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Equitable Estoppel against the Government - The Missouri Experience: Time to Rethink the Concept

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EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT—THE MISSOURI EXPERIENCE: TIME TO RETHINK THE CONCEPT

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I. INTRODUCTION

"Men naturally trust in their government, and ought to do so, and they ought not to suffer for it."[1]

WHEN an individual acts to his or her detriment in reliance upon information provided by the government, there may be no relief available.[2] When governments are involved the results often differ from what would occur as between private individuals, where the concept of equitable estoppel is well established.[3] A Missouri case illustrates the

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1. Menges v. Dentler, 33 Pa. 495, 500 (1859), *quoted in* Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954) and Floyd D. Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 TUL. L. REV. 596, 650 (1986).

2. ("This is on the theory of 'no right without a remedy' which is not necessarily of universal application.") Donovan v. Kansas City, 175 S.W.2d 874, 883 (Mo. 1943) (en banc) (citations omitted). For reasons why this may be the case, see discussion *infra* notes 38-42 and accompanying text.

3. *See, e.g.*, DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 42-43 (1973); *see also* 3 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 804 (5th ed. 1941). The requirements, occasionally modified by individual states, have been stated by John Pomeroy as follows:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.
> 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
> 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.*
> 4. The conduct must be done with the intention, or at least with the *expec-*

point. Daniel Ballard filed his application for a package liquor license with the city clerk of Woodson Terrace, as required by ordinance.[4] The ordinance also required that the application "be accompanied by a deposit of the annual license fee herein provided."[5] Mr. Ballard did not deposit the fee, however, because the city clerk informed him that the practice was not to submit the fee until the application had been approved and the license granted.[6] The license was denied, partly due to Ballard's failure to deposit the fee. The court held that the actions and words of the clerk did not estop the city "from asserting noncompliance with the ordinance as a legitimate ground for refusing to issue the license in the case."[7] Mr. Ballard made the mistake of relying on a statement of a person in charge of the application process. The expression of policy and practice made to him by the city clerk accurately reflected her practice at the time, and his reliance on it would seem reasonable under the circumstances. He failed to demand that she accept the deposit required by the ordinance. Few persons, if any, would have acted differently in his situation, yet his reasonable reliance cost him his license.

For an equitable estoppel to arise, Missouri courts have required that three essential elements must be met regardless of whether the government is involved:

> *[F]irst*, there must be an admission, statement, or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon; *second*, there must be action taken by a second party on the faith of such admission, statement, or act; and *third*, an injury must result to the second party if the party is permitted to contradict or repudiate his admission, statement, or act.[8]

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tation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon . . . .

5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.

6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

POMEROY, *supra*, § 805, at 191-92.

4. State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 530 (Mo. Ct. App. 1980).

5. *Id.*

6. *Id.* at 531.

7. *Id.*

8. Lake Saint Louis Community Ass'n v. Ravenwood Properties, Ltd., 746

In addition, the cases make clear that the proponent of the doctrine must not have had contrary knowledge about the truth of the statement or communication, and that his or her reliance must have been reasonable.[9]

While equitable estoppel has been recognized in dealings between private parties in Missouri, as well as in other states, there is far greater reluctance to apply the doctrine when the government is one of the parties involved.[10] The United States Supreme Court has yet to apply estoppel against the federal government,[11] although many of the circuits have done so on rare occasions.[12] The federal decisions generally require that the traditional elements[13] be met and, in addition, that there be findings that (1) there has been "affirmative misconduct,"[14] (2) the interests of the public will not unduly suffer, and (3) application of the doctrine is required by right and justice.[15]

S.W.2d 642, 646 (Mo. Ct. App. 1988). It has been said about estoppel that once one has misled a person, "justice forbids that one speak the truth in his own behalf." DeLashmutt v. Teetor, 169 S.W. 34, 41 (Mo. 1914); *see also* POMEROY, *supra* note 3, at § 804.

9. *See, e.g.*, Podschun v. Rice, 769 S.W.2d 441, 443 (Mo. Ct. App. 1989).

10. *See, e.g.*, DOBBS, *supra* note 3, at 988-91; for experiences in other states, *see, e.g.*, David K. Miller, *Estoppel and the Public Purse: A New Check on Government Taxing & Spending Powers in Florida Law*, 9 FLA. ST. U. L. REV. 33 (1981); H. Helmut Loving, Comment, *Estoppel Against the Government in California*, 44 CAL. L. REV. 340 (1956); Kathleen L. Nutt, Note, *Estopping the State: Just and Equitable Considerations*, 34 DRAKE L. REV. 197 (1985).

11. The most recent Supreme Court decision is Office of Personnel Mgmt. v. Richmond, 496 U.S. 414 (1990). The Court held that courts "cannot estop the Constitution" because the APPROPRIATIONS CLAUSE, art. I, § 9, cl. 7, limits payment of money from the Treasury to that authorized by statute. *Id.* at 434. The Court stated that "judicial use of estoppel . . . cannot grant respondent a money remedy that Congress has not authorized." *Id.* at 425.

One of the most famous cases which triggered a series of articles and presaged the rash of recent federal cases is Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

12. For a general discussion of estoppel at the federal level, see 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20:1-20:6 (2d ed. 1983 & Supp. 1989).

13. *See supra* note 3 for a list of the traditional elements.

14. The cases have not clearly defined "affirmative misconduct" but it appears to be something more than simple negligence. *See, e.g.*, Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979).

15. The Ninth Circuit Court of Appeals has been the most active in finding estoppel. *See, e.g.*, Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); and United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). The Ninth Circuit has stated that estoppel will be applied "where justice and fair play require it;" *and* where there is "affirmative misconduct going beyond

The view that estoppel should be applied against the government much as it is applied to any other party finds support with many scholars and judges.[16] During the past half century, several notes, comments, and articles analyzed the use of estoppel against the government and, on occasion, proposed legislative or judicial solutions.[17] In general, the

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mere negligence;" *and* "the public's interest will not suffer undue damage by imposition of the liability." *Watkins*, 875 F.2d at 706-07 (citations omitted).

Other circuits have also recognized that the federal government can be estopped. The following cases recognize actions brought by private litigants in which the federal government was equitably estopped: United States v. Fitzgerald, 938 F.2d 792 (7th Cir. 1991) (stating the government was equitably estopped from personally suing guarantors of a loan after the Small Business Administration informed the guarantors that they were no longer personally liable); *Watkins*, 875 F.2d 699 (Army equitably estopped from denying a homosexual soldier from re-enlisting after informing soldier over the past fourteen years, with knowledge of his homosexuality, that he was qualified to re-enlist); United States v. 198.73 Acres of Land, 800 F.2d 434 (4th Cir. 1986) (State of Virginia equitably estopped from claiming title to real property under theory that land was abandoned after previously asserting the land was not abandoned); Best v. Stetson, 691 F.2d 42 (1st Cir. 1982) (United States Air Force equitably estopped from discharging a research physicist after informing physicist for six years that he worked in a tenured, non-dischargeable position); Southwestern Bell Tel. Co. v. National Labor Relations Bd., 667 F.2d 470 (5th Cir. 1982) (NLRB estopped from prosecuting telephone company for engaging in unfair labor practices after previously entering into a settlement agreement with telephone company over the charges); Corniel-Rodriguez v. Immigration & Naturalization Serv., 532 F.2d 301 (2d Cir. 1976) (stating that the government was estopped from deporting an alien when immigration officials failed to inform the alien that her marital status would invalidate her visa where the alien had married three days before entering the United States); Walsonavich v. United States, 335 F.2d 96 (3d Cir. 1964) (stating the Tax Commissioner was estopped from asserting statute of limitations as a bar to taxpayer's refund claim after agreeing to extend limitation period).

16. In his dissent in *Merrill*, Justice Jackson stated that "[i]t is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387-88, (1947) (Jackson, J., dissenting); *see also* John M. Maguire & Philip Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1299 (1935) (authors' comment on Justice Holmes's admonition that "'[m]en must turn square corners when they deal with the Government'" by declaring "'it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens'").

17. For some of the more important and recent writings, see Michael Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 2 CHICANO L. REV. 4 (1975); Berger, *supra* note 1; Michael Braunstein, *In Defense of a Traditional Immunity—Toward An Economic Rationale For Not Estopping the Government*, 14 RUTGERS L.J. 1 (1982); Miller, *supra* note 10; Frank C. Newman, *Should Official Advice be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Thomas Nöcker & Gregory French,

writings question the special exceptions and considerations accorded to the government. These views are eloquently reflected by one author who asserted:

> [T]he perpetuation of the special immunities of the federal government creates a greater harm than the often substantial injustice to its immediate victims. When citizens cannot rely on the word of their own government, the very foundation upon which all democratic governments rests the trust between the people and their government is undermined.[18]

Few writers have dissented from this view.[19]

The practice in the states varies. Some state courts have refused to recognize estoppel against the government, while other states impose various conditions on its use.[20] In Missouri, the doctrine of estoppel against the government is recognized but its use is limited to those cases where the traditional elements are present, plus the requirements that: (1) there are "exceptional" circumstances; and (2) the doctrine is "required by right and justice" or is required to prevent a "manifest injustice."[21] A recent case seems to indicate that Missouri may have added a new element—affirmative misconduct.[22] However, as the analysis below suggests, the case that raises this new element is an anomaly and ought not be followed.[23]

The purpose of this article is to examine the Missouri cases to determine if there are patterns which provide guidance in understanding what constitutes "exceptional" circumstances or "manifest injustice," to determine if there is a coherent theory underlying the application of the

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Estoppel: What's the Government's Word Worth? An Analysis of German Law, Common Law Jurisdictions, and of the Practice of International Arbitral Tribunals, 24 INT'L LAW. 409 (1990); Michael C. Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L. J. 606 (1990); Bernard Schwartz, *Estoppel and Crown Privilege in English Administration Law*, 55 MICH. L. REV. 27 (1956); Shimomura, *supra* note 1; Richard A. Clark, Comment, *Estoppel Against State, County, and City*, 23 WASH. L. REV. 51 (1948); Nutt, *supra* note 10.

18. Shimomura, *supra* note 1, at 650.

19. For a contrary view see Braunstein, *supra* note 17.

20. *See generally* Annotation, *Applicability of Doctrine of Estoppel Against Government and its Governmental Agencies*, 1 A.L.R.2d 338 (1948); 28 AM. JUR. 2D *Estoppel and Waiver* §§ 127-33 (1966); 31 C.J.S. *Estoppel* §§ 138-47 (1964).

21. Murrell v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966).

22. Farmers' & Laborers' Coop. Ins. Assoc. v. Director of Revenue, 742 S.W.2d 141 (Mo. 1987) (en banc).

23. *See* discussion *infra* notes 48-57 and accompanying text.

doctrine, and, finally, to propose modifications to the traditional approach. The Missouri Supreme Court is in a position to apply some of the proposals in future estoppel cases; however, because of specific statutory provisions, a comprehensive correction is not possible without legislative action.

II. OVERVIEW OF EQUITABLE ESTOPPEL

In order for the assertion of estoppel to have merit against the government, not only must the traditional elements be shown,[24] but additional burdens must be overcome. The traditional elements have been described in a variety of ways[25] but they can be reduced to three essential features:

> [F]irst, an admission, statement, or act inconsistent with [the] claim afterwards asserted . . . ;
> second, action by [the claimant in reliance on] such admission, statement or act; and third,
> injury to [the claimant] resulting from allowing the first party to contradict or repudiate such admission, statement or act.[26]

Regarding the second element, some cases have held that there must be a "misreliance" on the government's statement or representation.[27] It seems clear, however, that what is meant by that term is sim-

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24. *See supra* note 3.

25. *See, e.g.*, Prouse v. Schmidt, 156 S.W.2d 919, 921 (Mo. 1941), which states:

> (1) There must be conduct-acts, language, or silence-amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse.

Id. (citations omitted).

26. Peerless Supply Co. v. Industrial Plumbing & Heating Co., 460 S.W.2d 651, 665-66 (Mo. 1970). *Peerless* did not involve a government entity, but the threshold elements of equitable estoppel are the same for private parties and cases involving the government. *See also* Independent Stave Co. v. Missouri Highway & Transp. Comm'n, 702 S.W.2d 931 (Mo. Ct. App. 1985).

27. State *ex rel.* City of California v. Missouri Utils. Co., 96 S.W.2d 607,

ply that the reliance be reasonable.[28] If a party had reason to believe the facts were other than as represented, then he or she could not have reasonably relied.[29] Unlike private party actions, where it appears the knowledge necessary to defeat the doctrine must be actual and not constructive,[30] knowledge may be imputed to the party seeking to estop the government. For example, a major barrier is presented by cases which hold that a party is "bound" to know the authority and power of the government or its agent to act[31] and to know the requirements of the law.[32] The opinions rarely explain that the imputation of knowledge to the claimant makes the reliance unreasonable.[33] The problems created by the imputation of knowledge will be addressed later in the article.[34]

The other two threshold elements—an admission, statement or act, and detriment—do not differ noticeably when the government is involved. The admission, statement or act can be verbal or nonverbal, express or implied.[35] It can be an inadvertent error and need not be willfully intended to cause harm.[36] The claimant must, however, be aware of the admission, statement or act[37] since otherwise there could be no reliance. In addition, there must be some reasonable expectation that the claimant will rely on the admission, statement or act.[38]

Estoppel is more commonly used defensively, such as against a

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614-15 (Mo. 1936) [hereinafter *California v. Missouri Utils. Co.*].

