which certain judicial determinations of government liability are inappropriate;\textsuperscript{5} (3) lack of reasonable reliance by the person seeking estoppel due to the limited scope of governmental agents' authority;\textsuperscript{6} (4) the greater weight given to public interests over private interests to be vindicated by estoppel;\textsuperscript{7} (5) the desire to limit potentially vast liability;\textsuperscript{8} (6) protection of the free dissemination of government information;\textsuperscript{9} and (7) the fear that an estoppel rule might be

\textsuperscript{1} Pomeroy defined equitable estoppel as:

[T]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

\textsuperscript{2} 3 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 804, at 189 (5th ed. 1941).

\textsuperscript{3} R.H. Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934) (Cardozo, J.). Pomeroy also found equitable estoppel to be premised on a policy of apportioning loss in the absence of fault: "When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible." 3 POMEROY, supra note 1, § 804, at 187.


\textsuperscript{6} Phelps v. Federal Emergency Management Agency, 785 F.2d 13, 17 (1st Cir. 1986).

\textsuperscript{7} Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1916).


9. Id.
used by government agents acting in collusion with private parties to defraud the government.\textsuperscript{10}

To effectuate these policies, while recognizing that "maladministration" of government can cause hardship to private citizens,\textsuperscript{11} courts have developed three elements to be proven in order to find an estoppel against the state: (1) a finding of affirmative misconduct on the part of the government;\textsuperscript{12} (2) a finding that the gravity of the harm to the private person seeking estoppel outweighs the public interest in protecting the government from liability;\textsuperscript{13} and (3) a finding that the government agent was acting without actual authority.\textsuperscript{14} To estop the government, then, a litigant must prove one or more of these additional elements, as well as the elements of traditional, private estoppel.

In spite of the large number of principles guiding government estoppel decisions (or perhaps because of it), the terms on which the government may be estopped are not well settled.\textsuperscript{15} While the modern United States Supreme Court has never affirmed a lower court's use of estoppel against the federal government,\textsuperscript{16} the Court has also expressly refused to embrace a per se rule immunizing the government from application of estoppel.\textsuperscript{17} This unsettled state of government estoppel law results from the unclear balance between judicial power on the one hand, and executive and legislative power on the other.\textsuperscript{18} The threshold question faced by a court in deciding whether to estop the government is whether the court has the power to do so.\textsuperscript{19} Only after answering this separation of powers question in favor of judicial intrusion may a court go on to analyze the propriety of granting estoppel on the facts of the case.\textsuperscript{20}

\textsuperscript{10} Id. at 2473 (citing Lee v. Munroe, 11 U.S. (7 Cranch) 366, 370 (1813)).
\textsuperscript{11} Id. at 2478 (Stevens, J., concurring).
\textsuperscript{13} United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973).
\textsuperscript{14} Utah Power, 243 U.S. at 408-09.
\textsuperscript{15} "The question of when the Government may be equitably estopped has . . . received inconsistent treatment from other Courts of Appeals, and has been the subject of considerable ferment." Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).
\textsuperscript{16} Richmond, 110 S. Ct. at 2470 ("[W]e have reversed every finding of estoppel we have reviewed.").
\textsuperscript{17} Id. at 2471 ("We leave for another day whether an estoppel claim could ever succeed against the Government.").
\textsuperscript{18} See infra notes 178-80 and accompanying text.
\textsuperscript{19} See Phelps, 785 F.2d at 16-17 (potential interference with separation of powers and public policy concerns limit courts).
\textsuperscript{20} Home Sav. & Loan Ass'n v. Nimmo, 695 F.2d 1251, 1260 (10th Cir. 1982) (McKay, J., dissenting), vacated sub nom. Walters v. Home Sav. & Loan Ass'n, 467 U.S. 1223 (1984) (suggesting that Supreme Court's government estoppel decisions may be harmonized by recognizing that they are based on dual inquiry into presence of elements of estoppel and propriety of frustrating statutory intent). Courts denying government estoppel do not always distinguish
Separation of powers has emerged as the linchpin on which the government estoppel debate turns. In its most recent major discussion of government estoppel, Office of Personnel Management v. Richmond, the United States Supreme Court for the first time used the Appropriations Clause of the Constitution as a barrier to government estoppel. Using the Appropriations Clause to bar government estoppel severely limits judicial scrutiny of a large class of government estoppel actions which present in a very sympathetic light the plight of private citizens whom the government has treated unjustly.

The development of the Supreme Court’s government estoppel jurisprudence shows a trend toward increasingly explicit reliance on separation of powers and deference to legislative prerogative as a basis for denying government estoppel. A review of the nineteenth century Supreme Court estoppel cases reveals a Court which pursued a careful policy of treating government estoppels under the same rules that governed private estoppel. However, following World War II, the Court began to ignore private estoppel grounds for denying government estoppel claims. This approach matured in Richmond with the Court’s use of the Appropriations Clause to deny estoppel in a case which could have been disposed of on conventional private estoppel grounds.

The more the decision to estop the government depends on the attributes of government as such, the more acute the need becomes to develop a criterion by which the relative weights of government and private

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between the substantive elements of estoppel and the policy against frustrating the legislative intent. See Note, The Supreme Court—Leading Cases, 104 HARV. L. REV. 129, 289-90 (1990) (Richmond Court explicitly recognized “distinction between power and policy” by invoking Appropriations Clause to reject estoppel claim).

22. Id. at 2472.
23. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ").
24. Richmond, 110 S. Ct. at 2471-72.
25. See, e.g., Lee v. Munroe, 11 U.S. (7 Cranch) 366 (1813); The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869); see infra notes 68-121 and accompanying text.
28. See infra notes 199-221 and accompanying text for a discussion of Richmond.
interests can be weighed. Courts occasionally explicitly, but more often implicitly, engage in such a balancing in government estoppel cases. The courts are more likely to grant estoppel, or estoppel-like relief, to protect rights of individual freedom such as the right of citizenship and the right to freedom from police entrapment. Where the rights are merely economic rights, courts are less likely to impinge upon the prerogatives of the other branches of government.

This Comment reviews the development of government estoppel in the United States, and analyzes courts' reliance on the separation of judicial, executive and legislative powers as a basis for limiting estoppel of the government. Given this reliance, it appears that a rule of decision which overtly recognizes the need to balance public and private interests will provide a useful measure of clarity to a somewhat muddled area of the law.

II. BACKGROUND: GOVERNMENT AND PRIVATE ESTOPPEL

A. The Remedy of Estoppel

Courts typically recite four elements that must be proved in order to establish an equitable estoppel against a private litigant:

(1) The party to be estopped must know the facts; (2) he [or she] must intend that his [or her] conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he [or she] must rely on the former's conduct to his [or her] injury.

29. The Supreme Court decides constitutional issues of governmental power on the basis of such a balancing. See, e.g., Plyler v. Doe, 457 U.S. 202, 224 (1982) (state may not restrict the education of illegal alien children unless its goal is "substantial," due to the "importance" of education in "maintaining our basic institutions"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (state may not abridge First Amendment freedom of speech unless "an important or substantial governmental interest" is implicated).

30. See infra notes 281-93 and accompanying text.

31. See infra notes 297-333 and accompanying text.


34. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) (quoting California State Bd. of Equalization v. Coast Radio Prods., 228 F.2d 520, 525 (9th Cir. 1955)). Professor Dobbs found "three important elements":

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The “conduct” referred to in this definition is usually a representation of fact. The representation may also be a promise, in which case the estoppel is referred to as promissory estoppel.

**B. Royal Prerogative**

Equitable estoppel is the product of several centuries of judicial evolution. Three species of the estoppel doctrine have evolved: estoppel by record, estoppel by deed and equitable estoppel, also referred to as estoppel in pais or estoppel by conduct. The earliest incarnation of the estoppel doctrine was estoppel by record, which accorded conclusive effect to “matters recorded by the king’s court, and authenticated by his seal.” In the sixteenth century, under estoppel by deed, a party could be estopped to deny facts recited in a document which the party had

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The actor, who usually must have knowledge of the true facts, communicates something in a misleading way, either by words, conduct or silence. The other relies upon that communication. And the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct.

**Dan B. Dobbs, Remedies § 2.3, at 42 (1973).**

Pomeroy gave the following elaboration of the elements:

1. There must be conduct—acts, language, or silence—amounting to a representation or concealment of material facts.
2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.
4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.
5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.
6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

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3 Pomeroy, supra note 1, § 805, at 191-92.
35. See, e.g., Restatement (Second) of Contracts § 90 cmt. a (1981) (“Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.”).
36. Under promissory estoppel “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Id. § 90.
38. 9 Holdsworth, supra note 37, at 144-47; 3 Pomeroy, supra note 1, § 802, at 179-80.
39. 9 Holdsworth, supra note 37, at 148.
signed under seal. Estoppels by record and by deed were based on a policy of according evidentiary weight to witnessed documents, and a policy favoring finality of judicial proceedings. Not until the early nineteenth century did equitable estoppel, or estoppel in pais, acquire its modern "ethical content" which focuses on preventing harm to persons who have reasonably relied on the misleading conduct of others.

The "excellent and curious" doctrine of estoppel developed in England in the context of the royal prerogative doctrine. The royal prerogative is the collection of "[t]hose rights and capacities which the [sovereign] enjoys alone in contradistinction to others and not . . . those which he enjoys in common with any of his subjects." Existing "out of the ordinary course of the common law, in right of [the sovereign's] royal dignity," the royal prerogative is the oldest part of the constitution of England.

An estoppel has sometimes been quaintly defined, the stopping a [person's] mouth from speaking the truth; and would seem, in some measure, to partake of severity, if not of injustice. But it is in reality founded upon the soundest principles, as a rule of evidence. That a party has, by his own voluntary act, placed himself in a situation as to some matter of fact, that he is precluded from denying it; and in its application to the dealings and contracts of men in the affairs of human life, it is a salutary practical rule, that a man shall not be permitted to deny what he has once solemnly acknowledged.

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40. 9 id. at 154.
41. 9 id. at 149, 154.
42. "Estoppel in pais" refers to the doctrine that a person can be stopped on the basis of conduct of which the jury, the "pays," might have some knowledge, in contradistinction to estoppel on the basis of "self-proving" court records and other documents which a person had solemnified by affixing a seal. 9 id. at 145.
43. DOBBS, supra note 34, § 2.3, at 42.
44. Pickard v. Sears, 112 Eng. Rep. 179, 181 (1837) ("[W]here one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time . . ."); see also Branson v. Wirth, 84 U.S. (17 Wall.) 32, 42 (1873) ("If one person is induced to do an act prejudicial to himself in consequence of the acts or declarations of another, on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations."); Sprigg v. Bank of Mount Pleasant, 35 U.S. (10 Pet.) 257 (1836). Sprigg enforced an estoppel based on a sealed instrument, but its statement of the rule is couched in terms sufficiently general to encompass estoppel by conduct:

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Id. at 265.
45. EDWARD COKE, COKE UPON LITTLETON § 352a (London, Saunders & Benning 1830).
46. See generally 10 HOLDSWORTH, supra note 37, at 340-425 (1938) (historical development of royal prerogative).
47. BLACK'S LAW DICTIONARY 1330 (6th ed. 1990).
48. 10 HOLDSWORTH, supra note 37, at 341 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *239).
49. 10 id. at 340.
GOVERNMENT ESTOPPEL

The royal prerogative afforded the sovereign numerous preferences in judicial proceedings in which the rights of the king conflicted with those of a subject.® These preferences included the doctrine that "The King is not bound by estoppels." On the other hand the King could take advantage of an estoppel, though, as between subjects, estoppels must be mutual.®

These privileges arose at a time when the king’s court, the curia regis, was the center of royal authority performing legislative, executive and judicial functions without differentiating among them.® As late as the end of the seventeenth century, the courts of law were literally the king's courts, and the judges were servants of the king.® The sovereign, who was "immortal and infallible... [and] who was accepted as the head and representative of the state" exerted "large powers of control" over the courts.® The courts in turn obliged the sovereign by creating "all sorts of remedies which were not open to the subjects, all sorts of exemptions from the ordinary rules of pleading, and all sorts of procedural privileges."® Judges, mindful that they served at the monarch's behest, developed "to their utmost logical consequences, principles and rules which favoured the king."® Even after judges gained a measure of independence and security of tenure after the Revolution of 1688, these hypertechnical rules remained.®

Although the royal prerogative and the susceptibility of the king’s

50. 10 id. at 343-45, 357. The monarch, conceived as omnipresent in his or her courts, could not be nonsuited for failure to appear. 10 id. at 345. Further, statutes of limitation did not bind the crown, and hence neither could the equitable principle of laches. 10 id. at 355.

