

1-1-2011

CONTRACT LAW—ESTOPPING BIG BROTHER: THE CONSTITUTION, TOO, HAS SQUARE CORNERS

Stephen Holstrom

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Stephen Holstrom, *CONTRACT LAW—ESTOPPING BIG BROTHER: THE CONSTITUTION, TOO, HAS SQUARE CORNERS*, 33 W. New Eng. L. Rev. 163 (2011), <http://digitalcommons.law.wne.edu/lawreview/vol33/iss1/5>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

NOTES

CONTRACT LAW—ESTOPPING BIG BROTHER: THE CONSTITUTION, TOO, HAS SQUARE CORNERS¹

INTRODUCTION

Equitable estoppel, also known as “estoppel in pais,”² is a common law doctrine³ that “prevent[s] one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.”⁴

In order for a party to be equitably estopped, they

must . . . : (1) . . . [make an affirmative] misrepresentation of fact to another person having reason to believe that the other [would] rely upon it; (2) the party seeking estoppel [must] rel[y] on [the misrepresentations] to its detriment; and (3) the reliance [must have been] reasonable in that the party claiming the estoppel did

1. The title is taken from a well-known quote from the great Justice Holmes in *Rock Island A. & L.R. Co. v. United States* where he emphasized that “[m]en must turn square corners when they deal with the Government.” *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

2. BLACK’S LAW DICTIONARY 630 (9th ed. 2009).

3. Equitable estoppel is sometimes confused with promissory estoppel. “Promissory estoppel” creates a cause of action that enforces an illusory promise as a contract when no consideration exists, while equitable estoppel acts as a repellent to prevent a party from raising a defense it would have in the absence of this doctrine. *Id.* at 631. “Promissory estoppel is a sword, and equitable estoppel is a shield.” *Jablon v. United States*, 657 F.2d 1054, 1068 (2d Cir. 1983). For further illustration, see Christopher S. Pugsley, *The Game of “Who Can You Trust?”—Equitable Estoppel Against the Federal Government*, 31 PUB. CONT. L.J. 101, 105 (2001); see also *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770, 772-73 (Ala. 1976).

Typically, equitable estoppel concerns a misrepresentation of past or present fact, while promissory estoppel concerns one of a future act. The distinction between the two types of estoppel is important because courts generally do not enforce claims of promissory estoppel against the government due to the doctrine of sovereign immunity. *Jablon*, 657 F.2d at 1070.

4. BLACK’S LAW DICTIONARY, *supra* note 2, at 630.

not know nor should it have known that its adversary's conduct was misleading.⁵

While this doctrine has been invoked for hundreds of years among private litigants,⁶ courts still struggle mightily over if and when equitable estoppel should be applied against government action.

Historically, equitable estoppel⁷ was not allowed against the government under any circumstance.⁸ The reasons for this are not without merit. These reasons include: protecting the public fisc (and fears of the resulting crushing liability from the numerous lawsuits emanating from the immense level of communication between the government and its citizenry),⁹ preventing the infringement of the federal government's sovereign immunity,¹⁰ avoiding schemes

5. *Mimiya Hosp. v. U.S. Dep't of Health & Human Servs.*, 331 F.3d 178, 182 (1st Cir. 2003). While these are the traditional elements of equitable estoppel, many courts have added that with regard to governmental acts, there must be an "affirmative misconduct" on behalf of the governmental agent that is greater than mere negligence. See *infra* Part II.C.

6. See Michael Cameron Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 607 (1990) (stating that "[equitable estoppel's] origins can be traced back to at least the Twelfth Century in medieval England"). See also MELVIN M. BIGELOW, *A TREATISE ON THE LAW OF ESTOPPEL* 1 (1872).

7. Hereinafter "equitable estoppel" will be simply referred to as "estoppel" unless otherwise noted.

8. See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("[I]t 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."); *Trs. of Phillips Exeter Acad. v. Exeter*, 27 A.2d 569, 586 (N.H. 1940) ("[T]he principle of sovereignty . . . would seem to defeat a claim of estoppel . . ."). But see *United States v. Kirkpatrick*, 22 U.S. 720, 735-36 (1820); *United States v. La Chappelle*, 81 F. 152, 155 (C.C. Wash. 1897) ("The authorities cited by counsel for the defendants prove that the doctrine of estoppel may be applied in some cases against the government.").

9. Fred Ansell, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026, 1027 (1986).

10. This doctrine has been withering for decades. See, e.g., *Portmann v. United States*, 674 F.2d 1155, 1169 (7th Cir. 1982) ("Sovereign immunity from contract and tort liability naturally carried with it sovereign immunity from equitable estoppel."). The court also stated: "[a]s the doctrine of sovereign immunity eroded, it became necessary to offer other justifications for the government's exemption from equitable estoppel." *Id.* at 1159. See also *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 98-99 (9th Cir. 1970) ("Sovereign immunity has been on the decline at both the state and federal level. It has been held generally that the Government is not subject to the same rules of property and estoppel as are private suitors. Such governmental immunity from estoppel is an off-shoot of sovereign immunity. Both the doctrine of sovereign immunity and that of governmental immunity from estoppel have been much discussed, criticized and limited in recent years." (internal citations omitted)); *State of Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 41 (N.D. Cal. 1981) ("Modern times have

to defraud the government,¹¹ and recognizing separation of powers principles.¹² In recent times, however, courts have realized that a failure to estop the government in every instance can lead to grave injustices.¹³

This Note will explore the legal history of equitable estoppel as it is applied to the government, including Supreme Court case law and subsequent interpretations by lower courts. It will then examine the various issues created by the current unsettled state of the equitable estoppel doctrine in the governmental context, and how various commentators have proposed remedying these issues.¹⁴ Next, it will recognize that there is no panacea; each of these remedies are inadequate.¹⁵ Finally, this Note will put forth a new idea, which is gaining traction in some circles, that when deciding equitable estoppel cases the government should apply each of these approaches in conjunction with each other, but with one additional element: when the government's actions in effect allow it to substantially undermine the core legislative purpose of the Act in question, the government should be estopped.¹⁶

I. MODERN EQUITABLE ESTOPPEL JURISPRUDENCE

Realizing the potential for miscarriage of justice, the Supreme Court has consistently eschewed a bright line rule against estopping the government while refusing to adopt a test dictating when estoppel of this type is permitted.¹⁷ If little else is clear, "equitable estoppel will not lie against the Government as it lies against private

seen the erosion of sovereign immunity in its various forms, including immunity from the equitable defenses of the statute of limitations, laches and estoppel."); Bernard Schwartz, *Estoppel and Crown Privilege in English Administrative Law*, 55 MICH. L. REV. 27, 27 (1957).

11. See *Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 368-69 (1813).

12. David K. Thompson, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 565 (1979).

13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part. IV.A-B.

17. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government."); *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60-61 (1984) ("[W]e are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* 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." (emphasis added)).

litigants.”¹⁸ Because of a lack of guidance, Supreme Court precedent provides ample opportunity for lower court interpretation in order to achieve their version of justice.¹⁹

While in the twentieth century, the Supreme Court has addressed cases implicating the issue of whether equitable estoppel should be applied against the government numerous times, the Court has squarely addressed the issue just four times.

A. *Cases Which Have Not Held the Government Estopped*

1. *Federal Crop Insurance Corp. v. Merrill*

The first case in the modern era in which the Supreme Court addressed equitable estoppel’s applicability to the government found that ordinary recourse available for private litigants would not be available against the federal government. *Federal Crop Insurance Corp. v. Merrill*²⁰ involved a group of farmers who applied for insurance under the Federal Crop Insurance Act, seeking to insure their fields against a poor harvest.²¹ The statute’s purpose was to protect wheat producers from financial catastrophe resulting from Acts of God.²² The farmers applied for insurance through the Bonneville County Agricultural Conservation Committee, a local agent for the federal government, telling the Committee that they were going to replant on land that had previously been a wheat field.²³ The Committee informed the farmers that their crop was insurable, and they conveyed this to the federal government.²⁴ The government approved.²⁵

18. *Richmond*, 496 U.S. at 419 (citing *Lee v. Munroe*, 11 U.S. (7 Cranch) 366 (1813)).

19. *See supra* Part I.A.

20. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). This case was dubbed “the leading case in our modern line of estoppel decisions” by Justice Kennedy in *Richmond*, 496 U.S. at 420.

21. *Merrill*, 332 U.S. at 382.

22. This legislative purpose was clear to the court.

To carry out the purposes of the Act, the Corporation, Commencing with the wheat . . . crops planted for harvest in 1945 is empowered to insure, upon such terms and conditions not inconsistent with the provisions of this title as it may determine, producers of wheat . . . against loss in yields due to unavoidable causes, including drought.

Id. at 380 (alterations in original) (quotation marks in original to statutory material omitted).

23. *Id.* at 382.

24. *Id.*

25. *Id.*

Drought then struck the western states, and the farmers' crop failed.²⁶ When the farmers sought to collect, the government discovered the crop had been reseeded, which prevented an insurance policy from being written.²⁷ The farmers sued.²⁸

Both the trial court and the Supreme Court of Idaho ruled for the farmers, reasoning that since a private insurance company would be bound by its error, the federal government should be as well.²⁹ The Supreme Court granted certiorari³⁰ and reversed.³¹

The Court first stated that the farmers would likely have a viable cause of action against a private insurance company.³² However, the Court denied that the government was "just another private litigant" when it was engaged in business usually reserved for the free market.³³ With little more, the Court stated that because of this, the government should not be estopped.³⁴ The Court held that the farmers had constructive notice that their insurance policy was invalid because a regulation published in the Federal Register was explicit in that regard.³⁵

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 382-83.

30. *Fed. Crop Ins. Corp. v. Merrill*, 331 U.S. 798 (1947).

31. *Merrill*, 332 U.S. at 380.

32. *Id.* at 383.

33. *Id.* In fact, the Court pointed out that this government program existed because farmers like Merrill would not be able to obtain similar insurance on the private market. *Id.* at 384 n.1.

34. *Id.* at 383. More specifically, the Court stated: "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures." *Id.* As will be explained, courts have subsequently reconsidered this line of thinking and have reversed course. *See infra* Part II.A.

35. *Merrill*, 332 U.S. at 383-86. Here Justice Frankfurter echoed Justice Holmes when he said "[m]en must turn square corners when they deal with the Government." *Id.* at 385. To this, Justice Jackson tersely replied, "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." *Id.* at 387-88. Indeed Holmes's quote has met stiff resistance in subsequent Supreme Court decisions. *See, e.g.*, *United States v. Seckinger*, 397 U.S. 203, 221 (1970) (Stewart, J., dissenting) ("Mr. Justice Holmes once said that '(m)en must turn square corners when they deal with the Government.' I had always supposed this was a two-way street." (alteration in original)); *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) ("It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."); *Comm'r v. Lester*, 366 U.S. 299, 306 (1961) (Douglas, J., concurring) ("The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners.").

Justice Jackson dissented, implicitly on equity grounds, stating:

I would affirm the decision of the court below I can see no reason why we should not adopt a rule which recognizes the practicalities of the business [I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event . . . one should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all.³⁶

Notwithstanding Justice Jackson's sentiments, protection of the government's interest and regulatory authority were paramount in the majority's decision.³⁷ This precedent would only become, if anything, strengthened by later Supreme Court rulings.

2. *Schweiker v. Hansen*

In *Schweiker v. Hansen*, the Supreme Court stated the general rule that in order for the government to have been estopped, the agent must have engaged in "affirmative misconduct," but stopped short of articulating what particular activity would constitute such conduct.³⁸ In *Schweiker*, a Social Security Administration (SSA) field representative offered flawed advice to a recently widowed mother.³⁹ Hansen asked a representative at her local SSA field office if she was eligible for "mother's insurance benefits."⁴⁰ The representative told her that she was not eligible, and she did not file a written application pursuant to this advice, despite the fact that an SSA manual instructed representatives to tell applicants to fill out

36. *Merrill*, 332 U.S. at 386-88 (Jackson, J., dissenting). Justice Jackson then advocated for a sweeping rule authorizing the use of estoppel against the government stating that the Court should "lay[] down a federal rule that would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment." *Id.* at 388.

