Relying on Government in Comparison: What Should the United States Learn from Abroad in Relation to Administrative Estoppel?

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Abstract

The United States’ Supreme Court had never upheld a claim of estoppel against the government. A citizen relying on government’s advice does that at her peril: if the government was wrong, if it misrepresented the statute or interpreted it wrongly, it can (by some interpretations, must) go back on its word and the citizen has no recourse. The Supreme Court provided many arguments for that position, but the core of them involves protection of what the Europeans refer to as “the principle of legality”: the executive does not have the ability to waive requirements from primary legislation or deviate from statutes, even to protect reliance. Similar concerns enter the law in other systems – as demonstrated in this article for the U.K., France and Israel. However, this position comes with a price. There are costs to the (usually innocent) relying citizen, both in money and in autonomy. There are costs to the government, in loss of trust and potential loss of legitimacy. The United States’ approach does not balance these costs; it completely privileges the principle of legality. The other systems discussed here do a better job

1 Professor of Law, UC Hastings College of the Law. I would like to thank Anne Joseph O’Connell, from whom I first learned about administrative estoppel in the United States; I would also like to thank Margreth Barrett, Evan Lee, and Adam Scales for discussions of the issue and comments on earlier stages. I would like to thank the participants in the American Society for Comparative Law YIP WIP (Yale-Illinois-Princeton Works-in-Progress) workshop and especially my commentators, Jacqueline (Jackie) Ross and Susan Rose-Ackerman, for their insightful and thoughtful feedback to the work. Any errors are, of course, my own. Thanks are also due to Annie Daher, Jennifer Raghavan Hardin, Fatemeh Shahangian Mashouf and Nicholas Yu for excellent research assistance.
balancing both interests and providing some protection to the relying citizen. They protect reliance in a number of situations. And they provide monetary damages in other cases, where forcing the government to adhere to its initial position would harm the public interest too much. This article suggests that not protecting reliance is unjustified, and draws on the comparative materials to demonstrate the interests at stake and offer a solution to the dilemma that allows the court to protect the principle of legality while also protecting the citizen’s interest: by suggesting an administrative law solution, and by providing a monetary remedy in appropriate cases.

Introduction

Imagine the following two scenarios.

Jane collects disability benefits. Jane wanted to work, and the law allowed her to work up to a certain amount and still collect her benefits. Wanting to be sure she stays within the permissible amount, she contacted the administrative agency handling her benefits and asked what the amount is. An official responded, gave her an amount and sent her a copy of the response in writing. The response was erroneous, and the amount Jane made was above the permissible amount in a statute or regulation. The administrative agency denied Jane benefits for the time period she worked based on the actual state of the law. Jane sued, claiming that the agency should be estopped from denying the benefits, since it was the agency that made the mistake when advising her.

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Contrast it to another scenario.³ A chemical plant applies for a permit to dump certain waste into a body of water. Uncertain about the meaning of some of the requirements for the permit, the plant asks the local office of the EPA a number of questions. The plant receives a written answer. At least part of the answer is in direct contradiction to the way the central office of the EPA interprets the Clean Water Act.⁴ Relying on that answer, the plant invests in preparing the facility, incurring substantial costs. The EPA, upon learning the error, revokes the permit. The plant sues, claiming that the EPA should be estopped from denying the permit, since it was the agency that made the mistake.

What should the result be? Under current United States law as articulated by the Supreme Court,⁵ both claims will almost certainly lose.⁶ But should they? And even if the agency cannot be estopped, is there no other remedy? This result, as pointed out by many scholars, seems unfair to the citizen involved.⁷


⁴ 33 USC §1251 and on.

⁵ Results are less uniform in lower courts. See generally Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own "Laws", 64 TEX. L. REV. 1 (1985); 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 (1992).

⁶ As developed in Part II, the Supreme Court has never formally rejected the possibility of estoppel applying to the government, but has also never found it to apply to a case brought before it, including Richmond. The second claim has a better chance, since it does not require direct payment of money from the Treasury; however, it would still be problematic – similar claims were denied, for example, in relation to filing annual mining claims, when they were one day late, allegedly because of misrepresentation by a federal official. See United States v. Locke, 471 U.S. 84, 89-90, n.7 (1985).

⁷ See generally Thomas W. Merrill, The Accardi Principle, 74 GEO. WASH. L. REV. 569 (2005-2006) (Hereinafter Thomas W. Merrill); Pugsley, supra note 2, at 108-09; Raven-Hansen, supra note 5, at 1; Schwartz, supra note 5, at 653.
This article focuses on the situation where an agency advises that if a private party – natural or corporate - acts in a certain way, the government will respond in a certain manner. The private party relied on the agency’s suggestion, but the agency then retreated from its original position and the reliance imposed costs or caused the private party harm. Most cases (though not all) that address this type of situation in the United States use the language of “administrative estoppel” (or “equitable estoppel” with language that suggests it applies to government), and that is the terminology I apply in this article. However, the emphasis is on the effect of reliance while estoppel – as pointed out by Schwartz – is just one of the possible remedies. Since other countries may use different terms to describe similar situations and also when I discuss the possible remedies to the situation, this terminological issue will have practical implications when I address the law in other countries.

This article will draw on comparative research to do three things: to add theoretical depth to the discussion, by systematically addressing the values involved and demonstrating clearly what is at stake; to demonstrate the similarities and differences between the approach taken by the United States and the United Kingdom, France and Israel; and to suggest modification of the doctrine as applied in the United States. The article suggests that United States should learn from these systems and protect reliance better. It then embraces two solutions: a principled public law approach for case by case evaluation suggested by Schwartz and reminiscent of the approach used in England or suggested in Israel; and either as a complement or as an alternative,

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8 Naturally “agencies”, like corporations, are aggregate entities, and the behavior in question was, in practice, done by an official or several officials that may or may not be representing the central agency. This point will be taken up later.

9 Schwartz, supra note 5, at 719-20.

10 Interestingly, as parts II and III will demonstrate, all four countries seek to protect the legality, status, and power of its legislature. The United Kingdom, France, and Israel, however, also give substantial weight to the other values.
if the United States courts are still reluctant to withdraw from the harsh doctrine regarding estoppel, a monetary remedy in appropriate cases.

Part I describes the United States Supreme Court’s approach to estoppel and the criticisms scholars raise against the Court’s restrictive approach to protecting reliance. Part II will analyze in depth the different interests at play. Part III demonstrates the approach of the United Kingdom, France and Israel, showing how these countries balance the competing interests. Part IV addresses how the law in the United States should change to arrive at more equitable results in these types of cases.

I. Administrative Estoppel in the United States

I. A. The Jurisprudence of the United States Supreme Court

While lower courts have occasionally favored citizens in cases where an agency has misrepresented a regulation, the United States Supreme Court has never granted estoppel against the government. It has long “recognized that equitable estoppel will not lie against the Government as against private litigants,” making it clear that a litigant claiming estoppel against the government carries an extremely heavy burden. Though the Court has refused to accept a “flat rule that estoppel may not in any circumstances run against the Government,” it has not expressed any clear guidelines for when it would support such a claim. The arguments

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12 For a detailed, thorough and thoughtful analysis of the cases on the topic, See Raven-Hansen, supra note 5, at 1; Schwartz, supra note 5, at 653. Since this article goes into the jurisprudence of three other countries and since the jurisprudence had been covered in detail, I kept the discussion relatively brief, providing more detail for the more recent cases. For elaboration on those cases, See Pugsley, supra note 2, at 108-09.
13 Richmond, 496 U.S. at 419.
the Supreme Court uses to justify this approach vary. In early cases, the Court emphasized the doctrine of sovereign immunity. More modern cases found that executive actions must adhere to statute, mostly anchoring this conclusion in the separation of powers principle, under which making law is the legislature’s prerogative. Again and again the Court refused to affirm executive deviation from congressional acts. For example, in the famous case of *FCIC v. Merrill*, the court explained that “the oft-quoted observation that ‘Men must turn square corners when they deal with the Government,’ does not reflect a callous outlook. It merely expresses the duty of the courts to observe the conditions defined by Congress for charging the public treasury.” Relying on that, the court affirmed the FCIC’s refusal to reimburse Merrill for his destroyed crops, even though he expressly told the FCIC’s official that the corps area in question was reseeded, and the government told him the crops were insurable, signed a policy with him (and accepted his money, “several hundred dollars”). Scholars have criticized the Supreme Court’s estoppel jurisprudence since the Merrill decision, pointing to the Court’s insensitivity and the injustice to the respondents. Even though the Supreme Court acknowledged this injustice, commentators’ feel it did not give sufficient weight to it.

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15 See Pugsley, *supra* note 2, at 101; Raven-Hansen, *supra* note 5, at 1; Schwartz, *supra* note 5, at 653 (explaining the problems with the Supreme Court’s reasoning in each case).
18 332 U.S. 380, 385 (1947) (Hereinafter Merrill). This is especially ironic since the decision in Merrill was based on a regulation created by the agency, not a statute: the statute was silent on the issue.
19 Urban A. Lavery, *The Declaratory Judgment in Administrative Law: A Neglected Weapon Against Bureaucratic Aggression*, 14 FED. RULES DECISIONS 479, 487 (1953-1954). The article in question describes the government’s behavior as “fraud” (id) – I would not go that far, but am somewhat surprised – and I will go back to it – that the question of restitution of money already paid was not discussed.
20 Id, pp. 382, 386.
22 Merrill, 332 U.S. at 383, 386.
In another case the court explained that “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.”24

The theme of fidelity to the statute runs in more modern cases too. In *OPM v. Richmond*, Charles Richmond relied on a federal Navy employee’s erroneous advice and as a result earned more than he was allowed in order to continue receiving disability benefits that Congress appropriated.25 Richmond brought suit after the Navy denied his disability benefits.26 The United States Court of Appeals for the Ninth Circuit applied estoppel against the government, and the Supreme Court granted certiorari.27 According to the Court, the award Richmond sought was in “direct contravention of the federal statute upon which his ultimate claim to the funds must rest, 5 U.S.C. § 8337.”28 The court explained that the court said that “. . . [E]stoppel may never justify an order requiring executive action contrary to a relevant statute, no matter what statute or what facts are involved.”29 Relying on the Appropriations Clause of the United States Constitution30, the Court appears to authorize a complete bar of estoppel for a whole category of cases, stating that “. . . judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.”31 The payment of money from the United States Treasury must be authorized by an act of Congress, rather than by the statements of government officials.32 Furthermore, “judicial adoption of estoppel based on agency misinformation would . .

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25 Richmond, 496 U.S. at 416.
26 *Id.* (Navy saying that “the statute directs . . . that the entitlement to disability payments will end if the retired employee is ‘restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement.’”)
27 *Id.* at 419.
28 *Id.* at 424.
29 Richmond, p. 435.
30 U.S. Const. amend. I.
31 Richmond, 496 U.S. at 426.
32 *Id.* at 424.
. vest authority in these agents that Congress would be powerless to constrain." Therefore, the Court reversed the decision of the Court of Appeals for the Ninth Circuit and did not allow estoppel against the government.

The scope of Richmond is unclear. As Schwartz pointed out, the language of the statute concerned in the case is more specific than many appropriations bills. Unlike many appropriation bills, the bill concerned in Richmond specifically limits apportionment for the payment of benefits to what is authorized by the subchapter of that bill. Furthermore, in his concurrence Justice Stevens disputed the relevance of the Appropriations Clause to the facts in Richmond. He stated that “[t]he Constitution contemplates appropriations that cover programs – not individual appropriations for individual payments.” Since the Appropriations Clause covers programs, not individual cases, issues of payment based on misrepresentation to an otherwise eligible beneficiary could still be covered. Therefore, the scope of the prohibition in Richmond remains unclear.

Lower courts have distinguished from Richmond and estopped the government in contexts where money was at issue. In United States v. Cox, the Federal Defender’s Office relied on guidelines promulgated by the Administrative Office of the United States Courts (AOUSC), the office that administers the funds appropriated to the Federal Defender’s Office. The guidelines indicated that the Department of Justice (DOJ) is responsible for the fees of

33 Id. at 429.
34 Schwartz, supra note 5, at 718-20.
35 Richmond, 496 U.S. at 424.
36 Id. at 435.
37 Id.
38 Richmond, 496 U.S. at 435. Despite his statement, Justice Stevens still agreed with the majority’s decision and reasoned that Richmond’s loss of benefits were temporary and his additional earnings mitigated his short-term refusal of benefits. See also Schwartz, supra note 5, at 719-20.
psychiatric examiners who are selected by the defense.\textsuperscript{40} The DOJ informed the AOUSC that it did not object to its guidelines, but it later refused to pay fees owed to a defendant’s psychiatric expert.\textsuperscript{41} Therefore, since the Federal Defender’s Office reasonably relied on the DOJ’s approval of AOUSC’s guidelines, it argued for estoppel against the government for its refusal to pay the fees due to the psychiatric expert.\textsuperscript{42} The decision of the United States District Court for the Eastern District of North Carolina included an order that the government pay the fees.\textsuperscript{43} On appeal, the appellate court distinguished from Richmond and emphasized that unlike previous cases, the entity requesting the money is a federal agency.\textsuperscript{44} Therefore, there were no concerns about unequal treatment between private citizens and estoppel would not undermine Congressional authority in appropriating funds.\textsuperscript{45} “In fact, application of the estoppel doctrine in the present case will have the opposite effect -- encouraging the orderly appropriation of funds by preventing government entities from refusing to make budgetary expenditures on items for which they have previously accepted financial responsibility.”\textsuperscript{46} Therefore, the United States Court of Appeals for the Fourth Circuit affirmed the district court’s decision.\textsuperscript{47}

In Burnside-Ott Aviation Training Center, Inc. v. United States,\textsuperscript{48} another case distinguishing from Richmond, the United States Court of Appeals for the Federal Circuit refused to summarily dismiss a claim of estoppel against the government because there were material issues of fact about the existence of the estoppel. The court concluded that “[t]he Richmond holding is not so broad. Richmond is limited to ‘claim[s] for the payment of

\begin{thebibliography}{99}
\bibitem{} Id. at 1434.
\bibitem{} Id.
\bibitem{} Id. at 1432.
\bibitem{} Id. at 1433.
\bibitem{} Id. at 1435.
\bibitem{} Id.
\bibitem{} Id. at 1434-35
\bibitem{} Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993) (Hereinafter: Burnside-Ott).
\end{thebibliography}
money from the Public Treasury *contrary to a statutory appropriation.*" Since Burnside-Ott’s claim for a right to monetary payment from the Public Treasury was based on its contract with the Navy rather than a statute, *Richmond* did not apply. In conclusion, lower courts have distinguished from *Richmond* when the party requesting monetary payment was a federal agency rather than an individual citizen and when the payment was based upon a contractual duty rather than a statutory entitlement.