51. 10 id. at 357 (quoting Sir Edward Coke's Case, 78 Eng. Rep. 169, 175 (1623)). Sir Edward Coke's Case held that lands granted by Queen Elizabeth in conjunction with a grant of office could be demanded in payment of a debt which the office holder owed to the Queen. 78 Eng. Rep. 169, 169 (1623). This was an estoppel by deed, not an estoppel in pais. Later cases distinguished Coke's Case from cases involving equitable estoppel. See Attorney General v. Collom, 2 K.B. 193, 204 (1916) (“A further point was raised that no estoppel binds the crown... I know of no authority for the proposition as applied to estoppel in pais.”).

52. CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 31 (Julius Goebel, Jr. ed., 1946).

53. 10 HOLDSWORTH, supra note 37, at 346. As late as the reign of Edward II (1307-1327) the king actually decided cases. 1 id. at 194. Until the Revolution of 1688, judges held office “durante bene placito,” that is, at the pleasure of the crown. 1 id. at 195; 6 id. at 514. James II (reigned 1685-1689) dismissed judges for “the least disobedience,” 6 id. at 509-10, such as failing to condemn to death James’ political enemies. Id. Such sovereign excesses led in part to the Revolution of 1688, and to the Act of Settlement which provided in part that judges would serve during good behavior, “quamdiu se bene gesserint,” and could be removed from office only “upon the address of both Houses of Parliament.” 6 id. at 234.

54. 10 id. at 346.

55. Id.

56. 10 id. at 358.

57. 10 id. at 346.
court to political pressure resulted in these procedural advantages, the executive was not omnipotent. The application of equitable remedies against the king was a feature of even the earliest development of equity. The "bromide that 'the King can do no wrong,'" actually is a reference to the limitations on the king's power and should be read, "the king has no authority to do wrong." The maxim that the king is not bound by estoppel has been attacked as a fallacy. Equitable estoppel had not come into existence at the time the royal prerogative barred application of estoppel to the king. Nevertheless, the doctrine of equitable estoppel continues to bear the marks of extreme judicial deference to sovereign power.

C. Origins of Government Estoppel in the United States

As the doctrine of equitable estoppel evolved in the United States, so did litigants' efforts to apply its principles against the government. Royal prerogative provided a singularly unsatisfactory basis for refusing to ap-
ply estoppel to secular authorities "deriving their just powers from the consent of the governed." The early government estoppel cases in the United States scrupulously avoided basing decisions on the sovereignty of the governmental litigant. Nevertheless, judicial limitations on the power of the executive were regarded as problematic and limitations on government estoppel developed to protect against that danger.

Although courts have developed numerous bases for rejecting estoppel claims against the government, a persistent thread of decisions recognizes that when a person has acted in reasonable reliance on representations of the government, a change in governmental position which harms that person offends basic notions of fairness and equity. An examination of three nineteenth century government estoppel cases illustrates that the United States Supreme Court treated the government no differently than it would have treated a similarly situated private litigant.

1. Lee v. Munroe

The earliest case in which the United States Supreme Court was called upon to decide the application of estoppel against a government...

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64. The Declaration of Independence para. 1 (U.S. 1776).
65. See infra notes 68-121 and accompanying text.
66. See, e.g., The Siren, 74 U.S. (7 Wall.) 152, 154 (1868) ("[T]he public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."). In the nineteenth century Blackstone could still admit that "it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject." 10 Holdsworth, supra note 37, at 355 (quoting 1 William Blackstone, Commentaries *261-62). In the United States the need for judicial independence was linked to the need for a judiciary that could serve as a check on the power of the other branches of government. "Madison and Hamilton described a judiciary that is 'not separated from the legislative and executive powers' as 'a threat to general liberty' . . . ." Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 672 (1978) (quoting The Federalist No. 78 (Alexander Hamilton)).
67. See St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do."); Foote's Dixie Dandy, Inc. v. McHenry, 607 S.W.2d 323, 327 (Ark. 1980) (corollary to Justice Holmes' remark that "[C]itizens] must turn square corners when they deal with the Government,") is principle that government should "be held to a like standard of rectangular rectitude when dealing with its citizens." (quoting John M. Maguire & Philip Zimet, Hobson's Choice and Similar Practices in Federal Taxation, 48 Harv. L. Rev. 1281, 1299 (1935)); Menges v. Dentler, 33 Pa. 495, 500 (1859) ([P]eople] naturally trust in their government, and ought to do so, and they ought not to suffer for it."); Raoul Berger, Estoppel Against the Government, 21 U. Chi. L. Rev. 680, 686 (1954) (modern state in essence "public service corporation" which ought to take responsibility for its wrongs).
litigant is \textit{Lee v. Munroe}^{68} in 1813. \textit{Lee} is repeatedly cited as evidence of the antiquity and, presumably by inference, the propriety of the rule against estopping the government.\textsuperscript{69} \textit{Lee}, however, was decided strictly on principles of conventional estoppel and affords no basis for a rule prohibiting government estoppel.\textsuperscript{70}

In \textit{Lee}, the plaintiff complained that misrepresentations made by two city commissioners of Washington, D.C. misled him to his detriment.\textsuperscript{71} Two business partners named Morris and Nicholson, not parties to the action, had prepaid the city for the purchase of real estate.\textsuperscript{72} As Morris and Nicholson needed to "draw" on this land account, they would apply to the city commissioners, who would convey the lots as requested.\textsuperscript{73} Morris and Nicholson owed Lee $3,000.\textsuperscript{74} They agreed with Lee that they would discharge their debt to him by means of a conveyance of land from the city to Lee.\textsuperscript{75} When \textit{Lee} approached commissioners Munroe and Thornton and explained the arrangement between Lee and Morris and Nicholson, the commissioners agreed to transfer the lots to Lee upon receiving a direction to do so from Morris and Nicholson.\textsuperscript{76} Morris and Nicholson then gave Lee a written direction to that effect.\textsuperscript{77} Lee, believing the paper to be worth something, surrendered to Morris and Nicholson their promissory notes for the $3,000.\textsuperscript{78} When he presented the direction to Munroe and Thornton, they refused to convey the lots unless Lee paid for them, since Morris and Nicholson actually had a negative balance in their account with the city.\textsuperscript{79} Morris and Nicholson became insolvent and Lee, casting about for a locus of blame, looked to the city commissioners who had led him to believe that the city

\textsuperscript{68} 11 U.S. (7 Cranch) 366 (1813).
\textsuperscript{69} \textit{See}, e.g., Office of Personnel Management \textit{v. Richmond}, 110 S. Ct. 2465 (1990):
\textit{From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as against private litigants. In \textit{Lee v. Munroe \\& Thornton}, we held that the Government could not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority.}
\textit{Id. at 2469} (citation omitted).
\textsuperscript{70} \textit{Lee}, 11 U.S. (7 Cranch) at 369.
\textsuperscript{71} \textit{Id. at 368}.
\textsuperscript{72} \textit{Id. at 369}.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id. The dollar amount is given in the reporter's syllabus. Id. at 366}.
\textsuperscript{75} \textit{Id. at 368}.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
would transfer the land to him. Lee sued on a theory of estoppel.

The Court refused to grant Lee any relief, holding that the representation by the commissioners to Lee was "altogether gratuitous," and since it was not "within the sphere of their official duties, the United States cannot be injured by it." Yet, at first blush, the facts seem to fit the definition of estoppel: the city officers knew or reasonably should have known the true state of affairs; Lee was ignorant of the true state of affairs and was without means of discovering the true state of affairs; and Lee relied on the officials' misrepresentations, and was injured as a result.

Why no estoppel?

First, Lee is not a promissory estoppel case; Lee did not sue on the promise made by Munroe and Thornton to transfer the land upon presentation of the order by Morris and Nicholson. Rather, the suit was for the misrepresentation of fact. Had the doctrine of promissory estoppel been extant in 1813, Lee might have stated his claim as one seeking to estop the government from breaching its promise to pay. Instead, the commissioners' promise was "gratuitous," as the Court observed, and hence could not form the basis of an enforceable contract.

Second, the decision is clearly based on conventional principles of

80. Id.
81. Id.
82. Id. at 369.
83. Id.
84. Whether Lee's injury was caused by Munroe's and Thornton's misrepresentation, or by Lee's own precipitous surrender of the notes, was an issue not lost on the Court. "The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he lost his remedy against Morris and Nicholson (of which very serious doubts may well be entertained)." Id.
85. See supra note 36. The doctrine of promissory estoppel has gained wide acceptance as such only during the present century. See 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 194, at 194 (1973) (although prior law not inconsistent with promissory estoppel, in 1901 Justice Holmes could still write: "'Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void.' " (quoting Martin v. Meles, 60 N.E. 397 (Mass. 1901))). Williston coined the term "promissory estoppel" in 1920. Benjamin F. Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U. PA. L. REV. 459, 459 (1950).
86. Lee, 11 U.S. (7 Cranch) at 369.
87. Id. at 368.
88. See, e.g., Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898) (granddaughter's quitting job in reliance on grandfather's gratuitous promise to provide granddaughter with two thousand dollar demand note sufficient to make promise enforceable against grandfather's estate). In Lee, the commissioners' statement (that they would transfer the land to Lee upon presentation of a direction from Morris and Nicholson) could be characterized either as a promise to transfer the land, or as a representation of the fact that Morris and Nicholson's account had a positive balance.
89. Lee, 11 U.S. (7 Cranch) at 369.
agency law and estoppel. The Court made no attempt to form a principled basis for distinguishing unauthorized misrepresentations of government agents from those of private agents.90 Under conventional principles of agency law, the principal is not liable for representations of the agent made outside the scope of the agent's authority.91 The Court rejected Lee's claim as an attempt to extend the liability of the government for actions of its agents beyond that recognized for principals in general.92 Under Lee, unauthorized actions of government and private agents give rise to identical levels of liability.93

Third, the Court's strict approach was based on the conventional rule governing estoppel to assert title to land, and not on the sovereignty of the government.94 In order to estop another party from asserting title to land, the party seeking to raise the estoppel had to prove that the other party's original representation was not merely erroneous, but was made with the intent to defraud.95 This rule developed to prevent insecurity of land titles and disruption of the rights and expectations of innocent third parties that would result from permitting an estoppel to contravene recorded title documents.96 Since Lee had not asserted that Munroe and Thornton had perpetrated a fraud, and neither Munroe nor Thornton had an interest in the property, the rule did not apply.97 Thus, Lee is

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90. Id. at 368. The Court noted:
   It is . . . not known to the court that [equitable estoppel of a principal who fraudulently asserts to a prospective mortgagee that there are no encumbrances on the principal's land] . . . has been extended so as to affect the interests of principals, and particularly of the public, in consequence of similar mistakes made by an agent, nor is it reasonable that such extension should take place, unless it most manifestly appear that the agent was acting within the scope of his authority . . . .

92. Lee, 11 U.S. (7 Cranch) at 368.
93. Id.
94. Id.
95. Boggs v. Merced Mining Co., 14 Cal. 279, 367-68 (1859), error dismissed, 70 U.S. (3 Wall.) 304 (1866); Trenton Banking Co. v. Duncan, 86 N.Y. 221, 224 (1881); 3 POMEROY, supra note 1, § 807, at 201-03. But cf. 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 1235, at 1124 (3d ed. 1975) ("decided weight of authority" does not require fraud in order to give rise to land title estoppel).
96. 3 POMEROY, supra note 1, § 807, at 203; see infra notes 228-32 and accompanying text. That these considerations governed the decision is evident from the Court's language:
   But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practiced by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct therefore ought to be conclusive on him, when the rights of third persons come in question.