37. *Id.* at 383-86.

38. *See Schweiker v. Hansen*, 450 U.S. 785, 787-88 (1982) (per curiam). *See infra* note 132 and accompanying text.

39. *Schweiker*, 450 U.S. at 786.

40. *Id.*

applications even if they believed the applicant ineligible.⁴¹ Hansen discovered a year later that she was in fact eligible.⁴² She then completed the necessary paperwork and began receiving benefits, which provided for a year's benefits awarded retroactively.⁴³ Had she filled out an application when she originally sought advice, she would have been eligible for a year's worth of benefits awarded retroactively *at that time*.⁴⁴ After a series of administrative rulings against Hansen, she sued for the year's benefits she did not receive due to the representative's faulty advice.⁴⁵

The trial court ruled for Hansen, and the Second Circuit affirmed,⁴⁶ holding that "misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel."⁴⁷ Additionally, the court pointed out that "[a]ppellee was at all times 'substantively' eligible in the sense that she was in the class of people that Congress intended to benefit. It would fulfill the fundamental legislative goal to grant appellee the benefits she seeks."⁴⁸

The Supreme Court reversed, not on the grounds that it was inappropriate to estop the government in *any* case,⁴⁹ but only that it was inappropriate in *this* case particularly.⁵⁰ The Court found that the field representative's failure to instruct Hansen to file an application (rather than, for example, preventing her from filing) fell "far short" of the conduct that would require estoppel of the government.⁵¹ The Court also voiced concerns about the potential for crushing liability against the government if the circuit court's decision stood.⁵² Such liability would subject innumerable conversa-

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 787.

45. Hansen v. Harris, 619 F.2d 942, 946 (2d Cir. 1980), *rev'd sub nom. Schweiker*, 450 U.S. 785.

46. *See generally id.* (holding that Hansen justifiably relied on the Government's conduct, which was unjustifiable).

47. *Id.* at 948.

48. *Id.*

49. *Schweiker*, 450 U.S. at 788. "This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." *Id.*

50. *Id.* at 790.

51. *Id.* at 789-90.

52. *Id.*

tions between field representatives and citizens to scrutiny where representatives did not precisely follow the lengthy SSA manual.⁵³

Two justices dissented, calling attention to the fact that the majority appeared to hastily overrule the court of appeals with little factual basis to do so.⁵⁴ The dissenting justices wrote of the impropriety of the court's issuance of a per curiam order in a case where the law was far from settled. In their view, the ruling would only serve to confusion among the lower courts.⁵⁵

3. *Heckler v. Community Health Services of Crawford County*

Just two years after *Hansen* the Supreme Court again examined this issue in *Heckler v. Community Health Services of Crawford County*.⁵⁶ The Court held that the federal government was not estopped from recovering federal funds from a nonprofit provider of health care services, despite the provider having been told orally by the government that the expenditures were proper.⁵⁷ The Court ruled that the provider had not demonstrated that the traditional elements of an estoppel were present, namely that money was improperly disbursed to Heckler in the first instance. As a result, Heckler could not have detrimentally relied on any government advice.⁵⁸ Heckler's position had not changed.⁵⁹ Recall, an estoppel

53. *Id.*

54. *Id.* at 791 (Marshall, J., dissenting).

55. In the words of the dissenting justices:

The apparent message of today's decision—that we will know an estoppel when we see one—provides inadequate guidance to the lower courts in an area of the law that, contrary to the majority's view, is far from settled . . . I believe that the majority, in its haste to reverse the judgment of the Court of Appeals, has simply added confusion to an already unsettled area by hinting, but not deciding, that various factual nuances may be dispositive of estoppel claims against the Government.

Id. at 792-93 (Marshall, J., dissenting).

This view was prescient. The confusion is exacerbated by the belief that "the doctrine of equitable estoppel does apply to the government" as a result of the "almost uniform support of decisions of the 1970s." KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES*, § 17.01, at 399 (1976). A few short years after Mr. Davis wrote this, the Supreme Court hastily overturned the Second Circuit, suggesting this was a settled area of law. However, the Court expressly recognized in its opinion that equitable estoppel was not settled. *See infra* Part I.A.4.

56. *Heckler v. Cmty. Health Servs.*, 467 U.S. 51 (1984).

57. *See id.* at 53.

58. *Id.* at 62.

59. *Id.* at 59 ("[T]he party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'") (quoting 3 J. POMEROY, *EQUITY JURISPRUDENCE*, § 805, at 192 (S. Symons ed. 1941)).

may not occur even in a private context when these required elements are not present.⁶⁰

In dicta, the Court refused to place an absolute prohibition on estoppel against the government, noting that there were indeed cases in which the government should be estopped, albeit only under a special set of circumstances left relatively undefined.⁶¹ Pursuant to this language, a number of lower courts subsequently allowed estoppel against the government.⁶²

4. *Office of Personnel Management v. Richmond*

In *Office of Personnel Management v. Richmond*, the plaintiff was a welder for the Navy who had problems with his eyesight and could no longer perform his duties.⁶³ He was given a disability annuity yearly and honorably discharged.⁶⁴ The statute regulating disability pay for government employees stated that if he was restored

60. *Id.* at 61.

61. The Court explained:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are no cases 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.

Id. at 60-61. The Court also noted that “the hallmark of the [equitable estoppel] doctrine is its flexible application.” *Id.* at 59.

62. Dicta such as this may have first appeared in *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961) (“[M]isconduct . . . might prevent the United States from relying on petitioner’s foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped”). This dicta is typical of subsequent Supreme Court cases. For an example of lower courts following this dicta, see *Watkins v. U.S. Army*, in which the court stated that:

The Supreme Court has expressly left open the issue whether estoppel may run against the government, refusing to hold “that there are *no cases* 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.” . . . This is a case where equity cries out and demands that the Army be estopped.

Watkins v. U.S. Army, 875 F.2d 699, 706, 711 (9th Cir. 1989) (quoting *Heckler*, 467 U.S. at 60-61) (holding the government estopped).

63. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990).

64. *Id.*

to his former earning capacity, he could no longer collect disability.⁶⁵ “Restored” for the plaintiff meant having a job that paid him eighty percent of his old welding salary.⁶⁶ He then took a job as a school bus driver.⁶⁷ He was offered overtime and called the Office of Personnel Management (OPM) inquiring how much overtime he could work and still collect disability.⁶⁸ They responded with an erroneously high number, and Richmond worked that number.⁶⁹ The OPM discontinued his benefits; Richmond appealed.⁷⁰

The United States Supreme Court decided the case on constitutional grounds,⁷¹ holding that the plaintiff’s claim for money was in direct contravention to the statute on which his claim must rest.⁷² Estopping the government in this and similar situations was held to be violative of the Constitution’s Appropriations Clause, which in the plurality’s⁷³ view must be interpreted to mean that “[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned [by Congress].”⁷⁴ Thus, the Court created a bright line rule that the government cannot be estopped when the plaintiff is seeking a money claim from the government, unless Congress consents to such an action through legislation.⁷⁵ Such an estoppel would vio-

65. 5 U.S.C. § 8337(d) (2006); *Richmond*, 496 U.S. at 417.

66. *Richmond*, 496 U.S. at 417.

67. *Id.*

68. *Id.*

69. *Id.* at 417-18.

70. *Id.* at 418.

71. “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. CONST. art. I, § 9. See generally Paul F. Figley, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009).

72. *Richmond*, 496 U.S. at 424 (citing 5 U.S.C. § 8337 (2006)).

73. Justices Kennedy, Rehnquist, O’Connor, and Scalia wrote for the majority with Justices Blackmun and White concurring. *Id.* at 15. Justice Stevens concurred only in judgment. *Id.* Justices Marshall and Brennan dissented. *Id.*

74. *Id.* at 425 (quoting *Reese v. Walker*, 11 How. 272, 291 (1851)). The Court then continued:

[I]f the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. . . . [J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.

Id. at 425-26 (citations omitted).

75. *Id.* at 434. This rule was only advocated by the three justice plurality. Justices Blackmun and White took issue with some of the Court’s spending analysis, while Justice Stevens stated that “[t]he Appropriations Clause of the Constitution has nothing to do with this case. Payments of pension benefits to retired and disabled federal servants are made ‘in Consequence of Appropriations made by Law’ even if in particular cases

late the Appropriations Clause, since it would be tantamount to the court forcing the government to pay funds that Congress never appropriated; the court would impermissibly be drafting laws from the bench.⁷⁶ However, some lower courts have interpreted *Richmond's* holding to be much narrower.⁷⁷

The Court also addressed whether a flat rule denying estoppel against the government should exist, and again declined to make such a rule:⁷⁸

But it remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government. A narrower ground of decision is sufficient to address the type of suit presented here, a claim for payment of money from the Public Treasury contrary to a statutory appropriation.⁷⁹

This passage is reminiscent of those present in other rulings concerning equitable estoppel against the government. In each instance that the court has addressed the estoppel issue, it has dis-

they are the product of a mistaken interpretation of a statute.” *Id.* at 435 (Stevens, J., concurring).

The dissenting justices felt that the Appropriations Clause should not stand in the way of a litigant’s attempt to collect funds from the government after it had been equitably estopped.

Although the Constitution generally forbids payments from the Treasury without a congressional appropriation, that proposition does not resolve this case. Most fundamentally, *Richmond's* collection of disability benefits would be fully consistent with the relevant appropriation. And even if the majority is correct that the statute cannot be construed to appropriate funds for claimants in *Richmond's* position, petitioner may nonetheless be estopped, on the basis of its prelitigation conduct, from arguing that the Appropriations Clause bars his recovery. Both the statutory construction and the estoppel arguments turn on the equities, and the equities favor *Richmond*.

Id. at 437-38 (Stevens, J., concurring).

76. *Id.*

77. *See, e.g.,* *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed Cir. 1993) (“[T]he Claims Court erred in concluding that *Richmond* stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. The *Richmond* holding is not so broad. *Richmond* is limited to ‘claim[s] for the payment of money from the Public Treasury *contrary to a statutory appropriation.*’”); *see also* *United States v. Hatcher*, 922 F.2d 1402, 1410 (9th Cir. 1991) (“[Plaintiff]’s assertion of equitable estoppel . . . would have a negative impact on the public fisc . . . this fact alone does not suffice to implicate the rule announced in *Richmond.*”).

78. Although the Supreme Court has refused to estop the government in the cases set forth here, they have held the government estopped (albeit under different doctrinal labels). *See infra* Parts I.B.1, I.B.2.

79. *Richmond*, 496 U.S. at 423-24.

posed of the claim on narrow grounds while declining to address the situations in which the government should be estopped, aside from imposing the affirmative misconduct requirement.

B. *Cases in Which the Court May Have Held the Government Estopped*

1. *Moser v. United States*

In *Moser v. United States*, the petitioner was a Swiss national who immigrated to the United States in 1937.⁸⁰ He registered with the Selective Service Agency in 1940, and then returned to Switzerland to serve in the Swiss military.⁸¹ Following his service in Switzerland, he returned to the United States and married a U.S. citizen, fathering three children with her.⁸² On January 11, 1944 he was declared eligible for the draft.⁸³ He sought aid from the Swiss Legation, claiming that under the Treaty of 1850 he did not have to join the U.S. military.⁸⁴ At the time this deal was allowed under the Selective Training and Service Act of 1940, with the proviso that if one exercised this right they could not become a United States citizen.⁸⁵ After contacting the Swiss Legation, Moser informed the Local Board of the Selective Service Administration that he had been “released unconditionally” from military service pursuant to the treaty.⁸⁶ After receiving Moser’s request, the Legation asked the U.S. State Department to grant Moser this unconditional release.⁸⁷ The Department then referred the matter to Moser’s Local Board, which replied that Moser must complete a Form 301 which was revised to comply with the Treaty.⁸⁸ This would grant him a draft deferral.⁸⁹ The Form was revised to exclude the provision that read “I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States”; language in conflict with the Treaty of 1850.⁹⁰ Moser also received written assurances from the Swiss legation that

80. *Moser v. United States*, 341 U.S. 41, 42 (1951).