Another argument raised by the court was concern about the effect on the public fisc. In cases where estoppel would require payment of benefits to citizens, arguments include concerns about the negative effect on the public fisc from allowing estoppel. Though it is unclear whether the burden would derive from the need to litigate estoppel claims, the administrative burden of reopening and reexamining all cases where there is an alleged error, or the need to pay back the claimant if the government made a misrepresentation. In terms of the administrative burden on courts and agencies, as Justice Marshall pointed out in more than one dissent, the Supreme Court’s refusal to categorically bar estoppel claims against the government means that such claims were viable and sometimes accepted in lower courts. In his dissent in *Richmond*, Justice Marshall says, “The door has been open for almost 30 years, with an apparently unnoticeable drain on the public fisc. This reality is persuasive evidence that the majority’s fears are overblown.” In terms of the costs of paying back or paying damages to a person who relied on misrepresentation (since estoppel only applies to those who rely on a misrepresentation), more evidence that paying claimants back in these cases would create a

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49 *Id.* at 1581 (quoting Richmond, 496 U.S. at 424).
50 *Id.*
51 See Schweiker v. Hansen, 450 U.S. 785, 788 n.4 (1981); Heckler, 467 U.S. at 63; Richmond, 496 U.S. at 428, 433.
52 Richmond, 496 U.S. at 433.
53 See generally Hansen, 450 U.S. at 788.
54 See generally Heckler, 467 U.S. at 63.
55 Richmond, 496 U.S. at 442.
serious drain on the public purse is desirable. A decision like *Richmond* once in ten years would likely not make a big difference to the Navy’s disability payments. On the other hand, to Charles Richmond himself, losing the disability benefits was probably drastic. His case is an especially painful example of the results of the Supreme Court’s strict doctrine. He was entitled to the money until he took the extra work, and he would not have taken the extra work without the agency’s advice. Therefore, he lost the money he was entitled to as a direct result. Would protecting his reliance really be such a drain on the public fisc? Charles Richmond lost benefits amounting to $3,993. Even in 2008, at the height of the financial crisis, and after adjusting for current value, paying Charles Richmond that amount would not have bankrupted the government.56

Finally, arguments opposing estoppel against the government include the Court’s concern that it will increase the possibility of government officials purposely giving erroneous advice in order to circumvent congressional requirement and of collusions between citizens and officials to defraud the government57. The former suggests a somewhat complicated plot in which a government official – in most cases, a relatively low-level official - knowingly gives wrong advice, counting on the agency being bound under the rules of estoppel, in order to subvert congressional commands with impunity58. Apparently, in all cases, even though estoppel is an equitable remedy focused on the particular case. The Court seems to think that under the rules governing agency deviation, it would be bound to treat all subsequent cases according to the wrong representation. However, agencies can deviate from previous decisions as long as it is not

56 *Id.* at 418.
57 *See generally* Heckler, 467 U.S. at 65-66,
58 Richmond, 496 U.S. at 428 (“If, for example, the President or Executive Branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc (such as the restriction imposed by the statutory change in this case) and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give this advice the practical force of law, in violation of the Constitution.”)
arbitrary and capricious to do so. The explanation, “the previous case was based on error and though we respect that decision to protect the citizen’s reliance and not penalize that citizen for our own error, the correct legal decision in the present case is different,” does not seem arbitrary or capricious. Yes, collusion can be a concern, but it can be overstated. Further, the potential for abuse is not always a convincing reason to avoid giving justice to those who deserve it.59 Any system can be abused. The question whether the potential for abuse is great enough to justify barring compensation deserves its own discussion. Other problems with this theory include the danger to such an official of internal penalties if the digression is discovered. If not discovered by the higher echelons of the agency, it will probably not go to court. Hence, the Courts’ acceptance or otherwise of estoppel against the government is not going to make a big difference to the motivation of officials.

In conclusion, a number of other arguments in favor of a bright-line rule barring estoppel against the government have been raised. However, these arguments are not persuasive and more than one Supreme Court Justice recognizes that there are important interests on the other side, primarily of which is fairness.60 Even here, the Court sees this as the interest of the individual in contrast to the interest of the public. However, in a democracy the individual citizens are the public and their rights and interests are counted even though they do not automatically trump other interests and may have to give way to a stronger interest. The public has an interest in an agency acting accurately and correcting its mistakes when needed. Beyond this, the Court does not address the potential impact on citizen autonomy from its policy. In a world where the government regulates many activities, where law enforcement may need permits before action,

59 Dillon v. Legg, 68 Cal 2d 728, 731, 739 (Cal. 1968) (“In the past we have rejected the argument that we should deny recovery upon a legitimate claim because other fraudulent ones may be urged”…. “we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.”
60 Merrill, 332 U.S. at 387-88.
and where citizens are fined for violations, it is hard for citizens to act in confidence without knowing how an enforcing or permitting agency interprets a regulation. Therefore, the agency is the natural source, often the only source, for citizens to turn to in order to learn how a regulatory scheme is interpreted. Furthermore, the Court does not address the harm in trusting the government and its legitimacy – already vulnerable in modern States generally and the United States in particular.61 Finally, agencies themselves have an interest in citizens relying on its decisions: compliance will be quicker if citizens do not need to check externally whether an agency’s advice is indeed accurate, and rates of compliance will be higher if compliance will protect citizens even if the agency was wrong. These arguments will be developed further in part II of the article.

I. B. Deviations

The Court refused to declare a complete bar of estoppel against the government and lower courts were left with the problem of identifying under what conditions estoppel against the government will apply. Lower courts have granted estoppel against the government when the government official was acting in some form of “affirmative misconduct.”62 Unfortunately, lower courts did not define the term “affirmative misconduct.”63 And in no case did the Supreme Court affirm such a decision. In Schweiker v. Hansen, the Court in essence said that it will know affirmative misconduct when it sees it – and it has not seen it yet.64 This has not prevented

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63 See Pugsley, supra note 2, at 108 and on for criticism of the standard’s vagueness and lack of definition.

64 Schweiker v. Hansen, 450 U.S. 785, 788 (1981). “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. In two cases involving denial of citizenship, the Court has declined to
appeal or district courts from finding for the citizen on these grounds in some cases. However, as the Supreme Court said in Richmond, “. . . we have reversed every finding of estoppel that we have reviewed.”

Lower courts have also granted estoppel against the government when the government was acting in a proprietary function – the government acting in the market as a private individual – rather than in its ordinary sovereign function. Interestingly, this distinction is actually used in various contexts in civil law countries, and does have important practical implications.

Not only the lower courts, but in other cases the Supreme Court itself deviated from its policy of not granting estoppel against the government. However, in these cases the Supreme Court does not use the term “estoppel” when describing the remedy allowed to the winning party. Instead, it called it “entrapment by estoppel” and “equitable tolling.”

The first is the doctrine of entrapment by estoppel. The Supreme Court has clearly stated that the government cannot criminally prosecute private individuals for acting in accordance with government advice. These cases are relatively easy to explain. As Joshua Schwartz pointed out in his article The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an
An agency’s violation of its own regulations or other misconduct, considerations of due process and the gravity of the private interests at stake can support estoppel against the government in criminal cases. However, the Court did not explain in detail why the considerations against estoppel in the Supreme Court cases addresses non-criminal issues do not operate here or why decisions allowing deportation do not affect interests just as grave, even though they are classified as civil and not criminal. Mr. Schwartz suggests that in many of the INS cases the Court’s refusal of estoppel did not create an absolute bar to reapply for citizenship or status, but especially if there was a deportation – the deprivation could be very substantial. Deportation would normally lead to the applicant being barred from the United States for five years and will be a factor in subsequent decisions, and the result of relocation to another country can be grave and irrevocable.

The second is the doctrine of “equitable tolling,” involving cases that are harder to explain. In a series of cases decided not long before Richmond, the Supreme Court put aside statutory or regulatory requirements to provide a remedy – frequently a monetary remedy – to claimants. The Court described what it was doing as “equitable tolling” or as forcing a waiver, but the differences from estoppel are hard to identify. The first case to use the doctrine of equitable tolling was Honda v. Clark. In Clark, there was disagreement between the United States Government and the petitioners, mostly of Japanese descent, about the correct rate of exchange for repayment of assets the Government took under the Trading with the Enemy Act in

70 Schwartz, supra note 5, at 728-32.
71 Lenni B. Benson, By Hook or by Cook: Exploring the Legality of an INS Sting Operation, 31 SAN DIEGO LAW REVIEW 813 (1994).
72 Schwartz, supra note 5, at 737-38.
73 Benson, supra note 108, at 813.
74 Id.
75 This discussion draws heavily on Schwartz’s excellent analysis. Schwartz, supra note 5, at 686-93.
76 Honda v. Clark, 87 S.Ct. 1188 (1967) (Hereinafter Clark).
a Japanese Bank. The lower courts dismissed the case because the action was not brought during the sixty-day period dictated in the Act. Claimants were waiting for the conclusion of a class action suit on the same issue (rate of exchange), and they understandably assumed that the results of that litigation would apply to all future and current claimants, even those who – like claimants – were not part of the class. The Supreme Court reversed, concluding that the issue was not one of estoppel. Instead, the limitation period was, based on the legislative scheme, tolled until the litigation was over. The Court’s interpretation of the statutory scheme was extremely broad and emphasized the lack of harm to the government when accepting the claims. Since the assets were not part of the general public fisc the government loses nothing when providing such assets to claimants. While this suggests a difference from Richmond, that difference was denied in Bowen v. City of New York where the Supreme Court accepted the argument of equitable tolling when it said,

Petitioners argue that Honda stands for the proposition that equitable tolling is permissible only in cases in which the public treasury is not directly affected. We decline to hold that the doctrine of equitable tolling is so limited. When application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme, there is no justification for limiting the doctrine to cases that do not involve monetary relief.

The Court clarified its approach to equitable tolling further in Irwin v. Department of Veteran Affairs. In Irwin, the Court explained that it would apply a presumption of equitable tolling.

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78 Clark, 87 S.Ct. at 1189.
79 Id. at 1191-94.
80 Id. at 1194-96; See also Schwartz, supra note 5, at 686-89.
81 Clark, 87 S.Ct. at 1197.
82 Id. “This case is, however, wholly different from those cases on which the Government primarily relies, where the public treasury was directly affected. Here Congress established a method for returning seized enemy assets to United States creditors, assets that were never contemplated as finding their way permanently into the public fisc.”
83 Bowen v. City of New York, 476 U.S. 467, 473, 479-82 (1986) (using equitable tolling to allow claimants who have not filed for judicial review within the 60 day statute of limitations established by section 205(g) of the Social Security Act to join a class action brought by severely mentally impaired individuals whose applications for disability benefits were denied by an alleged secret and illegal policy of the Social Security Administration).
tolling to statutes of limitations since “[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation . . . Congress, of course, may provide otherwise if it wishes to do so.” However, the Court limited the circumstances in which equitable tolling would be available to claimants actively pursuing remedies and to claimants somehow tricked by the other party into allowing the deadline to pass. In subsequent cases the Court further restricted the application of equitable tolling when it suggested that the statutes of limitations falls into two categories: defenses that can be waived and jurisdictional limitations that cannot. It also stated that if it previously interpreted the statute as creating a jurisdictional limitation period, that previous interpretation stands and equitable tolling is not available.

Of a similar vein are the cases involving a “forced waiver.” Those cases address the administrative law requirement that, barring the narrow exceptions, an applicant should exhaust its in-agency remedies before appealing to the courts. This doctrine was well established in the administrative jurisprudence of the United States and is embodied in several statutes. In Eldridge and Bowen v. City of New York, the Court applied a waiver of administrative remedies even though the plaintiffs did not request a waiver and the agencies involved did not give them

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84 498 U.S. 89 (1990)
85 Id. at 95-96.
86 Id. at 96. It should be noted that neither circumstance was in place in Honda or in Bowen – this is a retrenchment.
88 Gravel, 552 U.S. at 137-38; See also Henderson, 131 S.Ct. at 1203.
one.\textsuperscript{91} This decision of the Court was based mostly on considerations of justice.\textsuperscript{92} Once again, the Court refused to allow the agency to use an otherwise legitimate claim because of the consideration of justice. Though it also refused to label it “estoppel.”

In sum, whatever language the Court used, it actually looks like it prohibited the government from raising an otherwise valid claim for equitable reasons – like estoppel.\textsuperscript{93} In addition, the requirement removed here was a procedural requirement. However, treating this as a meaningful difference – and the English jurisprudence, for example, suggested it could be – runs into a problem because at least some of the estoppel cases involved a clearly procedural requirement. For instance, in \textit{Hansen}, the requirement discussed was not filing a written petition.