Lee, 11 U.S. (7 Cranch) at 368.
97. See Lee, 11 U.S. (7 Cranch) at 368. Because the agents' actions were unauthorized,
properly read primarily as a land title estoppel case, and only secondarily, if at all, as a government estoppel case.

Finally, Lee predates the first explicit recognition of equitable estoppel by conduct by twenty-four years. Lee cannot illuminate the substantive content of a doctrine which did not exist at the time Lee was decided.

2. The Floyd Acceptances

Another case often relied on to bolster the legitimacy of the rule against estopping the government is The Floyd Acceptances. This case, like Lee, was decided on conventional private estoppel grounds. Far from creating a no-estoppel rule to shield the government from liability, the Supreme Court reasoned from the "proposition . . . too well established by the decisions of this court, to admit now of serious controversy," that the United States, when it becomes a party to commercial paper, is "bound . . . by the same principles that govern individuals in their relations to such paper." In 1859, one Russell, along with co-venturers Waddell and Majors (Russell & Co.), contracted with the United States Army to sell and deliver provisions to the Army's garrison in Utah. Most of the contracts required the Army to pay for the supplies only upon delivery, in conformity with a statute which prohibited the government's making advance payments for goods and services. Russell was unable to raise the cash necessary to fund the expedition. To cure this difficulty Rus-
sell secured Secretary of War John B. Floyd's acceptances108 on a series of bills of exchange drawn by Russell & Co., payable in ten months to Russell & Co.'s own order. The drafts were to be paid out of the amount the Army would owe upon performance of the contract.109 The effect of the notes and the acceptances was to secure for Russell the credit of the United States, thus permitting Russell to negotiate the bills of exchange, raise the money and perform the contract.110

Over five million dollars were raised in this manner and some four million dollars' worth of these drafts were redeemed by Russell, apparently out of the money earned on the contract.111 However, after the United States had fully paid the contract price, notes worth over one million dollars remained outstanding.112 Russell & Co. was presumably without funds to redeem the outstanding notes, and the holders applied to the federal government for payment on the strength of Floyd's acceptances.113

The Court held the United States not liable on the acceptances.114 The Secretary had acted in contravention of an express statutory limitation of authority, and hence was without even apparent authority to accept the drafts.115 Russell & Co. took the acceptances with this infirmity, and, as

[i]n the case of such paper, issued by an individual . . . the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards.116

The Court found the Secretary lacked the authority to issue the acceptances because the only source of a federal official's authority is constitutional or statutory law, and neither source authorized the Secretary to issue the acceptances.117 While this rule pertains to the unique method by which the government communicates with its citizens, the

108. In commercial law, an acceptance is the drawee's signed engagement to honor the draft. U.C.C. § 3-410 (1977).
110. Id. at 681.
111. Id.
112. Id.
113. Id.
114. Id. at 683.
115. Id. at 682.
116. Id. at 676.
117. Id. at 676-77.
principle on which it is grounded is a conventional rule of the law of agency: apparent authority arises upon representations made by the principal to the third party.\textsuperscript{118} In the case of the government, the Constitution or a statute serves as that representation.\textsuperscript{119} Absent such a representation, apparent authority cannot arise.\textsuperscript{120}

In \textit{Floyd}, as in \textit{Lee}, the Court displayed a solicitous concern with protecting the federal government from uncontrollable fiscal liability.\textsuperscript{121} Nevertheless, that protection was provided on the basis of conventional rules of estoppel; the same result would have been achieved if the United States had been a private party.

3. \textit{Ultra vires} acts

The development of the doctrine that \textit{ultra vires}\textsuperscript{122} actions of municipal corporations are void and cannot form the basis of a claim also illustrates the early tendency of courts to treat the government litigant no differently than a private litigant. Municipal charters often limit the means by which the city may enter into contracts,\textsuperscript{123} for instance, by requiring competitive bidding\textsuperscript{124} or by restricting the power of the city to

\begin{footnotesize}
\begin{enumerate}
\item[118.] \textit{Restatement (Second) of Agency} § 27 (1958) ("[A]pparent authority . . . is created as to a third person by . . . conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.").
\item[119.] See infra notes 247-80 and accompanying text.
\item[120.] \textit{Floyd}, 74 U.S. (7 Wall.) at 676. This "strong" position holds that when an action is not specifically permitted it is prohibited. \textit{Id.} at 680-81. Courts more recently have applied a "weak" version of the same rule, under which an action is permitted if no statute or regulation prohibits it. \textit{See} People's Bank & Trust Co. v. United States, 11 Cl. Ct. 554, 563-66 (1987) (where no statute, regulation, or internal policy prohibited Farmers Home Administration employee from guaranteeing repayment of loan, and in view of broad powers which Administration granted to its loan officers, official had actual authority to issue loan guarantees).
\item[121.] The Court stated:
\begin{quote}
If A. authorized B. to buy horses for him, and to draw on him for the purchase money, B. cannot buy land and bind A., by drawing on him for the price. Such a doctrine would enable a [person], in private life, to whom a well defined and limited authority was given, to ruin the principal who had conferred it. So it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit. No government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper.
\end{quote}
\textit{Floyd}, 74 U.S. (7 Wall.) at 681.
\item[122.] "\textit{Ultra vires}" literally means "beyond the powers." The term is applied to actions of a corporation which are beyond the powers conferred on it by its charter or by the statute under which it was created. \textit{Black's Law Dictionary} 1522, 1570 (6th ed. 1990).
\item[123.] Whitworth College v. City of Brookhaven, 161 F. Supp. 775, 780 (D. Miss. 1958), aff'd, 261 F.2d 868 (5th Cir. 1958) (statutory restriction).
\item[124.] Smith v. City of Riverside, 34 Cal. App. 3d 529, 536, 110 Cal. Rptr. 67, 72 (1973).
\end{enumerate}
\end{footnotesize}
borrow money.\textsuperscript{125} Courts interpret these restrictions as evincing a strong legislative policy against collusion between city officials and the persons paid out of the city treasury.\textsuperscript{126} So strong is this policy that courts will view contracts made in violation of those regulations as void, not merely voidable.\textsuperscript{127} As a result, the contractor will neither be able to estop the city to deny the contract, which would give the contractor the benefit of the bargain, nor recover in quantum meruit the benefits which its contract performance has bestowed on the city.\textsuperscript{128} The operation of the doctrine of \textit{ultra vires} concerns actions which the corporation itself is incompetent to perform, as distinguished from actions outside the scope of the individual agent’s authority but which are otherwise \textit{intra vires}.\textsuperscript{129} Although early decisions decided governmental \textit{ultra vires} cases on the same ground as private corporation \textit{ultra vires} cases, and although the doctrine has died out in the area of private corporations, it is still applied today with respect to municipal corporations.\textsuperscript{130}

Early California cases serve as an example of this development. In \textit{Argenti v. San Francisco},\textsuperscript{131} the City of San Francisco was held liable on a contract for grading and planking of streets. The contractor had performed all the work and brought suit for payment of the contract price.\textsuperscript{132} The city sought to avoid payment by asserting that the amount of the contract was in excess of the limits set by the city’s charter and

\begin{footnotes}
\textsuperscript{126} D\textsc{obbs}, supra note 34, § 13.4, at 989. The danger of collusion is one of the traditional rationales for prohibiting government estoppel. See \textit{Lee}, 11 U.S. (7 Cranch) at 370. “It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it should be very difficult for the public to protect itself.” \textit{Id.} This passage was quoted with approval in \textit{Richmond}, 110 S. Ct. at 2473.
\textsuperscript{127} Seif v. City of Long Beach, 36 N.E.2d 630, 632 (N.Y. 1941) (no recovery for services performed by city counsel hired by mayor where city charter restricted power to hire to city council).
\textsuperscript{128} D\textsc{obbs}, supra note 34, § 13.4, at 989.
\textsuperscript{129} Discussing Pennsylvania law, which recognizes the apparent authority of municipal agents, one court explained the distinction as follows:

A municipal corporation cannot be bound by the \textit{ultra vires} acts of its agents, except that it may be bound by such acts if it had the power to authorize them but did not.

A more common way of articulating this principle is that an act is \textit{ultra vires} in the “primary sense,” and therefore void, if it is “utterly beyond the jurisdiction” of the municipal corporation; it is \textit{ultra vires} only in a “secondary sense,” and therefore subject to estoppel, if it is merely “the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional.”

\textsuperscript{131} 16 Cal. 255, 264-65 (1860).
\textsuperscript{132} \textit{Id.} at 262.
\end{footnotes}
was, therefore, *ultra vires.* Nevertheless, the court held that since the city had received the benefit of the contract and had acquiesced in the actions of its agent in entering into the contract, "[i]t would be a fraud upon the plaintiff to permit [repudiation by the city]." In his concurrence, Justice Field expressly dissented from the view that the city could be estopped to deny the *ultra vires* acts of its governing body. He concurred in the judgment on the ground that the contracts were within the city's charter, but did "not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the cases and in the mode prescribed by its charter."

Justice Field's view soon gained sway. Two years later, in his concurrence in *Zottman v. San Francisco*, Justice Cope expressly repudiated the doctrine of estoppel which he had espoused in the opinion he authored in *Argenti*.

Writing for the court in *Zottman*, Justice Field held that a contractor could not recover for extra work performed in conjunction with a valid contract with the city to erect a fence, where that extra work was requested *ultra vires*. The city charter provisions, "whilst conferring authority upon the Common Council, also fixed the bounds of their action. Beyond them they could not go, and give validity to their acts. . . . A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city." The court recognized that reliance on unauthorized acts of government agents is unreasonable and hence does not give rise to an estoppel.

133. *Id.* at 259-60.

134. *Id.* at 274. "It is well settled in relation to the contracts of corporations, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to question its validity." *Id.* at 264-65.

135. *Id.* at 282 (Field, J., concurring).

136. *Id.* (Field, J., concurring).

137. 20 Cal. 96 (1862).

138. *Id.* at 108 (Cope, J., concurring).

139. *Id.* at 104-05.

140. *Id.* at 101.

141. *Id.* at 104-05.

It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.

*Id.*
The rule permitting a city to deny its power to contract was not unique to sovereign litigants. Private corporations which received benefits under an *ultra vires* contract also were not estopped to deny the validity of the contract.142 The reasoning was that the scope of the corporation's activities is a matter of law determined by the legislature.143 A court which estopped the corporation to repudiate a promise would breach the separation of powers doctrine.144 Courts' reliance on the "interest of the public"145 to support the unenforceability of *ultra vires* contracts derived from turn-of-the-century society's distrust of large corporations.146 Thus, at its origin, the doctrine prohibiting estoppel to deny *ultra vires* activities of municipalities began as a rule applicable to both public and private entities alike. The rule denying recovery to the contractor in *Zottman*, for instance, was the rule that mistaken improvements to real property did not give rise to a right of restitution for the value conferred.147

The *ultra vires* doctrine was harshly criticized in the context of private corporation law for its unjust results.148 Many jurisdictions overruled the doctrine by legislation,149 and it finally became moribund.150


143. As the United States Supreme Court noted:

The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests . . . above all, on the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.


144. See, e.g., Bank of the United States v. Owens, 27 U.S. (2 Pet.) 527, 538-39 (1829) (Court allowed no recovery on promissory note issued in violation of bank's charter, since to do otherwise would render Court "handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to . . . violations of the law?").


146. See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548-66 (1933) (Brandeis, J., dissenting) (historical review of limitations on scope of corporations' powers); see also R. Mason Lisle, Judicial Legislative Estoppel, 20 YALE L.J. 110 (1910) (*ultra vires* doctrine should be strictly adhered to because "in America, to-day, there is hardly any one thing which has contributed more to the present uneasiness and discontent than the almost universal feeling that corporations are not subordinate to the law.").