81. *Id.*

82. *Id.*

83. *Id.*

84. The Treaty of 1850 provided that nationals of the United States and Switzerland living in the opposite country were exempt from military service there. *Id.*

85. *Id.* at 42-43; *see also* 50 U.S.C. § 303(a) (1940).

86. *Moser*, 341 U.S. at 43.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 44.

he would be allowed to apply for citizenship if he did not serve.⁹¹ Shortly thereafter, he applied for citizenship and was denied.⁹² The Naturalization Service claimed he obtained Form 301 through fraudulent mechanisms and in any event, that the Selective Service Act superseded the Treaty of 1850.⁹³ He sued, and in a sharply worded opinion the district court held for Moser.⁹⁴ However, this ruling was reversed by the Second Circuit, which held that while the Treaty of 1850 allowed Moser an exemption from military service, it did not force the United States to grant him citizenship simply because he had made this decision to take advantage of the exemption.⁹⁵

The Supreme Court reversed the court of appeals, holding that Moser did not intelligently waive his rights.⁹⁶ The Court also held, like the district court, that if Moser believed he would be prevented from obtaining citizenship by bypassing the draft, he would have served in the American military.⁹⁷

2. *United States v. Pennsylvania Industrial Chemical Corp.*

United States v. Pennsylvania Industrial Chemical Corp. (PICCO) was a case in which the United States prosecuted PICCO for violating 13 U.S.C. § 407, which was enacted in 1899.⁹⁸ The statute prohibited dumping industrial refuse into navigable water-

91. *Id.* at 43-44.

92. *Id.*

93. Petition of Moser, 85 F. Supp. 683, 684-85 (D.N.Y. 1949).

94. *Id.* at 685.

[T]o me it seems that verbal gymnastics in this case become quite irrelevant. Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed the revised form D.S.S. 301 if it were to be treated as a waiver of naturalization in the future . . . I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted.

Id.

95. Petition of Moser, 182 F.2d 734, 738 (2d Cir. 1950) (“Even if ‘right to apply for’ can be stretched to be synonymous with ‘right to obtain’ citizenship that would not bind this government.”).

96. *Moser*, 341 U.S. at 47 (holding that “nothing less than an intelligent waiver is required by elementary fairness”). In reality, the Court dismissed the estoppel issue in a rather cursory manner, stating, “[t]here is no need to evaluate these circumstances on the basis of any estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner. Petitioner did not knowingly and intentionally waive his rights to citizenship.” *Id.*

97. *Id.*

98. Currently codified at 33 U.S.C. § 407 (2006).

ways.⁹⁹ Section 407 also provided that “the Secretary of the Army . . . may permit the deposit of refuse matter deemed by the Army Corps of Engineers not to be injurious to navigation, ‘provided application is made to [the Secretary] prior to depositing such material.’”¹⁰⁰ PICCO dumped waste products into a river without seeking a permit from the Army Corps of Engineers, but this was because no permit program was established until December of 1970, seventy-one years after Section 407 was enacted.¹⁰¹

At trial, the district court refused to admit evidence both that the permit program was not in existence at the time of the alleged offenses and that the Army Corps of Engineers misled PICCO to believe that a permit was not needed for Section 407 compliance.¹⁰² The Third Circuit reversed the district court, which held that the Section 13 prohibition was operative in the absence of the requisite formalized permit procedures.¹⁰³

Relevant to estoppel, the Supreme Court held the district court’s refusal to admit PICCO’s evidence to be erroneous, explaining that this prevented PICCO from mounting an adequate defense.¹⁰⁴ In addition, the Court noted that the Army Corps of Engineers had always interpreted Section 407 to apply to industrial effluents that obstruct waterways, not refuse that caused no harm to ships in transit.¹⁰⁵ The Court further remarked that it was correct for PICCO to look for the Army Corps of Engineers regulations for guidance.¹⁰⁶ The Court then held, “Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of

99. *Id.*

100. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 658 (1973) (quoting original statute codified at § 13, the Court notes that the Secretary’s authority to issue permits under § 13 was terminated on October 18, 1972); 33 U.S.C. § 407.

101. *Pa. Indus. Chem. Corp.*, 411 U.S. at 660 n.9.

102. *Id.* at 661.

103. *United States v. Pa. Indus. Chem. Corp.*, 461 F.2d 468, 476 (3d Cir. 1972).

104. *Pa. Indus. Chem. Corp.*, 411 U.S. at 670.

105. The regulations stated: “Section 13 of the River and Harbor Act of March 3, 1899 authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby” *Id.* at 673 (citing 33 C.F.R. § 209.200(e)(2) (1969)).

106. *Id.* at 674.

criminal justice prevent the Government from proceeding with the prosecution.”¹⁰⁷

Many commentators have expressed the view that *Moser* and *PICCO* were cases decided on equitable estoppel grounds despite the fact that the Court did not say so expressly.¹⁰⁸ These scholars reason that the situations presented were decisions in which the estoppel doctrine could have readily been invoked.¹⁰⁹ Indeed, the lower court decisions in both cases spoke about estoppel as it applied to these litigants.¹¹⁰

It appears that confusion about the precedential value of these decisions befuddles even the justices themselves. In *Richmond*, Justice White wrote “[*PICCO*] may well have been decided on the basis of estoppel.”¹¹¹ Likewise, in *Heckler* Justice Rehnquist seemed similarly confused about the Supreme Court’s sanction of the use of estoppel.¹¹²

107. *Id.* The Court then cited two law review articles about the application of equitable estoppel against the government, supporting the view of some commentators that the Court had equitable estoppel in mind when rendering this decision. *Id.*; see Frank C. Newman, Note, *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).

108. See, e.g., Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency’s Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 730 (1992) (“In *PICCO*, as in *Moser*, the problem for the scholar is to account for the dramatically different approach used by the Court to address what is analytically an estoppel problem.”); Frederick W. Blumenschein, Note, *Equitable Estoppel of the Government*, 47 BROOK. L. REV. 423, 435 (1981).

109. See Schwartz, *supra* note 108, at 730; Blumenschein, *supra* note 108, at 435 n.50.

110. See *United States v. Pa. Indus. Chem. Corp.*, 461 F.2d 468, 480 (3d Cir. 1972), *rev’d*, 411 U.S. 655, 674 (1973); *Petition of Moser*, 182 F.2d 734, 738 (2d Cir. 1950), *rev’d sub nom.* *Moser v. United States*, 341 U.S. 41, 47 (1951). Of course, one reason the Court may not have couched the decision in estoppel terms is to prevent future litigants from pointing to these decisions as Supreme Court acceptance of the invocation of the doctrine.

111. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 434 (1990) (White, J., concurring).

112. *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 61 n.12 (1984) (“In fact, at least two of our cases seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception.”); see also *Nagle v. Acton-Boxborough Reg’l Sch. Dist.*, 576 F.3d 1, 4 (1st Cir. 2009) (“[T]he Supreme Court has almost never estopped the government—outside of criminal cases or deportation.”); *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973) (“We think the estoppel doctrine is applicable to the United States where justice and fair play require it. The Supreme Court applied this rationale in *Moser v. United States*”); *Griffin v. Reich*, 956 F.Supp. 98, 107 (D. R.I. 1997) (discussing how *PICCO* and *Moser* may have been decided on equitable estoppel grounds). *Contra Hansen v. Harris*, 619 F.2d 942,

II. SUGGESTED WAYS TO TREAT EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT

Addressing the ambiguity created by the Supreme Court, commentators have proposed various techniques to prevent most circumstances of grave injustice, but which also seek to avoid many of the negative effects associated with estopping the government. The following section analyzes and synthesizes the views of these commentators.

A. *Proprietary Capacity*

Many courts and commentators have suggested that when the federal government is acting in its proprietary function,¹¹³ it is acting much the same as private market participants and therefore should be estopped like a private entity.¹¹⁴ There are two ways in which the government acts in a proprietary capacity. The first involves a situation where the federal government is providing an essential service because there is not a strong enough profit potential for private actors to do so.¹¹⁵ The second is when it is essentially competing like other private actors.¹¹⁶

There are plentiful and often straightforward justifications for estopping the government in these situations. Obviously, it is lawful for private parties to be estopped in instances where their conduct satisfies the elements of equitable estoppel. When the government acts in this manner, it is at no greater a risk of incurring liability than the private litigant. For example, *Fed Ex* and the

950 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1982) (“While some courts and commentators have sought to find a contrary indication [that the Supreme Court did hold the government estopped] in *Moser v. United States*, this is an instance of the wish being father to the thought.”).

113. As opposed to its “sovereign” function. See John F. Conway, Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 *Fordham L. Rev.* 707 (1987).

114. For an example of this view, see *United States v. Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970) (“The growth of government and the concomitant increase in its functions, power and contacts with private parties has made many courts increasingly reluctant to deny the defense of equitable estoppel in appropriate situations.”). The court then held the government could be estopped because it was seeking enforcement of a contract made with a private party. *Id.* at 100. That is, the parties’ relationship was substantially similar to those of two private parties contracting. *Id.*

115. This is often referred to as “proprietary in form.” See Conway, *supra* note 113, at 720. Government operation of Amtrak is an example of “proprietary in form” action.

116. This is often referred to as “proprietary in fact.” *Id.* at 720. An example of this is the United States Postal Service. *Id.* at 720.

United Parcel Service both have extensive, nationwide operations with many agents, perhaps more so than the United States Postal Service. There are likely comparable opportunities for the Postal Service and these private carriers to incur liability. In the view of proponents advocating the proprietary exception to the longstanding doctrine against estoppel of the government, it is fundamentally unfair if the government can escape liability while private carriers are left paying damages for similar acts.

Many of these reasons have been judicially recognized for at least the past eighty years.¹¹⁷ The “proprietary capacity” idea has increasingly gained acceptance.¹¹⁸ Of course, not all courts have followed this model.¹¹⁹

B. *Procedural Estoppel*

Numerous courts and other observers have also noted a difference between estopping the government’s conduct by demanding it to provide a benefit to the plaintiff that they were never in fact entitled to receive, and estopping the government when it did not follow its own rules and regulations.¹²⁰ The latter is known as “procedural” rather than “substantive” estoppel.¹²¹ *Merrill* provides an example of substantive estoppel where claimants sought to invoke estoppel to recover insurance benefits to which they believed they were entitled as a result of government miscommunication.¹²²

117. *The Falcon*, 19 F.2d 1009, 1014 (D. Md. 1927) (“Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity [W]hen a sovereignty submits itself to the jurisdiction of a court of equity . . . its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.”).

118. *Accord Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) (finding issuance of permits for developers’ dredge and fill activities is unquestionably an exercise of the government’s sovereign power and therefore not subject to estoppel); *see also* *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (finding equitable estoppel may lie against government when agency was engaged in essentially a private business); *Portmann v. United States*, 674 F.2d 1155, 1161-62 (7th Cir. 1982) (finding proprietary character of government activity militates in favor of allowing estoppel). *See generally* *Wash. Metro. Area Transit Auth. v. Precision Small Engines*, 227 F.3d 224, 228 (4th Cir. 2000).

119. *See, e.g., F.D.I.C. v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986) (finding no merit in argument that proprietary nature of government activity justifies assertion of equitable estoppel against it); *see also* *Phelps v. Fed. Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986).

120. *See, e.g., Conway, supra* note 113, at 707.

121. *Id.* at 717-19.

122. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

There, the farmers sought the proceeds on their crop insurance, a benefit that they were never actually entitled to, yet believed they were because they were informed by the FCIC that their crop was insurable.¹²³

Schweiker v. Hansen was an example of a procedural estoppel claim.¹²⁴ The Second Circuit in *Hansen v. Harris* ruled that the plaintiff should not bear the costs of the SSA's errors because the SSA officer's misconduct resulted from a failure to follow clearly written guidelines in the SSA field representative's manual.¹²⁵ Had the field representative followed these guidelines, Hansen would have received the benefits to which she was entitled.¹²⁶ Because the government agent's failure to follow clearly promulgated guidelines resulted in an injustice to the private litigant, the Second Circuit held the government estopped.¹²⁷

Proponents of this view favor estopping the government when it commits a procedural error because claimants are denied benefits that they are actually entitled to through no fault of their own.¹²⁸ In addition, Congress purposefully allocated resources for people in the benefit-receiving class, thus showing a congressional belief that it is socially desirable that members of that class receive these benefits.¹²⁹ A policy that essentially results in permitting government agents to ignore rules frustrates the congressional purpose of providing benefits to people like Hansen.¹³⁰ Finally, failing to estop the government in cases such as this encourages laziness and lackadaisical behavior, and diminishes accountability in communication

123. *Id.* at 382-83.