28. *Id.* The court stated: "[T]he representation was communicated to him, he *should* have believed it, and his action was based on the belief." *Id.* (emphasis added); *see also* B&D Investment Co. v. Schneider, 646 S.W.2d 759, 764 (Mo. 1983) (en banc) ("An estoppel . . . must be based upon action taken upon reasonable reliance.").

29. *B & D Investment Co.*, 646 S.W.2d at 764.

30. Wilkinson v. Lieberman, 37 S.W.2d 533, 536 (Mo. 1931).

31. *See* discussion *infra* notes 81-96 and accompanying text.

32. *See, e.g.*, State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 532 (Mo. Ct. App. 1980).

33. *Id.*

34. *See* discussion *infra* notes 100-13 and 293-302 and accompanying text.

35. *California v. Missouri Utilities Co.*, 96 S.W.2d 607, 614-15.

36. *See, e.g.*, Brewen v. Leachman, 657 S.W.2d 698 (Mo. Ct. App. 1983).

37. *See, e.g.*, Barkshire v. Drainage Dist. No. 1 Reformed, 136 S.W.2d 701 (Mo. Ct. App. 1940) (no showing by the claimant of any representation by the agency on which he relied).

38. *See, e.g.*, Saint Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614 (Mo. 1983) (en banc) (representation was made to a third party and not to the claimant. There was no showing that the claimant relied on the representation or that the state expected the claimant to rely.). *See also* Independent Stave Co. v. Missouri Highway & Transp. Comm'n, 702 S.W.2d 931, 935 (Mo. Ct. App. 1985).

claim of the government for taxes or a refund of money,[39] and must be pleaded and proved by the party asserting it.[40] The doctrine, however, can also be used offensively, as in a claim for damages or to set aside a government action such as a tax sale of property.[41] In either situation, the burden of proof is on the party asserting it.[42] Also, estoppel does not create a new right of any kind but is used as a means "to preserve rights already acquired."[43]

In addition to the threshold elements, two general assumptions and two conditions appear to govern the application of estoppel to governmental organizations. The two recurring assumptions are that equitable estoppel:

1. Is not generally applicable to acts of a governmental body;[44] and

2. Should be applied with great caution.[45]

The two conditions that affect the application of equitable estoppel to government are that:

1. It is applied only in exceptional circumstances,[46] and

2. It is applied only where "required by right and justice" or where necessary to prevent a "manifest injustice."[47]

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39. *See, e.g.*, Shell Oil Co. v. Director of Revenue, 732 S.W.2d 178 (Mo 1987) (en banc) (appeal from assessment of taxes); County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957) (action by the county to recover a fee paid to an attorney); County of Bollinger v. Ladd, 564 S.W.2d 267 (Mo. Ct. App. 1978) (declaratory judgment action to determine rights in land).

40. Medical W. Bldg. Corp. v. E. L. Zoernig & Co., 414 S.W.2d 287, 294 (Mo. 1967).

41. *See, e.g.*, Brewen v. Leachman, 657 S.W.2d 698 (Mo. Ct. App. 1983); Crutchfield v. Warrensburg, 30 Mo. App. 456 (1888) (lawyer's suit for payment of services performed for the city).

42. *Medical W. Bldg. Corp.*, 414 S.W.2d at 294.

43. State *ex rel.* Liberty v. City of Pleasant Valley, 453 S.W.2d 700, 706 (Mo. Ct. App. 1970).

44. Bartlett & Co. Grain v. Director of Revenue, 649 S.W.2d 220, 224 (Mo. 1983) (not applicable to acts of a governmental body); State *ex rel.* Walmar Invest. Co. v. Mueller, 512 S.W.2d 180 (Mo. Ct. App. 1974). The court said "in the exercise of *governmental* functions, the doctrine of equitable estoppel cannot usually be invoked." *Id.* at 184 (emphasis added). The apparent conflict is discussed *infra* notes 169-95 and accompanying text.

45. *Bartlett & Co. Grain*, 649 S.W.2d at 224 (some cases say "jealously withheld and only sparingly applied").

46. *Id.*

47. Murrell v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966) (manifest injustice); State *ex rel.* City of Sikeston v. Missouri Utils. Co., 53 S.W.2d 394, 400 (Mo. 1932) (en banc) (when "required by right and justice"). *See also* Montevallo v. Village Sch.

In the discussion below, an examination of each of the assumptions and conditions will be undertaken to determine if, or how, they explain the court's use of estoppel against the government. First, however, it is necessary to address the possibility that a new requirement of affirmative misconduct may have been injected as an additional condition.

In *Farmers' and Laborers' Cooperative Insurance Ass'n v. Director of Revenue*,[48] the claimant was a mutual insurance company that had not filed a corporate income tax return from 1973 to 1984 even though a 1973 change in the tax laws subjected such companies to taxation. The Missouri Director of Revenue failed to enforce the law for a period of almost ten years. The Director changed his position in 1984 and notified the companies that the Department would waive all interest and penalties if the companies filed returns for 1980-83 by a certain date.[49] In addition, if the filing deadline was met, the Department would not assess tax for the years 1973-1979.[50] The claimant asserted that the director should be estopped due to the long period of non-enforcement which the claimant argued was based on a proper interpretation of the 1973 changes in the law and, in addition, reflected the Director's good faith belief that the 1973 changes did not apply to mutual insurance companies.[51]

Departing significantly, and apparently inadvertently,[52] from prior Missouri practice, the court held that the Director was not estopped by his prior actions and that his conduct did not rise to the level of "affirmative misconduct," asserting that "[f]undamental to an estoppel claim against the government is that in addition to satisfying elements of ordinary estoppel, governmental conduct complained of must amount to *affirmative misconduct.*"[53] A requirement of affirmative misconduct for estoppel had never been part of the law in Missouri prior to its assertion in this case, although it is a condition required by some federal courts.[54] Confusing federal cases with Missouri cases may be the

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Dist. of Montevallo, 186 S.W. 1078, 1080 (Mo. 1916) (en banc) ("where justice and right demand it, and where it is necessary to prevent wrong and injury being done to other.").

48. 742 S.W.2d 141 (Mo. 1987) (en banc).

49. *Id.* at 143.

50. *Id.* However, if they did not file they would be subject to audit and possible imposition of taxes from 1973. *Id.*

51. *Id.*

52. There is no detailed discussion by the court of Missouri estoppel cases and no recognition of the apparent change in the law.

53. *Farmers' & Laborers'*, 742 S.W.2d at 143 (emphasis added).

54. *See* Simon v. Califano, 593 F.2d 121 (9th Cir. 1979).

source of the court's error. The only authority cited by the court was a federal case from the eastern district of Missouri involving a suit against the United States government, where affirmative misconduct was required before application of estoppel.[55]

The inclusion of affirmative misconduct as an additional requirement or condition would make it even more difficult to apply the doctrine of estoppel against Missouri governments.[56] Fortunately, the court's error has not yet been replicated in the few subsequent cases reported.[57] But *Farmers' and Laborers'* does provide a potential trap for the litigant who may not look behind the apparent additional requirement of affirmative misconduct.

While affirmative misconduct may not yet be clearly established as a condition necessary to apply equitable estoppel, the two assumptions that limit application of estoppel, general nonapplicability and cautious use, are well established. To fully appreciate these assumptions, as well as the conditions of exceptional circumstances and manifest injustice, a historical perspective is necessary.

III. HISTORICAL DEVELOPMENT

One of the first Missouri cases applying equitable estoppel reasoning, although not using the term "estoppel," was *State v. Dent*.[58] The state was given land by Congress for the purpose of supporting schools.[59] Dent purchased lands from the United States government.[60]

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55. Peoples Bank v. United States, 635 F. Supp. 642 (E.D. Mo. 1986). No Missouri state cases were cited.

56. It seems clear that affirmative misconduct has not been a requirement, even *sub silentio*. *See, e.g., Brewen*, 657 S.W.2d at 701 (stating that the mistake made by the collector was at most negligent).

57. A case decided three months earlier distinguished a 1939 case applying estoppel by holding that "[t]hat case is distinguishable, because there the government took affirmative and frequent action. There was no affirmative action taken by the district here." Mississippi-Fox River Drainage Dist. No.2 v. Plenge, 735 S.W.2d 748, 754 (Mo. Ct. App. 1987). That case was not cited in *Farmers' and Laborers'* and it appears that the *Mississippi-Fox* court was not addressing the issue of *affirmative misconduct* but rather a series of "positive" acts that were sufficient to raise an estoppel. No other case has yet cited *Farmers' and Laborers'* as a basis for decision on affirmative misconduct, although the case was mentioned in a footnote in Newman v. Melahn, 817 S.W.2d 588, 590 n.1 (Mo. Ct. App. 1991), and in the dissent in State *ex rel.* May Department Stores v. Koupal, 835 S.W.2d 318, 323 (Mo. 1992) (en banc) (Spinden, Special J., dissenting).

58. 18 Mo. 313 (1853).

59. *Id.* at 315.

60. *Id.* It is not clear when the purchases were made.

Dent's purchases were part of the lands given to Missouri designated for school purposes.[61] An 1823 federal law provided that if part or all of the lands reserved for school purposes had been disposed of, then the United States agent could make a new selection of lands to replace those which were sold.[62] The United States agent, apparently in cooperation with the Missouri state school commissioners, selected another parcel of land for school purposes replacing that sold to Dent, and an annotation was properly entered on the public records.[63] The selected parcel was sold in 1838 with the proceeds going for school purposes.[64] The state then attempted to reclaim the original lands from Dent.[65] The court declared that Dent purchased his land "upon the faith of those acts of selection and location, which were expressly designed to influence the action . . . of [Dent],"[66] and that the state and the United States government were "bound" by the selection of another section of land for school purposes.[67] The state could not lay claim to the property as school lands, particularly since over thirty years had passed since the sale to Dent.[68]

Later, in 1865, the Missouri Supreme Court declared that "[t]he rules which regulate the business transactions of life, and which enjoin good faith, honesty and fair dealing, are alike applicable to individuals and corporations,"[69] and that counties, as political subdivisions of the state, are "*quasi* corporations"[70] subject to the rule. In this case, the county court committed an arguably irregular action—appointment of an agent to subscribe for stock of a railroad. The subscription and issuance of notes in payment for the stock was approved prior to the agent's appointment, and his actions were later ratified by the county court under a state statutory provision stating that a subscription would be binding if "approved of hereafter."[71] For years, the county had acknowledged its debt from the original issuance of notes for the stock by regular pay-

61. *Id.*
62. *Id.* at 316.
63. *Dent*, 18 Mo. at 316.
64. *Id.* at 317
65. *Id.*
66. *Id.*
67. *Id.*
68. *Dent*, 18 Mo. at 318.
69. Hannibal & St. Joseph R.R. Co. v. Marion County, 36 Mo. 294, 307 (1865).
70. *Id.* at 303.
71. *Id.* at 301.

ment of the annual interest on these notes.[72] When the county finally balked at making an interest payment, the court declared that money had been expended and investments had been made based upon actions of the county court, and that "[i]t would be grossly immoral and unjust to allow it to involve others in onerous engagements, and then, after lapse of ten years' silent acquiescence, repudiate its obligation."[73]

While these two cases do not speak in terms of the government being "estopped" and perhaps could be explained as an application of laches,[74] they were cited as primary support in *Union Depot Co. v. City of St. Louis*,[75] Missouri's first case which applied the term "estoppel" to the government. St. Louis City passed an ordinance in 1874 vacating part of a street and allowing it to be used by the depot company.[76] After the company had erected several buildings on the vacated street and paid the city large sums of money, the city claimed that its act of vacation was *ultra vires* and tried to reclaim the street.[77] The

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72. *Id.*

73. *Id.* at 307. By analogy, the court applied to the county the reasoning which the English jurist, Lord St. Leonards, originally applied to corporations, quoting from Bargate v. Shortridge, 5 H.L. Cas. 297, 322-23 (1855):

> (It does appear to me), he observed, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn around, and *themselves* raise the objections that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. The way, therefore, in which I propose to put it to your lordships, in point of law, is this: the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law; but the question simply is, whether by that *continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice, to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to an act which they themselves have neglected to do.*

Hannibal & St. Joseph, 36 Mo. at 307 (alterations in original) (emphasis added).

74. There is a distinction between estoppel and laches which was not always made in the early cases. Laches refers to that subset of equity where an otherwise valid claim is barred because of an unreasonable and unexplained delay. For a further discussion of laches as applied to governments in Missouri, see 20 ALFRED S. NEELY, IV & DANIEL W. SHINN, MISSOURI PRACTICE, ADMINISTRATIVE PRACTICE & PROCEDURE §§ 13.10-13.11, at 370-73 (1986); *see also* Lake Dev. Enter., Inc. v. Kojetinsky, 410 S.W.2d 361 (Mo. Ct. App. 1966).

75. 76 Mo. 393, 396 (1882).

76. *Id.* at 394.

77. *Id.*

city argued that state statutes allowed only the county court, and not the city, to vacate streets.[78] The Missouri Supreme Court, however, looked to the statutes under which the depot was organized and decided that those statutes allowed the city to vacate the street. Therefore, the ordinance was not *ultra vires* and the contract was valid.[79] The court declared "[w]hen a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals."[80] Curiously, the statement seems unnecessary because once a contract is recognized as valid, the estoppel doctrine does not come into play. It is only important in deciding *if* a contract has been made.