147. See Dobbs, supra note 34, § 5.8, at 368 ("[O]ne who in all good faith entered land and built on it had no affirmative remedy. He could not sue either at law or equity to recover the value of the improvements from the owner.").


149. See, e.g., DEL. CODE ANN. tit. 8, § 124 (1983); REVISED MODEL BUSINESS CORP. ACT § 3.04 (1985).

150. Widespread use of unrestricted corporate charters has rendered the doctrine otiose. ROBERT W. HAMILTON, CORPORATIONS 207 (4th ed. 1990) (modern corporate charters containing general purpose clauses authorizing "all lawful business" greatly reduce but do not
Its application as a basis for restricting government estoppel is no less objectionable. To the extent the doctrine has survived in the government estoppel context it illustrates the same development as the affirmative misconduct element from the time of *Lee v. Munroe*\(^{151}\) to the present.\(^{152}\) Courts have abandoned the no-estoppel rule in private *ultra vires* cases, but have retained the rule in the context of governmental *ultra vires*. The development of government estoppel in these cases is properly characterized not as the erection of discrete barriers unique to government estoppel, but rather as the retention of barriers which formerly applied to private and government estoppel alike but which courts have abandoned as unjust in the private estoppel arena.

4. **Clark v. United States:** An example of government estoppel

In *Office of Personnel Management v. Richmond*,\(^{153}\) Justice Kennedy asserted that the United States Supreme Court has reversed every lower court governmental estoppel case that has come before it,\(^{154}\) and that "not a single [Supreme Court] case has upheld an estoppel claim against the Government for the payment of money."\(^{155}\) This statement appears to be incorrect. Exactly such an estoppel was granted by the Supreme Court in 1877 in *Clark v. United States*.\(^{156}\)

In *Clark*, the United States Army had entered into an oral contract with Clark to use Clark's steamship on a trial run.\(^{157}\) The agreement called for payment of $150 per day, and required the Army to pay Clark the value of the vessel if it were lost.\(^{158}\) Eight days into the trial run, while under the command of the Army, the ship was wrecked and declared a total loss.\(^{159}\) The Army defended against Clark's suit for the daily rental and the value of the vessel on two grounds. First, since oral contracts were prohibited by federal statute, the contract was void.\(^{160}\) Second, since Clark did not have valid title to the vessel, he could not claim amounts due for its rental.\(^{161}\) The Supreme Court accepted the
first defense\textsuperscript{162} but curtly rejected the second.\textsuperscript{163}

Federal law required that all contracts with the Army be in writing; hence the oral contract for the trial run was void.\textsuperscript{164} Voicing a theme that has echoed through government estoppel cases to this day,\textsuperscript{165} the Court permitted the Army to deny its oral contract since "[e]very [person] is supposed to know the law,"\textsuperscript{166} and, therefore, by entering into such a contract the person "is knowingly accessory to a violation of duty on his part."\textsuperscript{167}

Nevertheless, the owner of the vessel was entitled to quantum meruit damages for the Army’s use of the vessel during the ill-fated shake-down cruise, and the basis for that award was a government estoppel.\textsuperscript{168} Although the Court did not use the term "estoppel" to describe its rejection of the defense based on invalid title, the elements of a conventional estoppel were clearly present.\textsuperscript{169} Further, the Court rejected the defense because "it would be bad faith on the part of the Government."\textsuperscript{170} This places the equitable considerations at the foundation of the Court's

\textsuperscript{162. Id. at 542.}
\textsuperscript{163. Id. at 544.}
\textsuperscript{164. Id. at 542.}
\textsuperscript{165. See infra notes 247-66.}
\textsuperscript{166. Clark, 95 U.S. at 542.}
\textsuperscript{167. Id.}
\textsuperscript{168. Id. at 543-44. The Court's rejection of the Army's objection based on lack of title is illuminating:}

The other objection relied on by the Government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate Government, in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. . . . The claimant was applied to for [the steamer's] use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the Government after getting possession of the steamer and getting it within its jurisdiction, under pretense of hiring it of the claimant, to set up that he had no title to it. This is so obviously in accordance with the justice of the case, that we deem it unnecessary to make any further observations on the subject.

\textit{Id.}

\textsuperscript{169. The Army, in chartering the ship, ought to have known the true state of its title; the chartering constituted conduct amounting to a representation to Clark that the Army was satisfied with the title; Clark relied on this representation to his detriment by entering into the charter, and would be harmed if the Army were permitted to deny the title. Id. at 539-40, 544; see supra notes 12-14 and accompanying text (enumerating elements of estoppel). The rule of the case is a corollary to the rule that the lessee is estopped to deny the landlord's title, since the benefits of possession enjoyed by the lessee were predicated on the lessee's recognition of that title. Although the estoppel involves title to property, it is, nevertheless, an equitable estoppel, and not estoppel by deed. See, e.g., \textit{Cal. Evid. Code} \S 624 (West 1991) ("Estoppel of tenant to deny title of landlord. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation."); Tewksbury v. Magriff, 33 Cal. 237 (1867).}
\textsuperscript{170. Clark, 95 U.S. at 544.}
This review of early estoppel cases in the United States illustrates that the Supreme Court did not apply government estoppel as a separate doctrine, but rather took pains to treat the United States as it would any other litigant. Such a reading of the cases explains why the Court recognized an estoppel against the Army in Clark. It also raises the further question as to the origin of the rule against government estoppel.

III. MODERN APPLICATION OF ESTOPPEL AGAINST THE GOVERNMENT: THE SEARCH FOR CONSTITUTIONAL LIMITS

In contrast to early government estoppel cases, the modern United States Supreme Court has given up its earlier, careful refusal to base rejections of government estoppel on executive and legislative prerogative, and has consciously striven to base its estoppel decisions on the constitutional attributes of the political branches and their relation to the judiciary.

Simultaneously, the Court has distanced itself from nonconstitutional grounds such as affirmative misconduct. The following sections examine conventional rules under which courts limit government estoppel in the light of the constitutional doctrine of separation of powers. While the rules of affirmative misconduct and limited

171. Three justices dissented, but only to the holding relating to the enforcement of the parole agreement, and not to the estoppel issue. Id. at 544-46.

172. See, e.g., Floyd, 74 U.S. (7 Wall.) at 675 (United States and individuals “bound . . . by the same principles”); Lee, 11 U.S. (7 Cranch) at 368 (applying same estoppel rule to United States as in “all the cases which have been decided on this principle”).

173. See, e.g., Office of Personnel Management v. Richmond, 110 S. Ct. 2465 (1990) (government estoppel prohibited by Appropriations Clause of Constitution); Federal Crop Insurance Corp. v. Merrill, 322 U.S. 380 (1947) (relying on Congress's exclusive power to charge treasury to deny estoppel claim). The early cases are not without suggestion of the separation of powers rationale. See, e.g., United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814). Claimants below were bona fide purchasers of a shipment of coffee which had been imported into the United States in violation of a federal trade embargo. Id. at 399. The customs official, however, had granted a permit to import the coffee and had issued a receipt for the duty. Id. at 400. In defense to an action to compel forfeiture of the coffee, claimants argued that the acts of the customs officer should estop the United States from treating the coffee as contraband. Id. at 401-02. The Attorney General of the United States argued that the collector had no authority to waive the penalty, and therefore could not be presumed to have waived it. Id. at 404. The Court did not address the estoppel argument explicitly, but its decision to uphold the forfeiture is couched in terms of unmistakable deference to the legislature’s prerogative to affix penalties for statutory violations. Even though “cases of hardship and even absurdity” might result from the Court’s decision to uphold the forfeiture, “provision is made by law for affording relief under authority much more competent to decide on such cases than this court ever can be.” Id. at 405.

174. See Richmond, 110 S. Ct. at 2469.

175. See infra notes 223-46 and accompanying text.
scope of government agents' authority are grounded in the separation of powers, the best rule for limiting government estoppel is a rule which balances public and private interests in light of the limitations on judicial review imposed by the separation of powers doctrine.  

A. Propriety of Judicial Review

The appropriateness of judicial review is inverse to the efficacy of political remedies. This thesis forms a “cornerstone of constitutional law.” Where adequate remedy from onerous laws can be exacted from the legislature, courts are reluctant to interfere with the political process. In the area of government estoppel, only the most egregious examples of governmental bad faith provoke self-adjustment by the political branches. Thus, there is a need to develop a viable theory of judicial review for government estoppel cases.

B. The Ascent of Legislative Prerogative

1. Federal Crop Insurance Corp. v. Merrill

Federal Crop Insurance Corp. v. Merrill is the leading modern case of estoppel against the federal government. In Merrill, the United States Supreme Court gave full expression to the presumption

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176. See infra notes 247-80 and accompanying text.  
177. See infra notes 281-333 and accompanying text.  
180. Carolene Prods., 304 U.S. at 152 n.4. A strong statement of the principle was given in Lockard v. City of Los Angeles, 33 Cal. 453, 461, 202 P.2d 38, 43 (1949) (“Legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties.”).  
181. A prominent federal example is the policy statements of the tax commissioner in the 1920s and 1930s. Perhaps the most noted change in position was Couzens v. Commissioner of Internal Revenue, 11 B.T.A. 1040 (1928), in which the Commissioner changed the valuation of Ford Motor Co. minority stock after Couzens sold his shares. Id. at 1146-47. This case led to the IRS policy of honoring its rulings. See Berger, supra note 67, at 680. Another example is the “good faith” clauses in certain federal acts which prohibit such reversals. See, e.g., Securities Act of 1933, 15 U.S.C. § 77s(a) (1988), which provides in part:

[N]o provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.


183. Richmond, 110 S. Ct. at 2469.
that private persons know the law. The Court also invoked an explicitly constitutional basis for denying recovery: only Congress has power to charge the federal treasury. 184

In Merrill, a local agent for the Federal Crop Insurance Corporation (FCIC) erroneously issued an insurance policy on petitioner’s replanted wheat crop.185 Published federal regulations excluded such crops from the FCIC program.186 The crop failed,187 and payment on the policy was denied.188 The Court ruled that, because the regulations were published, the petitioner had constructive notice of their provisions, and refused to estop the government on the basis of the unauthorized statements of a local agent.189 But the Court also justified its holding on the ground that it is “the duty of all courts to observe the conditions defined by Congress for charging the public treasury.”190

Merrill is notable not only for its overt reliance on the separation of powers, but also for the fact that the constitutional issue did not have to be reached. Presented as an alternative ground to the decision (which was also based on the government agent’s lack of apparent authority),191 the separation of powers argument was gratuitous. Furthermore, since there was no alternative source of insurance available to the respondent farmers in Merrill, their reliance on the advice of the federal agent did not work a detriment.192 In Merrill, the Court went out of its way to invoke a limited scope of review when the United States was before it as a litigant. In this regard, Merrill stands in contrast to Lee v. Munroe,193 The Floyd Acceptances194 and Clark v. United States,195 in which the Court strove to avoid reliance on separation of powers issues.

The Merrill Court hinted at the reason for this change. In explaining that persons are charged with constructive knowledge of administra-

184. Merrill, 332 U.S. at 385. To “charge the treasury” is to “create liability on the part of the government.” Id.
185. Id. at 382.
186. Id. at 381-82, 386.
187. Id. at 382.
188. Id. at 386.
189. Id. at 384-85. This reason is identical to that which governed the case in The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869). See supra notes 99-121 and accompanying text for a discussion of Floyd. The Merrill Court cited Floyd in support. Merrill, 332 U.S. at 384.
190. Merrill, 332 U.S. at 385.
191. Id. at 384.
192. See United States v. Lazy FC Ranch, 481 F.2d 985, 988 (9th Cir. 1973) (“It should be noted that in Merrill, the farmers had no alternate means of obtaining crop insurance . . . and therefore, they did not rely to their detriment on the erroneous advice.”).
193. 11 U.S. (7 Cranch) 366 (1813); see supra notes 68-98.
194. 74 U.S. (7 Wall.) 666 (1869); see supra notes 99-121.
195. 95 U.S. 539 (1877); see supra notes 153-71.
tive regulations as well as statutes at large, the Court noted that "Congress has legislated in this instance, as in modern regulatory enactments it so often does by conferring the rule-making power upon the agency created for carrying out its policy." The Court was continuing its project, begun in the 1930s with the abandonment of substantive due process as a limitation on the police power, of making the country safe for the administrative state.