Interestingly, a survey of agencies practice by Michael Asimow in the 1970s found that many agencies, while having no written policy about mistaken advice, see it as “unthinkable” that sanctions would be taken against someone who relied in good faith on agency advice provided in a customary manner by the agency.\textsuperscript{94} Asimow did point out that agencies would not see themselves as bound by reliance interests informal advice by low-level employees creates, however.\textsuperscript{95} This suggests that in practice, agencies themselves recognized that reliance on their advice deserves some protection, though there were limits to their willingness to offer that protection. Professor Asimow suggested a statutory solution protecting reliance to some extent.\textsuperscript{96}

\begin{footnotes}
\textsuperscript{91} Eldridge, 424 U.S. at 328-30 (holding that plaintiff did not raise with the Secretary his claim before bringing it to court, and leaving the matter to the Secretary’s judgment is inappropriate). Bowen, 476 U.S. at 483-85 (allowing into the class members who have not exhausted remedies, seeing this as another case where the equities demand that the court overtake the Secretary’s discretion to waive exhaustion).
\textsuperscript{92} Schwartz, \textit{supra} note 5, at 689-92.
\textsuperscript{93} \textit{Id.} at 688-89 (reminding us that the basis for relief was weaker than some of the estoppel cases in which the Court denied relief – there was no actual misrepresentation here).
\textsuperscript{94} Michael Asimow \textit{ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES} 30-31 (1973).
\textsuperscript{95} Id, p. 32.
\textsuperscript{96} Id, pp. 63-68.
\end{footnotes}
I. C. Dissents and Scholarly Criticisms, Suggestions for Reform

Shortly after *FCIC v. Merrill* Frank C. Newman mentioned in an article in the Columbia Law Review specific schemes that protect a citizen’s reliance on the government’s advice.97 One such scheme, prohibiting the government from taking action against such citizens, seems to work well.98 He suggested a general statute that would create a remedy for citizens relying on advice from the government, which in essence would overturn the “no estoppel against the government” doctrine.99 Furthermore, since *Merrill* the doctrine was taken to task several times with commentators generally not finding sufficient justification for its harshness.100 Two interesting takes on solving the estoppel problem deserve special discussion.

Professor Raven-Hansen suggests one principled way for the Court to address estoppel.101 His article highlights the potential tension between the *Accardi* doctrine102 under which agencies are required to follow their own regulations103 and the Supreme Court’s restrictive approach to

97 Newman, supra note 47, at 375-76.
98 Id. Newman referred to a specific statute as an example, the Portal-to-Portal Act of 1947 that "provides that employers are not to be held liable for failure to pay the wages required by certain labor laws, if the failure was due to good faith reliance on rulings of designated Labor Department officials." *Full citation to act and section needed, and citation to page number where Newman refers to it.*
99 Id; see also *Merrill* 332 U.S. at 384 (saying, “Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. 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.” The language in *Merrill* was harsher than in *Heckler, Hansen, or Richmond* because it suggests that estoppel may never lay against the government as long as the advising official is stepping beyond her or his authority.)
103 Thomas W. Merrill, supra note 7; Elizabeth Magill, *Agency Self-Regulation*, 77 see id. at 859, 873-881 (2009).
estoppel. He sees the problem as a need to balance the interests of private reliance, reliance on agency “law” that is broadly defined to include all agency pronouncements, with public interests in the legislative policies that may be overturned.

estoppel should be available if the private reliance interest in agency obedience to its own law outweighs the public interest in those legislative policies that would be affected by regulatory estoppel in a given case.

Professor Raven-Hansen sees estoppel as an issue that comes up when an agency broke its own law, of whatever level. In his view, the guiding principle to distinguishing between types of estoppel is what type of law is at stake, which affects how the level of expectations that the agency will comply with the representation. Raven-Hansen suggests that if the government’s wrongful conduct was a violation of an agency regulation, and the party is claiming a reliance on that regulation, reliance should be presumed, since the process by which regulations are created and their status makes it predictable that they will create reliance and expectations – what he calls “objective reliance”. If the person relied on other agency materials that were also intended to confer benefits or protections on the public, or created with quite a bit of formal process (e.g. public participation or publication), the agency is creating public expectations that it will comply with these statements. These same expectations attach to a long-standing and well-known agency practice. In all these cases, the pronouncement from the agency is “material” to the public, and reliance on it can be assumed and should be protected.

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104 Raven-Hansen, Supra Note #.
105 Id. at 5.
106 Id. at 1-2.
107 Id. at 47.
108 Id. at 48.
109 Id. For example, this could account for the D.C. Circuit’s decision in Alaska Prof’l Hunters Ass’n v. Fed. Aviation Admin., 177 F.3d 1030 (D.C. Cir. 1999) [hereinafter FAA].
On the other hand, if an individual relied on guidance issued primarily for the agency’s own convenience, without public participation or publication, or on individual advice, the same expectations of compliance cannot be assumed.\textsuperscript{110} A party whose claim is based on such materials must show subjective and reasonable detrimental reliance.\textsuperscript{111} No reasonable reliance to the party’s detriment – no estoppel.\textsuperscript{112} Similarly, reliance will not be assumed in cases of agency misconduct – there again the party needs to demonstrate reasonable detrimental reliance.\textsuperscript{113} However, if the misconduct is especially egregious, the courts should relax the requirement.\textsuperscript{114}

This suggests a principled, carefully detailed way to distinguish between cases, but I am not sure it is the right principle. Because he defines estoppel as a situation in which an agency wants to deviate from its own law (such law ranging from legislative regulations to individual representations), Professor Raven-Hansen emphasizes the question whether the representation has the force of law as his yardstick for the different tests. But this focus does not necessary capture the equities of the situation. Under Raven-Hansen’s approach, a citizen relying on the advice of an official as to what agency regulations require will have a heavier burden and less protection than a citizen relying on a published agency manual, without further inquiries. It is not clear that that is fair: should the citizen not be justified in assuming that the people working in the agency know the regulations binding the agency, and what the agency requires? Is asking an official to make sure less diligent than reading an online document that may or may not be up to date? While Raven-Hansen suggests a solution that has the merit of a relatively clear application, it may not fit the balance of considerations.

\textsuperscript{110} Raven-Hansen, supra note 5, at 49. \\
\textsuperscript{111} Id. \\
\textsuperscript{112} Id. \\
\textsuperscript{113} Id. at 50. \\
\textsuperscript{114} Id.
Professor Raven-Hansen’s approach also does not directly address the need to protect the rule of law (or the principle of legality, as it is named in Europe) and Congress’ legislative authority. What happens in cases of direct contradiction with Congressional law?

Part of the problem is that as with the court, the values involved are not sufficiently spelled out in detail in a systematic way. This article suggests such an inquiry is a first step to creating a test.

In another systematic and thorough treatment of the estoppel issue Professor Schwartz, also criticizing the Supreme Court’s jurisprudence, suggests a different approach to solving the estoppel dilemma. Professor Schwartz’s approach has two steps. In the first stage, he suggests a solution based on existing public law concepts, under which a party will request the agency to waive the statute, regulation or policy. For cases that fit certain special criteria and for which the first solution would not work, he then suggests a constitutional, due process based approach. Both of his tests allow for careful weighing of the equities, and as I address later, are my recommended solution for considering whether to apply estoppel (though not the only solution – I propose a monetary remedy where estoppel is inappropriate).

II. The Dilemma of Reliance on Government Representations

This section discusses in further detail what is at stake when we consider protecting citizen reliance on government representation. It draws on the literature from the U.K., France, and Israel to add theoretical depth to the arguments and raise some arguments – on both sides – not considered in the United States. The section concludes that the balance of considerations

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115 Schwartz, supra note 5, at 653.
116 Id. Professor Schwartz’ solution will be discussed in some depth in part IV of the article, which is why this discussion is relatively short.
supports some protection of reliance, although not in every case, and not necessarily through estoppel and that a nuanced, case by case approach, while adding complexity and hence costs, is more appropriate than a categorical bar.

II.A The Separation of Powers/Legality Argument and its Weaknesses

While in the older cases sovereign immunity was the basis for not allowing estoppel\textsuperscript{117} that argument was rarely relied on in more modern estoppel cases, from Merrill onwards.\textsuperscript{118} Merrill and its progeny emphasized, instead, the need to respect and support Congress’ authority over agencies: “…the duty of all courts to observe the conditions defined by Congress for charging the public treasury.”\textsuperscript{119} This argument can be framed as a problem of separation of powers: estoppel means that the executive has the right to overturn congressional legislation. This was the argument raised by the government to support its position that estoppel should never lie against the government, an argument quoted favorably by the court in Richmond: “…to recognize estoppel based on the misrepresentations of Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress.”\textsuperscript{120}

This argument, that officials should not be allowed to circumvent or deviate from statutory law by making representations to citizens, is probably the strongest argument raised by the court.\textsuperscript{121} This argument was addressed by the three other jurisdictions discussed here – France, England and Israel - using the terminology of “the principle of legality”. \textsuperscript{122} In spite of

\textsuperscript{117} Utah Power & Light Co., 243 U.S. at 408-09.
\textsuperscript{118} Richmond, 496 U.S. at 420 (stating that Merrill was “the leading case in our modern line of estoppel decisions.”).
\textsuperscript{119} Merrill, 332 U.S. at 386.
\textsuperscript{120} Richmond, 496 U.S. at 423.
\textsuperscript{121} See Ansell, \textit{supra} note 33, at 1036-38..
\textsuperscript{122} SØREN J. SCHONBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 7 (Oxford University Press. 2000) [hereinafter Schonberg, Legitimate Expectations].
the difference in terms, the issue is similar and very real: a reluctance to allow agencies to undermine the choices made by the democratically elected legislature. In extreme cases, the government’s representation can clearly deviate from enacted statutory law (that was, for example, the case in Richmond: there was a statutory requirement that the agency advice directly violated).  

None of the countries examined here is willing to directly enforce a decision that clearly deviates from a statute. In other words, no jurisdiction is willing to allow an administrative agency to act outside its mandate, “ultra vires”. In spite of the substantial powers of the administrative state and the inevitably broad discretion of bureaucrats democratic theory still emphasizes that the role of bureaucrats is to implement the will of the elected legislature.  

123 The United States is a presidential system. Therefore, its model for separation of powers is different from the one used in parliamentary democracies such as Britain. But the problem of respecting the will of the people’s representatives exists under either system.  
124 Richmond, pp. 417-418. The requirement in question was that the amount earned not exceed 80% of the previous earning in each of the preceding two years; the agency official instructed Richmond according to the previous statutory scheme, which averaged the amount of the earning in those two years. Since Richmond made very little money in the year before his request, when averaged between the two years he would have been below the threshold; but when calculated for the last year alone, he exceeded 80% of his previous earning capacity. Id.  
125 Ariel Bendor, Estoppel in Administrative Law (1994) Hebrew University).chapter 4, paragraph 135, p. 65, suggests a different variety of the Separation of Powers principle. This argument, which he calls the “sophisticated” or “clever” version of separation of powers, suggests that since estoppel is applied after a balancing of considerations of equity and leaves quite a bit of discretion for the court, the effect of allowing courts to estop the government will be to give the courts the power to excuse the other branches from following legal requirements, hence allowing the courts to circumvent the will of the elected branches.  
126 See Part III.  
130 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS § I (Harvard University Press, 1993); John Kingdom, Britain, in COMPARATIVE PUBLIC ADMINISTRATION 13 (J.A. Chandler ed. 2000) [hereinafter Kingdom].
The traditional view was that administrators do not even make policy, they just implement it.\textsuperscript{131} The policy-implementation dichotomy has been convincingly challenged as not well representing reality: implementation carries with it some discretion and therefore often creates a need for policy making.\textsuperscript{132} However, it is still the official doctrine of the administrative state, and for good reasons, that where there is a clear contradiction the legislature must win.

In a democratic country, the legislature is elected, the executive is not – even the political actors in the executive are typically not directly elected to those positions.\textsuperscript{133} Even in a pure parliamentary system, as Israel and the U.K. are, for example, the ministers may have, for the most part, been elected to parliament, but most of the officials – those most likely to be involved in the type of situations involved here, were not; and the government serves with the confidence of the legislature and is itself bound by its laws.\textsuperscript{134} The democratic idea of implementing the will...
of the people suggests that the body that is most representative – the legislature – should trump.\(^{135}\)

Similarly, concerns about bureaucratic power and a desire to prevent agencies from increasing it without limit support subjecting it to a higher authority – i.e., statutory law.\(^{136}\) If the idea of separation of powers is to set one powerful government authority against another, and thus bind and limit them both,\(^{137}\) the bureaucracy is extremely – and increasingly – powerful in the modern state.\(^{138}\) It often combines powers that in theory are separated between the other branches.\(^{139}\) More than any other authority it needs to be limited. The legislature is the natural body to limit it.\(^{140}\)

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\(^{135}\)M.D. McCubbins, et al., Structure and Process, Policy and Politics: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431 (1989). But cf. Dowdle, Public Accountability: conceptual, Historical, and Epistemic Mappings. 2006; Rubin, MICH. L. REV. (2004-2005); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Yale University Press 2nd ed. 1963) (explaining the challenges to the idea that elections really represent voters’ preferences.) There is also a tension between this idea of the people’s will and expertise, but in democratic countries the nature of the system is that the legislature – un-expert as it is – has the final word.\(^{136}\)


Finally, the principle of legality protects the idea of the rule of law. The argument is that the government should be subject to the written, formal law no less than the governed. The government cannot be allowed to deviate from the law except in exceptional circumstances. Allowing the government to deviate because it has made a mistake (or intentionally lied about what the law is) seems to create a dangerous loophole. That is part of the logic behind the Accardi doctrine under which agencies are bound by their own regulations. It is part of the concern about collusion that will be discussed later.