In the latter half of the 19th century, the courts appeared to recognize that an estoppel claim could be made against the government but that the doctrine would not be applied under the particular facts at issue. The cases established some of the important parameters on the use of estoppel and erected barriers seldom vaulted today. In *City of St. Louis v. Gorman*,[81] the city inadvertently assessed taxes against an individual for land that actually belonged to the city. The land was properly sold after nonpayment of taxes.[82] Gorman, the buyer, claimed the city was estopped from claiming an error, from denying the regularity of the sale, and from recovering the land.[83] The supreme court thought otherwise and said if officers of the city "do unauthorized acts to her prejudice, it would be hard that she should be bound by them."[84] Asserting that estoppel "can not [sic] apply to transactions where there is the interposition of third persons as agents acting in violation of their authority,"[85] the court claimed that if a private agent exceeded "his authority, his constituent is not bound."[86] It asked and answered in the affirmative the question, "[m]ust not those who contract with the officers employed

78. *Id.* at 395.

79. For a fuller discussion of *ultra vires* see discussion *infra* text accompanying notes 132-68.

80. *Union Depot*, 76 Mo. at 396.

81. 29 Mo. 593 (1860).

82. *Id.* at 599.

83. *Id.*

84. *Id.* at 600.

85. *Id.* at 601.

86. *Gorman*, 29 Mo. at 600. This was probably not a complete or accurate statement of the law then, and certainly is not now. *See, e.g.*, State v. Bank of Mo., 45 Mo. 528, 538-39 (1870), *infra* text accompanying note 95; Dierks & Sons Lumber Co. v. Morris, 404 S.W.2d 229, 232 (Mo. Ct. App. 1966); MAI 13.07(1), "Definition—Contract—Apparent Authority—Conduct of Principal" (West 1991).

by the city see that the officers, with whom they are contracting, conduct themselves in pursuance to law?"[87] The court made applicable to cities the reasoning and rule expressed in *Wolcott v. Lawrence County*,[88] which held that county courts were special, not general, agents of the state, and that anyone dealing with the county courts "is bound to know the law that confers the authority."[89]

Several reasons are given for the requirement that persons dealing with the government are "bound" to know the authority of its agents, including: avoiding frauds on the public,[90] preventing incurrence of liabilities beyond the ability of the government to pay,[91] and protecting "the public interest against losses and injuries arising from the fraud, mistake, or rashness or indiscretion of public agents."[92] The fact that an officer, agent or employee of the government might be held personally responsible for his or her actions was not viewed as a sufficient remedy to protect the public.[93] Therefore, it was established early on that the government was to be treated differently than private persons on the issue of being bound by its agents. For example, in *State v. Bank of Missouri*,[94] the court approvingly quoted the statement that "there is this difference between individuals and the government: the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of the power it has actually given to its officers."[95] Early federal cases expressed a similar view.[96]

However, if one must inquire into the powers of government agents to act before dealing with the agents, how far must that inquiry go? What about persons who later enter the transactions as innocent parties or as bona fide purchasers from the person who originally dealt with the government? Are they, too, required to ferret out the powers of the

87. *Gorman*, 29 Mo. at 600.

88. 26 Mo. 272 (1858).

89. *Id.* at 275.

90. *Gorman*, 29 Mo. at 600.

91. *Wolcott*, 26 Mo. at 275-76.

92. State v. Bank of Mo., 45 Mo. 528, 539 (1870).

93. Hutchinson v. Cassidy, 46 Mo. 431, 434 (1870).

94. 45 Mo. 528 (1870).

95. *Id.* at 538-39 (quoting Pierce v. United States, 1 Nott & Hun. Ct. of Claims, 270).

96. *See, e.g.*, The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868); Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868). Professor Davis asserts that the law has not fully recovered from the view expressed in Hart v. United States, 95 U.S. 316, 318 (1877), that "[t]he government is not responsible for . . . the wrongful acts of its officers." DAVIS, *supra* note 12, § 20:2, at 391 (Supp. 1989).

government's agent? The early cases provide partial answers to these questions in a series of decisions dealing with bonds, land transactions, and contract rights.

In *Flagg v. City of Palmyra*,[97] the city issued bonds to aid in construction of a railroad. The bonds were purchased in good faith, and some were resold to bona fide purchasers.[98] The court said that bonds issued in apparent conformity to law are entitled to be viewed by the public "as issued in actual conformity to the law, and to suppose that all the acts required . . . in reference to the bonds, have been duly performed."[99] This statement would appear to provide complete protection to a purchaser or subsequent purchaser. In *Steines v. Franklin County*,[100] however, the court distinguished *Flagg*, asserting that there had been "mere irregularities" in that case regarding the issuance of the bonds.[101] The *Steines* court declared the action of the county completely void because it failed to follow a specific required statutory procedure which demanded a vote of the people of the county before bonds could be issued.[102] The bona fide purchaser was therefore not protected because of the initial absence of power in the county.[103] The court expressed disagreement with the broad language in *Flagg* and, while not overruling it, seemed to limit *Flagg* to the specific facts of the case.[104]

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97. 33 Mo. 440 (1863). The enabling legislation stated that before the city could issue bonds, an election must be called on the issue of the subscription and the number of shares, with the vote to be held and counted in the same fashion as an election for mayor and councilmen. A vote was held and a majority voted for the subscription but there were defects both in the notice of the vote and in that the vote was not receipted, counted and returned to the city council in the manner required by the statute. *See also* Hannibal & St. Joseph R.R. Co. v. Marion County, 36 Mo. 294 (1865) (county issuing subscription notes in good faith to bona fide purchasers was later estopped to assert notes were illegally issued even though county was not authorized to issue subscriptions).

98. *Flagg*, 33 Mo. at 450.

99. *Id.*

100. 48 Mo. 167 (1871).

101. *Id.* at 185.

102. *Id.* at 187.

103. *Id.* at 186-87. The county contracted to have a road macadamized and bridge work done on the road. County courts had authority to pay money or issue bonds where "the amount of proposed expenditure had been submitted to a vote of the people." *Id.* at 174. There was no vote but the bonds were nonetheless issued. Later, the General Assembly passed legislation to allow the counties to issue new bonds for those sold without a vote, where the work was already contracted for or completed. New bonds were issued for the old, and the purchasers were protected—but not by any estoppel theory. *Steines*, 48 Mo. at 174.

104. *Id.* at 185.

Purchasers of bonds were expected to know if the county had the power or authority to issue the bonds. Where no power was granted, the action of the county was a nullity and void. The court, however, left an opening by proclaiming that "where the right to exercise the power depends upon certain facts, [the holder] may rely upon the representation as to the existence of those facts, because they are peculiarly within the cognizance of the agent issuing them."[105] *Steines* suggests that even where the government violated parts of the statute, if those violations were not easily known to the purchaser or were "peculiarly" within the knowledge of the government, the government would be estopped.[106] But *Steines* presented a major danger to purchasers of government bonds and to anyone relying on governmental representation. The court said the county had the power to issue bonds *if* it obtained a vote of the people *and* followed certain other procedures.[107] While the purchaser could rely on the representation of the agent regarding facts or, presumably, procedures "peculiarly" within the knowledge of the agent, he could not rely as to the "fact" or procedure of holding a vote of the people, a necessary precedent to the exercise of the power. Perhaps the distinction here is that it would be relatively easy to determine whether a vote were held but not so easy to determine whether other procedural steps were followed.

The cases have consistently indicated that where procedures are defective or "irregular" the county may be subject to a claim of estoppel. The county will not be subject to a claim of estoppel, however, in situations where there was no initial grant of power to perform the act.[108] How does a person dealing with the government, or that person's subsequent purchaser, determine if the government acted within its power or whether the problem is a mere "irregularity" in the procedures? Subsequent cases did not eliminate the confusion between an invalid grant of power as opposed to irregularities in its exercise. In *Cheeney v. Town of Brookfield*,[109] the town engaged a printer to produce bearer paper for distribution. Brookfield was not given power or authority to print and circulate bearer paper.[110] The town refused to

105. *Id.* at 187.

106. *Id.*

107. *Id.*

108. *See, e.g.*, Sturgeon v. Hampton, 88 Mo. 203 (1885) and discussion *infra* text accompanying notes 114-18.

109. 60 Mo. 53 (1875).

110. *Id.* at 54.

pay the printer's bill.[111] The court, in holding against the printer, reiterated the developing rule that those who deal with public agents are bound to know their powers,[112] but failed to see a distinction between the power to contract for printing—which the city apparently did have—and the subject matter of the printing, which was indeed *ultra vires*. Its ruling placed an undue burden on one who performs otherwise legal work for a city (*e.g.*, printing) to determine if the subject matter of the work is illegal. It seems equally logical to conclude, under the *Steines* approach, that the illegality of the subject matter was "peculiarly" within the knowledge of the city.[113]

Another line of cases dealt with title to land sold by the government, usually a county, to an individual. In *Sturgeon v. Hampton*,[114] a statute authorizing the land sale was said to be the exclusive method of sale, and a purchaser was bound to know the authority of the county in disposing of its lands. The court said that it would "go far to uphold their [the counties'] acts when merely irregular,"[115] but not when they were without authority or were void. Errors affecting the power of the county appeared on the face of the deeds,[116] thereby placing purchasers on notice of irregularities in the exercise of the power. The county could not be estopped due to "the illegal and void acts of their limited statutory agents."[117] The fact that the county subsequently assessed and collected taxes on the land, thereby treating the land as if it were properly sold, was not enough to constitute an estoppel.[118]

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111. *Id.*

112. The court stated that "those who deal with the officers of a corporation must ascertain, at their peril, what they will indeed be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act." *Id.*

113. Cities often contract to have roads or streets built on land owned by the city. Is the contractor required to perform a title search to determine if he can safely proceed, or can he act safely on assurances from the city? Are not the land title records available to the contractor? Yet it does not seem to be the practice to place the onus on the contractor.

114. 88 Mo. 203 (1885).

115. *Id.* at 214.

116. *Id.* at 212-13. The county clerk had the statutory power to make deeds to purchasers of swamp lands but only "when the purchase money shall be fully paid off and satisfied, or the terms of the contract complied with." *Id.* at 212 (quoting 1860-61 Mo. Laws 394). The deed recited on its face that the price was $3000 annually forever. *Id.*

117. *Id.* at 214.

118. *Id.; see also* City of St. Louis v. Gorman, 29 Mo. 593 (1860). The argument that subsequently assessing and collecting taxes on land sold by the county at a

In *Simpson v. Stoddard County*,[119] the county sold certain swamp lands and acquiesced in the sale for over thirty years before trying to reclaim the lands.[120] While the decision appears to turn on estoppel by "laches or delay,"[121] the court indicates that where the irregularities or infirmities in the sale of property by the county do not appear on the deed or in the record of title, then notice of defective exercise of the power to sell will not be imputed to subsequent holders.[122] The court attempted to sidestep the difficult question of whether the act of the county was void or voidable. Relying on *Dunklin County v. Chouteau*,[123] a virtually identical case, the court concluded that the county's sale of land in a manner not contemplated by the statute was not "absolutely void."[124] The court held:

> The principle is that where a county court[125] is charged by law with the performance of certain duties in reference to a particular subject-matter, and that court *undertakes, in good faith, to execute its powers, but fails to observe certain requirements of the law, so that its acts in that regard are irregular, such acts, if acquiesced in, will become binding* upon the counties as completely as if they had been regular in the first instance.[126]

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tax sale creates an estoppel has been made several times but never recognized as sufficient in itself to create an estoppel. *See, e.g.*, Hecker v. Bleish, 3 S.W.2d 1008, 1018 (Mo. 1927).

119. 73 S.W. 700 (Mo. 1903).

120. *Id.* at 702.

121. The court stated:

> The facts in this case fully warranted the trial court in the conclusions reached. It was especially appropriate to apply this doctrine upon the facts as disclosed. It must not be forgotten that these respondents are not the original purchasers of this land, but they stand before the chancellor as *innocent purchasers for value, in good faith.* Their position entitles them to every favorable presumption in their behalf. If the county of Stoddard had rights in this land, *her long silence, her acceptance and retention of the money paid her, her continuous acceptance of taxes, and efforts to enforce the collection of the assessments levied, is a complete ratification of the conveyance* made by commissioner, Eltzroth, to these lands, and the appellant is now estopped by reason of laches or delay in asserting such rights.

Id. at 712 (emphasis added).

122. *See id.* at 713.

123. 25 S.W. 553 (Mo. 1894).

124. *Simpson*, 73 S.W. at 709.

125. County court refers to the administrative governing body of the county. The name was changed to county commission in 1985.

126. *Simpson*, 73 S.W. at 710 (emphasis added). The court appeared to suggest that if *no power* had been granted to the county to dispose of the lands then no

The county, through its actions over a long period of time, in effect ratified the original conveyance and was estopped, by laches, to assert any rights it might earlier have asserted to set aside the consequences.[127] Again, this case suggests that an irregular exercise of an otherwise valid power may lead to an estoppel, where no such remedy is available if there is an absence of power. Further, there is an implication that the defect can be as "irregular" as a violation of the law and need not be confined to a minor ministerial mistake in following the dictates of the law.

The early contract cases further narrowed the grounds for application of estoppel to the government. *Keating v. Kansas City*[128] involved a contractor who performed street repairs for the city under a defective ordinance. Unfortunately, Keating had agreed in the contract to assume liability for any defect in the ordinance, and was therefore barred both contractually and equitably from recovering damages under the contract, or from recovering in quantum meruit for his services.[129] The court said Keating "was bound to take notice, at his peril, of the defective ordinance, when dealing with the officers of the defendant, and cannot urge against the city in this suit, such defects or wants of power in such officers."[130] Shortly thereafter, the same rule was applied to those dealing with counties.[131]

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subsequent action by the county could ever ratify the sale. It appears, however, that curative legislation by the state could make *void* acts of the county valid, but only if it would not impair the vested rights of individuals. *See* Barton County v. Walser, 47 Mo. 189 (1871).