2. Office of Personnel Management v. Richmond

Merrill's placement of a constitutional shield between the Court and the administrative state was furthered last term by Office of Personnel Management v. Richmond. While Richmond could have been decided on the rule that equity courts, no less than law courts, are bound to observe a statute, the Court instead reached the constitutional issue of separation of powers by basing its decision on the Appropriations Clause.

Charles Richmond was a welder at the Navy Public Works Center in San Diego, California. He qualified for a disability retirement annuity, which was conditioned on Richmond's earning capacity remaining

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196. Merrill, 332 U.S. at 384.
197. Id. (emphasis added).
198. The Due Process Clause of the Fourteenth Amendment had been invoked from about 1887 to 1934 to strike down legislation that regulated labor and other commercial practices. Mugler v. Kansas, 123 U.S. 623 (1887) (upholding law prohibiting alcoholic beverages, but asserting propriety of judicial review of substantive basis of invocation of police power); Lochner v. New York, 198 U.S. 45 (1905) (striking down law limiting bakers to 10-hour days or 60-hour weeks as beyond the police power); Nebbia v. New York, 291 U.S. 502 (1934) (upholding milk price legislation, returning to more deferential scrutiny of regulatory laws). Two years prior to Merrill, the Court held that in construing administrative regulations courts must defer to an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945). On the correlation between deferential judicial review and the rise of the modern administrative state, see Henry P. Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1 (1983) (judicial oversight of public administration necessary to vindicate fundamental political axiom of limited government); see also Eric M. Braun, Note, Coring the Seedless Grape: A Reinterpretation of Chevron USA Inc. v. NRDC, 87 COLUM. L. REV. 986 (1987) (judicial deference to agency interpretation appropriate only where Congress has expressly granted interpretive authority to agency).
200. "Wherever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." 2 POMEROY, supra note 1, § 425, at 189-90.
201. Richmond, 110 S. Ct. at 2473.
202. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . .").
203. Richmond, 110 S. Ct. at 2467.
below a level "fairly comparable to" his rate of pay at retirement. Not wishing to exceed that limit, Richmond, who had taken part-time work, asked a Navy Employee Relations Specialist what level of income would trigger the limiting condition attached to the annuity. The specialist erroneously told Richmond that his annuity would continue so long as Richmond did not earn more than eighty percent of his rate of pay at retirement for two consecutive years. While that had been the law prior to 1982, the law had since been amended to provide that "[e]arning capacity is deemed restored if in any calendar year the income of the annuitant . . . equals at least 80 percent of the [rate of pay at retirement]."

The specialist also provided Richmond with an outdated pamphlet which gave the same erroneous advice. Later, exercising what may have seemed an abundance of caution, Richmond again requested the same information of the Navy, and again received the same erroneous advice. Relying on this advice, Richmond earned in excess of the eighty percent limit, thinking that because his earnings two years prior had not exceeded the limit his benefits would not be affected. The Office of Personnel Management applied the one-year limitation provision and discontinued Richmond's disability annuity.

Reversing the Federal Circuit Court of Appeals, the Supreme Court held that the Office of Personnel Management could not be estopped to deny the validity of the specialist's erroneous advice, since doing so would violate the Appropriations Clause of the Constitution. The Court reasoned that "[f]or the particular type of claim at issue here, a claim for money from the Federal Treasury, the [Appropriations] Clause provides an explicit rule of decision."
Where Merrill\(^{215}\) and its progeny\(^{216}\) were content to limit judicial review of government actions because of the structural constitutional limitation of separation of powers, *Richmond* places the constitutional restraint in a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”\(^{217}\) The result is to turn the government estoppel question into a political question, rendering it beyond the competence of the judiciary.\(^{218}\) The Court’s recitation of a litany of political remedies to which the victim of a governmental reversal of position may turn demonstrates that this was the Court’s intention.\(^{219}\)

*Richmond’s* resort to the Appropriations Clause to reject an estoppel claim has been criticized as a procrustean attempt to apply an ill-fitting doctrine.\(^{220}\) Nevertheless, the decision explicitly conditions the appropriateness of government estoppel on the power of courts to invade


216. See, e.g., Heckler v. Community Health Servs., 467 U.S. 51 (1984) (per curiam) (United States not estopped to recover overpayments of Medicare benefits despite applicant’s reliance on erroneous advice); Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam) (erroneous advice by Social Security Administration field representative did not give rise to government estoppel since court could not overlook valid regulations).


218. See id. at 210.

219. *Richmond*, 110 S. Ct. at 2473-75. Legislative relief from detrimental reliance on the erroneous advice of government agents is provided by several devices. First, the “good faith” clauses of certain statutes prohibit the assessment of penalties against persons who have relied to their detriment on government agent’s erroneous or later reversed interpretations of regulations and statutes. *Id.* at 2473. Second, private laws and “reference cases” (cases referred by Congress to the United States Claims Court) are used by Congress to “provide remedies in individual cases of hardship.” *Id.* at 2475. A private law is a law that deals with the affairs of a specific individual, as opposed to a public law, which deals with the affairs of the nation generally. As with public laws, a private law begins as a bill introduced by a legislator, which is sent to committee, reported and voted upon, and ultimately signed or vetoed by the President. See Donald A. Wall & Robert Childres, *The Law of Restitution and the Federal Government*, 66 Nw. U. L. Rev. 587, 589 (1971) (discussing private bills and jurisdiction of Claims Court). The inadequacies of the private bill remedy have long been recognized. See *id.* at 594 (private bills and reference cases consume large amounts of valuable committee and subcommittee resources, and lack of standards for passing bills and referring cases causes inconsistent results). The Federal Tort Claims Act, ch. 753, 60 Stat. 812 (1946) (codified as amended at 28 U.S.C. §§ 2671-80 and scattered sections of 28 U.S.C. (1988)), was enacted as a remedy to the inadequacies of the private bill system. United States v. Smith, 111 S. Ct. 1180, 1195 n.12 (1991) (Stevens, J., dissenting).

220. See *Richmond*, 110 S. Ct. at 2477 (Stevens, J., concurring) (Appropriations Clause prohibits unappropriated expenditures but does not determine whether rules governing appropriation have been adhered to; administrative agency’s maladministration of appropriated money may require estoppel to effectuate intent of Congress); see also *id.* at 2481 (Marshall, J., dissenting) (Appropriations Clause does not speak to issues of statutory interpretation or appropriateness of stopping government); Note, *supra* note 20, at 294 (invoking Appropriations Clause constitutionalizes government estoppel and unsettles this area of constitutional jurisprudence).
the legislative and executive spheres of power.221

C. Separation of Powers

In order to account for the special case of government estoppel, courts have developed the additional elements of affirmative misconduct, the refusal to base estoppel on unauthorized conduct of government agents, and the balancing of public and private interests. All of these elements draw their ultimate rationale from the requirement that a court must justify intrusive review of legislative actions by reference to some policy sufficiently important to override the basic tenet of separation of powers. The government estoppel decisions which turn either on a balancing of interests or on the affirmative misconduct rule justify judicial review by applying an analysis similar to that used in equal protection and due process jurisprudence.

The overt reliance on separation of powers in government estoppel cases is a fairly recent phenomenon.222 A court which estops the government from denying the unauthorized acts of its agent is in effect extending the law under which the agent is acting. The administrative agent violates the separation of powers by committing a legislative act; the court does the same in ratifying it, or in ordering the executive branch to provide relief which would exceed the authority which the legislature had granted the executive.

1. Affirmative misconduct

One means by which courts seek to limit the application of estoppel to the government is to require that the representation on which the party seeking estoppel relied was an act of “affirmative misconduct.”223

221. Richmond, 110 S. Ct. at 2474 (“Judicial adoption of estoppel based on agency misinformation would ... vest authority in these agents that Congress would be powerless to constrain.”). The Court noted that “Congress has always reserved to itself the power to address claims ... that 'the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual.'” Id. at 2475 (citation omitted).


223. The progenitor is Montana v. Kennedy, 366 U.S. 308, 314-15 (1961) (American Consulate official’s “well-meant advice ... falls far short of the misconduct such as might prevent the United States from relying on petitioner’s foreign birth”); see also INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam) (dicta) (failure to fully publicize rights accorded under statute does not give rise to affirmative misconduct). Many federal circuit courts of appeal have embraced the affirmative misconduct standard. See S&M Inv. Co. v. Tahoe Regional Planning Agency, 911
The United States Supreme Court has not offered a definition of the standard,\textsuperscript{224} but its application by other courts indicates that its scope includes egregious wrongs of an intentional, or at least a reckless, nature.\textsuperscript{225} Courts which adopt the affirmative misconduct test will then require that a government estoppel rest on proof of five elements: the four elements which make up a private estoppel,\textsuperscript{226} and affirmative misconduct.\textsuperscript{227}

The limiting doctrine of affirmative misconduct was not cut from whole cloth to apply to government estoppels. As shown by the discussion of \textit{Lee v. Munroe},\textsuperscript{228} it was present in the common law doctrine of estoppel to assert land titles.\textsuperscript{229} In both the land title and government estoppel, the party to be estopped knows or should know the facts; the party seeking estoppel is ignorant of the facts, relying on the misleading conduct of the other party, and would suffer detriment absent estoppel. \textit{See supra} note 34 and accompanying text.

\textsuperscript{224} The Court has observed that one relevant factor may be the failure of a government agent to comply with a regulation. \textit{Schweiker v. Hansen}, 450 U.S. 785, 789-90 (1981) (per curiam).


\textsuperscript{226} See \textit{Morgan}, 779 F.2d at 545.

\textsuperscript{227} See \textit{Morgan}, 779 F.2d at 545.

\textsuperscript{228} 11 U.S. (7 Cranch) 366 (1813); \textit{see supra} notes 68-98 and accompanying text.

\textsuperscript{229} Intentional fraud inducing reliance is an essential element only in cases "in which an owner of land is precluded from asserting his legal title by reason of intentionally false representations or concealments, by which another has been induced to deal with the land." \textit{3 POMEROY, supra} note 1, § 805, at 196-97.

The theory that intentional fraud is necessary to induce the reliance appeared in \textit{Boggs v. Merced Mining Co.}, 14 Cal. 279 (1859) (Field, J.). The court enumerated the necessary elements of land title estoppel as follows:

\textit{First}, that the party making the admission by his declaration or conduct was apprised of the true state of his own title; \textit{second}, that he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; \textit{third}, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge and, \textit{fourth}, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved. \textit{Id.} at 367-68.
cases, the rationale for limiting the application of estoppel to cases of intentional misconduct is one of policy: some principle must be employed to limit the potentially disruptive effect which the estoppel would have on the rights of innocent third parties.\textsuperscript{230} Because the cases in which government agencies have intentionally misled the public are bound to be few, requiring affirmative misconduct severely limits government estoppel.\textsuperscript{231} Still, the lower courts have been willing to find “affirmative misconduct” in the actions of government agents.\textsuperscript{232}

Recent Supreme Court dicta seriously impugn the viability of the affirmative misconduct approach. The Supreme Court in \textit{Office of Personnel Management v. Richmond} clearly distanced itself from the affirmative misconduct doctrine, criticizing it as a source of “needless litigation.”\textsuperscript{233} After summarizing the development of the affirmative misconduct doctrine, which arose “[d]espite the clarity of . . . earlier decisions,”\textsuperscript{234} the Court observed that “[t]he language in our decisions has spawned numerous claims for equitable estoppel in lower courts,”\textsuperscript{235} but all such determinations have been reversed on appeal.\textsuperscript{236} The \textit{Rich-
Court also criticized the affirmative misconduct doctrine because it runs counter to the Federal Tort Claims Act (FTCA) which does not accept tort liability for the misrepresentations of government agents. The FTCA, however, is not implicated in the granting of an estoppel, since the misrepresentation can be completely innocent and therefore nontortious.