Powerful as the legislative power argument is, it has limits: first, it does not really capture many scenarios of reliance, even those addressed in the cases decided by the United States Supreme Court, where the agency misrepresentation does not directly deviate from statute. Second, it ignores the realities of the modern administrative state. Third, even this argument is not absolute, and in appropriate cases countervailing values should be allowed to trump over it, as developed below. Finally, protecting the legislature’s will is, in some cases, an extremely strong argument against enforcing action in contravention of a legislative command, but it’s not as strong an argument against other remedies.

Clear illegality?

Sometimes, the issue is clear illegality. In OPM v. Richmond, the statute was changed and the agency’s advice simply ignored the change and cited the old statutory scheme. But even in the United States, that’s not always the case. In Merrill itself, the issue was not violation of a statutory command; the inability to insure reseeded crops was embedded in the agency’s legislative regulations. In Schweiker too the issue was violation of a procedural requirement in

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142 Merrill, supra note 7, at 586-87.
an agency regulation.\textsuperscript{143} In that case, a mother applying for social security benefits was erroneously advised that she was not eligible. In contrast to the agency’s manual, she was not advised to file a written petition. The statute in question only allowed benefits if a petition was filed. The agency’s regulation interpreted this as requiring a “written petition”. In both cases the court explicitly treated the regulation as law, but for the purpose of this specific argument, the separation of powers or legality argument, the situation is not quite similar.\textsuperscript{144} In one sense, there’s a stronger case for refusing to protect expectations there: if one justification for the principle of legality is the rule of law, assuring the government will also be subject to rules and be a “...government of laws and not of men...”\textsuperscript{145}, the agency should be held to formal law, including its own regulations. However, the argument that the will of the elected legislature should trump is weakened (though not inapplicable) here. Regulations are issued pursuant to power delegated to an agency by statute, but regulations endorse a certain interpretation and the representation may still be within the boundaries of the delegating statute – there’s nothing in Merrill to say that insuring reseeded wheat was against the initial statute, and in fact, there are indications it was not. The concern about abuse of power does not apply in exactly the same way either. Here, the concern is that government will use representations to undermine their own regulations – to avoid applying them without abolishing them. This is problematic on a number of levels, and will be analyzed separately in the next section, but for the moment, suffice it to say that there is also a problem with allowing agencies to externalize the costs of their employees negligently (or worse, intentionally) misrepresenting the agency’s own regulations in a way that causes damages to citizens.

\textsuperscript{143} Hansen, 450 U.S. at 788.
\textsuperscript{144} Merrill, 332 U.S. at 380.
\textsuperscript{145} John Adams, Constitution of the Commonwealth of Massachusetts Article XXX (1780).
In other cases, the violation is not of regulations. In Heckler, the specific question was whether salaries of certain employees were reimbursable under Medicare. This depended on the interpretation of a user manual created by the Department of Health and Human Services, an interpretation the advising body should have referred to HHS for but did not. In other words, this was not a situation where the decision to reimburse was clearly in contrast to a congressional statute, or even to agency regulations; it was a matter of how to interpret the regulations.

Quite a few of the English cases addressing legitimate expectations deal with situations where the agency made a representation that it will interpret the statute in one way, and then went back on that representation. For example, in HTV v. Price Commission the courts decided that a public authority which led traders to rely on one interpretation of a statutory provision could only adopt another interpretation if there was 'an overriding public interest' in doing so. Similar rulings were made in relation to taxation, where the courts found that it was an abuse of power to go back on a precise and unqualified representation.

Not only does the issue of reliance come up in many situations where the issue is agency interpretation of statute or regulations, it may easily come up when the agency is exercising its discretion. A classic situation is an enforcement scenario: when it comes to enforcement, agencies have substantial discretion when to enforce and when not to enforce legislation and regulations. If an agency promises it won’t enforce the regulation in a certain situation and then changes its mind, a citizen may be harmed. Or if the agency makes a decision that changes an interpretation a citizen relied on, that citizen may suffer. For example, in Hoctor v. United

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146 Heckler, 467 U.S. at 60.
148 Schonberg, Legitimate Expectations, supra note 166, at 110 n.21.
149 Schwartz, supra note 5, at 7.
States Department of Agriculture, Mr. Hoctor, raising big cats, was told by a veterinarian of the USDA inspecting his property that to be licensed to raise those cats he would need a six-foot perimeter fence around all his property. Mr. Hoctor did so – and a year later, the Department, in a provision in its manual, told inspectors to require an eight-foot fence for dangerous animals. In 1990, seven years later, Hoctor was cited for this and sanctioned. The issue here was not a direct violation of a statute.

This happened in other jurisdictions as well. Some examples from Britain may be useful. In the Coughlan case, the applicant was a gravely disabled patient who agreed to be transferred from the hospital where she received treatment to a National Health Service facility relying on a promise that the institution would serve as their "home for life". Later the authorities decided to close the institution. The decision was not illegal – it was clearly within the authorities’ discretion, but in violation of the representation given to petitioner, and when petitioner claimed she would not have agreed to the transfer without a promise of permanent residence, the court protected her reliance.

In another situation, local authorities, mistakenly thinking they had a duty to supply homeless refugees with permanent accommodations, promised those refugees secure accommodations. After the House of Lords decided there is no such obligation, the question was whether the authorities’ promise binds them to provide such accommodation. Again, the promise was not in violation of a statute.

150 82 F.3d 165 (7th Cir. 1996) [hereinafter Hoctor].
151 Id. at 168.
In spite of the fact that citizen reliance on government advice does not always – or even usually - involve direct violation of a statute, the United States courts apply the same restrictive standard in all cases.

_The realities of the modern administrative state_

The reason so many situations in which reliance needs to be protected do not involve statutes is because agencies make so much of the law applying to individuals in the modern administrative state.\(^{154}\) Statutes often provide agencies substantial room to fill in details. And implementation carries with it substantial amounts of discretion.\(^{155}\) As pointed out elsewhere, administrative agencies combine legislative, executive and adjudicative powers;\(^{156}\) for the individual citizen or corporation, the interaction is often between them and the agency and the broader dance between the agency, Congress, President and Courts less relevant to the specific reliance problem. It is the agency that is in charge of implementing the statute to which the citizen will naturally direct questions about implementation; and the agency on whose words she will rely. Asking the agency for answers about the legislative scheme they are implementing is the simple, logical and practical thing to do for a citizen seeking to manage her affairs and comply with the law.

The Supreme Court based its estoppel jurisprudence in part on the presumption that the citizen knows the law.\(^{157}\) Yes, the citizen is constructively presumed to know the law, but in the

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\(^{154}\) Smith & Licari, Public Administration, _supra_ note 172..


\(^{156}\) Charles H. Koch, _Policy Making by the Administrative Judiciary_, 56 AL. L. REV. 693 (2005). See also Lawson, _supra_ note 183 (viewing the administrative state as unconstitutional for exactly that reason).

\(^{157}\) Heckler, 467 U.S. at 64 (saying “This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.”).
administrative state there are pages on pages of legislation and secondary legislation.158 Who is it more realistic to expect will know the regulations applying to a particular agency – the agency’s staff that works with the material day in and day out, or the citizen who has to interact with multiple agencies each day?159 And if the agency tells the citizen that its regulation says X – as in Merrill – there is at least a case for protecting a citizen who assumes the agency knows the regulations governing it and relies on its word.

**Other values**

Even if we accept the importance of separation of powers, it is not clear that in every case separation of powers and legality should trump over the countervailing values. There are very few instances in which our system provides absolute protection to any value, regardless of what is on the other side. Freedom of speech is limited in certain important cases.160 Parental rights and freedom of religion have been limited in certain cases.161

Why would separation of powers be dominant in this case? I will elaborate on the values protected here in subsection II.b, but in short, they include fairness to the citizen, protecting citizen autonomy and promoting government legitimacy and effective administration. The financial hardship to the citizen was mentioned in several of the cases (though it is my impression it was underestimated); but the potential injury to citizen autonomy and the effect on trust in government were not. And they should be considered as part of the picture.

Other remedies:

In the most extreme case, the only way to directly enforce the representation relied upon is for the agency to be allowed or ordered to ignore a statutory command. As explained, that raises very real concerns of democratic legitimacy and potential abuse of power by agencies. But the same concerns do not come up if instead of enforcement the remedy is providing reliance damages – monetary damages – to the injured citizen.\(^{162}\) To protect both citizen reliance and the principle of legality, the court could refuse direct enforcement – but then compensate the relying citizen for damages directly resulting from the reliance (upon proof of certain elements). This proposal will be developed in section IV.

II.b Protecting Individual Autonomy and Government Legitimacy

For a variety of reasons, protecting the individual’s reliance on government representation is important. From the point of view of the individual, individuals need to be able to plan ahead and foresee the results of their actions in order to be able to act autonomously, to make choices about their lives. Knowing the legal framework in which they operate – having some degree of legal certainty – is important for such autonomy.\(^{163}\) Without the ability to rely on official representations, such certainty decreases dramatically.\(^{164}\) Given the vast discretion that administrative agencies possess,\(^{165}\) anticipating their actions is very hard without any input from them; and not being able to rely on representations negates the value of such input.\(^{166}\)


\(^{163}\) Schonberg, Legitimate Expectations, supra note 166, at 164. That, after all, is one of the reasons for the principle of legality in criminal law.

\(^{164}\) Id at 12-13.

\(^{165}\) Barkow, HARV. L. REV., 1333-1335 (2008); Bryner, supra note 173; MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (The Free Press 1964); Sidney A. Shapiro & Richard W. Murphy, Eight Things Americans Can’t Figure Out About Controlling Administrative Power, 60 ADMIN. L. REV. (2008).

\(^{166}\) Schonberg, Legitimate Expectations, supra note 166, at 13.
Not only that, but administrative authorities have reasons to want citizens to rely on their representations and to turn to them for advice. To assure smooth running of their functions, agencies want the citizens and regulatees to follow their requirements. If it’s a matter of enforcement, even if the agency has all the resources it wants – and most agencies today do not\(^{167}\) - it probably has other things it wants to dedicate resources to besides enforcement. If it’s just a matter of managing its work, things run more smoothly if the requirements are clear. The best source for understanding a complex administrative scheme with substantial ambiguities is asking the agency in charge of enforcing it.\(^{168}\) If the citizen cannot rely on what the government is saying – not only will the citizen have substantial costs in figuring out what the requirements are,\(^{169}\) costs that will reduce the social utility of the regulatory scheme without any real benefits, there will be delays in implementation. If the issue is one where the government is regulating the market in some way, not protecting expectations will undermine the ability of government to credibly commit in ways that will allow business to act with confidence – people or business will hesitate to rely in future.\(^{170}\) Of course, in areas where the government is the “only game in town” – e.g. pollution permits – people will have no choice. However, if there is substantial uncertainty in those areas, investors may not invest in technologies that require access to an unreliable government – or invest less.

A less utilitarian argument starts from the premise that the modern state exists for its citizens. Government “by the people, for the people”\(^{171}\) suggests that government agency should

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\(^{169}\) Id. Daphne Barak-Erez, *supra* note ###, at 29.

\(^{170}\) Id. at, 20, 31-32.

serve citizens, not cheat or negligently mislead them.\textsuperscript{172} To push the argument further, the principle of legality aims not at reducing the rights of a citizen, but at protecting them, by reducing the ability of government to deviate from the law and abuse its powers.\textsuperscript{173} Using this principle to prevent a citizen from holding government to its representation goes against its fundamental goals.

From a public administration point of view, allowing government to go back on a representation make would undermine trust in government and government’s legitimacy: if the government breaks its word – and further more, the courts allow it to break its word – how can what it says be trusted?\textsuperscript{174} Holding government to its representation, on the other hand, should help control public authorities – if they know they will be held to their representations, they will be more careful in making them, and hopefully, those representations will better reflect actual law and policy.\textsuperscript{175}

\textbf{II.c Dangers to administrative integrity: The risk of Collusion and Abuse:}

One of the concerns raised by the court is the danger of collusion and abuse.\textsuperscript{176} The idea is that a regulator wishing to go beyond its mandate, or to deviate from the rules binding it, will intentionally misrepresent the law - with or without the cooperation of the relying party – and if the law will protect third party reliance, the representing party will thus be bound to its illegal misrepresentation.\textsuperscript{177} This could allow agencies to avoid Congressional requirements - generally, or in specific cases where the regulator is particularly close to or sympathetic to the regulated industry. Another concern of a similar vein is the concern that accepting estoppel will

\begin{footnotesize}
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\item \textsuperscript{172} Daphne Barak-Erez, \textit{supra} note 206, at 29 .
\item \textsuperscript{173} Bendor, \textit{supra} note 169, at 26; Daphne Barak-Erez, \textit{supra} note ###, at 153.
\item \textsuperscript{174} Schonberg, p. 25.
\item \textsuperscript{175} Id. Barak-Erez, MISPATIM, 35 (1996).
\item \textsuperscript{176} Heckler, 467 U.S. at 65-66.
\item \textsuperscript{177} Bendor, Estoppel in Administrative Law Chapter 4, p. 4. 1994.
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allow low-level officials in the agency to avoid the instructions of the center, undermining hierarchical control.\textsuperscript{178}

It is possible for an agency member to collude with a private party to avoid Congressional law or the instructions of the agency’s center. In one example,\textsuperscript{179} an inspector for the FAA at the Southwest Airlines (SWA) office, Charalambe Boutris was responsible for inspecting the airframe and systems of the airline’s fleet of Boeing 737 jets. As early as 2003, Boutris found that SWA records of airworthiness directives did not meet the requirements of the law. He informed the SWA maintenance officials and recommended on numerous occasions to his Supervisory Principal Maintenance Inspector – his superior - Douglas Gawadzinski that they file a letter of investigation against SWA. Gawadzinski refused the request by Boutris and instead offered to conduct a safety attributed investigation to see if the airline was in compliance with federal regulations. Gawadzinski approved the investigation a year later. On March 15, 2007, SWA informed Gawadzinski that 47 of their aircraft had over-flown the required fuselage fatigue inspection. On March 19, 2007, SWA filed a voluntary disclosure claim with the FAA. Shortly afterwards Boutris learned that the affected aircraft were still flying in passenger operations until March 23, 2007 and that six of these aircraft had up to 4-inch cracks in the fuselage (USHTI Hearing 4/3/2008). On the VDRP application, Gawadzinski falsely confirmed that SWA had ceased operations of the planes after they discovered the crack in the fuselage and allowed the 47 aircraft to continue in service for up to 30 months after they were due to be inspected. This was a direct violation of the regulation. Direct collusion appears much less common than problems with compliance result from agency members having too much trust in

\textsuperscript{178} Magill, \textit{supra} note 147, at 859.
the regulated industry, but such collusion does happen on occasion.