127. *Simpson*, 73 S.W. at 710. While it could be argued that the doctrine of laches forms the basis of the decision, the court makes reference to several estoppel cases and it appears clear that both estoppel and laches combine, in the court's view, to provide the grounds for the decision. *See id.* at 710-13.

128. 84 Mo. 415 (1884).

129. *Id.* at 419 (no cause of action in quantum meruit or damages when a void contract with the city is involved).

130. *Id.*

131. Heidelberg v. Saint Francois County, 12 S.W. 914 (Mo. 1890). The county road commissioner orally contracted with the plaintiff to perform work on a bridge pier and abutment. The statute on bridges specifically provided that the commission advertise and accept the lowest bid. While the bridge work was advertised, bids for the preparatory work performed by the plaintiff, who did not do the main bridge work, were not taken. The court said the commissioner's act was void and could not be ratified by the county. It went further and baldly asserted that "[t]he doctrine of estoppel does not apply to counties" a statement that clearly was wrong at the time and has only been quoted with approval once. *Id.* at 915.

In *State ex rel. St. Louis Underground Serv. Co. v. Murphy*,[132] the court made clear, as it had in the bond and land cases, that if the city had no power to grant a franchise to allow a private company to use the city streets for underground supply pipes, it could not be estopped to deny the franchises because its actions were *ultra vires* and therefore void.[133] The court cited the holding in *Union Depot Co. v. City of St. Louis*,[134] that estoppel applies only to a city contract "*which it* [the city] *has the power* [sic] *to make*."[135] What the city did not have the power to do by contract, it could not be forced to do by application of the doctrine of estoppel. As one would expect, the assignee of a void contract is in no better position to assert estoppel.[136]

These early cases illustrate that the doctrine of equitable estoppel became recognized in Missouri as a potential remedy to be used, in appropriate circumstances, against the government—municipal, county, or state.[137] The cases began to provide some guidance to determine when estoppel would or would not be applied. For those wishing to assert estoppel against the government, however, one element made clear by the early cases, and still rigidly followed today, is that absent a grant of power to the government to perform an act, no estoppel will lie because the governmental act is *ultra vires* and is therefore void. What was not made clear by the early cases, and still presents difficulties today, is what constitutes the difference between an absence of power or authority to act and a merely irregular exercise of the power. While the latter might lead to an application of estoppel, estoppel would be precluded by the former.[138]

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132. 134 Mo. 548 (1896).

133. *Id.* at 560-62. The decision actually turned on the city's improper delegation and surrender of its powers to supervise the use of the subways under the city streets. *Id.* at 575-76.

134. 76 Mo. 393 (1882).

135. *Murphy*, 134 Mo. 548, 567 (quoting *Union Depot*, 76 Mo. at 396). The [sic] designation in the text refers to the error of the court in misquoting *Union Depot*. The language should have read "which it has *the authority* to make" (emphasis added). 76 Mo. at 396.

136. *See* Wheeler v. Poplar Bluff, 49 S.W. 1088 (Mo. 1899). After completing grading work, the contractor assigned the contract rights to Wheeler. The ordinance authorizing the grading was defective; therefore, the city had no power to make the contract. The assignee was "bound to take notice" of the defective ordinance and it made no difference that the city had received the benefit of the work. *Id.* at 1090.

137. *See* discussion *supra* text accompanying notes 81-131.

138. For additional cases, *see, e.g.*, Missouri & S.W. Land Co. v. Quinn, 73 S.W. 184 (Mo. 1903) (sale of land by county—no authority by agent—no estoppel); Wright v. City of Doniphan, 70 S.W. 146 (Mo. 1902) (collecting taxes and failing to

It might not be entirely fair or accurate to conclude that the result a court wished to reach determined whether the governmental action was merely irregular or was *ultra vires*. However, when confronted with an issue of power or authority to act, coupled with patently unfair or egregious actions by the government causing harm to the private party, it was more likely a court would find that the act was merely irregular and not *ultra vires*,[139] except perhaps in the area of contracting with a local government.[140]

In the narrow area of contracting with the government, two statutory provisions recur and, initially, they appear contradictory. Unchanged since its original adoption in 1874, Missouri Revised Statute section 432.070[141] requires that any subdivision of government make only those contracts authorized by law or within its powers; that the contract be based on present or future consideration, be in writing, be dated when made, and have the consideration shown. These requirements have consistently been interpreted as mandatory and not directory,[142] so that failure to comply with any of the statutory provisions makes the government action void and not merely voidable.[143] Violation of the statute is

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prosecute for encroachment did not estop the city from claiming land); *see also* DOBBS, *supra* note 3, at 988-90.

139. *See* Donovan v. Kansas City, 175 S.W.2d 874 (Mo. 1983) (en banc); Sturgeon v. Hampton, 88 Mo. 203 (1885); Cheeney v. Town of Brookfield, 60 Mo. 53 (1875); Steines v. Franklin Country, 48 Mo. 167 (1871).

140. *But see* Bride v. City of Slater, 263 S.W.2d 22 (Mo. 1953).

141. MO. REV. STAT. § 432.070 (1988):

> CONTRACTS, EXECUTION OF BY COUNTIES, TOWNS—FORM OF CONTRACT.—No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

Id.

142. *See, e.g.*, Thies v. St. Louis County, 402 S.W.2d 376, 379 (Mo. 1966); Donovan v. Kansas City, 175 S.W.2d 874, 881 (Mo. 1943) (en banc).

143. There is authority to suggest that if the government has power to make a contract but makes it in violation of § 432.070 *and* receives and pays for the benefits under the contract it may *not* then recover the amount paid. *See* Polk Township, Sullivan County v. Spencer, 259 S.W.2d 804 (Mo. 1953); Bride v. City of Slater, 263 S.W.2d 22 (Mo. 1953).

Normally a government may recover monies paid, even though a benefit has been received, if the contract is void due to a lack of power. *See* Likes v. City of

not an "irregularity" in the exercise of a power—in which case the court could consider the application of estoppel—but is an absolute bar to recovery by the party dealing with the government. Several reasons have been propounded for this statutory provision, including: (1) to protect the government from "fraud and peculation";[144] (2) to protect the government from claims not in writing;[145] (3) to prevent extravagance by the government and extravagant demands;[146] (4) to restrain officials from "heedless and inconsiderate engagements";[147] and (5) to protect the public from "greed or graft" of public officers.[148] These reasons may be well founded. For example, if recovery were allowed for a violation of the statute, even if only for restitution or to prevent unjust enrichment to the government, and not the contract price, it would be possible for unscrupulous officials to enter into contracts with accomplices in violation of the statute. At a minimum, the accomplice could always recover the reasonable value of the benefit to the governmental unit.[149] Under that scenario there would be little incentive for the venal government employee or official to abide by the statute. The unfortunate result of the statute, however, has been to trap the unwary or the uninformed person who deals in good faith with the government.[150]

A recent case dramatically highlights the problem.[151] Klotz entered into a three year written contract to serve as superintendent of schools.[152] The contract set the specific salary for the first year and provided that the salary for the second and third years would be set

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Rolla, 167 S.W. 645, 647 (Mo. Ct. App. 1914). Moreover, where there is no power to make the contract and, in addition, the government violates § 432.070 it can then recover any monies paid, even if a benefit has been received. *See* County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957) (the court did indicate there was benefit to the office holders but not to the county); Fulton v. City of Lockwood, 269 S.W.2d 1 (Mo. 1954).

144. *Donovan*, 175 S.W.2d at 879.

145. *Bride*, 263 S.W.2d at 26, 28.

146. Crutchfield v. Warrensburg, 30 Mo. App. 456, 462 (1888) (citing Woolfolk v. Randolph County, 83 Mo. 501, 506 (1884)).

147. *Id.*

148. Mullins v. Kansas City, 188 S.W. 193, 197 (Mo. 1916).

149. *See* DOBBS, *supra* note 3, at 989. At least one state has rejected the general practice of no recovery, holding that restitution would "not lead to the evils once imagined." Blum v. City of Hillsboro, 183 N.W.2d 47, 48 (Wis. 1971).

150. There does appear to be the possibility of an emergency exception. *See* Donovan v. Kansas City, 175 S.W.2d 874, 882-83 (Mo. 1943) (en banc).

151. Klotz v. Savannah R-III School Dist., 747 S.W.2d 708 (Mo. Ct. App. 1988).

152. *Id.* at 709.

prior to June 30 in each of those years.[153] The court found that there was a valid contract for year one but not for the last two years because the consideration for those years was not set out in the contract as required by section 432.070.[154] It is difficult to see how this result advanced the purpose of the statute to protect the public and restrain officials from "heedless and ill-considered engagements"[155] since the contract would have been enforceable *if only* the salary for the last two years had been listed. While the court's interpretation of the statute was consistent with prior decisions interpreting section 432.070, the result seems contrary to normal concepts of justice and would almost certainly have been different if two private parties were involved.[156] However, the "hard line" position has been taken many times and was forcefully stated in *Donovan v. Kansas City*:

> Missouri public policy considers the rights of the *public paramount to the rights of the individual*; that is, it is better to adopt, by legislation, a rule under which *individuals may suffer occasionally* than to permit

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153. *Id.*

154. *Id.* at 710.

155. *Id.* at 709 (quoting Bride v. City of Slater, 263 S.W.2d 22, 26 (Mo. 1956)). It is ironic that this quote is taken from *Bride* since that case held that the city could not recover payments made for fuel oil received under a contract which was void under § 432.070. *Bride*, 263 S.W.2d at 29.

156. It should be remembered that § 432.070 was enacted almost a century ago when the methods of interpretation of contracts differed from those used today. A modern view of contracts is illustrated by the principles of the RESTATEMENT (SECOND) OF CONTRACTS (1981), particularly § 33(2), which states that "[t]he terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy;" and § 34, which states:

> CERTAINTY AND CHOICE OF TERMS; EFFECT OF PERFORMANCE OR RELIANCE:
>
> (1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.
>
> (2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.
>
> (3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.

Id. at § 34.

Using the above principles the court could have decided that the consideration listed for year one, with an "agreement to agree" in years two and three, was a sufficient written listing of consideration, even under the strictly enforced guidelines of § 432.070. Moreover, Missouri sales law specifically recognizes that a contract can exist, even though terms are left open, if there is a "reasonably certain basis for giving an appropriate remedy." MO. REV. STAT. § 400.2-204(3) (1986).

> a rule subjecting the public to injury through the possibility of carelessness or corruptness of public officials. Individual cases may present apparent hardships but it is our duty to be guided by the law the same as it was plaintiff's decedent's duty to be so guided in the first instance.[157]

It should not matter that cases are relatively rare where the innocent, unsophisticated or uninitiated are harmed. What should matter is that respect for government suffers by allowing such a harsh result.

The other statutory provision which appears to give relief to those who provide services or benefits to counties (the statute does not address municipal corporations) is Missouri Revised Statute section 431.100,[158] originally passed in 1863. It provides that one may receive the value[159] of goods or services provided even though in making the contract the county did not "pursue the form of proceedings prescribed by law." Unfortunately for claimants seeking to use this statute, *Heidelberg v. Saint Francois County*[160] held that laws passed subsequent to 1863 where "special powers are conferred" or "where a special method is prescribed for the exercise and execution of a power" would control over the terms of this provision.[161] Additionally, shortly prior to *Heidelberg*, the court, in *Woolfolk v. Randolph County*,[162] severely limited the effect of section 431.100 by holding that its terms were modified by

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157. 175 S.W.2d 874, 885 (Mo. 1943) (en banc) (emphasis added).

158. MO. REV. STAT. § 431.100 (1986) (Originally codified in 1879, Ch. 6 § 1218), states:

> CLAIMS AGAINST COUNTY FOR WORK AND LABOR.
>
> If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law.

159. This appears to be a quantum meruit concept rather than a contract recovery provision. Quantum meruit claims, however, are not allowed under MO. REV. STAT. § 432.070; *see* Keating v. Kansas City, 84 Mo. 415 (1884).

160. 12 S.W. 914 (Mo. 1890).

161. *Id.* at 915. The court also noted that the road commissioner was not an "agent of the county, lawfully authorized" because he did not follow the specific provisions of the law relating to roads and bridges, and therefore his actions were not covered by § 431.100. *Id.* One might question the viability of the court's analysis, as it made the inaccurate, unsupported assertion that "the doctrine of estoppel does not apply to counties." *Id.*

162. 83 Mo. 501 (1884).

section 432.070 because: (1) section 432.070 was enacted later in time (1874) and thus controlled; (2) section 431.100 was meant to cover a different kind of labor; in this case, manual labor as opposed to legal services; and (3) the contract did not have the consideration set by amount or rate, nor was it in writing, dated or signed.[163] Subsequent cases have held that section 431.100 applies where there is a defect in the required form of procedure in executing the contract (i.e. the "irregularities" situation) but not where there is a failure to follow the statutory conditions imposed upon the making of the contract (i.e. the lack of power or authority situation).[164] Even though estoppel might be applied where there are "irregularities" in the execution of the contract, those "irregularities" become *ultra vires* when the court says the government's action did not follow the mandates of the particular statute, or was performed by an unauthorized person, or was not within the power of the governmental unit.[165]

The practical effect of the two statutory provisions is that the party contracting or attempting to contract with local governments (these two statutes do not apply to the state) will almost always be in a losing position when making a claim of estoppel. In one of the most recent cases[166] where section 432.070 was applied with harsh results, the court asserted that with one possible exception, later limited,[167] estop-

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163. *Id.* at 505-06.

164. Missouri - Kansas Chemical Co. v. Christian Co., 180 S.W.2d 735 (Mo. 1944); Bryson v. Johnson Co., 100 Mo. 76 (1890); State *ex rel.* Walton v. Miller, 297 S.W.2d 611 (Mo. Ct. App. 1956).