If the requirement of affirmative misconduct is indeed an attempt to limit disruption of settled expectations of third parties by means analogous to the “actual fraud” element in the land title estoppel cases, then it is subject to criticism not for spawning false hopes but rather for interfering with the legitimate rights of private litigants. In land title cases, the reason for requiring fraud is to protect the settled expectations of innocent third parties. The loss in such a case is the entire loss of title to a single parcel of land. As between an innocent purchaser and a seller lacking technical legal rights, the loss will fall fully on one or the other; estoppel provides a systematic way of assigning that loss to the party who “rendered the injury possible.”

The loss faced by the government in the typical entitlements case is a monetary loss represented by the benefit at stake. Such a loss is not lie against the government."

But cf. United States v. Hatcher, 922 F.2d 1402, 1409-10 (9th Cir. 1991) (distinguishing Richmond and applying affirmative misconduct test). For a case relying on Richmond as authority to apply the affirmative misconduct test, see Gibson v. Resolution Trust Corp., 750 F. Supp. 1565, 1572-73 (S.D. Fla. 1990) (citing Richmond for proposition that “the Supreme Court has held that some type of ‘affirmative misconduct’ is necessary to estop the Government.”).}


238. Richmond, 110 S. Ct. at 2474 (“[T]he FTCA by its terms excludes both negligent and intentional misrepresentation claims from its coverage. The claim brought by respondent is in practical effect one for misrepresentation, despite the application of the ‘estoppel’ label.” (citation omitted)). The exclusion of liability for misrepresentation is found at 28 U.S.C. § 2680(h) (1988).

239. On the possibility of raising an estoppel on the basis of an innocent misrepresentation see 3 Pomeroy, supra note 1, § 803, at 185.

240. As tortious conduct is wrongful conduct, innocent conduct is by definition nontortious, since no innocent conduct is wrongful. See generally W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 1, at 1-6 (5th ed. 1984) (offering definitions of "tort").

241. 3 Pomeroy, supra note 1, § 807, at 202-03. See supra notes 56-58 and accompanying text for a discussion of the doctrine of estoppel to assert title to land.

242. “In equity the person in favor of whom the owner is estopped to claim the land is entitled to a conveyance of the land by the owner . . . .” 4 Tiffany, supra note 95, § 1235, at 1125.

243. 3 Pomeroy, supra note 1, § 803, at 187.

244. See, e.g., Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (insurance settlement paid by government-funded crop insurance corporation).
necessarily passed on to taxpayers and is thus distributed over society as a whole. The settled expectations of members of the taxpaying public, responsible individually for an infinitesimal part of the cost of the deprivation to the private party, are not comparable to those of the innocent land purchaser who stands to bear the entire loss alone. Of course, the Takings Clause of the Fifth Amendment, which requires the government to pay just compensation for private property which it takes for a public purpose, places constraints on the government's tendency to force such losses on individuals, rather than accept responsibility and distribute them over society.

2. Unauthorized acts of government agents

The principle under which an agent with apparent authority has power to bind a principal is closely related to equitable estoppel. In general, government agents who act beyond their scope of express or implied authority do not bind the government under either a theory of apparent authority or estoppel. Conversely, where the government

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245. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

246. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

247. Apparent authority is "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency § 8 (1958).

248. "[T]he principle which underlies the doctrine of the implied authority of an agent in most of its applications, and which prevents the principal from denying the authority which, by his conduct, he has held the agent out to the world as possessing, is identically the same principle which constitutes the essence of all equitable estoppels." 3 Pomeroy, supra note 1, § 801, at 177-78. This is not to say that the effect of the two doctrines is identical. Apparent authority, unlike estoppel, requires no change in position of a third party; apparent authority creates rights in both principal and third party whereas estoppel creates no rights in the party to be estopped. Restatement (Second) of Agency § 8 cmt. d (1958).

249. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."); see also Merrill, 332 U.S. at 383-84 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); Hicks v. Harris, 606 F.2d 65, 68 (5th Cir. 1979) ("[E]ven if government employers purported to waive the requirements for obtaining federal student loan insurance . . . they were acting outside the bounds of their authority and could not bind the government . . . ."); Michael C. Pitou, Equitable Estoppel: Its Genesis, Development and Application in Government Contracting, 19 Pub. Cont. L.J. 606, 623-25 (1990) ("It has generally been held that the unauthorized act of government employees cannot support an estoppel against the government.").
action is authorized an estoppel will often lie. 250 This rule is intimately bound up with the requirement of good faith reliance on the part of the person invoking the estoppel. 251 The unauthorized acts of government bureaucrats cannot give rise to "apparent" authority for the same reason that erroneous bureaucratic advice cannot be reasonably relied upon. 252 Justifications for the rule include separation of powers and protection of the public treasury. 253

The rule that a government agent's unauthorized acts will not give rise to an estoppel is a venerable one. 254 In Utah Power and Light Co. v. United States, 255 the United States sued to enjoin certain power companies from using dams and other power generation plants which they had placed on public lands without permit or license from the Secretary of the Interior or the Secretary of Agriculture, as required by law. 256 The power companies argued that they had a vested right in continued use of the generating facilities, and, therefore, the United States was estopped to deny their right to use the land. 257 The power companies claimed to have relied on the representations of "some unmentioned officers or agents of the United States, to the effect that the reservations [of the land as national forest] would not be an obstacle to the construction or operation of the works in question." 258 The Court gave this argument short shrift: "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." 259

250. See, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 807-08 (D.C. Cir. 1984) (federal government official estopped to deny validity of contract where official had authority to waive administrative regulation which would have barred contract, and acted in way which induced private party's reliance on official's intent to waive regulation); Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) ("The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority.").

251. See infra note 262.

252. Restatement (Second) of Agency § 27 (1958) (representations of principal "reasonably interpreted" give rise to apparent authority) (emphasis added).

253. The underlying basis of the unauthorized actions rule is a concern "that judicial validation of unauthorized actions by federal officials may infringe on congressional authority under the separation of powers doctrine." Thompson, supra note 230, at 562.


255. 243 U.S. 389 (1917).

256. Id. at 402.

257. Id. at 403.

258. Id. at 408-09.

259. Id. Private estoppel is likewise unable to violate a statute. See Hedges v. Dixon County, 150 U.S. 182, 192 (1893) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law."); 2 Pomeroy, supra note
The internal workings of a private agency relationship are presumed private and beyond the knowledge of the most conscientious, except as revealed at the discretion of the principal. By contrast, citizens are charged with constructive knowledge of the workings of their government. The functioning of the "no apparent authority" rule follows immediately from that charge. The availability of information on the workings of government makes independent verification of the authority of agents at least a theoretical possibility. Also, on a purely theoretical level, the distinction between agent and third party breaks down in the case of government contracts. Since the agent's authority is vested by "the representatives of the American people in Congress assembled," a private citizen who relies on the agent's representation is identified with the agent's principal. Thus, the private citizen is chargeable with the principal's knowledge on the basis of a legal fiction analogous to that which charges a partnership with the knowledge of each partner.

1, § 425, at 189 (equity courts "are bound by positive provisions of a statute equally with courts of law"); Note, supra note 20, at 291 (1990).

260. See Restatement (Second) of Agency § 27 cmt. b ("[A]pparent authority exists only as to those who learn of a manifestation from conduct of the principle for which he is responsible. . . . Until there has been a communication to a particular person, and until that person learns facts from which he reasonably infers that the agent is authorized, there is no apparent authority . . . .").

261. Merrill, 332 U.S. at 384 (persons entering into agreements with government assume risk of having accurately ascertained scope of agent's authority, even where agent is unaware of own authority); Mullan v. State, 114 Cal. 578, 46 P. 670 (1896) (State not estopped from denying validity of contract made without authority because contractor in good faith performed services under it, since contractor must at own peril know authority of those who seem to act for State).

262. One author put the argument as follows:

The logic of the position is elementary. Apparent authority and estoppel must both be predicated on a reliance by the party asserting the right. The authority of a public agent or officer must be found in a public statute or a proper delegation pursuant thereto. Since all persons are "presumed to know the law," or to have official notice of its content, no one is justified in reliance on any appearance or representation of authority to act for the Government contrary to that which is contained in the law itself.


263. Indeed, unless the requirements of a law are knowable, enforcement of the law may violate due process. Musser v. Utah, 333 U.S. 95, 97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law abiding . . . ."); see also Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (1982) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . ."). Id. at 498 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).


265. Uniform Partnership Act § 12 (1914).
as the authority of the individual government official increases, or as the
difficulty of ascertaining the law increases, the reasonableness of the pri-
ivate individual's reliance increases, and the more loudly equity will call
out for the application of estoppel. Application of the concept of con-
structive notice to limit the reasonableness of reliance on governmental
representations only makes sense with reference to the type of representa-
tion and the source of the notice. A paradigm example of constructive
notification is the land title recordation system. The purpose of the
system is to convey information, and the information it conveys is
explicit and accessible. In private estoppels, courts have held that re-
cording of the title to real property furnishes the party seeking estoppel
with constructive notice of the actual state of affairs, thus defeating the
estoppel. However, where the party to be estopped has made an affir-
mative representation contrary to the contents of the record, "it would
be in the highest degree inequitable to permit him to say that the other
party, who had relied upon his conduct and had been misled thereby,
might have ascertained the falsity of his representations."

Imputing to private citizens constructive notice of the content of the
Code of Federal Regulations, on the other hand, has been criticized as an
"absurdity." If every person is deemed to "know the law," then no burea-
cratic error will ever give rise to reasonable reliance. The norma-

266. The dissent in Merrill urged that it was unreasonable to require a farmer to scour
the Federal Register in order to verify the statements of a government agent. Merrill, 332 U.S. at
387 (Jackson, J., dissenting); see also United States v. Lazy FC Ranch, 481 F.2d 985, 990 n.6
(1973) ("We think it important to note that the more responsible the individual giving the
advice, the more reasonable the reliance and the greater the injustice in not permitting the
application of the estoppel defense.").

267. See, for example, Division 2, Part 4, Chapter 4 of the California Civil Code, "Recording
Transfers of Real Property," providing detailed rules governing the filing of record of title
with the county recorder, CAL. CIV. CODE §§ 1169-73 (West 1991), authentication and ac-
knowledgement of title instruments, id. §§ 1180-1201, and a legal presumption that persons
dealing with the property are aware of the contents of the officially recorded title documents,
id. §§ 1213-20.

268. See, e.g., id. §§ 1180-1207 (requiring proof and acknowledgement of recorded instru-
ments); CAL. GOV'T CODE §§ 27230-65 (West 1991) (requiring recorder to maintain extensive
cross-indexing of recorded documents).

269. McClellan v. Penick, 298 F. 366 (5th Cir. 1923); 3 POMEROY, supra note 1, § 810a, at
221.

270. 3 POMEROY, supra note 1, § 810a, at 223 (citing Wiser v. Lawlor, 189 U.S. 260
(1903)).

271. Merrill, 332 U.S. at 387 (Jackson, J., dissenting). Expressions of judicial frustration
with the unintelligibility of administrative regulations are commonplace. See, e.g., Diamond
Roofing Co. v. Occupational Safety and Health Review Comm'n, 528 F.2d 645, 650 (5th Cir.
1976) (court refused to adopt agency interpretation of its own regulation since doing so would
"delay the day when the occupational safety and health regulations will be written in clear and
concise language so that employers will be better able to understand and observe them").
tive "should have known" becomes a tautological bar to any estoppel: to know the law is to know that there is no reasonable reliance sufficient to give rise to estoppel.272 Once the Supreme Court has announced that "[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority,"273 any subsequent reliance on an unauthorized act is per se unreasonable.274

Courts have recognized the practical limits of knowing the law.275 In Schuster v. Commissioner,276 the court estopped the federal government from recovering a tax deficiency from a bank that had relied on a ruling by the Commissioner of the Internal Revenue Service in not paying taxes on certain estate property which the bank administered as trustee.277 The bank's reliance was detrimental in that it had distributed the property to the heirs, and any deficiency would have to be paid by the bank, even though the bank was not a beneficiary of the estate.278 The reliance was reasonable in that the court could not see "what additional action the bank might have taken to protect itself from liability."279 Even though the action of the Commissioner was "of legislative significance" and the policy against estoppel was therefore "particularly strong,"280 this did not mean that the Commissioner could correct any mistake of law regardless of the injustice that would result.