However, relying on estoppel to get around a regulation seems a very problematic, roundabout way to achieve the goal. Let’s distinguish between two scenarios: seeking noncompliance with the rule or seeking to benefit a specific private party. If the end sought is avoiding the rule, we have a situation where the agency dislikes the Congressional statute or the local office dislikes the command of the center, and the end goal is completely avoiding it. In that case, estoppel, which is a case specific remedy, does not seem to achieve that goal. It is true that agencies may be found arbitrary and capricious if they deviate from their own previous decisions without an explanation. But agency previous decisions are not precedent under any strict interpretation of the term and an agency may deviate from a previous decision if there is good reason to do so, and the fact that the previous decision was based on error is a pretty good reason. If an agency makes an argument in court that it is bound to adhere to a previous misrepresentation, that argument would be unconvincing. One concern here is that it is unclear, if the agency is using a representation a party relied on, who would be in position to complain – in terms of knowledge or in terms of standing. If the representation worked for a certain party, that party won’t complain, and you would need an external actor with enough interest in the matter to watch out for it and take steps. So in some cases an agency may consistently deviate from a mandate. It does not seem, however, that this scenario raises a real threat of widespread

182 Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994).
183 Id.
deviation from Congressional requirements or agency regulations.

If it’s a local office that is deviating from the center’s desire, the local office can be brought back once the center discovers the deviation. Alaska Professional Hunters creates an obstacle to this, since in that case, the FAA’s central office was held by the D.C. Circuit to the regional office’s interpretation;\(^\text{184}\) though even there, there was no indication of intentional rebellion of the regional office against the center, rather, an error of interpretation seemed to be at issue. At any rate, later cases dramatically cut into Alaska Professional Hunter’s holding\(^\text{185}\) and it had never been embraced by the Supreme Court or by another circuit. The reasons seem to be twofold: it gives substantial weight to non-legislative rules, in a way that seems to contradict the APA; and it undermines the control of the agency’s central (chief) office over its local offices.

In the other scenario, an agency colludes with a private entity by making an official representation that the entity can rely on. Estoppel will be relevant in cases that the agency’s decision, if not the collusion itself, is detected and the agency is forced – because of external pressures – to go back on its word, or when a regional office’s promise is overturned by a central office, because if the agency’s decision is not known, the other party will get what it wants and no one will be the wiser – and there will be no question of estoppel. If collusion can be shown, as in the case of Southwest above, a reliance claim will probably be rejected. There is no unfairness to a private party in reversing a benefit it only got through underhanded means.\(^\text{186}\) So the question is should we refrain from protecting reliance to avoid the cases in which the agency was

\(^{184}\) FAA, 177 F.3d at 1032.


\(^{186}\) Just as when immigration finds a marriage fraudulent it can revoke a Greencard. Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases within the Scope of the Constitution*, 15 AM. U. J. OF GENDER SOC. POL’Y & L. 743 (2006-2007).
acting in a problematic way but the private party was not involved, or if collusion cannot be shown. We do not know how common such cases are; and blanket denial of protection to citizens without evidence of collusion because there may be undetected collusion in some cases seems very problematic. Before going there, I would like evidence that collusion does, indeed, happen in a substantial portion of cases.

II.d Social Utility and Cost Allocation

The courts emphasized the risk to the public fisc. While I pointed out that in Richmond the amount in question was low, and that estoppel probably does not have precedential value, in other cases the amount can be more substantial. In Heckler, the Court said:

Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds.\(^{187}\)

In that case, the amount in question was $71,480.\(^{188}\) The amount could be substantial. The potential harm to the public purse if the government has to pay for it is one consideration, but should not be the end of the discussion. There are also costs to not having the government pay. One, from a social utility point of view, is that refusing to protect reliance will lead to wasting the expenses made as part of reliance, and social waste is never a benefit.\(^{189}\) Not only is this a waste, but it is unfair to make the party investing in reliance bear those costs. The costs are there, and someone has to pay, and if the government made an error, placing the costs of that error on one party – the relying individual – is unfair. In a real sense, allowing agencies to go back on representation means externalizing the costs of mistakes: the government made the

\(^{187}\) Heckler, 467 U.S. at 63.

\(^{188}\) Id, p. 57.

\(^{189}\) Daphne Barak-Erez, supra note ###, at 20.
mistake, but the recipient citizen will have to pay for it. A strong argument can be made that the costs of government errors should be internalized by the government. From a point of view of fairness, again, requiring the government and not the relying citizen to pay for such errors would spread the cost among the general public, by forcing the government to either keep to its representation or pay damages out of the public purse.

In line with these tort-style arguments, the counter to the argument that government will collude with citizens in circumventing the law is that protecting reliance will deter negligent misrepresentations and lead government to be more careful in its advice, since it can be forced to pay for its mistake. One can argue that there are other controls in place to prevent agencies from misrepresentations, negligent or otherwise, among other things the risk of judicial review, something no sane public official wants, if it can be avoided, and of bad publicity. It’s unclear, however, how powerful these other controls are in a system where the courts have a clear approach of not protecting reliance, and where many of the cases involve small, individual stories – often by weak individuals – who may not get the attention of the press.

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192 Daphne Barak-Erez, supra note 206.
194 Though even in the United States, in the lower courts, arguments of estoppel were sometimes accepted, so the risk exists, and may be enough. See Klein v. Securities & Exchange Comm’n, 224 F.2d 861 (2d Cir. 1955); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Georgia-Pacific Corp., 421 F.2d 92, 103 (9th Cir. 1970) (holding that estoppel could be applied against the government, because “ . . . the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case.”); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); Schuster v. Comm’r, 312 F.2d 311 (9th Cir. 1962); United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.d. Wash. N.d. 1942); Cinciarelli v. Reagan, 729 F.2d 801 (D.C. Cir. 1984).
II.e Other Issues

Besides the principle of legality a number of other arguments go against protecting reliance. One concern is that protecting one party can harm others. If we consider the second example I provided – giving a permit to a plant to pollute – protecting the plant’s reliance, if done through direct enforcement, can harm the environment and the health of those that rely on the water.\textsuperscript{195} Similarly, giving a license or benefit to one party based on a representation can harm another party that did not get that license. This can come up if the regulation is in place to overcome a market failure, for example, regulation to prevent the harms from a monopoly.\textsuperscript{196} In a case like this, the parties involved are not just the regulator and the regulated industry, but also the third parties for whose protection the regulation was created. Allowing the regulator to respect the regulated industry’s reliance may harm those parties. But since this will not always be the case, it seems problematic to have a general rule limiting estoppel just because of that. Effects on a third party are one of the things to consider, but do not justify the almost absolute position the court currently takes.

Another possible concern is the equal treatment of similar cases: if other parties are denied the benefit in the name of the law, it is unfair to grant it only to one party. But equality means treating like cases alike, but treating different cases differently. The party towards which the government gave a misrepresentation, which then relied on it is not situated similarly to all other claimants. It relied on a misrepresentation: the harm to it is worse than the harm to a similarly situated party without such reliance.

\textsuperscript{195} Daphne Barak-Erez, \textit{supra} note 206, at 30.
\textsuperscript{196} Bendor, \textit{supra} note 169, at 6.
II.f Conclusion

The discussion above strongly suggests that the balance of considerations probably support some protection of reliance, though the force of the counter arguments suggests that the protection should be on a case by case basis, and not absolute.

III. Reliance in Comparison: How Do Other Systems Balance These Considerations?

The starting point of this discussion is that there is a common core between the three systems I am comparing the United States to: in the UK, France, and Israel there is a strong emphasis of the principle of legality: an authority cannot act outside its legal authority. The principle of reliance is only acknowledged to a limited extent if it directly clashes with legality – though each system offer at least some potential protection. All three systems, however, protect reliance to some degree when the issue is not blatant illegality and may offer a monetary remedy. What seems to be happening is that the systems are trying to find a practical solution to the relying citizen’s problem without sacrificing the principle of legality.

III. A. Britain

After some thought, the British House of Lords – now the Supreme Court 197- decided that estoppel does not, usually, apply to public authorities.198 But although estoppel itself is not used, there is substantial protection of reliance on lawful representations, protection that increased over the first decade of the twenty-first century.

197 The Constitutional Reform Act 2005 created a Supreme Court.
The legal tool used by English law in these circumstances is the doctrine of “protection of legitimate expectations.” Under this doctrine in certain circumstances expectations generated due to an individual’s reliance on a representation of the administration will be protected. The courts have struggled with several questions: when will such reliance be protected; should the courts protect only procedural reliance, or also substantive reliance; what should be the effect of legitimate expectations on the administrative decision; and what yardstick should the administration’s behavior be measured by.

In Rowland, the court summarized the doctrine of legitimate expectations as follows:

By a representation (a term which embraces a regular practice and a course of dealing) a public body does not give rise to an estoppel but may create an expectation in another (“the citizen”) from which it would be an abuse of power to resile: R v East Sussex County Council ex parte Reprotech Pebsham Ltd [2002] 4 All ER 58. The principle of good administration prima facie requires adherence by public authorities to their promises. Whether it does so require must be determined in the light of all the circumstances. The public body can only be bound by acts and statements of its employees and agents if and to the extent that they had actual or ostensible authority to bind the public body by their acts and statements: South Bucks District Council v Flanagan [2002] 1 WLR 2601 at 2607 para 18 per Keene L.J. …. The expectation may be substantive or procedural and the categories of legitimate expectation are not closed… Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation. … The court must

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199 Daphne Barak-Erez, The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests, 11 EUROPEAN PUBLIC LAW 583 (2005); Hilaire Barnett, CONSTITUTIONAL AND ADMINISTRATIVE LAW (T&F Books 8th ed. 2010) [hereinafter Barnett]; Schonberg, Legitimate Expectations, supra note 166. The court in Reprotech found an “analogy” between the doctrine of legitimate expectation and the doctrine of estoppel, but said that “There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see [Coughlan]. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public that the authority exists to promote. Public law rights can also take into account the hierarchy of individual rights which exist under the Human Rights Act of 1998, so that, for example, the individual’s right to a home is accorded a high degree of protection (See Coughlan’s case, at 254-55) while ordinary property rights are in general far more limited by considerations of public interest” [Id. at para. 34].

200 Barnett, supra note 243; Daphne Barak-Erez, supra note 243, at 599-600 (arguing that although the cases themselves do not use the term, courts tend to offer more protection when the individual relied on an administrative representation to her detriment than when expectations were disappointed but there was no reliance).

also consider whether and how far (going beyond the immediate parties) the wider interests of the public may be affected by giving effect to the expectation, for the wider interests may require that the public body resiles in order properly to protect those wider interests. … At the end of the day the court must decide whether having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public and considerations of proportionality for the public body to resile would in all the circumstances and applying the criteria referred to be so unfair as to constitute an abuse of power.

In other words, the court will protect reliance on a case-by-case basis, reconciling the different interests involved. A recent case, Bancoult, demonstrates how those principles can be applied.\textsuperscript{202} An immigration ordinance made in 1971 compulsorily removed the Chagossian inhabitants of islands in the British Indian Ocean Territory so that the main island could be used as a United States military base. The respondent had been successful in an earlier application for judicial review of this ordinance. The United Kingdom government stated that it accepted the court’s ruling and would not appeal. However, the government later decided that resettlement of the islands was not feasible and that the territory was still wanted for defense purposes. Her Majesty exercised her prerogative to make two Orders in Council to prevent the Chagossians from returning to the islands.

On the issue of legitimate expectation, the House of Lords reiterated the principle that the basis of actionable claims of legitimate expectation is “abuse of power and unfairness to the citizen on the part of a public authority.”\textsuperscript{203}

The House found that there is no abuse of power because the government’s statement did not meet the standard of “a clear and unambiguous promise.”\textsuperscript{204} Taking into account the context

\textsuperscript{202} R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61.

\textsuperscript{203} Id, at 35.
of the statement, there was an ongoing study “on the feasibility of resettling the Ilois” and there was no promise as to how long it would be specifically until the Ilois would be returned to the outer islands.

Alternatively, even if a different construction of that statement could be made, the House found sufficient public interest justification for not resettling the Chagossians - the danger and the prohibitive cost of resettlement.

It is clear that traditionally, legitimate expectations cannot be created by an unlawful representation or promise. Several prominent administrative law scholars criticized this as overly harsh. Two recent decisions suggest a possible rethinking of this principle.