165. *See, e.g., Donovan v. Kansas City*, 175 S.W.2d 874, 882 (Mo. 1983) (en banc).

166. Kennedy v. City of St. Louis, 749 S.W.2d 427 (Mo. Ct. App. 1988) (four foreign ophthalmologists were offered four year residencies in the St. Louis city hospitals and signed "contracts" on forms which had been used by the city for some 30 years. The "contracts" were signed or approved by at least three city officials but not by the comptroller, as required by the city charter. The contracts were terminated prior to the end of the residencies. The court held: no estoppel and thus no recovery because not signed by the comptroller as required by the city charter.)

167. Judge Simeone suggests that the only exception was Schueler v. City of Kirkwood, 177 S.W. 760 (Mo. 1915), which dealt with a contract but § 432.070 was not mentioned in the case. Schueler installed two septic tanks for the city of Kirkwood. His wife, as administratrix, sought the value of his services and not the contract price. The court specifically noted that the contract was not void, and, at most, there were minor irregularities in delegating certain powers of approval to the city engineer. The city was *estopped* to deny compensation. Section § 432.070 did not arise, however, because it appeared there was compliance with all of its elements. Further, the city had the power to do what it did (contract for the installation of septic tanks). The case, however, is not clearly written. It is difficult to tell if the

pel had not been applied to any situation covered by section 432.070 or to contracts with governments.[168] Section 431.100 has, for all practical purposes, been eviscerated by the early decisions holding that section 432.070 modified it, as well as by legislation which sets out specific procedures that must be followed by government officials. The statute does not provide the relief originally intended and today is virtually useless.

This historical background provides the necessary framework for examination of the two assumptions—general nonapplicability and cautionary use—and the two conditions—exceptional circumstances and manifest injustice—which are said to govern the application of estoppel to the government. It will become apparent that neither the two assumptions nor the two conditions provide bright line distinctions which enable the claimant to determine when estoppel will be an effective tool to protect his or her reliance on government communications.

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court holds there was a valid contract, which easily provides the basis for recovery. If that were so, then there would seem to be no need for an estoppel claim. At several points, the court appears to proclaim the validity of the contract. The court specifically notes, however, that it was not a suit for the contract value but for the *reasonable value* of services, which may be asserted *independently* of the contract but may not exceed the contract price. *Id.* at 763. The ordinance provided for a special sewer tax to pay for the work. The contract provided that payment would come from that fund. The tax was later declared invalid but only after over $7,000 was voluntarily paid into the special fund for the septic tank work. The city diverted those monies to its general coffers. Even though the contract promised payment from the special tax fund, Schueler was allowed to go after the general fund. *Id.* at 764. However, the court did not discuss what the result would have been if no money had been voluntarily paid. Would Scheuler have been able to recover? If recovery were under the terms of the contract, the answer would seem to be no, but if recovery were under the reasonable value theory, the answer is far less clear.

Judge Simeone in *Kennedy* suggests that *Donovan* limited *Schueler*. *Schueler* was not limited, however, but rather was distinguished as being factually different than *Donovan*. *Schueler* clearly was different than *Donovan*, since there was no written contract in *Donovan* and the agent acted without following the charter requirements for purchases.

168. *Kennedy*, 749 S.W.2d at 434. In fact, the author's research discovered several other cases where § 432.070 was not observed but estoppel was applied. *See* Polk Township, Sullivan Cty. v. Spencer, 259 S.W.2d 804 (Mo. 1953); Bride v. City of Slater, 263 S.W.2d 26 (Mo. 1956). *See also* the following cases where other statutory provisions seem to have been violated but the claimant prevailed: Howard County v. Snell, 161 S.W.2d 238 (Mo. 1942); State *ex rel.* Nolen v. Nelson, 275 S.W. 927 (Mo. 1925); Cole Cty v. Central Missouri Trust Co., 257 S.W. 774 (Mo. 1923); Edwards v. City of Kirkwood, 127 S.W. 378 (Mo. Ct. App. 1910).

IV. ASSUMPTIONS AND CONDITIONS

A. *Generally Not Applicable to Acts of a Governmental Body*

The assertion that estoppel is generally not applicable to the acts of a governmental body is at best misleading and at worst a misstatement of the law. The early cases repeatedly proclaimed that the doctrine of estoppel was applied to municipal corporations in the same manner as to individuals.[169] As to counties, in *Missouri & S. W. Land Co. v. Quinn*,[170] the court, rejecting application of estoppel under the particular facts, said that under appropriate circumstances, when the rights of the individual have been prejudiced, and "officers of the county have power to act, but act irregularly,"[171] the court "will rigidly enforce the

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169. *See* Union Depot Co. v. City of St. Louis, 76 Mo. 393, 396 (1882); Hannibal & St. Joseph R.R. Co. v. Marion Cty., 36 Mo. 294, 307 (1865). *See also California v. Missouri Utils.*, 96 S.W.2d 607 (Mo. 1936); St. Joseph v. St. Joseph Terminal R.R. Co., 186 S.W. 1080, 1082 (Mo. 1916) for more recent statements.

In Simpson v. Stoddard County, 73 S.W. 700 (Mo. 1902), the court quoted with approval the following from HERMANN, ESTOPPEL AND RES ADJUDICATA § 14:

> It is a mistake to assume that the doctrine of laches or delay, or the doctrine of estoppel, does not apply to a county or other municipal corporation. Indeed, it may be said that there is no state, or any of the political subdivisions of a state, against which the doctrine of estoppel or laches may not, in certain instances, be urged. If a transaction shows all the observances of the law, then the law itself will afford all the relief necessary, and estoppel or laches need not be urged. It is only where there are irregularities by the officers and agents of states or municipalities in the performance of certain duties imposed upon them by the Constitution or laws that there is reason that they should be not allowed to insist that the act was improperly or irregularly done, to the prejudice of those who, in good faith, have assumed, and acted upon the assumption, that the acts of such officers and agents were within their power to perform. The doctrine of estoppel is not only a very old doctrine but, it may be said, is one that 'has grown with the growth' of human affairs. It is a principle whose existence is not to be deprecated, for its enforcement not only prevents the commission of a wrong upon those who are innocent, but it teaches the moral lesson to all persons that they shall not to-day [sic] dispute the truth of what they said yesterday, to the financial injury of others. 'Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case.'

Id. at 709-10.

170. 73 S.W. 184 (Mo. 1903) (officers of the county sold land without authority, thus the sale was void).

171. *Id.* at 190.

doctrine of estoppel or laches."[172] In two cases handed down the same day in 1916, the Missouri Supreme Court, en banc, said there are "conditions under which the rule [estoppel] may be invoked as against municipal corporations,"[173] even as to "*their governmental functions.*"[174] The Supreme Court boldly reasserted in 1929 that it is "now well settled that, as to matters within the scope of powers of municipal corporations and their officers, such corporations may be estopped upon the same principles and under the same conditions as natural persons."[175]

In light of those strong, early statements, what then is meant by the assertion of general nonapplicability? If it is intended to mean that a more favorable result may occur where the claim of estoppel is made when governments act in their proprietary as opposed to their governmental capacity, there is some early support for such a distinction.[176] The distinction, however, has been largely undiscussed, and application or nonapplication of the doctrine has not turned on a governmental versus proprietary distinction in the more recent cases. There is some indication that the courts may assume there is a difference and that the difference has some importance.[177] In *West Virginia Coal Co. v. City of St. Louis*,[178] however, the court declared: "[G]ranting that the city . . . was acting in a proprietary capacity, yet the charter expressly prescribes the manner and form of making such contracts . . . persons dealing with the city in a contractual way are bound to take notice

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172. *Id.*

173. *St. Joseph v. St. Joseph Terminal R.R. Co.*, 186 S.W. 1080, 1082 (Mo. 1916).

174. *Id.* (emphasis added). *Accord California v. Missouri Utils.*, 96 S.W. 607 (Mo. 1936).

175. Peterson v. Kansas City, 23 S.W.2d 1045, 1048 (Mo. 1929).

176. *See* State *ex rel.* Saint Louis v. Light and Dev. Co. of St. Louis, 152 S.W. 67, 74-75 (Mo. 1912). A general discussion of the distinction between governmental and proprietary functions is beyond the scope of this article. For an extensive discussion of why there should be a governmental-proprietary distinction used as a basis for application of estoppel at the federal level, *see* John Conway, Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 FORDHAM L. REV. 707 (1987). However, the distinction should not be confused with the concept that the government cannot give up or delegate its governmental decision-making responsibilities or its sovereign power by estoppel or by contract. *See* Coalition To Preserve Educ. v. School Dist. of Kansas City, 649 S.W.2d 533, 539 (Mo. Ct. App. 1983).

177. *See Light and Dev. Co.*, 152 S.W. at 74. *See also* Adams v. Board of Zoning Adjustment 241 S.W.2d 35, 38 (Mo. Ct. App. 1951).

178. 25 S.W.2d 466 (Mo. 1930).

thereof."[179] This statement seems to indicate that the distinction is unimportant, at least where contracts are involved.

It is difficult to trace the origins of the assertion. It appears as an unsupported proposition in *Montevallo v. Village Sch. Distr. of Montevello*[180] as the "general rule that estoppel cannot ordinarily be invoked against a municipal corporation,"[181] *without* the modifier "in its governmental functions." The assertion also appears in *City of Mountain View v. Farmers' Telephone Exchange Co.*[182] as "not generally applicable to municipal corporations in matters pertaining to *governmental* functions,"[183] citing as support *Dunklin County v. Chouteau*[184] and *State ex rel. St. Louis v. Light and Development Co. of St. Louis*[185] The recent cases continue to present conflicting statements about the scope of the assertion.[186]

It may seem unimportant whether the condition affecting the application of the doctrine is "not generally applicable to a government body" or "not generally applicable to a government body performing governmental functions," but in fact there are disturbing implications for erosion of the already limited use of estoppel. If the broad statement appearing in a 1983 Missouri Supreme Court decision, "[a]s a general proposition, the doctrine of estoppel is not applicable to acts of a government body . . . ,"[187] gains acceptance through repetition without careful analysis to determine if the conditions for imposition of estoppel

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179. *Id.* at 472.

180. 186 S.W. 1078 (Mo. 1916).

181. *Id.* at 1079.

182. 243 S.W. 153, (Mo. 1922).

183. *Id.* at 155.

184. 25 S.W. 553 (Mo. 1894) (the case does not appear to support the statement).

185. 152 S.W. 67 (Mo. 1912) (the case may support the governmental versus proprietary distinction).

186. *Compare* Kennedy v. City of St. Louis, 749 S.W.2d 427, 433 (Mo. Ct. App. 1988) ("ordinarily is not applicable against governmental entities," no estoppel applied) *with* Murrell v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966) ("as a usual thing [estoppel] cannot be invoked against a city in matters pertaining to the exercise of governmental functions,"—estoppel applied). *See also* State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 531 (Mo. Ct. App. 1980) ("not generally applicable against a governmental body"); State *ex rel.* Walmar Inv. Co. v. Mueller, 512 S.W.2d 180, 184 (Mo. Ct. App. 1974) ("involving a governmental body, the doctrine of estoppel is not generally applicable . . . in the exercise of governmental functions, the doctrine of equitable estoppel cannot usually be invoked").

187. Bartlett & Co. Grain v. Director of Revenue, 649 S.W.2d 220, 224 (Mo. 1983) (citations omitted).

are different for some functions of government (*e.g.*, proprietary), as opposed to other functions (*e.g.*, governmental), then not only has a claimant been robbed of a potential remedy but the law has been changed by inattention rather than by deliberation. A few other jurisdictions apply equitable estoppel more liberally where proprietary functions of government are involved and some treat the government almost like a private party.[188] It is not the purpose of this article to argue that the governmental/proprietary difference has merit or is a logical basis for imposition of estoppel.[189] The point is that the distinction, if there is one, is not clear in the cases. Further, if the assertion of general nonapplicability is addressed to governmental functions then that should be made clear by the courts.

It is possible that the statement of general nonapplicability simply means the government is different because it is not bound by the "unauthorized or illegal acts of its agents." If that is all it means, it does not add much to our understanding. As noted earlier, that principle seems well established in a long line of cases[190] which reflect the broad historical view that government is different, and rules that apply between private parties should not necessarily be followed in their application to transactions between private parties and government.

The assertion could be a statement about the relative weight to be given to the rights of each party. It has been established that a private party will prevail only when its rights outweigh those of the public,[191] but that would be true in any cause in equity. Therefore, the assertion, in part, recognizes that the government is always assumed to have *greater* rights than the individual, and an exceptional or unusual show-

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188. *See, e.g.*, Conway, *supra* note 176, at 722-23 and cases cited therein; Annotation, *Applicability of Doctrine of Estoppel, supra* note 20, at 348-49, 354.

189. There are frequent assertions that the governmental/proprietary distinction is the most unsatisfactory in the law. *See, e.g.*, Jones v. State Highway Comm'n, 557 S.W.2d 225, (Mo. 1977) (en banc), where the court noted that the dichotomy had, in regard to tort suits against municipalities, created a "maze of inconsistency" and "uneven and unequal results which defy understanding." *Id.* at 229 (quoting O'Dell v. School Dist. of Independence, 521 S.W.2d 403, 417 (Mo 1975) (en banc) (Finch, J., dissenting)). *See also* Ayala v. Philadelphia Bd. of Public Educ., 305 A.2d 877 (Pa. 1973). The Pennsylvania Supreme Court abolished governmental immunity after years of an "archaic and artificial distinction" between proprietary and governmental tortious conduct. *Id.* at 881.