124. *Schweiker v. Hansen*, 450 U.S. 785 (1982); *see supra* notes 39-51 and accompanying text.

125. *See supra* notes 45-48 and accompanying text.

126. *See supra* note 42 and accompanying text.

127. *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980), *rev'd sub nom. Schweiker*, 450 U.S. at 790 (“[O]ur holding of estoppel under these circumstances is limited to the situation where (a) a procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective standards of conduct exists and supports an inference of misconduct by a Government employee.”). The Supreme Court rejected this rationale in *Schweiker*. *Schweiker*, 450 U.S. at 788.

128. *See generally* Peter Raven-Hansen, *Estoppel: When Agencies Break Their Own “Laws”*, 64 TEX. L. REV. 1 (1985).

129. *Hansen*, 619 F.2d at 962 (Newman, J., concurring), *rev'd sub nom. Schweiker*, 450 U.S. 785 (stating that estopping the government in this case “does not drain the public fisc of one dollar that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress”).

130. *Id.* at 948 (majority opinion).

R

R

R

between government officials and the citizenry, threatening public trust in their government.¹³¹

C. *Affirmative Misconduct*

In yet another attempt to develop an approach that would prevent injustice while remaining cognizant of the concerns underlying the general rule against estopping the government, most courts have held that the government may only be estopped when its agent engages in some sort of “affirmative misconduct.”¹³² Mere negligence will not suffice to estop the government.¹³³

It is often difficult to determine what sort of conduct constitutes “affirmative misconduct.” Courts usually determine if conduct is “affirmative” on a case-by-case basis, and have refused to set forth a definite test.¹³⁴ Indeed, some courts have held that the government may not be estopped procedurally because failure to follow internal guidelines does not constitute affirmative misconduct.¹³⁵

Supreme Court case law supports the affirmative misconduct requirement. The Court first touched on the affirmative misconduct requirement in *Montana v. Kennedy*.¹³⁶ In *Kennedy*, the petitioner had an American-born mother and an Italian father.¹³⁷ He was born while his parents were temporarily living in Italy.¹³⁸ Prior to his birth, an American Consular Officer told his mother that she could not return to the United States because she was pregnant, and the United States did not issue passports to pregnant women.¹³⁹ However, the U.S. did not require that citizens have passports when they were returning to the U.S. at the time of the

131. See generally Raven-Hansen, *supra* note 128, at 73-75.

132. See, e.g., *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961).

133. See *de la Fuente v. F.D.I.C.*, 332 F.3d 1208, 1220 (9th Cir. 2003).

134. See, e.g., *Olsen v. United States*, 952 F.2d 236, 241 & n.2 (8th Cir. 1991) (noting that “[The Supreme Court’s] opinions have mentioned the possibility that some type of affirmative governmental conduct might give rise to estoppel” (emphasis added)). At the very most, courts have employed guidance similar to that stated in *Purcell v. United States*. See *infra* note 159 and accompanying text.

135. See *Ingalls Shipbuilding, Inc. v. U.S. Dep’t of Labor*, 976 F.2d 934, 938 (5th Cir. 1992) (stating that “‘more than mere negligence, delay, inaction, or failure to follow an internal agency guideline’” is required for establishing an equitable estoppel claim (quoting *Mangaroo v. Nelson*, 864 F.2d 1202, 1204-05 (5th Cir. 1989))).

136. *Kennedy*, 366 U.S. at 308.

137. *Id.* at 309.

138. *Id.*

139. *Id.* at 314.

R

R

petitioner's birth.¹⁴⁰ Petitioner sought, inter alia, to estop the government from denying birth citizenship because of this misrepresentation.¹⁴¹ The Court ruled that the officer's faulty advice¹⁴² "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth."¹⁴³

Twelve years after *Kennedy*, *INS v. Hibi*¹⁴⁴ involved the passage of a 1940 statute through which a Philippine-born serviceman sought benefits.¹⁴⁵ The Act allowed for foreign-born members of the U.S. military to be granted citizenship without requiring them to undergo residency and literacy requirements they would otherwise need.¹⁴⁶

Seventeen years after the application deadline passed, petitioner's visa expired.¹⁴⁷ He argued that the government failed to provide a naturalization representative in the Philippines, or publicize this benefit to servicemen in any way.¹⁴⁸ The Court held that this too fell short of the affirmative misconduct needed to estop the government.¹⁴⁹

140. *Id.*

141. *Id.*

142. The officer simply stated, "I am sorry, Mrs., you cannot [return to the United States] in that condition." *Id.* at 314.

143. *Id.* at 314-15.

144. *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam).

145. *Id.* at 6, 8; 8 U.S.C. §§ 1001, 1002, 1005 (repealed 1952).

146. Nationality Act of 1940 § 701, 8 U.S.C. § 1001 (repealed 1952); see also *Hibi*, 414 U.S. at 7 n.8.

147. *Hibi*, 414 U.S. at 7.

148. *Id.* at 8.

149. *Id.* at 8-9. Accord *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam). In *Miranda*, a foreign-born man had married a naturalized U.S. citizen. *Id.* at 14. At the time of the marriage, respondent's wife filed a visa petition with the INS on respondent's behalf requesting that he be granted an immigrant visa as her spouse. *Id.* at 15. *Miranda* also filed an application requesting the INS to adjust his status to that of a permanent resident alien. *Id.* The INS took no action for eighteen months. *Id.* Respondent's marriage failed, and his ex-wife withdrew her application. *Id.* When respondent's application was then processed, it was denied "because he had not shown an immigrant visa was . . . available to him." *Id.*

An immigration judge ordered *Miranda* deported. *Id.* at 15-16. He appealed, and the Board of Immigration Appeals judge denied his estoppel claim, reasoning the government's actions were not an affirmative misconduct. *Id.* at 16. The Ninth Circuit reversed, stating they believed the government's actions were affirmative. *Id.* The Supreme Court granted certiorari and remanded the case back to the circuit court in light of their opinion in *Hansen*. *Id.* The Ninth Circuit again ruled that the government's misconduct was affirmative, and the Supreme Court again disagreed. *Id.* at 19.

Justice Douglas's dissent¹⁵⁰ viewed the facts very differently, focusing on some facts that he felt the Court had ignored.¹⁵¹ The failure to provide a naturalization agent was not an omission by the government.¹⁵² Instead, it was the consequence of an act taken by the Executive Branch. The Filipino government feared the application of the provision of the Serviceman's Act that authorized naturalization of those Filipinos who served alongside U.S. soldiers in the Second World War into the United States.¹⁵³ The Filipino government feared that young men, upon gaining American citizenship, would flee the country. They asked the Attorney General to revoke the Vice-Consul's authority to naturalize Filipino ex-servicemen, and he so allowed.¹⁵⁴ This left no naturalization representative in the Philippines to enforce the Congressional mandate that these Filipino soldiers have the opportunity to become U.S. citizens, even though Congress clearly intended for naturalization agents to be present in the Philippines to naturalize these men.¹⁵⁵ Hibi could not have been naturalized even had he known about the program, or if he had tried.¹⁵⁶ In Justice Douglas's view, this behavior constituted a "deliberate—and successful—effort on the part of agents of the Executive Branch to frustrate the congressional purpose and to deny substantive rights to Filipinos such as respondent by administrative fiat."¹⁵⁷ Justice Douglas then noted, "The record does not support [the] conclusion," apparently reached by the majority, "that there was no affirmative misconduct involved in this case."¹⁵⁸

Naturally, an "affirmative" misconduct requirement serves to defray endless liability concerns. Negligence in communication usually involves a misunderstanding by the party relying on the communication. That is, the communicator said something in a way that caused a second party to misunderstand, while the communicator had a good faith belief that the second party's understanding was correct. Conversely, courts often find "affirmative misconduct" when the government has reason to believe it has communicated

150. Joined by Justices Marshall and Brennan. *Hibi*, 414 U.S. at 9-11 (Douglas, J., dissenting).

151. *Id.* at 10-11.

152. *Id.*

153. *Id.*

154. *Id.* at 11.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

misinformation, and has done so as part of an ongoing series of misrepresentations or distortions against the suing party.¹⁵⁹ However, many courts have found that affirmative misconduct by the government can occur even without the intent to mislead.¹⁶⁰

D. *Actual Authority*

As a general rule, the government cannot be estopped when a particular agent is acting outside the scope of his authority.¹⁶¹ This is true where the agent's authority is apparent or clearly *ultra vires*.¹⁶² In fact, many courts have held that a government agent may never be bound by apparent authority, because any agent of the government would always appear to have authority, at least to an unsophisticated party.¹⁶³ Apparent authority is, therefore, too dependent on the private litigant's subjective belief.¹⁶⁴ The scope of a government agent's authority is critical because the existence of actual authority is a prerequisite to equitably estopping the government.¹⁶⁵

159. See *Purcell v. United States*, 1 F.3d 932, 940 (9th Cir. 1993). "Affirmative misconduct involves 'ongoing active misrepresentations' or a 'pervasive pattern of false promises'" as opposed to "an isolated act of providing misinformation." *Id.* (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989)).

160. See, e.g., *Watkins*, 875 F.2d at 707 (citing *Jablon v. United States*, 657 F.2d 1064, 1067 n.5 (9th Cir. 1981)); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 573 F. Supp. 2d 311, 327 (D. Me. 2008), *aff'd*, 585 F.3d 495 (1st Cir. 2009) (citing *Watkins*, 875 F.2d at 707 (en banc)).

161. This rule has been in existence for hundreds of years. See *Lee v. Munroe*, 7 Cranch 366, 367 (1813) ("[The] United States is not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appears that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration.").

162. See *United States v. Stewart*, 311 U.S. 60, 70 (1940) ("An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right." (citing *Utah v. United States*, 284 U.S. 534, 545-46 (1932)). "*Ultra Vires*" is Latin for "beyond the powers (of)" and means "[u]nauthorized; beyond the scope of power allowed or granted by . . . law." BLACK'S LAW DICTIONARY, *supra* note 2, at 1662.

163. See Randy L. Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27 ROCKY MTN. MIN. L. INST. 41, 54-55 (1982).

164. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958) ("[A]pparent authority exists only with regard to those who believe and have reason to believe that there is authority.") Indeed, apparent authority has often been labeled a misnomer, as in order for authority to be "apparent" authority does not exist at all. See *Pitou*, *supra* note 6, at 632-33.

165. See *Urban Data Sys. v. United States*, 699 F.2d 1147, 1154 (Fed. Cir. 1983) (quoting *Yosemite Park & Curry v. United States*, 552 F.2d 552, 558 (Ct. Cl. 1978) ("[T]he United States will not be estopped to deny the acts of its agents who have acted beyond the scope of their actual authority.")).

R

R

This is because if a government agent acts outside the bounds of his authority, he is effectively re-writing legislation to give himself authority he does not have. Imposing an estoppel in these instances would be tantamount to the court condoning this behavior, resulting in a violation of the Separation of Powers doctrine.¹⁶⁶

Stated another way, if the court enforces the unauthorized action taken by the government agent, the court is recognizing the agent's power to engage in the conduct upon which the private litigant alleges he or she detrimentally relied. Since this power was not given to the particular agent by Congress, judges that uphold this exercise are legislating to give effect to the agents' *ultra vires* acts.¹⁶⁷

166. See, e.g., *United States v. 18.16 Acres of Land*, 598 F. Supp. 282, 288 (E.D.N.C. 1984) ("Using the unauthorized actions of a government representative as the basis for estopping the government effectively circumvents a statutory or regulatory mandate, and can effectively waive a statutory or regulatory requirement."). This mirrors the rationale in *Richmond*, but here the court is only sanctioning the acts of the government agent, who is the "legislations" drafter (although the ability to "draft" is enabled by the Court). Compare *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423-25 (1990), with *United States v. 18.16 Acres of Land*, 598 F. Supp. at 288. In a *Richmond* situation, the court would be "writing" the legislation itself, for example, by improperly appropriating money, a power vested in Congress. See *Richmond*, 496 U.S. at 424-25. In other words, in a *Richmond* situation, the court is not excusing the acts of the agent, and allowing the government to recover resulting in a separation of powers violation, while in this situation the court is enforcing the effect of the agent's *ultra vires* act, which similarly results in a violation.