First, in Stretch, a claimant purchased a lease from a local authority that obliged him to build a commercial building and gave him the rights to it for 22 years. The lease included an option to renew for 21 years. When it was time to renew the local authority told the claimant that he could not exercise the option because (among other things) its predecessor did not have the legal capacity to grant the option. The court of appeals grudgingly accepted this, saying it’s unfair to allow public bodies to use their own error to get out of unlawful bargains they made. The claimant than appealed to the European Court of Human Rights, which said that the

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204 Id.
205 Schonberg, Legitimate Expectations, supra note 166, at 146-47.
206 PAUL CRAIG, ADMINISTRATIVE LAW 675-680 (2003); WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 343 (Oxford University Press. 2004).
208 Stretch v. West Dorset District Council (1999) 77 P. & C.R. 342): “... I would dismiss this appeal. I do so with little satisfaction. It seems to me unjust that when public bodies misconstrue their own powers to enter into commercial transactions with unsuspecting members of the public, those bodies should be allowed to take advantage of their own errors to escape from the unlawful bargains which they have made. For a local authority to assert the illegality of its own action is an unattractive stance for it to adopt. It is the more striking when, as in this case, the transaction in question is as mundane as a building lease; and the local authority, by taking the point against the member of the public with whom it or its predecessor contracted, thereby robs that member of the public of part of the consideration for entering into the lease. ...”), and see also Mark Elliott, Legitimate Expectations and Unlawful Representations, 63 THE CAMBRIDGE LAW JOURNAL 261(2004).
applicant acquired a legitimate expectation of exercising that option, which can be seen as a property right under Article 1, Protocol 1 of the European Convention of Human Rights.\(^{209}\)\(^{210}\)

In a subsequent case, the court considered how Stretch affects domestic English Law.\(^ {211}\) Mr. and Mrs. Rowlands bought a country house bordering a stretch of the River Thames, Hedsor Water, in 1968. Public rights of navigation exist over the River Thames “from times immemorial”.\(^ {212}\) However, for over 100 years the authorities treated Hedsor Water as private, creating barriers to entries and putting signs that it was private. In 2001 the Environmental Agency reviewed its position and decided that Hedsor Water was still public, and that it had no authority to make it private. However, in consideration of the Rowland’s rights it promised not to publish or put up notice that it’s public. Mrs. Rowland (now a widow) appealed, claiming her legitimate expectations were frustrated. The court concluded that under domestic law, the court could not uphold a legitimate expectation based on an unlawful promise – with substantial reluctance from at least one of the justices, Justice May.\(^ {213}\)

However, Lord Justice Gibson also addressed the effect of Stretch and the convention, and concluded that under the European Convention of Human Rights a legitimate expectation can arise even if the public body that created the expectation acted ultra vires. The doctrine cannot entitle the party to enforcement of something that is ultra vires but entitles it to other relief – “benevolent exercise of a discretion available to alleviate the injustice or payment of

\(^{209}\)“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”


\(^{212}\)Id, at para. 3.

\(^{213}\)See id, L.J. Gibson, Paragraph 81; L.J. May, para. 114-122.
compensation.”214 The reason for the illegality will affect the balancing of the expectation with the private right, though.215 In applying these principles to the specific facts of the case, LJ Gibson concluded the agency here acted proportionally and minimized the harm to the private interests and that the public interest was too strong to put aside.216

What this suggests is that in cases where the behavior of the agency affects property, under the European Convention of Human Rights, even unlawful representations that create legitimate expectations must be considered. In the face of anything less than clear illegality, the doctrine of legitimate expectations, as described above, can protect a citizen’s reliance.

On the other hand, generally speaking, the courts do not see damages as an appropriate response to unlawful decisions, and tort liability has been substantially narrowed. Unlawfulness does not in itself create a right to damages – another tort must be acknowledged. Possible torts are usually breach of statutory duty, negligence, and misfeasance in public office – and all three are hard to prove in this context.217 All three are limited in terms of who can sue and which kind of damages can be granted (usually property damages and personal injury are covered, but not economic loss and lost profits – very relevant to cases of revoked licenses or welfare benefits).218

The reasons are usually that courts are worried that liability will have a chilling effect on officials, will lead to a flood of litigation, that the courts are not able to properly evaluate the hard administrative decisions, that allowing damages for economic loss will make liability potentially limitless and strain public resources and that damages will erode more appropriate administrative remedies.219

214 Id, at para. 85, 90.
215 Id.
216 Id, at para. 96.
217 Schonberg, Legitimate Expectations, supra note 166, at 182-92.
218 Id.
219 Id, at 183.
In relation to misrepresentations specifically, negligence liability was narrowly established in the classic case of Hedley Bryne v. Heller – not just for agencies.\textsuperscript{220} The case established that anyone who makes an incorrect statement of fact, law or intent is liable for damage – including pure economic loss – of a recipient of that statement if:\textsuperscript{221}

a. Representor willfully assumed responsibility for its correctness, according to the court’s objective assessment (subjective state of mind not determinative).

b. Recipient acted in reasonable reliance.

c. Representor knew the statement would be communicated to and acted upon, by the recipient for a specific purpose.

Why the representor made an error is irrelevant.

Public authorities are subject to the principle, but it is limited to special situations because the cases applying Hedley Bryne are influenced by the policy considerations which led to restriction of negligent liability here – the courts are reluctant to impose liability since they are worried it will adversely affect the exercise of public powers, cause a flood of claims, and erode alternative remedies.\textsuperscript{222}

Can this be applied to the United States? Aside from the usual concerns about learning from another country, the U.K. has a parliamentary system, so separation of powers operates differently. It is also a unitary country, more centralized than the United States. However, as explained in section II, the strongest reason raised by the Supreme Court for denying estoppel is the concern about allowing executive officials to deviate from commands of the legislature or


\textsuperscript{221} Schonberg, Legitimate Expectations, \textit{supra} note 166, at 218.

\textsuperscript{222} Schonberg, Legitimate Expectations, \textit{supra} note 166, at 219.
allowing those officials scope to abuse their power. Those considerations are raised and addressed by the legitimate expectations jurisprudence directly.

III. B. Israel

Israel offers limited protection of reliance on government representations using several tools. First, Israeli law directly protects reliance on an administrative promise in certain narrow circumstances and uses an acknowledged doctrine of estoppel in others. Second, Israeli law acknowledges a tort remedy for misrepresentation. Third, through the doctrine of “proportional invalidation” it allows defective (faulty) administrative decisions to stand in certain cases by acknowledging the problem but setting a different remedy than invalidation.

Israeli law acknowledges an “administrative promise” that binds the agency in certain, narrow circumstances. If an administrative agency made a promise on a matter within its legal authority, with the intent to give it binding legal force, and the agency has the power to fulfill the promise, the agency is bound by the promise – unless there is a legal justification to retreat from it.223 The requirements of this doctrine are narrowly construed and closely scrutinized,224 and even if the first three conditions are fulfilled an authority can still retract its promise if there is a good justification – for example, a deviation from general policy or a violation of the principle of equality.225

This suggests very limited protection of reliance, but is not the whole picture.

223 Alex Stein, Administrative Promise, 14 Mishpatim 255, 258-265 (1984-1985); Case no. 135/75 Sai-Tex v. Minister of Commerce and Industry, P.D. 30 673, 676; 594/78 Oman Knitting v. Minister of Industry, Commerce and Tourism, P.D. 32 (3) 469, 474 (1978); 142/86 Dishon v. Minister of Agriculture, P.D. 40 (4) 523, 529. These requirements were reaffirmed in 714/06 Major Amir Ziv v. IDF (Not published, decision on December 30, 2007).

224 See Yoav Dotan, An Administrative Promise to the Public, 5 Mishpat Umumshal (Law and Government) (2000) 117-63 (Hebrew) (demonstrating that the cases in which the Israeli Supreme Court accepted a claim of administrative promise have been very few).

225 Id. at 491; See also Id. at 492 (criticizing that approach).
The protection of reliance on a decision that is outside the agency’s authority is even more limited. The vehicle used here is estoppel, and estoppel against the government has rarely been acknowledged in Israeli law. After many years of denying it completely, the Supreme Court acknowledged it in principle in 1999, in a case addressing whether the Israeli Land Administration can retreat from an agreement to provide lands without tender to a plaintiff in certain conditions. The presiding justice in that case acknowledged estoppel in narrow circumstances and created a balancing test, balancing the public interest and the gravity of the harm to the public interest from enforcing an illegal decision with the harm to the individual from overturning the decision. The Justice also decreed that if the harm to the public interest was too high, then an alternative remedy to enforcement should be considered – either an alternative remedy close to the initial representation or monetary damages. In that specific case the Justice believed that given the importance of awarding public lands only through tender, the public harm from enforcing the administrative representation – that lands would be awarded without tender – was too high, and therefore remanded to a lower court for the consideration of an alternative remedy.

This grudging acceptance of estoppel was repeated in a later case though that case highlighted the hesitation of using administrative estoppel and did not find one in the circumstances of the case.

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228 Id, 124. See also Barak-Erez, *supra* note ##, footnote 209 on p. 155.
230 Id, p. 125.
231 9634/08 *Hof Hasharon Regional Council v. Minister of Interior*, Dinim Elyon 87 192 (2009). In that case a local authority wanted to appoint a salaried vice-chair. The law requires a municipality to have a minimum of 10,000 inhabitants, and the official census did not reflect that; the municipality claimed it did in fact have more than 10000 people, and that it met with a Ministry of Interior official that promised that one the census reflected 10,000
This would suggest very limited protection of reliance on government, but this discussion is incomplete. Through remedies, Israeli law provides potentially stronger remedies.

First, Israel allows tort damages for negligent misrepresentation by public officials.\textsuperscript{233} This liability was used in the zoning and construction field in cases involving faulty permits or faulty promises.\textsuperscript{234} In fact, a prominent scholar (and now a Supreme Court Justice), Daphne Barak-Erez, strongly advocates damages as the preferable remedy (compared to an injunction) in most circumstances:

\[\ldots\text{reliance damages to the injured individual can correct the injustice without enforcing an ultra vires decision... the monetary remedy also corrects the injustice to the party in question without harming third parties (who would suffer the externalities of enforcing an illegal decision). Other advantages are internalization of the damage by the agency, deterrence from negligent violations in future, and spreading the harm (across all tax-payers). Another important advantage is the ability to match damages to the extent of the harm (since damages match the reliance, while enforcement may provide higher benefits than just the reliance).}\textsuperscript{235}

Similarly, Israeli administrative law acknowledges a doctrine of “relative voidness”.\textsuperscript{236}

Under this doctrine, in appropriate cases, where justice demands it, an administrative action will

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\textsuperscript{234} 86/76 “Amidar”, the National Corporation for Housing Immigrants in Israel v. Avraham Aharon; 209/85 Kiryat Ata City Council v. Ilanko LTD (acknowledging the principle that an authority must pay damages for negligent misrepresentation, but not applying there because of proof issues); 1540/97 Local Zoning and Construction Committee, Holon v. Avraham Rubinstein and partners, Construction company LTD, P.d. 57 (3) 374 (2003).

\textsuperscript{235} Barak-Erez, \textit{supra note} ##, p. 156. See also Barak-Erez, MISHPATIM, 39-41 (1996). The circumstances where injunction will be better is when the reliance is so great the damages will harm the public interest by bankrupting the authority. Daphne Barak-Erez, \textit{supra} note 206, at 156-57 n.214.

not be void, and may have some validity. While in many of the early cases the doctrine was applied against the citizen, to preserve actions done without sufficient notice or hearings from being voided, often with harsh results towards the citizen, that is not the only way it was used. For example, in the Beit Herkev matter, the court used relative voidness to assess the competing interests of a public body and a private firm and arrive at a compromise solution. In that case, the City of Jerusalem’s behavior suggested to a company operating a parking garage that it may deduct expenses from its rent, although the municipality had no legal authority to do that. The court decided that given the fault of both parties, the correct result is not to completely invalidate the contract but to reduce the rent owed to the city to make up for the deducted expenses.

The principle of relative voidness was criticized from both directions – for being too formalistic and not allowing the court to do justice, and for subjecting the authority of public agencies to judicial discretion to an extensive degree and violating separation of powers, e.g. by Barak-Erez. More specifically, Barak-Erez distinguishes between two meanings of relative voidness. The first meaning is procedural: a claim of voidness of administrative action can only be heard if made “by the right party, in the right case”. This sounds a lot like estoppel: the action may be void, but the voidness cannot be raised in certain circumstances. That, in Barak-

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Daphne Barak-Erez, Relative Voidness and Judicial Discretion, 24 see id. at 519, 529, 531-533 (1995).


237 Id, paragraphs 26-38.
238 Id, paragraphs 3-22.
239 Id, paragraph 77.
240 Id, paragraphs 3-22.
241 Dotan, Relative Voidness, supra note 279, at 639.
242 Id. at 527-529, 537 (regarding the claim that this meaning is natural and not problematic).
Erez’ view, is relatively uncontroversial and not problematic. The other meaning – the one 
Barak-Erez criticizes – is a discretionary meaning: under this meaning, relative voidness gives 
the court discretion to waive voidness – to uphold the administrative action – if it thinks it is just 
to do so.  

III. C. France

French law distinguishes representations and actual decisions. France protects public 
reliance on actual decisions via the principle of irrevocability of administrative decisions that 
create rights (intangibilité des décisions créatrices de droits).  
The principle is based upon the 
idea that some administrative decisions, government contracts or even laws create a “vested 
right” (droit acquis) in the person seeking to act. A vested right can only be revoked under 
certain circumstances, especially those with an aim to uphold legal certainty and a legitimate 
public expectation.  
To illustrate how this operates we can use the example of citizenship. 
Citizenship can be considered as a vested right. It can be granted when the birth occurs in France 
and the parents are themselves born in France (“jus soli”) or through a procedure of 
naturalization. The loss of the French nationality can be voluntary (express declaration of the 
person seeking to give up this vested right after obtaining another nationality) but this vested 
right can also be lost involuntarily by a person who is not French by birth or by descent. There is 
a revocation/ withdrawal of nationality (“déchéance de nationalité”) when the person has

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245 Id, pp. 531-542. 
246 Schonberg, Legitimate Expectations, supra note 166, at 70. 
247 Ibid., p. 92. 
248 See website du Ministère des Affaires Etrangères: http://www.diplomatie.gouv.fr/fr/francais-a-l- 
etranger-1296/vos-droits-et-demarches/nationalite-francaise/ 
249 http://alexandrecoque-avocat.fr/la%20notion%20d'actes%20cr%E9ateurs.pdf 
250 Article 23, Code Civil
committed certain types of violations as terrorism or crime against the fundamental interests of the Nation. But the right can only be revoked if the person obtained the nationality during the ten years before revocation and the withdrawal of nationality must happen within the 10 years after the commission of the crime. All these conditions demonstrate how difficult it is to revoke a vested right, even if there are strong public considerations in support of such revocation.