190. *See* Sager v. State Highway Comm'n, 160 S.W.2d 757 (Mo. 1942); Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164 (Mo. 1938); Mullins v. Kansas City, 188 S.W. 193 (Mo. 1916); Walmar Inv. Co. v. Mueller, 512 S.W.2d 180 (Mo. Ct. App. 1974). *See also* discussion *supra* text accompanying notes 81-107.

191. *See* Donovan v. Kansas City, 175 S.W.2d 874, 885 (Mo. 1943) (en banc).

ing is required of the individual in order to prevail.[192] Support for this analysis is also shown by the fact that courts have found it easier to find an estoppel when both parties to the suit are governmental bodies. In *Montevallo*, the court specifically noted that because the dispute involved one public entity against another, estoppel was appropriate "particularly in cases of this character, *where it is one class of public as against another class.*"[193] Subsequent cases continue to recognize this apparent exception to the general rule of nonapplicability.[194]

In summary, at least three different views have been expressed by the courts regarding the meaning of "generally not applicable to acts of a government body." A court may have the choice of viewing estoppel as: (1) equally applicable to individuals and the government;[195] (2) not

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192. *Id. See also* Newman v. Melahn, 817 S.W.2d 588, 590 (Mo. Ct. App. 1991) ("The theory behind its infrequent application against governmental bodies and public officials is that public rights should yield only in the face of greater equitable rights possessed by private parties."); State *ex rel.* Letz v. Riley, 559 S.W.2d 631, 634 (Mo. Ct. App. 1977) (the doctrine "has been jealously withheld and only sparingly applied against governmental bodies and public officers acting in their official capacity").

193. Montevallo v. Village Sch. Dist. of Montevallo, 186 S.W. 1078, 1079 (Mo. 1916) (emphasis added).

194. *See, e.g.*, State *ex rel.* Consolidated Sch. Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 808 (Mo. 1931). Quoting from the court of appeals opinion, the supreme court said "'the doctrine will be held to apply, *particularly where, as is true here, the controversy is between one class of the public as against another class.*'" *Id.* (quoting Consolidated Sch. Dist. No. 2 of Pike County v. Cooper, 28 S.W.2d 384, 386 (Mo. Ct. App. 1930) (emphasis added)). In this case, one district was illegally merged with another, received benefits from the merger, and was estopped from recovering money collected by the other district.

See also State *ex rel.* Priest v. Gunn, 326 S.W.2d 314 (Mo. 1959) (en banc). The court held that the city, in a dispute with the St. Louis Police Board, by failure to object to the employment of prison guards as "clerks and subordinates" in the past, was not estopped to object in the future. However, to the extent that salaries had already been paid, they could not be recovered or used as a set off against the total appropriation to the Board. Since the classification of prison guards as "clerks and subordinates" was unlawful, the court would not compel the city to pay the salaries in the future and estoppel was deemed "irrelevant." But as a practical matter, the city was prevented, or estopped, from recovering the money it had previously paid. *Id.* at 325-6.

In another case involving two public entities, estoppel was raised but was not a basis for the court's decision. State *ex rel.* Dalton v. Reorganized Dist. No. 11., Clinton County, 307 S.W.2d 501 (Mo. 1957).

195. Although stated at various times in the past, this position does not seem reflective of current practice. *See California v. Missouri Utils.*, 96 S.W.2d 607 (Mo. 1936); St. Joseph v. St. Joseph Terminal R.R. Co., 186 S.W. 1080 (Mo. 1916).

generally applicable to governmental bodies;[196] or (3) not generally applicable to the actions of government when it is performing "governmental" (as opposed to non-governmental) functions.[197] Additionally the assertion may incorporate an assumption that public rights should generally prevail over those of private individuals.

B. *It Is Applied With Great Caution*

The second assertion, that estoppel against the government must be "applied with great caution" is a phrase often repeated but seldom explained. Its genesis is in the 1914 Missouri Supreme Court decision of *St. Joseph v. St. Joseph Terminal R.R. Co.*,[198] where the court made the unsupported assertion that "courts apply with much caution the doctrine."[199] The concept was reiterated in *City of Mountain View v. Farmers' Telephone Exchange Co.*[200] and appears regularly in subsequent opinions.

However, the true beginnings of this cautionary conundrum may come from *Dunklin County v. Chouteau*,[201] where the court, addressing the doctrine of laches, said, "care must be taken in applying this doctrine to a county or other municipal corporation;"[202] citing as support the following quotation from Dillon, *Commentaries on the Law of Municipal Corporations*:

> As experience shows that the officers of public and municipal corporations do not guard the interest confided to them with the same vigilance and fidelity that characterizes the officers of private corporations, the *principle of ratification by laches or delay* should be more *cautiously* applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons.[203]

The early cases often spoke of laches and estoppel in the same breath,[204] so it is likely the concept of cautious application of laches

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196. *See* discussion *supra* text accompanying notes 169-94.

197. *See* discussion *supra* text accompanying notes 169-94.

198. 186 S.W. 1080 (Mo. 1916).

199. *Id.* at 1082.

200. 243 S.W. 153 (Mo. 1922). In the court of appeals' decision, reprinted therein, it is said "much caution is to be, and should be observed." *Id.* at 155 (citing *St. Joseph*, 186 S.W. at 1080).

201. 25 S.W. 553 (Mo. 1894).

202. *Id.* at 557.

203. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 548 (4th ed. 1890) (emphasis added).

204. *See, e.g.*, Simpson v. Stoddard County, 73 S.W. 700 (Mo. 1902). The

was easily transferred to estoppel. The *St. Joseph* court may have been affected by the reasoning of *Chouteau* or by the other writings of Judge Dillon which were frequently quoted in the early Missouri cases.

Regardless of its genesis, the task is to understand what the statement means and why the statement is used. This assertion may be just another way of declaring that estoppel is not generally applied against a governmental body because of the collective public interest government represents. The cases suggest that courts should be especially diligent when dealing with equitable claims against the government because "common law and equity yield to express legislative enactments contra,"[205] and the rights of the public are to be carefully safeguarded.[206] If the statement only means that public interests outweigh private, then it adds little to the assertion of general nonapplicability.

Another possible meaning for the cautionary statement is that it relates to the standard of proof. Clearly, the burden of proof falls on the person asserting an estoppel, whether the parties are private or public.[207] However, there appears to be a heightened standard of proof needed, beyond a preponderance, where estoppel is asserted. For example, it is regularly said that "[e]very fact essential to create [estoppel] must be established by clear and satisfactory evidence."[208] This standard applies whether or not the government is a party and is applicable to the threshold elements[209] which must always be proved. The courts have long said that estoppels are "not favorites of the law," even in the

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section from DILLON, *supra* note 203, addresses estoppel only a few sentences after it addresses laches.

205. Donovan v. Kansas City, 175 S.W.2d 874, 884 (Mo. 1943) (en banc) (citations omitted) (referring to the policy that an action forbidden by law makes an equitable remedy unavailable).

206. Fleshner v. Kansas City, 156 S.W.2d 706, 707 (Mo. 1941) ("[estoppel] is applied cautiously because of the public interest involved").

207. Medical W. Bldg. Corp. v. E. L. Zoernig & Co., 414 S.W.2d 287, 294 (Mo. 1967); Van Kampen v. Kauffman, 685 S.W.2d 619, 686 (Mo. Ct. App. 1985).

208. Kind v. Staton, 409 S.W.2d 253, 257 (Mo. Ct. App. 1966) (quoting John Hancock Mutual Life Ins. Co. v. Dawson, 278 S.W.2d 57, 61 (Mo. Ct. App. 1955)). *See also* Peerless Supply Co. v. Industrial Plumbing & Heating Co., 460 S.W.2d 651, 666 (Mo. 1970) (quoting 31 C.J.S. *Estoppel* § 63, at 394 (1964) ("only when all elements constituting an estoppel clearly appear")); McLain v. Mercantile Trust Co., 237 S.W. 506, 508 (Mo. 1922) (estoppels should be "closely and critically scanned"). It is not clear that "clear and satisfactory" used in most cases is the same as "clear and convincing" which has been the standard declared in a couple of recent cases; *see e.g.*, Jerry Anderson and Assoc. v. Gaylan Indus. Inc., 805 S.W.2d 733 (Mo. Ct. App. 1991), but it is apparent that more than a preponderance is required.

209. *See supra* text accompanying note 8.

private setting, so the use of caution seems equally applicable to both the governmental and non-governmental party.[210] Therefore, if the statement reflects the general cautionary use of estoppel, it is not helpful to explain why caution should be used in particular with the government. Whatever the inception or reason for its use, the admonition of caution serves as a warning to both the claimant and the courts to be careful when estoppel is raised, to pay attention to the rights of the public and to protect them, to ensure that the evidence of each element is "clear and satisfactory," to examine closely the conduct of both parties, and to apply estoppel only where the circumstances indicate the private party should prevail over the greater public interest.

C. *It Is Applied Only In Exceptional Circumstances*

In *California v. Missouri Utilities Co.*,[211] the court, comparing the development of estoppel to the development of due process of law, asserted that the parameters of estoppel are best left to the gradual process of "judicial inclusion and exclusion,"[212] because decided cases are often of little value "outside of the identical state of facts."[213] While recourse to equity jurisdiction necessarily implies that the particular facts and circumstances of the individual case are the key determinants, it should be possible to discover whether certain fact patterns cause the courts to favor imposition of the doctrine against the government.

Several claimants have unsuccessfully asserted that the assessment and collection of taxes by the government should trigger estoppel. For example, claims that the county should be estopped to deny the validity of a land sale because it subsequently assessed and collected property taxes against the land have not been enough.[214] Nor has the imposition of a general property, income, or sales tax been sufficient to preclude the government's claim that a business or activity is not lawful or should not be allowed.[215] Equity increases in favor of the claimant, however, as the nature of the tax and the subject matter becomes more

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210. *See, e.g.*, John Hancock Mutual Life Ins. Co. v. Dawson, 278 S.W.2d 57, 60 (Mo. Ct. App. 1955).

211. 96 S.W.2d 607 (Mo. 1936).

212. *Id.* at 614.

213. *Id.*

214. *See, e.g.*, Hecker v. Bleish, 3 S.W.2d 1008, 1018 (Mo. 1927); Senter v. Lumber Co., 164 S.W. 501, 504 (Mo. 1914); Hooke v. Chitwood, 30 S.W. 168 (Mo. 1895); St. Louis v. Gorman, 29 Mo. 593 (1860).

215. *California v. Missouri Utils. Co.*, 96 S.W.2d at 618.

specific. In *State ex rel. City of Sikeston v. Missouri Utilities Co.*,[216] the city attempted to oust a utility company, claiming it did not have a valid franchise. Unfortunately for the city, it had, for several years, collected a license tax on the business, issued an operating license to the utility, and also collected a state franchise tax.[217] These factors, among others, were cited as reasons for estopping the city to deny the company the right to operate in the city.[218]

Receipt of taxes by the city collector for several years on a piece of property, without action by the collector to inform the payor that he, personally and not in his official capacity, had purchased the land at a tax sale several years earlier, was deemed enough to invoke an estoppel.[219] But receipt of payments for two quarters after a franchise had expired, coupled with notice that no more payments would be accepted under the old rate, did not create an estoppel preventing the city from ousting the expired franchisee.[220] Taxation alone may not be an exceptional circumstance.

Other tax cases indicate that the term "exceptional circumstances" is not "exceptionally" helpful in predicting when estoppel will be applied. Where a tax collector misinforms a person about the status of his or her taxes and the land is subsequently sold at a tax sale, that sale will be void, the collector will be estopped to deny the nonpayment of taxes, and the misinformed person may recover the property from the innocent purchaser at the sale.[221] For example, in *Brewen v. Leachman*,[222]

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216. 53 S.W.2d 394 (Mo. 1932).

217. *Id.* at 400.

218. *Id.* The court said the doctrine of laches also applied. *Id.*

219. Liese v. Sackbauer, 222 S.W.2d 84, 86-87 (Mo. 1949). (It is clear the court considered the actions of the collector particularly distasteful and unfair).

220. State *ex rel.* City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613 (Mo. 1935) (en banc).

221. *See, e.g.*, Harness v. Cravens, 28 S.W. 971, 976-77 (Mo. 1894) ("[W]hen he pays the amount said by the collector to be due, he can set his mind at rest, seek no further, and be under the protection of the law. If this is not the meaning of the statute, then it operates as a snare and pitfall for the unwary." Referring in part to what is now MO. REV. STAT. §§ 140.050 - .070.). "Others may say it, but I for one will never say that this old man is to be robbed of his land through the neglects and blunders of the state's chosen agents. Others are bound by the acts and blunders of their agents, and I know of neither rule nor reason which prevents the state from being likewise bound in similar circumstances." *Id.* at 978. *See also* Campbell v. Daub, 159 S.W.2d 683 (Mo. 1942) (the court was also concerned about the "unclean hands" of the purchaser); City of Aurora *ex rel.* Williams v. Lindsay, 48 S.W. 642 (Mo. 1898).

222. 657 S.W.2d 698 (Mo. Ct. App. 1983).