167. See, e.g., *Pitou*, *supra* note 6, at 629.

Administrators are clothed with authority to act and make rules by the exercise of legislative powers; and such legislative power is exercisable only by Congress. It cannot be exercised by an administrator; no administrator may do that which is forbidden, nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, i.e., with the power to assume an authority that has been withheld or prohibited.

Id. Fred Ansell points out that:

The application of the doctrine of separation of powers to estoppel against the government is straightforward. If the government is estopped as a result of unauthorized government action, congressional power to legislate under article I is undermined: in effect, courts would be refusing to apply the law as enacted by Congress because an executive branch official has misrepresented the content of the law to the citizen. Estoppel would endorse the decisions of executive agents that are contrary to congressional commands and directives. The executive branch would be refashioning the law through its errors in individual cases, thus contravening the separation of powers.

Fred Ansell, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026, 1037 (1986). Peter Raven-Hansen agrees:

When a court imposes an estoppel, it sets aside the agency action taken in violation of agency law. The estoppel therefore may at least temporarily block

The threshold determination of whether the government agent was acting within his authority is often difficult to determine because courts use varying tests. Some courts use an approach where an agent is authorized to do only that which is specifically delegated to him or her by statute, regulation, or warrant of authority.¹⁶⁸ Other courts use a more nebulous test that asks the question “is the agent’s action within the scope of his official duties?”¹⁶⁹

E. *Lazy FC Balancing*

United States v. Lazy FC Ranch is a Ninth Circuit case in which the court of appeals allowed the government to be equitably estopped.¹⁷⁰ In its opinion, the court attempted to fashion a workable test for when the government should be estopped. The dispute in *Lazy FC* was whether the United States was entitled to recover money erroneously paid to members of a ranch partnership.¹⁷¹ An agent of the U.S. Department of Agriculture informed the partnership that they were able to receive payments if they divided operations so as to appear like separate producers.¹⁷² Government regulations at the time supported this, but the regulations were subsequently changed to prohibit it.¹⁷³ The ranch continued operating as it had before, and it kept receiving payments, which were part of a USDA program that allowed for payments to certain farmers for taking their land out of production, under the pre-existing arrange-

the agency’s enforcement of legislative policy against the party invoking estoppel, confer benefits on the party that are not authorized by legislative policy, or otherwise give effect to an incorrect interpretation of the governing law. The separation of powers objection to equitable estoppel of the government is that a court, by estopping the agency in such cases, effectively “legislates” a change or waiver of governing law or forces the agency to do the same, invading Congress’ exclusive constitutional authority to make law.

Raven-Hansen, *supra* note 128, at 1, 33-34 (footnotes omitted); *accord* Portmann v. United States, 674 F.2d 1155, 1159 (7th Cir. 1982) (“One such justification invoked a separation of powers rationale; proponents argued that permitting equitable estoppel against the government would, in effect, allow government employees to ‘legislate’ by misinterpreting or ignoring an applicable statute or regulation. Judicial validation of such unauthorized ‘legislation,’ it was claimed, would infringe upon Congress’ exclusive constitutional authority to make law.”).

168. *See, e.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990); *Floyd Acceptances*, 7 Wall. 666, 676-77 (1868).

169. *See, e.g.*, *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998); *Broad Ave. Laundry & Tailoring v. United States*, 681 F.2d 746, 748 (Ct. Cl. 1982).

170. *United States v. Lazy FC Ranch*, 481 F.2d 985, 990 (9th Cir. 1973).

171. *Id.* at 987.

172. *Id.*

173. *Id.*

ment.¹⁷⁴ The USDA informed the ranch that this was permissible, and assisted the farmers in their application to the program.¹⁷⁵ Later, regulations governing this program had changed, making the ranch ineligible.¹⁷⁶ However, the ranch continued to receive payment. The government acquiesced, but later demanded a return of its money.¹⁷⁷ The State Committee of the Agricultural Stabilization & Conservation Service determined that the partnership had not engaged in a scheme to defraud the government, and recommended that the partnership retain the payments received.¹⁷⁸ However, even though the Secretary of Agriculture was empowered to allow the ranch to keep the payments for equity reasons, he chose not to do so and the government filed suit.¹⁷⁹ The ranch partners relied on an estoppel defense.¹⁸⁰

The court ruled that the ranchers were entitled to keep funds received, because ruling otherwise would lead to a serious injustice to the plaintiffs, and the “public policy of the United States would [not] be significantly frustrated by permitting the partners to retain the additional payments.”¹⁸¹ This marked the adoption of a balancing approach by the Ninth Circuit¹⁸² that essentially advocated weighing the amount of injury the government would suffer if the government were not estopped.¹⁸³ The court explicitly stated that private litigants could evoke estoppel even if the government was acting in its sovereign rather than proprietary capacity.¹⁸⁴ It did, however, state that courts should be more reluctant to estop the

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 988.

181. *Id.* at 990.

182. The court did not explicitly call it this. *Id.* at 985.

183. *Id.* at 988 (“We think the estoppel doctrine is applicable to the United States where justice and fair play require it.”).

184. *Id.* at 989.

government when it is acting in a sovereign capacity.¹⁸⁵ Many courts have followed the *Lazy FC* court's lead.¹⁸⁶

III. SHORTCOMINGS OF THESE PROPOSALS

The number of proposed situations in which commentators have suggested that the government should be estopped illustrates the difficulty in devising an immaculate test that would prevent injustice to private litigants while remaining sensitive to concerns underlying the traditional no-estoppel rule. Indeed, while many of these tests forward the interests of justice in a particular case, they ignore the public policy concerns behind the no-estoppel rule. Thus, there are serious drawbacks to all of these tests which will be explored in this Part.

A. *Proprietary Capacity*

The benefits of the "proprietary capacity" test are clear.¹⁸⁷ However, it suffers from a number of defects. For example, allowing claims against the government when it is acting in its proprietary capacity will still harm the public fisc, as money claims would be paid out to litigants. Also, although some courts interpret *Richmond* differently,¹⁸⁸ *Richmond* bars invoking the equitable estoppel doctrine when it may result in paying money to the private litigant.¹⁸⁹ As already seen, actions involving property are likely to involve a financial component that would necessitate money being

185. *Id.* The court also noted facts in the case that qualified as affirmative misconduct, although again the court did not expressly use these words. The court stated:

The partnership would not have entered into the soil bank program had it not been for the advice and assistance of [the USDA agent] At the time the partners entered into the contracts, even the agency's published regulations arguably permitted this type of arrangement. Moreover, not only did the partners rely on the government's approval of their contracts but . . . the Ranch requested permission to terminate the contracts. At this time, the more complete regulations had been published and it was clear that the arrangement was improper, but the government never apprised the partnership of this, and in fact refused permission to terminate the agreements.

Id. at 989-90.

186. *See, e.g.,* *Portmann v. United States*, 674 F.2d 1155, 1164-65 (7th Cir. 1982); *Clinger v. Farm Serv. Agency*, No. CV 04 424 E BLW, 2006 WL 581192, at *5 (D. Idaho Mar. 8, 2006); *Dempsey v. Dir. Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1339 (E.D. Ark. 1982); *Ex parte Four Seasons, Ltd.*, 450 So. 2d 110, 111 (Ala. 1984).

187. *See supra* Part II.A.

188. *See supra* note 77 and accompanying text.

189. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423-25 (1990).

awarded to the victor from the federal treasury, a result prohibited by *Richmond*.¹⁹⁰

Furthermore, because of the vast resources of the federal government the number of government contracts granted are much greater than any single private entity's (such as Fed Ex) both in number and amount.¹⁹¹ That is, they are exposed to a much greater level of liability than any private entity would ever bear. The sheer mass of the government's dealings would imperil the public fisc to an unreasonable degree under this approach.

B. *Procedural Estoppel*

Again, estopping the government when it fails to follow its own rules is a well-thought-out idea firmly rooted in logic. However, the procedural estoppel rule is very limited in scope and application, and leaves ample opportunity for injustices to occur which may be as serious as if this rule were never invoked. In effect, it rewards litigants who were fortunate enough to have the agent involved in their interaction violate a procedural rule, leaving those without this fortune wanting.

Furthermore, this test assumes that government agents may be more culpable because they did not follow a promulgated rule or regulation, but this is not necessarily so. It is hardly reasonable for every agent of the government to have knowledge of every rule in oft-voluminous regulation manuals.

Additionally, imposing liability on the government through its agents could discourage candidness. Liability for government agents flowing from faulty advice would discourage government agents from providing any advice at all. When faced with a decision to either provide advice for which the government could face liability or refuse to advise (or advise citizens to consult a document), the agents may choose the latter to protect themselves, especially when disregarding an arcane rule can be the source of the liability. Candidness is an attribute that people seek from a government agent from whom they want advice.

190. *Id.* at 424-25.

191. In the 2009 fiscal year the government awarded \$409,677,980,249 in contracts. USASpending.gov, <http://www.usaspending.gov/> (last visited Jan. 8, 2010). Presumably, this number is actually much larger when money at stake is taken into account in contracts that are more informal, such as that at issue in *Richmond*.

C. *Affirmative Misconduct*

The affirmative misconduct requirement is weak in that determining what conduct is “affirmative” (rather than passive malfeasance which would constitute negligence) is a difficult task. The line between what constitutes an “act” or “omission” is often thin.¹⁹² While in some areas of law this determination is unavoidable, in many cases it makes scant sense for the hinges of justice to swing on such an unsteady ground. This should be evaded when possible. Additionally, limiting liability to affirmative acts surely decreases findings of malfeasance. This incentivizes weak decision-making in the government by impeding government agents from proactively seeking to advise citizens, ultimately making their lives easier (and thus fulfilling their function).

Beyond this, the affirmative misconduct requirement is deserving of little criticism unless used alone; it is not encompassing enough—an offense of which all current approaches are guilty. This test serves mainly as a means to limit the government’s liability. If this requirement did not exist, a government agent’s words could be misinterpreted by the citizen seeking advice, and that citizen could act in a manner detrimental to him or herself while relying on this advice.¹⁹³ A jury would likely find the citizen’s reliance reasonable because of the carelessness in which the advice was communicated. The lack of an affirmative misconduct requirement would certainly subject the government to a high risk of liability in nearly every transaction between a citizen and a government agent. Of the proposed tests, the affirmative misconduct requirement is surely the most reliable, and has enjoyed widespread acceptance by the courts.¹⁹⁴

D. *Actual Authority*

While the rationale behind this rule is that a government agent cannot perform acts on behalf of the government for which he is not statutorily authorized,¹⁹⁵ the presence of this rule has the per-

192. See, e.g., Jacob Kreutzer, Note, *Causation And Repentance: Reexamining Complicity in Light of Attempts Doctrine*, 3 N.Y.U J. L. & LIBERTY 155 (2008); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547 (1988); Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1344 (2002).