Under French law, the revocability of government decisions rests heavily upon the government’s assessment of whether the decision created a vested right in the person seeking to act. There is no bright line rule as to which types of decisions are “rights bearing” and which types of decisions are not, but the distinction – and the type of right she possesses – is obviously very important to the relying citizen. This is an area of substantial uncertainty. For example, a decision that was the result of an agency’s consent to waive a requirement or not insist on return of money can still create a right. Similarly, in one case an agency exercised its discretion and issued a permit for opening a factory. The Conseil d’etat decided that “malgré son caractère purement gracieux”, although this decision was discretionary and the agency was not, in the circumstances, required to make it, it did create vested rights.

In addition, French law has an exception for unlawful declaratory decisions. Where a specific result is required under specific, clear legal provisions, an agency decision deviating from that result is revocable at any time. This is in contrast to constitutive decisions, in

251 Article 25, Code Civil
252 Article 26, Code Civil.
253 Id.
254 CE, 24 oct. 2001, Min. éco., fin. et ind. c/ Poussin: Juris-Data n° 2001-063245 ; Dr. adm. 2002, comm. 33, obs. C. M.
256 Schonberg, Legitimate Expectations, supra note 166, at 95.
relation to which the government has discretion. In relation to those, even if the constitutive decision was unlawful, French law allows for revocation if and only if the initial government act/decision becomes subject to review within the first two months of its entrance into the public sphere. That means that in practice, government cannot revoke a decision – even if it is illegal – if it did not act within the first two months. The rationale is that there needs to be a balance between the principle of lawful government and the legitimate expectations of the citizen.

Concluding that the power to revoke is a reflection of the power of an administrative judge to annul unlawful decisions, the court analogized to judicial review, and applied the same time limit allowed for seeking judicial review – in France, a very short time: two months. Today the time limit towards third parties starts at publication for third parties. In the rare case that a decision has not completely been disclosed to the public (following French procedures of notification and publication) or to the beneficiary of a government act, revocation is allowed within four months of the date that the decision was made.

While decisions create rights, informal representations do not do so. In relation to representations, they are “legally relevant facts” (faits juridiques) rather than “legal acts” (actes administratifs), and thus are not subject to the principle of irrevocability. The administration

\[\text{Dupuis, G. Droit administratif (11th ed.) Paris: Sirey, 2009. p. 500; See also Schonberg, Legitimate Expectations, supra note 166, at 93-94.}\]
\[\text{Id.}\]
\[\text{Schonberg, Legitimate Expectations, supra note 166, at 95.}\]
\[\text{Pècresse conclusions CE 24/10-97 Laubier RFDA 1998, 528; See also Schonberg, Legitimate Expectations, supra note 166, at 92.}\]
\[\text{Schonberg, Legitimate Expectations, supra note 166, at 93; Dupuis, G. Droit administratif 500 (11th ed., 2009).}\]
\[\text{Code de Justice Administrative, Article R421-1: Sauf en matière de travaux publics, la juridiction ne peut être saisie que par voie de recours formé contre une décision, et ce, dans les deux mois à partir de la notification ou de la publication de la décision attaquée. La publication, sous forme électronique, au Journal officiel de la République française fait courir le délai du recours ouvert aux tiers contre les décisions individuelles ...4° Emanant d'autorités administratives indépendantes ou d'autorités publiques indépendantes dotées de la personnalité morale.}\]
\[\text{Article R421-2 "Sauf disposition législative ou réglementaire contraire, le silence gardé pendant plus de deux mois sur une réclamation par l'autorité compétente vaut décision de rejet."}\]
\[\text{Schonberg, Legitimate Expectations, supra note 166, at 7.}\]
may, therefore, go back on informal representations, though it may be required to compensate for loss caused by reliance on such representations. For example, in the Bouveret case, the applicant was offered a position in a letter signed by the mayor of a French town, following a job competition. He resigned from another position. The mayor refused to confirm the appointment, and the Conseil d’Etat decreed that the applicant cannot challenge the refusal – though the local authority was liable in damages. Applicants tried to draw on the principle of legitimate expectations in several cases, but the Conseil d’Etat rejected that attempt. The only exception to this is that since European Community law (EC Law) does acknowledge a principle of legitimate expectation, in cases implementing provisions of EC law – and these are not uncommon – the French courts will apply the principle.

This principle is even more strongly stated in relation to unlawful representations. Unlawful representations are not binding and can neither give rise to an estoppel by representation or a legitimate expectation. This is true even if the administration made a very precise and unqualified assurance. For example, in the case of Société des huileries de Chauny, the Minister of Finance gave a written assurance to French oil traders that a price regulation would remain in force. The Conseil d’Etat found that that assurance illegally fettered the Minister’s discretionary power to regulate prices, and was thus unlawful – and the Minister could not be bound by it.

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264 Id. at, 114.
265 CE 18/10-57Bouveret Rec 542. ; See also Schonberg, Legitimate Expectations, supra note 166, at 115.
266 Id.
267 Schonberg, Legitimate Expectations, supra note 166, at 115-16; CE 5/3-99 Rouquette RFDA 1999, 370. This was also approved by the Conseil Constitutionel – CC 30/12-96, no 96-385, Receuil CC 141.
269 Schonberg, supra note #, at 146-147.
270 CE 24/4-64 Société des huileries de Chauny, Rec 249. ; See also Schonberg, Legitimate Expectations, supra note 166, at 147.
This is also true in European Community Law. For example, in Pauvert\textsuperscript{271} the applicant was offered a job as a chauffer – in writing, after an interview. But the vacancy notice specified that the job required fifteen years of experience as a chauffer - and the applicant did have fifteen years of experience, but only ten of them were as a chauffer. This meant the Court of Auditors was not bound by its job offer. This case may not close the matter, though, since the ECJ stated in its opinion that the applicant had no legitimate expectation since he should have known the length and nature of his work experience, and thus should have known that he does not satisfy the legal criteria.\textsuperscript{272}

While this appears to give no protection to individuals relying on informal representations, and create some risk for those relying on decisions, the picture is incomplete, since individuals relying on both decisions and representation are very likely to have a damages remedy available.

Again, there is a distinction between decisions and informal representations. In relation to decisions, unlawfulness is by definition a service fault (faute de service) which can make the administration liable in damages.\textsuperscript{273} Unlike United States\textsuperscript{274} or English\textsuperscript{275} law, a duty of care by the administration to citizens is assumed – it is the administration’s duty to administer competently. Two principles of French administrative law support a damage remedy to the individual. First, under the principle of liability of risk (theorie de risqué)\textsuperscript{276}, if a risk is caused by a dangerous activity the administration is engaged in for the public interest, and causes abnormal harm to certain individuals, the loss should be shouldered by society (spreading the cost) through

\begin{footnotesize}
272 Id.
273 Schonberg, Legitimate Expectations, supra note 166, at 171.
274 Add references.
275 Schonberg, Legitimate Expectations, supra note 166, at 171.
\end{footnotesize}
a damage award. Second, under the principle of a breach of equality before public burdens (égalité devant les charges publiques)\textsuperscript{277} any decision that is in the public interest that causes abnormal harm to a limited class of people must be followed by compensation. The compensation under either principle is provided under a no-fault standard.\textsuperscript{278}

In relation to informal representations, it is accepted that the administration can be liable for loss caused by misrepresentation of its officers.\textsuperscript{279} An incorrect representation of fact, law or intent relied upon by someone acting with no fault of their own makes the administration prima facie liable.\textsuperscript{280} For example, in the case of Aubin,\textsuperscript{281} Mr. Aubin was advised by French authorities to apply for unemployment benefits in Belgium. He was not entitled to them, but mere registration precluded him for registering for such benefits in France. The Conseil d’Etat held that the French authorities were liable for Mr. Aubin’s loss, even though the information was part of a general advisory service and the correct interpretation of the Belgian and European Community rules was not clear.

Damages are less broadly provided if the situation is one where the administration wants to change a representation that was not an error. French law allows the administration to change such a representation, as noted above, and does impose liability under the doctrine of breach of non-contractual promise.\textsuperscript{282} However, liability is limited. First, the administration has to make a clear and unqualified statement of intent – a promise – beyond consultations and preparations.\textsuperscript{283} Second, the courts balance the citizen’s reliance with the public interest that led the

\begin{itemize}
\item \textsuperscript{277} CE 30/11-23 Couiteas Rec 789.
\item \textsuperscript{278} Schonberg, Legitimate Expectations, \textit{supra} note 166, at 172.
\item \textsuperscript{279} CE 22/7-49 Aubery Rec 37; CE 21/12-50 Feiz Karam Rec 612 ; CE 18/10-57 Bouveret Rec 542 ; CE 25/6-54 Otto Rec 380 ; Schonberg, Legitimate Expectations, \textit{supra} note 166, at 220.
\item \textsuperscript{280} Schonberg, Legitimate Expectations, \textit{supra} note 166, at 220.
\item \textsuperscript{280\textsuperscript{281}} CE 20/1-88 Aubin RDP 1988, 903.
\item \textsuperscript{282} Schonberg, Legitimate Expectations, \textit{supra} note 166, at 224.
\item \textsuperscript{283} TA Paris 14/10-97 Société Batignolles DA 1998 no. 118; \textit{See also} in Schonberg, Legitimate Expectations, \textit{supra} note 166, at 224.
\end{itemize}
administration to go back on the representation, and the damages will be reduced – or not awarded – if there were compelling reasons for the change.284

Causation and remoteness requirements, however, limit the extent of damages for both decisions and representations. Especially in relation to unlawful decision or representations – often the unlawfulness itself leads to dismissal, under the assumption that even without the unlawfulness, the plaintiff would not get what they asked for. This is especially true if the unlawfulness was procedural.285 For example, in the Dame Deux case, certain medical procedures were refused reimbursement by the national medical insurance without a hearing. The damages claim failed because the owner did not comply with legal requirements and would not have gotten reimbursement because of that, regardless of a hearing, according to the Conseil d’Etat.286

In relation to informal representation, the Caladou case can be an example.287 In Caladou, the plaintiff received incorrect information about a time limit and because of that lost his opportunity to apply for war damage compensation. The Conseil d’Etat assessed his claim and found that is would probably not have succeeded under the legal requirements for providing the compensation. Therefore, the incorrect advice caused no loss, and the administration was not actually liable.288

The causation requirement limits compensation on a case-by-case basis, but the principle still stands: the injured citizen can appeal and try and prove her damages.

284 Schonberg, Legitimate Expectations, supra note 166, at 225.
285 Schonberg, Legitimate Expectations, supra note 166, at 200-201.
286 CE 22/1-69 Duex Rec 956.
287 CE 18/11-60 Caladou AJDA 1960, 190.
288 Schonberg, Legitimate Expectations, supra note 166, at 231.
III. D. Comparison

What the previous sections suggest is that all three countries offer some protection for reliance, though none of them offers it in every case: it’s a case by case analysis in each country. All countries provide much less protection, if any, to clearly unlawful representations. All of them consider both the harm to the individual and the harm to the public interest. And there is a monetary damage remedy in both France and Israel, though less in England.

There are substantial differences in terms of the political and legal structure and features between the three countries. Specifically, while the United States is a federal country, the U.K., France and England are unitary. This could affect the ability of the center to control the local units, and give more weight to the need of the center to control others by not making representations by local offices binding. This issue has been addressed in some detail in section II.c, but while collusion between a local office and a regulated party is not impossible, my conclusion was that concern is not sufficient to justify a hard line on estoppel in the United States. To repeat the main points raised there, it is unlikely the possibility of estoppel will be what determines local disobedience, because if collusion is discovered that is justification to overturn the decision. In addition, it is not a way to overturn a general rule, since it is unlikely to govern future cases because an error is an appropriate reason for an agency to decide other cases differently, and even a repeated error would only bind the agency in narrow circumstances, under current jurisprudence. I would add that agency centers have other mechanisms to control lower offices that are more direct. Finally, even if a doctrine of estoppel could encourage subversion by a local office, that needs to be balanced with the probably more common scenario where there is just an error on the part of the local office, and the harm to the citizen from that error.
Similarly, the United States is a presidential system; the U.K. and Israel are both parliamentary, with a different model of separation of powers, while France is semi-presidential and has unique features. It is not clear, however, as explained in section II, that this difference affects the basic problem. In both cases the worst tension is between the framework provided by a democratic legislature and representations offered by the executive branch, which is mostly a professional bureaucracy. In a parliamentary system the political executive is part of the legislature, but the full executive is mostly civil servants, and statutory changes are still required to go through the process for changing statutes. In both cases, civil servants do not have the authority to deviate from statutes independently; on the other hand are citizen reliance, trust in government, and administrative efficiency. The dilemma seems similar enough for the solutions developed in other, admittedly different, systems to be applicable.

IV. Solutions to the Dilemma

Combining the analysis of the arguments on both sides with the comparative analysis suggests that while the concerns about the rule of law are real enough, there are competing interests. Harm to the individual’s interests, as well as harm to individual autonomy, and even to the functioning of the public administration, support protection of reliance in certain cases. The countervailing concerns, however, do not support automatic or constant protection, at least not if done through enforcement.

This section addresses two potential solutions to the problem, solutions that can operate simultaneously and cover different situations. The first is direct enforcement of the decision relied upon. In that, I am breaking no new ground, aside from the previous discussion of the considerations behind the decision: I am recommending Schwartz’s excellent proposal, though I
In the second part I recommend a monetary remedy and suggest both a judicial way to arrive there and a potential legislative change.