Brewen bought property in 1954, which was divided into three parcels by the collector for taxing purposes.[223] Brewen was unaware of that division.[224] The deed of trust was held by a bank until 1974, when the loan was paid off.[225] During the twenty-year loan period, the collector sent the three separate tax bills to the bank, which paid the taxes from an escrow account.[226] After the loan was paid off, the tax bills were to be sent to Brewen but an error was made in the collector's office and only one of the three bills was sent.[227] Moreover, another error was made when Brewen gave a quitclaim deed for the land to her children, in which she retained a life estate, and had the deed recorded.[228] The names of the children were not placed on the tax records.[229] When the two parcels were sold for taxes the next year, the children were not notified of the pending tax sale.[230] The trial court applied estoppel to the collector. The court of appeals affirmed, noting that Brewen had no reason to believe there was more than one tax bill, that her reliance on the one bill as her total bill was reasonable, and that the "blunders" in the collector's office were unexplainable.[231]

However, one year earlier, the same court found similar blunders in the same office not to create an estoppel. In *Ewing v. Lockhart*,[232] Lockhart purchased, at different times in 1972, two contiguous pieces of property which were separately assessed. Each year thereafter, he received one bill from the collector and he thought, incorrectly, that the bills for the two parcels had been combined.[233] One parcel was sold for unpaid taxes.[234] The court held that failure to receive a bill does not relieve one of the obligation to pay taxes, thus Lockhart lost the land.[235] The *Brewen* court stressed that estoppel was not raised in *Lockhart*, but observed that if it had been, Lockhart had less equity on

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223. *Id.* at 700.

224. *Id.*

225. *Id.*

226. *Id.*

227. 657 S.W.2d at 700.

228. *Id.*

229. *Id.* at 701.

230. *Id.*

231. *Id.* at 702. In fact, the court said that chaos would result if all 350,000 taxpayers had to check at the office to insure that their bills were accurate. *Id.*

232. 641 S.W.2d 835 (Mo. Ct. App. 1982).

233. *Id.* at 836.

234. *Id.*

235. *Id.* The dissenter in *Brewen* cited *Lockhart* (in which he participated) and noted that the obligation to pay taxes arises without any notice. *Brewen*, 657 S.W.2d at 703 (Crandall, J., dissenting).

his side because his assumption that the bills were consolidated was not as justified as Brewen's.[236] In essence, the court suggested that one of the threshold elements for application of estoppel—reasonable reliance—may not have been present in *Lockhart*.

Not only may a tax sale be set aside, but it appears that a misstatement by the collector as to taxes owed may extinguish a tax lien on the property, at least where the person who relies on the misstatement is the prospective purchaser. In *Rottjakob v. Leachman*,[237] the prospective purchaser relied on the tax records of the county collector which showed no taxes owed. However, after the purchase, the collector discovered the error and the new owners were billed for a prior year's taxes.[238] The supreme court held that the collector was estopped to collect the taxes, overturning the court of appeals decision which asserted that estoppel should not be applied because "the public welfare would be 'seriously menaced' or the public functions of the county [i.e. tax collection] may be 'dangerously crippled.'"[239] After noting that the cases from other jurisdictions are numerous and conflicting, the court squarely faced the policy issue involved—"who should bear the burden of the error?"[240] After reviewing several Missouri cases, the court declared that "'fairness' should be an ever present objective in the administration of justice"[241] and concluded that public tax records must provide a measure of certainty in order to serve the public interest. The court further stated:

> If title companies, abstractors, attorneys and prospective purchasers of realty cannot rely on the collector's public records, maintenance of which is required by law, then a measure of uncertainty necessarily will attend every transfer of realty in this state. Such a result would not seem to further the public interest.[242]

Thus the collector's error in marking the tax "paid" in any given year, whether accidental or not, released the lien as to innocent parties.[243]

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236. *Brewen*, 657 S.W.2d at 701.

237. 521 S.W.2d 397 (Mo. 1975) (en banc).

238. *Id.* at 398.

239. *Id.* at 399. The county is clearly damaged by a loss in taxes. Statutes provide that no personal judgment is possible for taxes on real estate. *See* MO. REV. STAT. § 140.640 (1986). However the court suggested recovery may be made on the bond of the collector, thus resulting in no loss to the county. *Rottjakob*, 521 S.W.2d at 402.

240. *Rottjakob*, 521 S.W.2d at 400.

241. *Id.* at 401.

242. *Id.*

243. *Id.* This statement is one of the first where the court recognized that there

Few would argue with the court that certainty and the need to rely on records for land transactions is vital, but cannot the same be equally said of many other public statements and writings? Is harm to an individual's land interests really any different than harm to any other interest? Certainty, or at least the security to reasonably rely on the government, would seem applicable to most government communications. How does a simple error in a tax book become an "exceptional circumstance," compared to other errors that have been made, many with much more culpable conduct?

The search for "exceptional circumstances," however, is not confined to tax cases. A review of some of the more recent cases indicates the imprecise and unpredictable nature of that term:

1. A letter from the Attorney General to a company stating that certain "'games will be deemed not to violate the liquor laws or rules'" and asserting that "'the Division of Liquor Control has no objection to the utilization of these promotions on licensed premises'" was held to be at most a mere *opinion* and not binding on the Director of Liquor Control.[244]

2. A county's promise to an organization that its property would be exempt from taxation in order to induce that organization to locate in the county was not enforceable because the action was void for lack of power or authority of the county to make such a promise.[245]

3. A statement by the city clerk that a filing fee was not required at the time of application for a liquor license, *even though it reflected the longstanding practice of the clerk on behalf of the city*, did not estop the city from denying the license for failure to submit the fee, since the ordinance on its face required that the application be accompanied by the deposit.[246]

4. Prior to an invalid rezoning by the city, the party had applied for and been denied a building permit. The city had never previously denied a permit. The party consulted officials who reassured the party

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may be good public policy reasons to estop the government, in addition to reasons of justice and fair play.

244. State *ex rel.* Letz v. Riley, 559 S.W.2d 631, 633 (Mo. Ct. App. 1977).

245. American Aberdeen Angus v. Stanton, 762 S.W.2d 501 (Mo. Ct. App. 1988). It should be noted that this decision turned in part on the lack of a written contract (triggering MO. REV. STAT. § 432.070) as well as a lack of power by the county to promise what it could not do. *Id.* at 503.

246. State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529 (Mo. Ct. App. 1980). The court suggests that Southland should have known of the requirements of the ordinance and thus it did not meet one of the threshold requirements that the "truth concerning these elements must be unknown." *Id.* at 532.

that nothing would prevent the operation of the party's store on any parcel of land purchased in the city. Estoppel was applied.[247]

5. A developer proposed a comprehensive plan to the city involving the purchase of over 600 acres of land at a cost of $1.5 million. Purchase was made based on assurances from the city that the work could be done, and the city was given money. As part of the project, a building permit was issued for construction of multiple unit dwellings on commercially zoned land. The city then changed its position and its zoning laws. The city was held estopped to deny further permits on the project.[248]

6. Building permits issued by an employee, but not authorized by ordinance, are void, and the city is not estopped to revoke the permit.[249]

7. Oral assurances that a building could be used for commercial purposes did not estop the city from denying occupancy permits when it was discovered the building did not meet the city building codes.[250]

8. Attorneys' contracts with a state agency to recover monies due the state, with payment to come from the funds recovered, did not estop the state from denying payment. The agency had *no power* to contract that compensation would come from the fund collected. Anyone dealing with the agency is "charged with knowledge" of the power and authority of the agency.[251]

9. The city's appointment of a fire chief, in violation of a statute requiring the chief to be a resident of the city, with knowledge by the city that he was a non-resident, did not estop the city from removing him some two years later without following rules for dismissal set out in the personnel guidelines.[252]

10. An insurance licensee agreed to give up his broker's license but retain his agent's license in a settlement with the Division of Insurance.

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247. State *ex rel.* Casey's Gen. Stores, Inc. v. City of Louisiana, 734 S.W.2d 890, 896 (Mo. Ct. App. 1987).

248. Murrell v. Wolff, 408 S.W.2d 842 (Mo. 1966).

249. Eichenlaub v. City of St. Joseph, 21 S.W. 8 (Mo. 1893); City of Maplewood v. Provost, 25 S.W.2d 142 (Mo. Ct. App. 1930).

250. State *ex rel.* Walmar Inv. Co. v. Mueller, 512 S.W.2d 180, 185 (Mo. Ct. App. 1974) ("We do not find such exceptional circumstances existing in the case before us.").

251. Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1166 (Mo. 1938). This case spawned a quarter century of litigation by the wronged attorneys and their estates. For a history, *see* State *ex rel.* Johnson v. Leggett, 359 S.W.2d 790 (Mo. 1962), *cert. denied*, 371 U.S. 577 (1963).

252. Helbig v. Murray, 558 S.W.2d 772 (Mo. Ct. App. 1977).

The Division *dismissed with prejudice the case against the licensee.* A few months later the licensee pleaded guilty to a felony arising from the same circumstances that led to the settlement and dismissal by the Division. The Division began a new action for revocation of the licensee's agent license based on his felony conviction. The court of appeals reversed the circuit court's application of estoppel to the Division.[253]

11. Statements or acts of an agent of the government, where characterized by the court as not allowed by statute or as unauthorized, no matter how culpable, will not estop the government.[254]

The cases above, like *Brewen*,[255] indicate that simple, often innocent errors or omissions by a government or its agents may constitute sufficient circumstances to invoke estoppel,[256] whereas other simple errors such as those in *State ex rel. Woodson Terrace Southland Corp. v. City of Woodson Terrace*[257] are not sufficient, and even major misrepresentations such as those in *State ex rel. Letz v. Riley*,[258] *American Aberdeen Angus v. Stanton*,[259] and *Newman v. Melahn*[260] may be insufficient. Where are the exceptional circumstances? Is that term really useful to determine when an estoppel will be applied? Perhaps the best

253. Newman v. Melahn, 817 S.W.2d 588 (Mo. Ct. App. 1991).

254. *See, e.g.*, Elkins-Swyers Office Equip. Co. v. County of Moniteau, 209 S.W.2d 127 (Mo. 1948) (company performed binding at request of circuit clerk who failed to follow the requirements of the statute in seeking county court approval); Sager v. State Highway Comm'n, 160 S.W.2d 757 (Mo. 1942) (oral promise of highway department engineer to contractor to pay for extra expenses due to unforeseen costs of excavation, in violation of statutes for contracts); McDonald Special Rd. Dist. v. Pickett, 694 S.W.2d 273 (Mo. Ct. App. 1985) (oral assertions that road could be vacated, failure to follow statute, no estoppel); County of Bollinger v. Ladd, 564 S.W.2d 267 (Mo. Ct. App. 1978) (oral agreement with county court to give new right of way in return for old road was void); Arbyrd Compress Co. v. City of Arbyrd, 246 S.W.2d 104 (Mo. Ct. App. 1952) (city entered into written contract not to extend city limits to company property in violation of state statutes, acquiescence for thirteen years, no estoppel).

255. 657 S.W.2d 698 (Mo. Ct. App. 1983). *See discussion supra* text accompanying notes 222-31.

256. State *ex rel.* Casey's Gen. Stores, Inc. v. City of Louisiana, 738 S.W.2d 890, 896 (Mo. Ct. App. 1987). *See* discussion *supra* text accompanying note 247.

257. 599 S.W.2d 529 (Mo. Ct. App. 1983). *See* discussion *supra* text accompanying note 246.

258. 559 S.W.2d 631 (Mo. Ct. App. 1977). *See* discussion *supra* text accompanying note 244.

259. 762 S.W.2d 501 (Mo. Ct. App. 1988). *See* discussion *supra* text accompanying note 245.

260. 817 S.W.2d 588 (Mo. Ct. App. 1991). *See* discussion *supra* text accompanying note 253.

view is that exceptional circumstances such as the damage done to the non-governmental party, the nature of the governmental conduct, or the effect on public policy may help in developing the case for estoppel, but they are not *necessary* to sustain the application of the doctrine. Even when exceptional circumstances exist, other policies such as protecting overriding public interests, or imputing knowledge of the law to a party, or a party's failure to recognize *ultra vires* acts of the government may outweigh them. Therefore, the claim of equitable estoppel against the government may come to hinge on the final element that must be shown—manifest injustice.

D. *Manifest Injustice*

Some of the early cases draw upon the writings of Judge Dillon in which he proclaimed that estoppel should be recognized in exceptional cases "as right and justice may require."[261] Other cases spoke in terms of "elementary principles of natural justice"[262] requiring estoppel, or requiring estoppel where failure to invoke it would "result in an injustice."[263] The implication from these early cases is that a showing of injustice was all that was needed. However, the term "manifest injustice" began appearing in cases as early as 1929, when the Missouri Supreme Court said estoppel should apply "only under circumstances clearly demanding its application to prevent manifest injustice."[264] In 1932, the Kansas City Court of Appeals, in finding estoppel as an alternative to its main holding, said: "If necessary to prevent a manifest injustice, the situation, shown by the facts and circumstances in this case, is suffi-

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261. 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 1194, at 256 (5th ed. 1911), *quoted in* Montevallo v. Village Sch. Dist. of Montevallo, 186 S.W. 1078, 1079 (Mo. 1916) (en banc). There the court said that "we should apply the principle of estoppel or laches where justice and right demand it, and where it is necessary to prevent wrong and injury being done to others." *Id.* at 1080.