193. Indeed, the Supreme Court warns about “real and imagined claims of misinformation.” *Richmond*, 496 U.S. at 433.

194. See *supra* Part II.C.

195. See *supra* Part II.D.

verse effect of subjecting unsophisticated citizens to injustice because of their failure to inquire into the powers of a particular agent. While many courts hold that litigants cannot reasonably rely on statements of a person who has no governmental authority,¹⁹⁶ this too rests on the assumption that the litigant had reason to know or cause to investigate what the agent's authority actually was. Weighing the equities, traditional notions of justice suggest that the citizen should not be the party punished for relying on statements of a government official, which in many cases could be conveyed over the phone, in mail, or in electronic mail. These media further the unlikelihood that it would even occur to a citizen that the person with whom they dealt with was not authorized to act or advise as they did. Even if the citizen exercised the utmost diligence and endeavored to determine the scope of the agent's authority with whom they spoke, it would undoubtedly be a Herculean task.¹⁹⁷ In fact, oftentimes the agents themselves may be unaware that they do not have the authority which they purport to have, further complicating the ability of citizens to discover if the agent's advice exceeded his or her authority.¹⁹⁸

E. Lazy FC Balancing

The weakness in the *Lazy FC* balancing test is that it can lead to disparate results because the test itself provides little guidance.¹⁹⁹ This test requires little more than making an equitable judgment as a court would when judging a case litigated between private parties.²⁰⁰ In an equity case litigated between two private parties, a court would consider the relative harm of the injury done to one

196. See *supra* note 161 and accompanying text.

197. Courts show little sympathy to those embroiled in this plight. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (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.”); *Northrop Grumman Ship Sys., Inc. v. Min. of Def. of Rep. of Venez.*, 575 F.3d 491, 500 (5th Cir. 2009); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 449 (11th Cir. 1982); *In Re Estate of Hooper*, 359 F.2d 569, 578 (3d Cir. 1966); *Gov’t of the V.I. v. Gordon*, 244 F.2d 818, 821 (3d Cir. 1957).

198. See *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001) (“The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. *And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.*” (emphasis added)).

199. Indeed, this runs contrary to the very purpose of the doctrine of *stare decisis* which is “designed to promote stability and certainty in the law.” *Hubbard v. United States*, 514 U.S. 695, 720 (1995).

200. See *supra* Part II.E.

party versus the other, as well as the interests of the public at large.²⁰¹ In effect, this test is nothing but a more lenient standard of the Supreme Court's *jus aequum* rule.²⁰² *Lazy FC* balancing is hardly different from the test the court espouses when it advocates that courts should "permit[] the estoppel defense against the government in cases where basic notions of fairness require[] us to do so."²⁰³

Furthermore, it is foreseeable that widespread application of this test would cause courts to cease being sensitive to the issues that created the no-estoppel rule. What in individual cases may seem like a grave injustice may serve a greater social good when viewed holistically. In their treatise on Administrative Law, Professors Davis and Pierce illustrate this problem. They state:

[The Internal Revenue Service] is one of the federal agencies that is most respected for its competence. Yet, each year the General Accounting Office (GAO) conducts a study of the taxpayer advice provided by the IRS, and each year that study shows that IRS gives erroneous advice in somewhere between 10 and 20 percent of all cases. Some taxpayers are injured by reliance on IRS' advice, but millions of taxpayers are benefited by its availability.²⁰⁴

Balancing the equities in instances where erroneous advice was given would inevitably favor the private litigant at some point if the *Lazy FC* test was commonly used. As professors Pierce and Davis intimate, if these rulings adverse to the IRS became common enough, it would soon encourage the IRS to limit its advice or spend more taxpayer money on costly training. This would limit the valuable social good provided by the IRS; indeed, a service the citizenry demands.

201. See *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1990)).

202. *Jus Aequum* is defined as "law characterized by equity, flexibility, and adaptation to the circumstances of a particular case." BLACK'S LAW DICTIONARY, *supra* note 2, at 461.

203. *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973).

204. K.C. DAVIS & R.J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 229-30 (3d ed. 1994).

IV. PLUGGING THE HOLE—A NEW TEST

A. *The Need for a Complementary Test*

The presence of the numerous tests that courts have developed for deciding whether to estop the government illustrates the difficulty of creating a test that would result in the just disposition of all estoppel cases. If applied alone, all of these approaches will inevitably work substantial injustices. Rather than have each test described above function as independent “tests,” the separate tests should instead function as numerous factors to be considered within one test. These factors²⁰⁵ must be balanced against one another as the particular factual situation demands. They must not be applied in a vacuum, as if the options before the court are to follow the traditional no-estoppel rule or estop based on consideration of a single factor, as is the case in many courts today.²⁰⁶ Courts should apply each test with the other tests in mind, in order to create a “net” that would catch litigants as justice applied to their case. Considering these factors when deciding an estoppel case against the government would, when taken together, create an effective guide for courts to determine estoppel cases fairly.

However, these factors alone are not sufficient to serve justice. In combination with these other views, courts should also consider whether the government’s actions allowed it to substantially undermine the core legislative purpose of the statute in question. This idea would create a multi-factor test that courts should consider when determining whether the government should be estopped:

- (1) whether the traditional elements of estoppel are present;
- (2) whether the government was acting in its proprietary or sovereign capacity;
- (3) whether the government agent broke or disregarded a rule that he was bound to follow;
- (4) whether the agent’s conduct was authorized;

205. Proprietary capacity, procedural estoppel, affirmative misconduct, actual authority, and *Lazy FC* balancing.

206. For example, the Court refused to estop the government based on its procedural capacity in *Schweiker*, when it could have considered the various other factors but failed to. Note that the Court also considered whether the SSA’s conduct was an “affirmative misconduct” in *Schweiker*, but considering only two of the various factors still resulted in what surely would be considered an unjust result if the case were litigated between two private parties. For example, if the Court would have engaged in *Lazy FC* balancing and gave weight to this analysis, it may have determined that even though the SSA’s agent’s conduct “fell far short” of what constituted estoppel under that factor, it may have concluded that the private litigant would prevail under the *Lazy FC* test. Failure to use all factors in the test will not save many litigants from injustice.

- (5) whether the government employee engaged in “affirmative” misconduct;
- (6) the egregiousness of the injustice that would result if the government was not held estopped; and
- (7) whether failing to estop the government would serve to substantially undermine the core legislative purpose of the statute in question.

The core legislative purpose factor would require a court to consider the facts of the case at bar, and then ascertain the “core legislative purpose” of the statute. If this purpose is substantially undermined by the failure to impose an estoppel, then the court should strongly consider estopping the government, subject to the application of the other factors in the test. The crux of the need for this test, much like the actual authority test, is partially based upon the separation of powers principles. The reasons for only allowing the government to be estopped when its agent acts within its authority are well-known and have already been covered extensively.²⁰⁷ With these in mind, it makes little sense to fail to estop the government when an agent’s actions are not consistent with the delegation of congressional powers (that is, employing this “improper legislation”) and their actions thus serve to circumvent or otherwise undermine the meaning of the statute as well.

Ansell argues that estopping the government for the unauthorized conduct of its agent would lead to a separation of powers violation because the judiciary would be infringing on Congress’s legislative powers.²⁰⁸ He states: “If the government *is estopped* as a result of unauthorized government action, congressional power to legislate under Article I is undermined.”²⁰⁹ However, what Ansell and many other observers fail to fully appreciate is that, in many cases, *failing to estop* government agents acting within their powers likewise violates the separation of powers principle, even if not in the strictest sense, if the consequences of the agent’s actions substantially undermine the statute in question.²¹⁰

We are left with an interesting dichotomy. The traditional separation of powers argument, explained by Ansel, Raven-Hansen, and others, is that an estoppel based on an agent’s misrepresentation made because of an agent’s mistaken belief or otherwise, can-

207. See *supra* Part II.D.

208. See Ansell, *supra* note 167, at 1037.

209. *Id.* (emphasis added).

210. See *infra* Part IV.C (discussion of *Nagle* and *Dempsey*).

not stand because it would be giving effect to an agent's actions made pursuant to no authority whatsoever. This results in a circumvention, or a *de facto* supersession of legislative power. However, under some circumstances, denying estoppel of the government also undermines Congress's Article I power to legislate by frustrating the purpose Congress intended when it enacted the statute.²¹¹ The proponents of the traditional separation of powers objection to government estoppel is that it allows a result or action that Congress did not wish to occur, but in some instances, ignoring the broader purpose also actualizes a result Congress did not intend. In fact, refusal to estop may produce an outcome that is antithetical to the very reason the agency in question exists.

Further illustration of this factor will be provided later, but preliminarily the facts in *Schweiker* provide an adequate demonstration of the application of the proposed factor. Recall, in *Schweiker*, an SSA agent mistakenly advised Hansen that she was ineligible for social security benefits, and omitted to tell her to fill out a written application even though the SSA claims manual directed agents to advise claimants to take such action. The Supreme Court denied estoppel, reasoning in part that allowing such estoppels would deprive Congress of enforcing its mandate that written applications be submitted. The core legislative purpose factor would recognize what the Court ignored—that Hansen was sub-

211. The judicial system is a mighty chorus bellowing this refrain. *See, e.g.*, *Wade Pediatrics v. U.S. Dep't of Health & Human Servs.*, 567 F.3d 1202, 1206 (10th Cir. 2009); *Fed. Deposit Ins. Corp. v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) ("Courts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws." (citing *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir. 1991))); *Che-Li Shen v. INS*, 749 F.2d 1469, 1474 (10th Cir. 1984) (holding that when a party seeks to estop the government, estoppel will not be judicially used to "frustrate the purpose of valid statutes expressing the will of Congress"). Anecdotally, this reasoning is also prevalent in Massachusetts equitable estoppel case law. *See, e.g.*, *Risk Mgmt. Found. of Harvard Med. Inst., Inc. v. Comm'r of Ins.*, 554 N.E.2d 843, 850 (Mass. 1990) ("Estoppel is not applied to governmental acts where to do so would frustrate a policy intended to protect the public interest." (quoting *LaBarge v. Chief Admin. Just. of the Trial Ct.*, 524 N.E.2d 59, 63 (Mass. 1988))); *Langlitz v. Bd. of Registration of Chiropractors*, 486 N.E.2d 48, 51-52 (Mass. 1985); *Weston Forest and Trail Ass'n, Inc. v. Fishman*, 849 N.E.2d 916, 921 (Mass. App. Ct. 2006) (ruling that estoppel would "frustrate [the governmental] policy"). However, as this Note has explored, estoppel should be applied to government acts when to do so would promote a policy intended to protect the public interest. *Cf. United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985) ("The possibility of harm to a private party inherent in denying equitable estoppel . . . is often (if not always) grossly outweighed by the pressing public interest in the enforcement of congressionally mandated public policy." (citing *Best v. Stetson*, 691 F.2d 42, 44-45 (1st Cir. 1982))).

stantively eligible for benefits. While Congress intended written applications to be submitted, the overriding purpose behind the SSA is that the people Congress deemed deserving of social security benefits would receive them.²¹² While Congress did require written applications to facilitate accomplishment of this goal, it makes little sense to refuse to estop on the basis of preserving Congressional intent on the facilitative policy while ignoring the larger legislative objective—to ensure delivery of benefits to those deserving. One should not lose sight of the forest for the trees.²¹³

A statute is an embodiment of carefully crafted public policy that was the result of years of congressional hearings, findings, and research. Rigid adherence to the traditional no-estoppel rule is sometimes tantamount to the court ruling the traditional reasons underlying the no-estoppel rule trump the legislative initiative reflected in a statute, something that, if not explicitly barred by the constitution, is looked upon with strict disfavor by observers of the judicial system.²¹⁴ This is improper, and courts should exercise the utmost care to avoid this when handling cases concerning equitable estoppel against the government. Judges here are making their own law, a power reserved solely for Congress.²¹⁵

Ansell and others believe that estoppels based on an agent's *ultra vires* acts undermines Congress's article I legislation powers, but when courts harm the statute's underlying purpose, Congress's power is similarly undermined because a statute, via its purpose, is an affirmative congressional proclamation directing government

212. The first words in H.R. 7260, the Bill which became the SSA described its purpose as:

An act to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.

H.R. 7260, 74th Cong. (1935).

213. Note, there are several different factors at play in this situation, this is why the factors need to be applied in conjunction with each other. In addition to the separation of powers concerns discussed here, also related are the "procedural estoppel" issues, and there is a question as to whether this misconduct was affirmative. While some cases may require some applications of the individual tests (proprietary capacity, actual authority, *Lazy FC* balancing, etc.), others may involve applications of other such tests. All of these concerns must be considered by the court.

214. Even in the absence of a constitutional issue, a full analysis of which is admittedly outside the scope of this Note, courts should strive to maintain the congressional prerogative whenever possible. *See* cases cited *supra* note 211.