3. Balancing of public and private interests

Courts have also limited the application of estoppel to the state by expressly balancing the injustice done to the private person with the pub-

272. The problem has been explained by Professor Tribe as follows: the norms which protect settled property rights from government appropriation cannot be expressed entirely within the language of expectations; that path is a circular one inasmuch as expectations are themselves subject to governmental manipulation. . . . Without appeal to such concerns [as the norms of regularity, autonomy and equality], we are defenseless against the alluring but fatal argument that, since it is government that gives, government is free to take as well.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-7, at 608-09 (2d ed. 1988).

273. Merrill, 332 U.S. at 384.

274. The Merrill Court noted that "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Id. at 384-85.

275. Id. at 387 (Jackson, J., dissenting).

276. 312 F.2d 311 (9th Cir. 1962).

277. Id. at 318.

278. Id.

279. Id.

280. Id. at 317.
lic policy that would be supervened by an estoppel. 281 Government interests and policies which may be affected by raising an estoppel are the separation of powers, drain on the public fisc, the risk of countenancing fraud, and the effect on the dissemination of government information. 282 A person's liberty or other personal interest is more likely to outweigh the governmental interests, and hence, courts are more likely to grant an estoppel than when mere economic interests are at stake. 283 To gauge the weight of the personal injustice in government estoppel cases, courts employ criteria analogous to those which govern the imposition of heightened levels of scrutiny in constitutional adjudication. 284

Although some courts introduce both the balancing element and the affirmative misconduct element as distinct requisites to government estoppel, 285 the affirmative misconduct requirement is a special case of the more general balancing rule. Affirmative misconduct is an element so weighty that it tips the balance in favor of the private litigant.

The ability of government misconduct to overcome the policy reasons against government estoppel has been recognized, at least in dicta, by the United States Supreme Court. In Heckler v. Community Health

281. The rule as stated by the California Supreme Court in City of Long Beach v. Mansell serves as an example:

The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.

3 Cal. 3d 462, 496-97, 476 P.2d 423, 448, 91 Cal. Rptr. 23, 48 (1970); see also Lazy FC Ranch, 481 F.2d at 989 ("[E]stoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."") (citation omitted).

282. See supra notes 3-10 and accompanying text.

283. See infra notes 297-333 and accompanying text.

284. See infra notes 286-89 and accompanying text.

285. See, e.g., Watkins v. United States, 875 F.2d 699, 707 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990). Prior to examining elements of private estoppel, a government estoppel claim must establish two threshold elements: (1) "'affirmative conduct going beyond mere negligence,' " and (2) whether "'the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage . . . .'") Id. (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)); see also Sierra Club v. Union Oil Co., 716 F. Supp. 429 (N.D. Cal. 1988):

The party seeking to raise estoppel against the government must establish [in addition to the traditional elements of estoppel] that (1) the government, via authorized acts of its agents, engaged in affirmative misconduct going beyond mere negligence; and (2) the injustice done to the party must outweigh the harm that will be done to the public interest if the government is estopped.

Id. at 436.
the Court refused to estop the government from asserting that Community Health Services was required to surrender program funds erroneously paid to it under the Comprehensive Education and Training Act (CETA). Community Health Services claimed that because it had relied on government advice to the effect that it was entitled to the funds, the government was estopped from reversing its position. The Court denied the estoppel claim on private estoppel grounds, holding that because there was no entitlement to the funds under law, Community Health Services suffered no detriment by disgorging those funds.

In dicta, however, the Court refused to rule out the possibility of applying estoppel against the government. Cases may arise, the Court noted, "in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Notably, the Court expressed the balancing as one between two public interests, the interest in confidence in government and the interest in prohibiting government estoppel. Presumably, however, any determination of the extent of the public interest in confidence in government will necessarily take into account the type and degree of detriment suffered by the private litigant.

Lower courts had been using the balancing test for many years prior to Heckler as grounds for granting government estoppels. For example, in Oil Shale Corp. v. Morton, the court held that even if the administrative actions of the Secretary of the Interior were unauthorized or contrary to law, estoppel was still appropriate, since the erroneous advice was "so closely connected to the basic fairness of the administrative decision-making process that the government may be estopped from disavowing the misstatement."

Unlike the affirmative misconduct rule, which liberalizes government estoppel by providing a means for granting estoppel in a certain class of cases, the balancing rule will not necessarily have a similar effect.

287. Id. at 61.
288. Id. at 56-57.
289. Id. at 56-57.
290. Id. at 60-61.
291. Id.
293. Id. at 126 (quoting Brandt v. Hickel, 427 F.2d 53, 56 (9th Cir. 1970)). At issue were oil leases erroneously granted under an earlier administrative decision. Id. at 119.
As long as respect for institutional boundaries is considered to be per se more important than the liberty interests of individuals, the "balancing" will always favor denying estoppel of the government.

Basing the application of government estoppel on a balancing of private and public interests is, nevertheless, a salutary development. While such a rule may be criticized as being vague and hence subject to abuse,294 it does no violence to the basic nature of equitable remedies, which are inherently flexible295 and depend on the facts of each case.296

Recognition of this balancing also explains numerous decisions. In criminal law, the liberty interests of individuals are scrupulously protected under constitutional and other safeguards.297 Rights of this constitutional dimension weigh heavily against congressional policy and public interest.298 Thus, the Supreme Court in United States v. Penn-

294. Whether the limitations of governmental authority may be based on principles other than those expressed in positive law has long been debated. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Iriell, J.) (natural rights provide insufficiently firm basis for judicial review); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975); see infra note 333.

295. Richmond, 110 S. Ct. at 2481 (Marshall, J., dissenting) ("Significant policy concerns would of course be implicated by an indiscriminate use of estoppel against the Government. But estoppel is an equitable doctrine. As such, it can be tailored to the circumstances of particular cases, ensuring that fundamental injustices are avoided without seriously endangering the smooth operation of statutory schemes.").


297. Criminal convictions must be based on the "reasonable doubt" standard, a higher standard of proof than that which is usually required in civil jury findings. In re Winship, 397 U.S. 348 (1970) (proof beyond reasonable doubt constitutionally required in criminal cases). The criminally accused has, for example, a right to a speedy trial, a right to freedom from self-incrimination, and a right to assistance of counsel. U.S. CONST. amend. VI (speedy trial, assistance of counsel); U.S. CONST. amend. V (self-incrimination).

298. Violation of these rights may result in dismissal of criminal charges without regard to the guilt or innocence of the accused. See Strunk v. United States, 412 U.S. 484 (1973) (dismissal of charges only possible remedy for violation of Sixth Amendment right to speedy trial); see also Johnson v. Williford, 682 F.2d 868, 871-72 (9th Cir. 1982) (revocation of prisoner's erroneously granted parole status, after prisoner successfully reintegrated himself into community, would compromise prisoner's important expectation interest in freedom without serving to alleviate threat to public safety).
GOVERNMENT ESTOPPEL

sylvania Industrial Chemical Corp.,\(^{299}\) (PICCO) held that where the government had in effect "affirmatively misled" a corporation into believing that its actions were not criminal, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."\(^{300}\) Although PICCO was arguably not decided on equitable estoppel grounds,\(^{301}\) the opinion considered the possibility of affirmative misconduct by the government,\(^{302}\) reasonable detrimental reliance on the part of PICCO,\(^{303}\) and cited two law review articles on estoppel.\(^{304}\)

Balancing of liberty and public interests also explains in part the outcome of Clark v. United States.\(^{305}\) In Clark, the Supreme Court emphasized the unfairness of the government's challenging rightful ownership of a steamship after inducing the owner to bring the ship within its jurisdiction.\(^{306}\) The Court may have intended to bolster its decision by reference to the need to protect Clark from entrapment.\(^{307}\)

The relation between due process rights, entrapment, and estoppel is made explicit in the so-called "entrapment by estoppel defense."\(^{308}\) The Due Process Clauses of the United States Constitution\(^{309}\) prohibit government officials from acting to induce the commission of criminal acts.\(^{310}\) When a person reasonably relies on the legal advice of a public official charged with interpreting the law, and as a result acts in violation


\(^{300}\) Id. at 674.

\(^{301}\) Heckler, 467 U.S. at 68 (Rehnquist, J., concurring). But cf. Office of Personnel Management v. Richmond, 110 S. Ct. 2465, 2477 (1990) (White, J., concurring) (PICCO "may well have been decided on the basis of estoppel").

\(^{302}\) PICCO, 411 U.S. at 674.

\(^{303}\) Id.

\(^{304}\) Id. at 674-75 (citing Frank C. Newman, Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 COLUM. L. REv. 374 (1953); Note, Applying Estoppel Principles in Criminal Cases, 78 YALE L.J. 1046 (1969)).

\(^{305}\) 95 U.S. 539 (1877); see supra notes 153-71 and accompanying text.

\(^{306}\) Clark, 95 U.S. at 544.

\(^{307}\) Id. (government could not challenge claimant's title to steamship under statute governing dealing with the Confederacy, "after getting it within its jurisdiction under pretense of hiring it of the claimant").

\(^{308}\) United States v. Hedges, 912 F.2d 1397, 1404 (11th Cir. 1990).

\(^{309}\) U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ").

\(^{310}\) United States v. Gamble, 737 F.2d 853 (10th Cir. 1984). Although the due process defense based on government misconduct "is often raised but is almost never successful," entrapment may be so outrageous as to violate due process. Id. at 856-57 (citing Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973)); United States v. Gardner, 658 F. Supp. 1573 (W.D. Pa. 1987) (postal inspector's request that postal worker purchase drugs violated due process). See generally Tim A. Thomas, Annotation,
of a criminal statute, the person can defend on the grounds that the gov-
ernment is estopped to deny the correctness of the interpretation thus
given. It is the protection of the individual right to due process which
requires the raising of an estoppel against a government agent in such a
case.

The same analysis explains the Supreme Court's decision in Moser v.
United States, a case often cited as an example of the Supreme Court
granting a government estoppel. Moser was a Swiss national who
married an American woman and was living in the United States. The
State Department granted Moser an exemption from military service
pursuant to a treaty between the United States and Switzerland. The
Department of State erroneously informed Moser that the exemption
would not act as a waiver of his right to United States citizenship.
In fact, section 3(a) of the Selective Training and Service Act of 1940
provided that an exemption from military duty of an alien would result
in permanent waiver of the ability to become a United States citizen.
The Court found that Moser had justifiably relied on the advice of "the
highest authority to which he could turn," and that to bar Moser from
citizenship would violate principles of "elementary fairness." The
Court asserted that it did not need to decide the case on an estoppel
theory, holding instead that only by means of a knowing and intelligent
waiver can a person effectively relinquish a right as important as the
right to citizenship.