**IV. A. Providing for Direct Enforcement in Appropriate Cases**

In his article, Schwartz builds on existing doctrines of administrative law to allow limited, case-by-case reliance in appropriate cases. He suggests a two-way process the court should use. Under Schwartz’s two-stage approach, the first stage will draw on the Supreme Court’s approach in *Lyng v. Payne*. Schwartz suggests that in all estoppel cases the plaintiff will first be required to explain the problem to the agency and request a remedy. If there is a statute, regulation or other policy, the plaintiff should request a waiver of those policies. If the agency refuses the waiver, the plaintiff can then appeal, and the agency’s decision to refuse the waiver will be examined under the Administrative Procedures Act’s standard for judicial review, under which agency action may be set aside if it’s “arbitrary, capricious, an abuse of discretion.”

In examining the agency’s decision the court will consider whether the agency had authority to grant the waiver, and “the relationship between the legislative regulation that the agency allegedly has violated, together with its purposes, and the body of law, application of which is sought to be estopped, along with its policies. The impact of the estoppel remedy on the policies underlying the latter body of law must be considered as well as the availability and adequacy of alternative nonestoppel remedies…” The ultimate inquiry is whether it is reasonable

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289 Schwartz, *supra* note 5, at 698.
291 Schwartz, *supra* note 5, at 698.
for the agency to insist on strict enforcement of the particular pieces of law it favors, in the face of its own particular lawless conduct.”

This allows the court to focus on the heart of the matter: should reliance be protected, when comparing the harm to the individual with the harm to the public interest from enforcement? Can the agency’s decision be supported? It does, however, subject the doctrine to all the problems surrounding the arbitrary and capricious standard.

Courts’ interpretation of the arbitrary and capricious standard has been riddled with internal contradictions at least since the Supreme Court in Overton Park294 said: “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” Is the standard, therefore, searching or narrow? Scholars disagree on how to interpret the standard.295 Some scholars emphasize the need for close review of agency action,296 others highlight the problems it causes to agency operation, including ossifying agency action, giving interest groups a tool to sabotage decision making, and forcing agencies to focus on potential litigation rather than substance.297

The problems are real enough, but arbitrary and capricious is the statutory standard of review, and is still the tool the courts use regularly to review agency decisions. It is flexible, and hence suitable in this context.

293 Schwartz, supra note 5, at 698-99.
296 Seidenfeld, supra note 295, at 524.
297 McGarity, Some Thoughts, supra note 295, at 1419, 1451-1453.
Schwartz’ second stage applies to a small subset of cases characterized by harm to an important liberty or property interest and really unfair government behavior and a situation where the only way to cure a deprivation of due process is estoppel, he suggests application of a test of “remedial due process, based on Mathews v. Eldridge”.\textsuperscript{298} This test would allow the court to balance the private interest with the government interest, and arrive at an appropriate result, taking all considerations into account.\textsuperscript{299}

His approach has the advantage of using tools courts are already familiar with, allowing for flexibility, building in considerations of the public interest, and increasing protection of reliance. It is reasonably clear yet flexible, allowing case-by-case assessment. It also takes into consideration the rule of law.

It has the disadvantages of probably creating room for more litigation (it’s hard to predict whether there will, in fact, be more litigation as a result of this), reducing clarity by using a vague standard, and is vulnerable to the arguments raised against the hard look doctrine elsewhere.

**IV. B. A Monetary Remedy**

In at least two situations, direct enforcement will be inappropriate, but there may still be good reasons to provide some remedy. One situation is where the agency’s representation is in direct contradiction to a statute; in that scenario, as we have seen, no system offers direct, unconditional enforcement because the concerns about legality and separation of powers are strongest. The other situation is where the balance of considerations does not support direct enforcement, but the citizen will be unfairly harmed without a remedy. The example of the plant that opened this paper is one of those: the plant in my example sought to comply with the law,

\textsuperscript{298} Schwartz, *supra* note 5, at 739-40.
\textsuperscript{299} Id. at 740-41.
asked the EPA for instructions on how to do that, invested money, and now is facing potential denial of permit. Denying the permit because of erroneous government advice, causing financial loss, seems unfair. But allowing the plant to pollute water, with harm to the environment and potential harm to the health of humans and other life forms is also problematic. One way out of the dilemma is to provide a monetary remedy in those situations, tailored to the specific harms to the individual.

Is there a legal tool to do so? This paper suggests two legal paths: an extension of Takings doctrine, following what the court did in Ruckleshaus v. Monsanto\(^ {300}\) and a legislated remedy.

\textit{IV.B.1. Extending Takings}

An interesting line of cases related to takings may suggest a judicial solution, even though context and area are different. The Fifth Amendment reads: “private property [shall not] be taken for public use, without just compensation.”\(^ {301}\) This has been interpreted as preventing government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^ {302}\) This question is handled on a case by case basis.\(^ {303}\) The courts identified three factors of particular significance: “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”\(^ {304}\)

In Monsanto the court applied this doctrine to a situation that sounds a lot like the estoppel cases discussed here. At issue were certain health, safety, and environmental data the

\(^{301}\) U.S. Const. amend. V.
\(^{303}\) Id, p. 124.
Monsanto Company had submitted to the EPA. Monsanto considered these data trade secrets, but willingly submitted them to the EPA as part of the process to register new pesticides. This process was governed by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). FIFRA was originally concerned with the licensing of labeling of statutes, thus its original incarnation was silent on the use and disclosure of health and safety data. In 1972, FIFRA was updated in a way that prevented EPA from publicly disclosing any data that was considered a “trade secret” and also limited EPA’s ability to use one applicant’s health, safety, and environmental data in considering a subsequent application if that data were designated a “trade secret.” “Trade secret” was never defined, and the EPA interpreted the term as limited to formulae and manufacturing processes, whereas applicant firms argued that “trade secrets” should include health, safety, and environmental data. Several court decisions supported the position taken by the applicant firms. In 1978, Congress amended FIFRA to resolve this dispute, allowing EPA to use most health, safety, and environmental data submitted after the date the statute became effective in considering other applications, provided the new applicant offered some compensation to the original submitter. The amendment also allowed EPA to disclose as much of this data to the general public as necessary.

Monsanto argued that these new provisions were an unconstitutional taking under the Fifth Amendment. It had spent over $23.6 million to develop the health, safety, and

305 Id. at 998.
306 Id. at 998, 1004.
307 7 U.S.C. chapter 6 (s. 136 and on).
308 Monsanto, 467 U.S. at 991, 1008.
309 Id. at 992.
310 Id. at 993.
311 Id. at 993-94.
312 Id. at 1006.
environmental data for its application. The company considered the health, safety, and environmental data to be trade secrets. The value of the data would be destroyed by any public disclosure. The district court agreed and also concluded that allowing EPA to consider Monsanto’s data when evaluating other applicants would “give Monsanto’s competitors a free ride at Monsanto’s expense.”

The analysis centered on the third Penn Central factor of “reasonable investment-backed expectation” because the Court found that the force of this factor was so overwhelming as to be dispositive. The court split the decision into pre 1972, 1972-1978 and post 1978, but our focus is on the 1972-1978 period. For this period, the 1972 amendments allowed companies to protect data from disclosure by designating them as trade secrets and prohibited the EPA to disclose such data. Thus, “the Federal Government had explicitly guaranteed to Monsanto . . . an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation.” If EPA were to either disclose or consider data submitted during this period designated as trade secrets, EPA would “frustrate Monsanto’s reasonable investment-backed expectation[s.]”

A couple of issues to highlight here. First, the guarantee here was in a statute, as is true for Monsanto’s progeny. However, that does not mean we cannot extrapolate from this line to administrative actions, even those in violation of statute. After all, the constitution governs administrative actions as well as statutes. This line of cases offers a case-by-case method to

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313 Id. at 998.
314 Id. at 999.
315 Id. (citations omitted).
316 Id. at 1005.
317 Id. at 1011.
318 Id.
319 Which will be discussed in the next paragraphs.
examine whether a monetary remedy is appropriate. As explained below, it can be tailored to take into consideration the public interest. It also helps solve the Court’s dilemma in Richmond: if the Court is concerned about the Appropriation Clause, then it may not be allowed to provide direct monetary disbursement without Congressional authorization, but may be allowed to compensate justifiable reliance based on another Constitutional clause – the fifth amendment.

Second, the Monsanto court itself emphasized the element of reasonable, investment-backed expectation. That can be a problem here. In Jane’s case, for example, when Jane was applying for benefits, she did not have any relevant investments. The Court in Monsanto did not define what reasonable, investment-backed expectation means.\footnote{The Court simply stated that, “the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation.” \textit{Id.} at 1011.} It did mention Monsanto’s expenses and the value of the data to Monsanto when describing the data, but that is it.\footnote{\textit{Id.} at 998.} In Nollan,\footnote{\textit{Nolan v. California Coastal Commission}, 483 U.S. 825 (1987).} a case examining a permit to build a larger residence on the land, where the government granted the permit conditional on an easement, the Court did not seem to demand previous investment, focusing instead on the Nolans’ right to build on their property, in contrast to Monsanto’s request of registering an insecticide.\footnote{\textit{Id.}, at 833.} The third circuit in Tri-Bio Laboratories upheld the FDA’s decision refusing to allow a company to use the health and safety data submitted by the original manufacturer to support its generic drug application on the grounds it would be considered a taking. The court did not expressly emphasize investment, but instead emphasized the manufacturer’s property interest in the data.\footnote{\textit{Tri-Bio Laboratories, Inc. v. United States}, 836 F.2d 135, 137, 141 (3rd Cir. 1987) [hereinafter Tri-Bio Labs].} In short, the courts following Monsanto seemed to emphasize the strength of the private interest (as in Nolan) or of the

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\item \textsuperscript{320} The Court simply stated that, “the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation.” \textit{Id.} at 1011.
\item \textsuperscript{321} \textit{Id.} at 998.
\item \textsuperscript{322} \textit{Nolan v. California Coastal Commission}, 483 U.S. 825 (1987).
\item \textsuperscript{323} \textit{Id.}, at 833.
\item \textsuperscript{324} \textit{Tri-Bio Laboratories, Inc. v. United States}, 836 F.2d 135, 137, 141 (3rd Cir. 1987) [hereinafter Tri-Bio Labs].
\end{itemize}
reliance, rather than the need for investment per se. This means it can be applied to the situations discussed here.

The last point is whether the doctrine allows consideration of the public interest. Although that was not the focus of the cases, the public interest seems embedded in the court’s analysis of the extent, though not the existence, of the taking. Courts vary in their balancing, but all seem to be considering the public interest to some degrees. The variation in the effect is not surprising given the court’s acknowledgment that the inquiry on takings is very much “ad hoc, factual.”325 For example, the court in *Monsanto* notes that sharing the data is important for EPA and for public good and restricting *Penn Central* from building on top of the train station protects a historical landmark.326 On the other hand, an easement granted for public to access a beach is not good enough and the court in *Nolan* seemed to give it less weight.327 Similarly, the Third Circuit in *Tri-Bio Laboratories*328 and First Circuit in *Phillip Morris* found that governmental agencies couldn’t share the data from the corporations without compensation regardless of the obvious good for public health and safety.329

The conclusion from this is that I suggest that courts expressly extend the Monsanto line of cases to cover cases where there was citizen reliance but estoppel is not an appropriate remedy. In those situations, the Taking Clause can be the basis for a monetary remedy. Courts should focus on the facts of the case, the degree of reliance, the reasonableness of the reliance, and the reasons for the takings in assessing the extent of the damages.

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325 *Monsanto*, 467 U.S. at 1005.

326 *Id.*; See also *Penn Central*, 438 U.S. at 138.

327 *Penn Central*, 483 U.S. at 825.

328 *Tri-Bio Labs*, 836 F.2d at 141.

329 *Philip Morris v. Reilly*, 312 F.3d 24, 38 (1st Cir. 2002).
2. The Reliance Act

An alternative to both Schwartz’s solution and a takings remedy is to enact legislative act that would protect reliance. The act should address both the conditions that would be required to qualify and the remedy. The advantage of the statutory route is that it can offer a change without having to wait for an appropriate case to make its way to the Supreme Court, which, given the court’s previous estoppel jurisprudence, may take a while. It can also set out guidelines. Statutes have also been passed before protecting reliance so there is precedent.330

What should the act say?

PROTECTION OF RELIANCE ACT:

1. If an individual or corporation demonstrates that:
   a. The individual or corporation received:
      i. Individualized advice from government on how to comply with a legal requirement. Or
      ii. A promise from the government as to how a certain requirement will be enforced.
      Or
      iii. Another individualized representation on which the government should have known the affected person would rely.
   b. Relied on that advice.

330 Joshua I. Schwartz, supra note 5, at 653.
c. And would suffer harm if the government went back on its advice, representation or promise,

The citizen is entitled to one of the remedies offered in section 2.

2. Remedies: An agency or reviewing court will provide the affected person with the most equitable remedy, balancing the harm to the individual with the public interest.
   a. Direct enforcement of the initial representation, notwithstanding any statutory provision to the contrary.
   b. Monetary damages in an amount sufficient to compensate the affected person for her reliance.

3. The government may not award a remedy if it demonstrates that reliance on the advice, promise or representation was unreasonable.

**Conclusion:**

In *Merrill*, the Supreme Court decided that the cost of protecting reliance is too high. In hindsight, it seems the court did not give sufficient weight to the harm to the individual from such a doctrine and may have overestimated the public dangers. The court’s concern about separation of powers and legality are real enough and powerful, but they do not call for the stringent estoppel doctrine the court used. This article suggests at least two ways to soften that doctrine: a judicial remedy and a legislative one.