215. *See* U.S. CONST. art. I, § 8.

agents to perform certain functions Congress deems socially and administratively desirable. Ansel writes: “Estoppel would endorse the decisions of executive agents that are contrary to congressional commands and directives. The executive branch would be refashioning the law through its errors in individual cases, thus contravening the separation of powers.”²¹⁶ The logic behind this reasoning is sound, and indeed it should carry the day in appropriate cases. However, it sometimes needs to give way when the larger legislative goal is being effectively circumvented. Failing to estop the government in these cases leads to ignorance of the congressional imperative, severely weakening the statute’s reach, force, power, and effect. Rather than the executive’s mistakes broadening the reach of the statute, judicial ignorance of a statute’s core legislative purpose would unduly limit the congressional affirmation that the particular subject of the legislation is a social good that needs to be protected, or an evil that needs to be vanquished. Such a constitutional weakness mandates that courts consider the underlying legislative purpose of the statute when determining whether to estop the government.

As previously stated, the vast array of factual situations in which estoppel issues can arise would make the creation of any test that would promote justice in all cases impossible to forge. This multi-factor test is superior because courts will no longer singularly weigh one factor against another, but instead apply each factor to the situation and balance them as justice requires, resulting in less total injustice to litigants while remaining sensitive to the government’s concerns. However, the application of some factors is strong in all situations, and should be treated as such. The factor that government agents must have acted pursuant to their actual authority is sometimes treated as a requirement, and should be given great weight by courts for the reasons outlined above. Absent the most extreme situations where the immense weight of the other equities pleads for estoppel, courts should require government agents to have acted pursuant to their actual authority in order to be estopped. This is because, as previously stated, estopping the government in these cases would enforce the effect of an *ultra vires* act, redefining the proper role of that agent. However, this must be tempered by the “core legislative purpose” factor, and should, in appropriate cases, be given great weight as well. Similarly, the affirmative misconduct requirement should likewise be given great

216. Ansel, *supra* note 167, at 1037.

significance, because doing so would address the concerns underlying the traditional no-estoppel rule, namely, limiting liability.

In many cases the basis of the litigant's estoppel claim resulted in a slight to the litigant at the government's hand. Compounding injustice by a court's refusal to enforce the Constitution's separation of powers doctrine, or denying them a substantive right, is an even worse fate to thrust upon innocent litigants.

B. *Determining the Applicable Legislative Purpose*

The application of this factor necessitates explanation of how the "core legislative purpose" should be interpreted in order for the new factor to operate properly, including providing guidance as to the proper method of ascertaining the legislative purpose of a statute. Legislative histories are often long and complex, featuring a voluminous amount of pages from House and Senate Reports, comments from the floor, testimony given at and transcripts of committee hearings on the matter, and prior versions of the bill enacted.²¹⁷

As words are merely indefinite proxies for ideas, no definition can precisely capture what "core legislative purpose" means in every instance. The "core legislative purpose" is perhaps best defined as "the fundamental and irreducible congressional objective in enacting the legislation in question."²¹⁸ This definition is somewhat obscure, as it must be to remain malleable—an essential characteristic of this test if it is to lead to optimally just outcomes. However, some ground rules apply.

Delving deep into the legislative history to determine the purpose of the statute is not necessary for this test and should be avoided.²¹⁹ Instead, it is only necessary that one know the "core

217. See Jennifer L. Behrens, J. Michael Goodson Law Library, Duke University School of Law, *Research Guides: Federal Legislative History*, DUKE LAW (2010), available at <http://www.law.duke.edu/lib/researchguides/pdf/fedleghist.pdf>.

218. As Justice Holmes put it, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (citing *Lamar v. United States*, 240 U.S. 60 (1916)).

219. Indeed, judges long opposed to the use of legislative history have had no difficulty determining the "purpose" of a statute. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring).

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford

legislative purpose,” or as alternatively defined, the “general purpose” of the statute.

The terms “general purpose” and “core legislative purpose” are terms of art that are intentionally and unavoidably ambiguous.²²⁰ It is impossible for a definition to be created that would convey to the court interpreting the maxim the same meaning with precision. What is clear, however, is that “core legislative purpose” is different from “legislative motive.”

A “legislative motive” test would act as a modifier that would broaden, rather than restrict the meaning of the test. If “motive” were used, courts would view the test as examining the statute’s “purpose” rather than “core legislative purpose.” The result would

neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

Id.

Admittedly, today it is much easier for attorneys to access legislative material than it was when Justice Jackson expressed this view. What has yet to change, however, is the fact that legislative histories are often a compilation of dueling agendas, providing little guidance of the intent of a large and diverse body.

220. Alas, legal terms are often inescapably vague, as they must be to apply to the multitudinous factual situations with which they are confronted. As such, they must be read applying *jus aequum* to best effectuate their purpose. For example, see “miscarriage of justice” (often termed “substantial miscarriage of justice,”) defined as “[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.” BLACK’S LAW DICTIONARY, *supra* note 2, at 1088. While this definition appears straightforward, it is undoubtedly subject to interpretation, as reasonable minds can differ as to what constitutes a “grossly unfair outcome” or whether evidence was truly lacking in an element of the crime at trial. Examples such as these are endless. As such, modifiers are placed to serve as a guide to the unwary. In the example above “grossly” is present to dissuade those who might be tempted to reverse a case on appeal for what they believe is merely a slight to the defendant, real or perceived. Similarly, “core” legislative purpose, and “general” purpose serve this role. These modifiers are meant to dissuade counsel who, by delving deep into legislative history, can argue that a statement made on the Senate floor proves conclusively that their interpretation is what Congress had intended.

Additionally, they should not argue that such a minute piece of history affects its core purpose. While a piece of legislative history might be indicative of one of the many concerns of Congress, its core purpose should be apparent long before it is discovered. Also weighing against this technique is that in reality members of Congress often make statements on the floor of their respective chamber to obfuscate the true legislative purpose with which they might disagree.

It should be noted, however, that scratching the statute’s legislative history, may be helpful, in fact necessary to correctly determine a statute’s core legislative purpose, especially if the statute is not already well-known among legal professionals. What should be discouraged, if not barred, is the sort of outright excavation into legislative history materials described above.

be an unduly broad test that, instead of acting like the net catching litigants, would become a chasm in which they would fall.

An unduly broad interpretation of “core legislative purpose” would lead to courts disregarding the test altogether. It is undemanding for an attorney zealously representing the government to cobble together a patchwork argument that the government agent was complying with the statute’s “motive.” The word itself is so vague it can be contrived so that statutes can appear to have a motive that in fact they never had.

Inquiring into the legislative “motive” would encourage attorneys to delve into the legislative history of the statute in question, as it is very difficult to ascertain a “motive,” even in a broad sense, without taking this step. Moreover, it is simply too easy to find material to support an invented “motive” if the statute has many pages of legislative history.²²¹ As stated earlier, even if the attorney finds the true legislative motive, in many cases it would be difficult to determine whether or not the government agent’s conduct ran contrary to this motive or not. As such, a statute’s “core legislative purpose” at the very least must mean something more than the congressional “motive” for enacting the statute.

Without doubt, a statute’s core legislative purpose and true motive are related, and indeed in some cases may be the same. Most times, the legislative motive is reflected in the statute’s general purpose. However, this does not prevent them from being distinct entities. Only the terminology “core legislative purpose” can set up the cognitive framework necessary to properly apply this test.

C. *Application of the Test*

Dempsey v. Director of the Federal Emergency Management Agency provides a terrific example of how a court should determine the core legislative purpose of a statute.²²² Dempsey owned a house in Arkansas that was insured against all “direct loss by flood”

221. Indeed, safeguards may need to be in place to prevent the introduction of too much extraneous evidence entered to determine Congress’s intent. What may suffice is placing a presumption against admission of that extraneous information to prove legislative purpose and forcing the burden on the party seeking to admit evidence to prove that such legislative purpose is multi-faceted or not commonly known before such evidence can be admitted. Another route is asking the court to take judicial notice of the broad policy objectives that a statute wishes to accomplish.

222. *Dempsey v. Dir. Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334 (E.D. Ark. 1982).

through the National Flood Insurance Act of 1968.²²³ During the time when his policy was active, a storm struck, causing severe water damage to his home.²²⁴ That very day he notified his insurance agent who inspected his home and contacted the General Adjustment Bureau (GAB) to assess damage to Dempsey's home.²²⁵

During the course of the year, Dempsey continued contact with the bureau, which sent him a Proof of Loss form approximately a year later that determined Dempsey suffered \$918.17 in damages.²²⁶ The Bureau instructed him to sign it, have it notarized, and return the form.²²⁷

However, Mr. Dempsey believed that he had suffered more damage than the amount claimed by the Bureau.²²⁸ He amended the form, claiming \$7,711.27, and returned it.²²⁹ The Bureau rejected the amount, and paid nothing despite the fact that it admitted it owed Mr. Dempsey the \$918.17 in compensation.²³⁰

The government moved for summary judgment, arguing that Dempsey failed to file a valid Proof of Loss form within sixty days of the incident, a requirement to bring suit.²³¹ The court estopped the government from making this argument because no Proof of Loss form was sent to him in a timely manner.²³²

Notably, in making its decision the court examined the core legislative purpose of the National Flood Insurance Act.²³³ The court stated:

To begin, the Court notes the government interests involved here. The broad congressional purpose in establishing the national flood insurance program was to alleviate the personal hardship and economic distress created by flood damage by making flood insurance coverage available on "reasonable terms and conditions" to those persons needing such protection which private insurers alone could not economically make available. This Court must construe the provisions of the SFIP in light of its pur-

223. *Id.* at 1335.

224. *Id.*

225. *Id.*

226. *Id.* at 1336.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1340.

233. The court did not expressly call it the "core legislative purpose," but its analysis mirrors what would be the "core legislative purpose" analysis. *Id.*

pose to make flood insurance coverage available under “reasonable conditions” Given these purposes of the insurance program in general and the proof of loss requirement in particular, can it be said that failure to file a timely proof of loss will *per se* preclude recovery on the policy in a civil action? This Court thinks not.²³⁴

Notice the court considered a variety of factors in reaching its decision. Not only did it consider the core legislative purpose of the SFIP, but it also contains language that mirrors *Lazy FC* analysis.²³⁵ Furthermore, in an omitted part of the opinion the court discusses the proprietary versus sovereign distinction.²³⁶ Moreover, the holding of the court itself, that the government was estopped because it did not mail the Proof of Loss forms within the statutory period in which a disgruntled citizen could bring suit, is reminiscent of a procedural estoppel.

Additionally, had the court not held the government estopped, the Bureau’s negligence would have allowed it to escape an obligation that Congress clearly intended the citizenry to enjoy. The court would have, in essence, made a value judgment declaring that courts’ traditional hesitancy to apply estoppel against the government was more important than Congress’s core purpose of the National Flood Insurance Act, thus frustrating the purpose of that Act. This is not only undesirable, but it impermissibly legislates from the bench by creating “de facto laws,” the “law” in this case being that if the Bureau wishes someone to not receive benefits to which they are entitled, they simply can refrain from mailing the Proof of Loss Form.

234. *Id.* (citation omitted). The court then continued:

The Court finds that the injury to the plaintiff in this case would be great if estoppel were denied, while injury to the public treasury and weakening of the purpose underlying the proof of loss requirement would not only be small, but, if estoppel were not allowed, the public interest in compensating individuals for flood damage would suffer: a victim of flood damage would be unjustly precluded from being compensated contrary to the objective of the legislation.

Id.

235. *Id.*

236. The court stated:

This Court holds [that] . . . the government agency will not be permitted belatedly to assert a technical defense to a law suit which admittedly, if it had been in a state court against a private insurance carrier, would not have prevailed. The Agency was not in any sense acting in a sovereign capacity here but was engaged in essentially a private business.

Id. at 1340.