The Court engaged in a balancing of private and public interests to
reach its result in Moser. The level of importance ascribed by the Court
to citizenship is indicated by its applying the same test—knowing and

What Conduct of Federal Law Enforcement Authorities in Inducing or Co-Operating in Crimi-
311. See, e.g., Cox v. Louisiana, 379 U.S. 559 (1965) (police official's advice to defendant as
to permissible location of demonstration barred later prosecution of defendant for demonstrat-
ing at that location).
313. See Office of Personnel Management v. Richmond, 110 S. Ct. 2465, 2479 (1990) (Mar-
shall, J., dissenting); Johnson v. Williford, 682 F.2d 868, 871 (9th Cir. 1982); Frederick W.
Blumenschein, Note, Equitable Estoppel of the Government, 47 BROOK. L. REV. 423, 435
314. Moser, 341 U.S. at 42.
315. Id. at 44.
316. Selective Training and Service Act of 1940, ch. 720, § 3(a), 54 Stat. 885, 885-86 (re-
pealed 1945).
318. Id. at 46.
319. Id. at 47.
320. Id.
intelligent waiver—applied to relinquishment of constitutional rights such as the right to trial.\textsuperscript{321} The public interest behind the federal statute regulating the admission of foreign nationals is also a strong interest.\textsuperscript{322} Nevertheless, the citizenship interest, as well as the reliance interest implicated in the absence of knowing and intelligent waiver, were sufficiently important to overcome both the public interest in regulating immigration and the separation of powers interest implicit in overriding a constitutional power of Congress.\textsuperscript{323}

In \textit{Watkins v. United States},\textsuperscript{324} the Ninth Circuit Court of Appeals, sitting en banc, estopped the United States Army from refusing to grant reenlistment to Sergeant Perry Watkins on the ground that he was an avowed homosexual.\textsuperscript{325} Watkins’ performance was exemplary, and the court found no evidence that his homosexuality had a deleterious effect on his unit.\textsuperscript{326} Therefore, the injustice to Watkins outweighed the nonexistent damage to the public interest in national security.\textsuperscript{327} Finding the other elements of estoppel present, the court estopped the Army from denying reenlistment on the basis of Watkins’ homosexuality.\textsuperscript{328} The resort to estoppel in \textit{Watkins} resulted in the withdrawal of an earlier decision in the same case in which a three-judge panel of the Ninth Circuit Court of Appeals had decided that homosexuals did not constitute a suspect classification for purposes of equal protection scrutiny.\textsuperscript{329} The en banc decision in \textit{Watkins} illustrates that where the rights of the individual justify (or arguably justify) heightened equal protection scrutiny, the balancing of those rights against the governmental interest can give rise to an estoppel.

In \textit{PICCO}, \textit{Moser} and \textit{Watkins}, the courts granted estoppel, or at

\begin{thebibliography}{9}
\bibitem{notes1} Boykin v. Alabama, 395 U.S. 238, 242 (1969) (guilty plea must be based on intentional and voluntary relinquishment of right to trial).
\bibitem{notes2} INS v. Miranda, 459 U.S. 14, 19 (1982) (cases involving immigration laws and residency requirements implicate increasingly important interests and matters of broad public concern). The area of immigration is one in which the separation of powers doctrine usually requires courts to exercise great deference to the legislature. The Constitution authorizes Congress to “establish an uniform Rule of Naturalization.” U.S. CONST. art. I, § 8. In view of this plenary delegation of power, the Supreme Court has recognized that “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
\bibitem{notes3} Moser, 341 U.S. at 47.
\bibitem{notes4} 875 F.2d 699 (9th Cir. 1989) (en banc), \textit{cert. denied}, 111 S. Ct. 384 (1990).
\bibitem{notes5} \textit{Id.} at 702.
\bibitem{notes6} \textit{Id.} at 709.
\bibitem{notes7} \textit{Id.}
\bibitem{notes8} \textit{Id.} at 707-10.
\bibitem{notes9} Watkins v. United States, 847 F.2d 1329, 1349 (9th Cir. 1988).
\end{thebibliography}
least estoppel-like equitable relief, where the rights of the private party were fundamental liberty interests.\textsuperscript{330} By contrast, most government esttoppels involve economic rights, such as the right to receive benefits under a government program or the right to recover under a contract with the government.\textsuperscript{331} Government limitations on economic rights are subjected to extremely deferential "rational basis" scrutiny by the Court.\textsuperscript{332} The lack of any overt balancing of public and private interests in such cases can be interpreted as a tacit recognition that the right in question does not merit the intense scrutiny implied by a balancing of the right against the government policy.\textsuperscript{333}

\textsuperscript{330} See supra notes 297-329 and accompanying text.

\textsuperscript{331} See, e.g., Richmond, 110 S. Ct. at 2465 (retirement annuity).

\textsuperscript{332} See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (Equal Protection Clause not violated by city regulation banning certain hot dog vendors from New Orleans' French Quarter on basis of number of years on job); Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding statutory exemption of ready-to-wear eyeglass vendors from regulations applicable to licensed opticians).

\textsuperscript{333} Ordinarily, the courts will not strike down a statute for violating the Equal Protection Clause of the Fourteenth Amendment if there is some rational basis for believing that the statute will achieve some legitimate legislative end. See, e.g., Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding legislation prohibiting display of mobile billboards but permitting advertising of products sold by vehicle owner because distinction between them was rationally related to conceivable legitimate legislative end). Legislative acts subjected to this level of scrutiny are rarely struck down. Gerald Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). The policy behind this judicial restraint is grounded in the separation of judicial and legislative powers. See Dukes, 427 U.S. at 303 ("In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines "). When legislation is based on "suspect classifications" such as race or sex, a highly intrusive judicial review is warranted because of the presumption that such legislation violates the Equal Protection Clause. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (striking down Oklahoma statute that permitted sale of 3.2% beer to females older than 18, but prohibited its sale to males under 21); Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia anti-miscegenation statute on basis of "most rigid scrutiny"). A separate strand of equal protection cases gave heightened scrutiny to legislation impinging on a "fundamental right." See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (striking down Virginia poll tax of $1.50, finding right to vote "fundamental political right, because preservative of all rights,") and "mindful that where fundamental rights and liberties are asserted . . . classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

The Supreme Court has since restricted the tendency to invoke the Equal Protection Clause to protect "fundamental rights" not explicitly guaranteed by the Constitution. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to recognize right to education as fundamental right). The Rodriguez Court stated:

[T]he key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
4. Vested rights

A possible alternative approach to the equitable protection of private persons from governmental overreaching lies in the doctrine of "vested rights." When a private person's right has "vested," the right acquires the status of "property" which cannot be taken by the state without just compensation. The government, of course, may exercise its eminent domain power and condemn the property or otherwise appropriate the entitlement, but if it does so it must, under the Fifth

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Id. at 33.

The Court struggled to provide a criterion by which the fundamentalness of a right could be measured. See, e.g., Rodriguez, 411 U.S. at 62-63 (Marshall, J., dissenting) ("As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."). The derivation of fundamental interests from the Equal Protection Clause itself, however, inevitably encountered the same interpretive problems that led to the demise of substantive due process: the risk that judicial review ultimately would be based not on constitutional mandate but rather on judges' own interpretation of natural law was too great to sustain development of the doctrine. See Adamson v. California, 332 U.S. 46, 91 (1947) (Black, J., dissenting) ([To pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another."); see also Gerald Gunther, Constitutional Law 787-88 (11th ed. 1985) (discussing limitations of fundamental rights approach).

Courts which grant estoppel where the private litigant's reliance interest overbalances the separation of powers are in effect applying a fundamental rights analysis. Just as in equal protection analysis, intrusive judicial review cannot be justified in government estoppel cases unless the private right is sufficiently "fundamental" to outweigh the limitations on the court's power imposed by the separation of powers. The search for fundamental rights is no less problematic in the area of government estoppel than in the area of equal protection. Likewise, the need for justifying judicial intrusion is no less urgent. If the Equal Protection Clause can not be invoked to justify judicial review of fundamental rights, it is difficult to see how fundamental rights can be used to justify government estoppel.

334. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 196-98 (1980) (Brennan, J., dissenting) (retirees had obtained vested right in retirement benefits which was immune from subsequent congressional revocation); Flemming v. Nestor, 363 U.S. 603, 624 (1960) (Black, J., dissenting) (Congress was not free to revoke benefits that were not "gratui-
ties," and to do so was to "break its plighted faith"); Lynch v. United States, 292 U.S. 571, 577 (1934) (federal government's issuance of insurance policies created "vested rights," not "gratui-
ties [to] be redistributed or withdrawn at any time in the discretion of Congress"); Avco Community Developers v. South Coast Reg. Comm'n, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 390 (1976) ("Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.").

335. See, e.g., West River Bridge v. Dix, 47 U.S. (6 How.) 507, 535 (1848) ("All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation [of eminent domain] . . . . The people in their sovereign capacity . . . have a right to resume the possession of the property . . . whenever the public interest requires it." ) (quoting Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 72-73 (N.Y. Ch. 1831)).
Amendment, pay just compensation to the owner. The term "vested rights" is a conclusory term, which merely "forecloses the searching analysis necessary to a proper dissection of the problem." Indeed, any right which has not vested is still susceptible of revocation or abridgment and is more properly understood as a mere privilege or revocable license. Thus, the term "vested rights" is probably redundant, in that if an entitlement is not "vested," it is not a "right" at all.

A vested rights claim "is a species of governmental estoppel," in which actions on the part of a private person render a formal governmental action or promise immune from repudiation. The Supreme Court has intimated the relationship between estoppel and takings: "While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for . . . ."

Just as the weight appropriate to liberty interests can be analogized to due process and equal protection standards, the balancing of public and private economic property rights may draw its substance from the takings jurisprudence of the Fifth Amendment. Although economic rights are at stake in regulatory takings, and although such rights are left virtually without protection by the Due Process Clause and the Equal Protection Clause, the Fifth Amendment may require heightened scrutiny.

336. U.S. CONST. amend. V.
338. A property right creates an entitlement such that "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller." Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1092 (1972).
340. Id.
342. See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In Nollan, the Court applied heightened scrutiny to strike down an administrative agency's decision to condition a building permit on the landowner granting a public easement. Id. at 837. The Court noted that "[t]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." Id. at 834 n.3. The heightened scrutiny which the Court applied in Nollan is "[n]ot quite the stuff to rehabilitate property rights after Carolene Product's footnote 4, but close." Richard A. Epstein, Takings: Descent and Resurrection, 1987 SUP. CT. REV. 1, 38 (footnotes omitted).
IV. Recommendation

The United States Supreme Court in *Richmond v. Office of Personnel Management* sent a clear message that the proper grounds for estopping the government are much narrower than many lower courts had heretofore realized. At the same time, however, the Court suggested that a litigant who has been dealt an injustice by the federal government should look to the executive and legislative branches, rather than to the courts, for relief. The Court's suggestion that litigants seek relief by means of a private bill has a cynical ring given the limitations of that remedy. Nevertheless, pursuit of other political remedies is not only feasible; given the Court's hostility towards estoppel claims it may be necessary.

Congress is not the only level at which non-judicial remedies can be sought. The administrative agencies charged with carrying out congressional intent may have sufficient authority to undo individual wrongs, and to promulgate rules designed to prevent maladministration of government. For example, the error which misled the plaintiff in *Richmond* could have been avoided by requiring periodic audits of informational materials being disseminated by the Navy's employment specialists. Such an authority will remain unlikely to provide these palliatives, however, unless the political branches can be made responsive to the hardships they are capable of inflicting.

Just as under *Richmond* government estoppel can be limited by the Constitution, so too, perhaps, can the Constitution provide justification for government estoppel. The cases which employ a balancing of rights approach to determine whether the hardship suffered by the private citizen justifies the imposition of government estoppel indicate the feasibility of such an approach. Rights sufficiently fundamental to justify judicial repeal of repugnant legislation may also justify the judicial enforcement of administrative actions which are beyond the literal scope of statutory authorization. Absent some such check on the power of the government to do wrong, there will be no defense to the maxim "the government giveth, and the government taketh away."

V. Conclusion

The development of government estoppel in the United States demonstrates that the early cases treated estoppel of the state no differently than estoppel of private persons. Barriers to government estoppel are erected out of respect for the separation of powers between the judiciary

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and the other branches of government. The effect of estopping the state is to nullify the operation of a law as to the person who relied on the state's misrepresentation. Ordinarily, such a nullification is within the power of the judiciary only when based on constitutional grounds. The limits on the power of government to harm its citizens are found in the Constitution and in government's self-reflexive surrender of that power by express statutory means. The equity power of the judiciary, typified by the remedy of estoppel, is ill-suited to the task of overcoming the structural limitation on the court's ability to undo legislative and administrative actions. Where courts have resorted to estoppel or estoppel-like remedial mechanisms, they have employed a balancing of public and private interests analogous to that employed in the granting of constitutionally-based relief under the Due Process, Equal Protection, or Takings Clauses. When constitutionally justifiable intrusion is not warranted, political branches ought to provide the remedy in the form of administrative rule-making and legislation.

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