Nagle v. Acton-Boxborough Regional School District is a more recent example where the dissenting judge explored the importance of the core legislative purpose underlying the Family Medical Leave Act.²³⁷

School monitor Kathleen Nagle was hired at the school district in 2000.²³⁸ In January of 2004, her husband became ill.²³⁹ She requested time off under the Family Medical Leave Act.²⁴⁰ The act allows any family member to take unpaid leave for a period of up to twelve months to care for an ailing family member, as long as they worked 1,250 hours in the previous twelve months.²⁴¹ Nagle had worked only 554.²⁴² She asked the district's deputy superintendent (Frost) if she could be allowed to take FMLA leave despite this.²⁴³ Though Nagle claimed he allowed her to, Frost says he did not.²⁴⁴ However, since this was a summary judgment appeal, the facts were considered in the light most favorable to the plaintiff and her version controlled.²⁴⁵

Nagle took leave from January to April.²⁴⁶ She wrote Frost thanking him for his generosity in March.²⁴⁷ Once she returned in April, she met with Frost who again told her FMLA leave was available if necessary.²⁴⁸ Her husband became sick again in May and died in early June.²⁴⁹ Nagle took what she believed to be FMLA leave during this time period.²⁵⁰ She was then terminated upon returning to work in June.²⁵¹

Nagle sued, alleging a violation of FMLA by her employer.²⁵² The school responded that she was not eligible, and that she was terminated because her position was no longer needed.²⁵³ She argued that the school district was estopped from claiming she was

237. *Nagle v. Acton-Boxborough Reg'l Sch. Dist.*, 576 F.3d 1, 6-10 (1st Cir. 2009).

238. *Id.* at 1-2.

239. *Id.*

240. *Id.*; see 29 U.S.C. § 2601 (2009).

241. *Nagle*, 576 F.3d at 1-2.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 2.

253. *Id.* at 2-3.

not eligible because of Frost's statements.²⁵⁴ The district court granted summary judgment for the school district, and Nagle appealed.²⁵⁵

The majority affirmed the district court, stating that a case in which the government is estopped is "hen's-teeth rare."²⁵⁶ The court repeated the traditional reasons for refusing to estop the government, including concerns relating to a potentially negative effect on the public fisc.²⁵⁷ The court also pointed out that Nagle had nothing in writing from the school district granting her leave.²⁵⁸ However, the court's decision largely turned on the court's unwillingness to depart from Supreme Court precedent, which it read as hostile to estoppel claims against the government.²⁵⁹

Judge Lipez's dissent criticized the majority for admitting that the use of estoppel against the government is permissible, while again rejecting its use in this case for only the reason that the government is rarely estopped.²⁶⁰ Judge Lipez then pointed out that the majority's concerns about applying estoppel against the government generally are warranted, but there was little chance in this case the majority's fears were founded.²⁶¹ For example, the majority feared the specter of endless liability if estoppel is allowed because of the volume of interaction between government agencies and the citizenry.²⁶² Judge Lipez rejected this argument more generally by stating that endless litigation probably will not occur because the cost of litigation may prevent low-stakes claims from being filed, as well as the fact that judges can ferret out unmeritorious claims at the early stages of litigation.²⁶³ Lipez then stated that there is an even smaller chance of precedent from cases like these

254. *Id.* at 3.

255. *Nagle v. Acton-Boxborough Reg'l Sch. Dist.*, 578 F. Supp. 2d 313, 318 (D. Mass. 2008).

256. *Nagle*, 576 F.3d at 3 (citation omitted).

257. *Id.* at 5.

258. *Id.* ("A prime danger in applying estoppel to the government is the prospect of he said-she said trials as to whether an alleged oral statement was ever made.").

259. *Id.* at 5-6.

260. *Id.* at 6.

261. *Id.*

262. *Id.* at 5. "To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc." *Id.* (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990)).

263. *Id.* at 9 (Lipez, J., dissenting).

spurring allegations because Nagle has evidence her allegations are true.²⁶⁴

Most importantly, though, Judge Lipez reasoned that the use of estoppel in this context furthers the governmental objective that the FMLA serves to advance.²⁶⁵ In previous cases, like *Richmond*, litigants used estoppel to escape obligations. However, in this case Nagle is using it to advance the precise reason the FMLA was enacted to ensure that sick family members get care.²⁶⁶ The Supreme Court sanctions allowing estoppel in “rare” cases, and these cases should involve litigants seeking to further policies underlying the enactment in question.²⁶⁷

Judge Lipez’s dissent demonstrates that a government agent’s conduct that serves to undermine a statute’s purpose should give rise to an estoppel claim. It is illogical to believe that an act contrary to a statute’s purpose that is given effect by a court’s refusal to estop does not damage the statute. Acting contrary to a statute’s purpose is tantamount to acting contrary to the statute itself, by disregarding the will of Congress.²⁶⁸ When a court refuses to estop the government in this instance it impermissibly legislates, and the

264. *Id.* Nagle’s note thanking Frost for his assistance. *Id.*

265. *Id.* at 7. Judge Lipez found the FMLA’s core legislative purpose thusly:

Allowing her to invoke estoppel against the government would not undermine the policy of the act whose limitations she seeks to avoid. The Family Medical Leave Act . . . is designed, inter alia, to protect the continued employment of individuals-like Nagle-who need time away from their jobs to help family members confronting serious illnesses. *See* 29 U.S.C. § 2601(b)(2) (stating that the Act’s purposes include entitling “employees to take reasonable leave for . . . the care of a child, spouse, or parent who has a serious health condition”). . . . [A]llowing Nagle to pursue her claim advances the employee-protective policy sanctioned by Congress when it enacted the FMLA.

Id. at 7-8.

266. Judge Lipez responded to the argument that the FMLA was not enacted to aid workers who worked less than the statutory number of hours:

I realize that the Congressional cutoff for FMLA eligibility—1,250 hours worked in the preceding twelve months—is the product of a deliberate compromise that balances the needs of employees and their employers.” *See* 29 U.S.C. § 2601(b)(3) (noting that the Act is designed to accomplish its purposes “in a manner that accommodates the legitimate interests of employers”). But the explicit provision allowing more generous benefits under state and local law forecloses an argument that allowing estoppel here would contravene the federal law.

Id. at 8 n.8.

267. *Id.* at 10 (“The remedy sought does not violate federal law and, indeed, advances an important public policy These considerations justify Nagle’s invocation of the estoppel doctrine.”).

268. *See United States v. Freeman* 44 U.S. (3 How.) 556, 565 (1845) (“A thing within the intention of the makers of the statute is as much within the statute as if it

resulting decision weakens the statute by announcing it is permissible for the government to act in a manner prohibited by Congress. Furthermore, like enforcement of the actual authority requirement, it prevents litigants from suffering injustices at the hands of a government disregarding its supreme law.²⁶⁹

While Judge Lipez performed valiantly in focusing on what might become the “core legislative purpose” requirement, it is a worthwhile experiment to determine how the court would apply the remaining factors.

As stated earlier, the most important factors of this test are the core legislative purpose, actual authority, and affirmative misconduct factors of the test.²⁷⁰ Did Frost’s misleading assertions to Nagle constitute affirmative misconduct? In *Kennedy*, the Court held that a false statement made by a government agent to a citizen was not by itself an example of affirmative misconduct, even if relied on to their detriment.²⁷¹ Nevertheless, Frost’s misrepresentation was likely not an isolated occurrence, and might have been construed as being an active pattern of ongoing misrepresentations, a construction which would categorize it as affirmative misconduct.

Furthermore, it is undoubtedly true that Frost had authority to deny Nagle benefits—benefits she would have no reason to believe

were within the letter.”); *cf.* *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 461 (1892).

It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act The reason of the law in such cases should prevail over its letter.

Id.; *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (“The preference for plain meaning is based on the constitutional separation of powers—Congress makes the law and the judiciary interprets it . . . we generally assume that the best evidence of Congress’s intent is what it says in the texts of the statutes.”).

269. For another example of the proper operation of the core legislative purpose test, see *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1092 (10th Cir. 2003) (holding that although Washington follows the traditional no-estoppel rule, an exception should be made when the Washington Open Meetings Act (OPMA) is at issue because “these provisions of the Washington code demonstrate a strong legislative intent that property held for the public use and benefit not be summarily disposed of without giving the public affected a significant opportunity to participate” (internal quotations omitted)).

270. See *supra* Part IV.A.

271. *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961).

she was entitled if not for the statements by Frost. These factors considered together tip the scale heavily in Nagle's favor even without considering the remaining factors. However, they are weighed down even further by the fact that failing to estop the government in this particular situation results in a level of unfairness that offends our notions of justice. The proprietary factor is not applicable and thus cannot be considered.

The multi-factor test's efficacy can be further demonstrated if applied to the facts in *Merrill*.²⁷² In *Merrill*, the Court simply determined that the government could not be held estopped in the same way as private litigants, and pointed out that the farmers were responsible for knowing the applicable regulations published in the Federal Register, despite affirmative misrepresentations by the FCIC's agent to the contrary.²⁷³

If the multi-factor test was applied in this case, a fairer outcome would have followed. Taking each in turn, the traditional elements of estoppel indeed were present. It is undisputed that the FCIC agent provided the farmers with faulty information, the farmers acted in reliance on that information, and they did not recover, which was to their detriment.²⁷⁴

Next, the government was acting in its proprietary capacity in this case. The court gave little weight to this, but subsequent jurisprudence has made clear that this should be considered for the aforementioned reasons.²⁷⁵ Concerning procedural estoppel, while it is questionable whether the FCIC agent broke its own rules,²⁷⁶ it is certainly arguable. The agent failed to inform the farmers of the contents of a newly promulgated regulation. The agent unwittingly lied to the farmers, which can be viewed as affirmative misconduct, since it may have been reasonable for the agent to be aware of an important published regulation so vital to the advice he gave. However, even if the conduct was not "affirmative," the other factors militation toward estoppel could overcome this. Concerning actual authority, it is true that the agent did not have authority to change this regulation, so traditional separation of powers argument would state that permitting an estoppel in this instance would allow the

272. See *supra* Part I.A.1.

273. See *supra* Part I.A.1.

274. See *supra* Part I.A.1.

275. See *supra* Part II.A.

276. As stated previously, *Schweiker* is a better example of procedural estoppel. See *supra* notes 124-127 and accompanying text.

agent to unilaterally change the anti-reseeding crop insurance regulation.

Perhaps this fact would be enough for some judges to refrain from going forward with estoppels. However, this situation undoubtedly begot farmers suffering from long-lasting financial ruin. Indeed, the Court expressed sympathy for the farmers, stating that “[t]he case no doubt presents phases of hardship.”²⁷⁷ This was a hefty price to pay by the farmers for relying on advice from an agent employed to help them.

Perhaps most importantly, the Court had no difficulty determining the core legislative purpose in the applicable statute, which was to prevent the exact sort of catastrophe that took place here.²⁷⁸ This makes it a close case. This both demonstrates the need, and shows it would be prudent for courts to adopt this multi-factor approach, as courts should make every endeavor to prevent grave injustice.

CONCLUSION

The Supreme Court has stated that applying equitable estoppel against the government is disfavored, but beyond that it has provided little guidance for lower courts. As such, lower courts and commentators have fashioned a number of tests to determine in which situations equitable estoppel should be applied to the government. All of them apply to their own particular factual situations, but there remains a natural reluctance to consider all possible tests when confronted with a situation.

These tests should be viewed as factors within one test. However, of these traditional tests, an important one is missing: whether the government agent’s actions served to undermine the applicable statute. Each factor the private litigant can show should weigh more heavily toward estopping the government. It is undeniable that the application of the multi-factor test will capture justice when it slips through the fingers of the status quo, as demonstrated by applying it to *Nagle*.

Justice Holmes declared “men must turn square corners when dealing with the government.” However, the more crucial and provident maxim is that the judiciary must turn square corners when interpreting the Constitution. Failing to estop the government when its agent’s conduct allows it to perform acts directly con-

277. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).

278. See *supra* note 22 and accompanying text.

2011]

ESTOPPING BIG BROTHER

209

trary to the statute that they are charged with facilitating is an affront to the spirit of both ordinary statutes and the Constitution itself. Only through ensuring that government agents' acts are done in accordance with the core legislative purpose will it be certain that and a just result secured.

*Stephen Holstrom**

* J.D., Western New England University School of Law, 2011; Research Review Editor, *Western New England Law Review*. This Note is dedicated to my loving fiancée Amelia, and my parents. I also wish to extend many thanks to the professors who assisted in developing this Note, and the *Review* staff for all of their hard work during the editorial process.