262. Edwards v. City of Kirkwood, 127 S.W. 378, 383 (Mo. Ct. App. 1910) (estoppel applied).

263. City of Mountain View v. Farmers' Tel. Exch. Co., 243 S.W. 153, 157 (Mo. 1922).

264. Bragg City Special Rd. Dist. v. Johnson, 20 S.W.2d 22, 26 (Mo. 1929) (board of special road district selected bank depository for treasurer to place funds and prescribed duties of treasurer. Depository failed and treasurer's bonding company claimed board's action in selecting the depository should relieve it of liability. The court held: board not estopped—circumstances did not warrant it). A subsequent opinion, en banc, three years later applied estoppel "where upon all the circumstances of the case right and justice require it." State *ex rel.* City of Sikeston v. Missouri Utils. Co., 53 S.W.2d 394, 400 (Mo. 1932) (en banc) (not citing *Bragg City*).

cient to invoke the doctrine of equitable estoppel."[265]

It is unclear if the requirement of "manifest injustice" as it came into usage in the 1920s and 1930s is significantly different than "injustice" or "where required by right and justice." Manifest means "evident," "obvious," "not obscure or hidden," "open, clear, visible, unmistakable, indisputable."[266] Therefore, a manifest injustice could be either (1) an injustice that is manifest because the elements have been clearly established, or (2) an injustice that is manifest in the sense that it would be obvious to all or a conclusion over which reasonable persons would not likely differ. It could also be simply a synthesis of the two assumptions—not generally applied, exercised with great caution, and the other condition—applied in exceptional circumstances—but it would add little to our understanding of the application of the doctrine if that were all the assertion meant.

The recent cases typically devote little attention to a discussion of what constitutes manifest injustice. Usually, there is just a recitation of the facts followed by a conclusory statement. Estoppel would seem to be more difficult to establish under a manifest injustice standard. In *Murrell v. Wolff*,[267] one of the first modern cases dealing with manifest injustice, the court held that substantial expenditures ($1.5 million), after assurances from the city that the developer could proceed on an integrated development plan, followed by a change in the zoning ordinance that could prevent part of the development, would result in manifest injustice unless the city was estopped from enforcing a subsequent rezoning ordinance or from refusing to issue a building permit.[268] Only a few other modern cases have applied estoppel, and the discussions of injustice, manifest or otherwise, have been sparse.[269] In other cases,

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265. Bonsack & Pearce, Inc. v. School Dist. of Marceline, 49 S.W.2d 1085, 1088 (Mo. Ct. App. 1932) (contract with a school board by architects; the issue was whether the contract was *ultra vires*. It was not clear whether a majority of the board voted for the contract because no vote was recorded for two of the five members present, although the circumstance would warrant an inference of a positive vote. After holding the contract was not *ultra vires*, the court suggested that even if it were, the circumstances were sufficient to show "manifest injustice.").

266. BLACK'S LAW DICTIONARY 963 (6th ed. 1990).

267. 408 S.W.2d 842 (Mo. 1966).

268. *Id.* at 851.

269. *See, e.g.*, Rottjakob v. Leachman, 521 S.W.2d 397, 401 (Mo. 1979) ("'fairness' should be an ever present objective"); Brewen v. Leachman, 657 S.W.2d 698 (Mo. Ct. App. 1983) (*see supra* text accompanying notes 222-31); Casey's Gen. Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. Ct. App. 1980) (reassuring that nothing would prevent the operation of the store on any property acquired); Boone County v. Blue Cross Hosp. Servs., Inc., 526 S.W.2d 853 (Mo. Ct. App.

however, estoppel was not applied, even where the injustice seemed clear:

1. The city requested changes and improvements in the electric company's system while the city knew it was intending to construct its own system.[270]

2. A change of position or interpretation of the law, or the failure to appeal an adverse decision cannot bind the state, at least as to collection of taxes.[271]

3. A statement by the Missouri Director of Revenue that a sales tax would not be refunded, even though the tax was wrongfully collected and retained, did not estop the state from applying the one year statute of limitations to claims for refund.[272]

4. Oral or written assertions by a city or county employee, agent, or officer made in good faith, but contrary to law or unauthorized, with subsequent performance by the non-governmental party, does not create an estoppel.[273]

1975) (estoppel by waiver—no discussion of injustice).

270. Sho-Me Power Corp. v. City of Mountain Grove, 467 S.W.2d 109 (Mo. 1971).

271. Lynn v. Director of Revenue, 689 S.W.2d 45, 49 (Mo. 1985) (en banc) (statement of an employee that Department had waived its rights to collect certain taxes, with a caveat that verification would have to come from the state capitol—no verification. However, a strong dissent said the person was a victim of the Department's inability to make a definitive ruling. *Id.* at 50 (Welliver, J., dissenting)); Shell Oil Co. v. Director of Revenue, 732 S.W.2d 178, 182 (Mo. 1987) (en banc) ("The Director's prior positions whether by judgment or consent may not form the basis of estoppel against him.").

These cases indicate the very hard line taken regarding assessment and collection of state taxes. A failure by one Director to collect or pursue a certain taxpayer will not estop future action by the same or a new Director, *even if the law has not changed.* Even a letter stating taxes not due on a certain type of transaction just states "current policy" and is not binding. *See* St. Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614, 616 (Mo. 1983) (en banc). The court, however, in dicta, did suggest that if a party could show a reliance on the Department's position as a basis for entering a transaction, then a different result might occur. *Id.*

For a similar holding in a non-tax area, see Penner v. King, 695 S.W.2d 887, 892 (Mo. 1985) (en banc) (failure by Department to enforce the requirement of providing a social security number for a drivers license several times previously will not estop the Department from demanding the number for subsequent renewals of the license)

272. Charles v. Spradling, 524 S.W.2d 820 (Mo. 1975) (en banc).

273. *See, e.g.*, McDonald Special Rd. Dist. v. Pickett, 694 S.W.2d 273 (Mo. Ct. App. 1985) (oral agreement-performance—"would thwart the legislative intent and would promote scheming and contrivances between a landowner and public officials who lack the authority to act in the manner requested"); County of Bollinger v. Ladd,

5. A mutual error, made in good faith, does not create an estoppel.[274]

Injustice may, like beauty, be found only in the eye of the beholder. But if citizens are to retain faith and trust in government, some remedy should be available when injustice occurs. Unfortunately, the cases provide few clues regarding the meaning of manifest injustice and even when it may be "manifest," other policies may cause the individual claimant to suffer. Even if it is accurate to describe estoppel as a process of inclusion or exclusion based on the specific circumstances of the case,[275] it is desirable that a coherent underlying theory be visible to guide not only persons dealing with government, but also to courts, to determine when the government should be estopped. It matters not from what perspective cases are approached—amount of damage to the party; type of party;[276] subject matter;[277] active or passive use of equitable estoppel; formality or informality of government action;[278] type of governmental activity (governmental or proprietary); culpability of the governmental action—there is no satisfactory approach to explain when an injustice will be manifest enough to trigger the use of estoppel against the government.

V. SUMMARY

One should be able to place reliance on the statements or acts of government when that reliance is reasonable. That principle has been recognized several times by Missouri courts during the past 100 years[279] but never uniformly applied. As the foregoing analysis indi-

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564 S.W.2d 267 (Mo. Ct. App. 1978) (oral agreement-performance); Missouri Int'l Investigators, Inc. v. City of Pacific, 545 S.W.2d 684 (Mo. Ct. App. 1976) (written agreement-performance).

274. Bresnahan v. Bass, 562 S.W.2d 385 (Mo. Ct. App. 1978).

275. *California v. Missouri Utils. Co.*, 96 S.W.2d 607, 614 (Mo. 1936).

276. However, there is less concern with the usual conditions when the parties are governments; *see* discussion *supra* text accompanying notes 190-94.

277. Except, perhaps, for the collection of taxes by the state and even a chink in that armor may exist; *see supra* note 271.

278. It has been suggested that even when the action is formal, the government may not be estopped. Where the action is less formal estoppel is even less likely; *see* NEELY & SHINN, *supra* note 74, at 366-67. Note the recent result in Newman v. Melahn, 817 S.W.2d 588 (Mo. Ct. App. 1991), where a formal settlement and dismissal with prejudice did not estop the state.

279. *See, e.g.*, Peterson v. Kansas City, 23 S.W.2d 1045 (Mo. 1929), where the Missouri Supreme Court unequivocally asserted: "It is now well settled that, as to matters within the scope of the powers of municipal corporations and the powers of their officers, such corporations may be estopped upon . . . the same circumstances

cates, none of the assumptions or conditions regularly recited—generally not applicable; used with caution; in exceptional circumstances; to prevent manifest injustice—have clear meaning or are capable of providing an explanation for application of the doctrine. If there is one recurring theme, it is that estoppel is seldom applied against the government. The cases clearly indicate a reluctance by the courts to apply estoppel to the government for a variety of reasons, including: (1) the view, not always clearly articulated, that government is different; (2) that public rights outweigh private rights; (3) that public servants do not protect the rights of the public as carefully as private persons do their own rights; (4) that public agents might engage in collusive or fraudulent activities to defeat public purposes or policy; and (5) that a government ought not to be bound to do something by estoppel that it could not do otherwise. There is an element of validity in each of these reasons. Most, however, are overstated or lack the persuasive force they might once have had, one exception being the view that government is different because it must protect the public welfare. But if government is different, that difference should be clearly articulated in the cases. More importantly, individuals and those who represent them should be told how that difference affects the outcome in *this* case.

It is time for the law and the practice to change. Government is big business. Its pronouncements affect virtually every aspect of our existence, and its effect on our lives becomes more visible each day. At every avenue we deal with agents of the government. We rely on their advice, their representations, their rulings. We ought not to be penalized for that reliance when it is well founded. Nevertheless, there should be a recognition that government *is* different. It represents the collective welfare, and it is deserving of protection from estoppel claims when that collective welfare must be protected in spite of the harm to a particular individual. That protection, however, can be accomplished within the parameters of the proposal below.

VI. PROPOSAL FOR A NEW APPROACH TO THE APPLICATION OF EQUITABLE ESTOPPEL TO MISSOURI GOVERNMENTS

The government's general immunity from the doctrine of equitable estoppel springs from the theory of sovereign immunity and the idea that the "king can do no wrong," brought from the English common law.[280] However, sovereign immunity has eroded both nationally[281]

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as natural persons." *Id.* at 1048.

280. "The King cannot be estopped, for it cannot be presumed the King would do wrong to any person . . ." 15 HALSBURY'S LAWS OF ENGLAND § 1695 n.8 (4th

and in Missouri[282] through legislative action and judicial pronouncements during the latter half of this century. Several of the reasons given for retaining sovereign immunity, already rejected by the Missouri Supreme Court,[283] are the same reasons given for not applying estoppel, particularly the idea that "public officers are without authority to bind the sovereign without constitutional or statutory authorization."[284] The court demonstrated its rejection of that concept as applied to tort liability when it declared "[w]e believe that government should both have the benefits of its agents' and employees' acts and the responsibility of them."[285] This reasoning is equally applicable to estoppel.

Therefore, since equitable estoppel is premised on the concept of achieving fairness between the parties and is primarily judge-made in its parameters, action by the judiciary should be taken to more clearly establish when estoppel against the government is warranted. Even though Missouri courts have noted that estoppel is not "favored by the law,"[286] one approach would be to put the opponent of the government on essentially the same footing as between two private litigants.[287] This approach would support the policy that "fairness" by the government is a goal in dealing with its citizens,[288] for it would treat

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ed. 1976) (quoting 3 M. BACON, NEW ABRIDGEMENTS OF THE LAW 442). *See also*, Alan I. Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?* 45 FORDHAM L. REV. 497, 500 (1976).

Professor Kenneth Culp Davis has noted that "sovereign immunity from contract and tort liability naturally carried with it sovereign immunity from equitable estoppel." 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01 (1958).

281. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1032-33, 1044-46 (5th ed. 1984).

282. *See, e.g.*, Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977) (en banc) (holding that governmental immunity from suit in tort would no longer be recognized). This decision was significantly modified by the General Assembly the following year by H.B. 1650 which, in most particulars, reestablished sovereign immunity.

283. *Jones*, 577 S.W.2d at 228-9.

284. *Id.* at 228.

285. *Id.* at 229.

286. State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 531 (Mo. Ct. App. 1983).

287. Professor Davis has suggested this approach, DAVIS, *supra* note 12 §§ 20.2-20.5, 20.13, at 392, 397-98 (Supp. 1989). However, his comments seem to favor the generally artificial governmental/proprietary distinction. *See also Never Trust a Bureaucrat: Estoppel Against the Government*, 42 SO. CAL. L. REV. 391, 406 (1969); articles cited *supra* note 17.

288. Brewen v. Leachman, 657 S.W.2d 698, 698 (Mo. Ct. App. 1983).

the government as any other private litigant. Moreover, it would focus the court's inquiry on whether the traditional elements have been met—statement or act, reliance, and detriment[289]—not on the additional, generally unhelpful, talismanic incantations of caution, exceptional circumstances, manifest injustice and general nonapplicability. These assumptions about, and conditions for, imposition of the doctrine have set a negative tone toward its use that permeates the cases and has impeded the courts' thinking. This proposal is a plea for rethinking the use of equitable estoppel against the government, particularly in light of historical developments in the law both nationally and in Missouri.

It is unclear whether the current standard of proof is the normal "preponderance of the evidence" or if the standard is something more. There appears to be a greater burden as a result of statements such as those calling for "clear and satisfactory"[290] evidence. The cases do not explain whether "clear and satisfactory" is the equivalent of the more customary "clear and convincing" standard, although some recent decisions indicate that the court of appeals so thinks.[291] The judiciary should affirm not only that the government will, in the initial analysis, be treated as any other private litigant, but also what standard of proof is required. While the standard is preponderance in some jurisdictions,[292] which is the level that appears most logical, it is quite likely that Missouri has, with the apparent heightened standard, too much history to overcome. Moreover, by heightening the standard, the goal of protecting the public could be more readily achieved because of the increased burden on the claimant to prove all of the traditional elements with more compelling evidence.

Based on some of the cases of the past century when estoppel was not applied, disputes might arise as to the meaning of each of the traditional elements. There exists a body of case law, however, that could be

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289. *See supra* text accompanying note 8.

290. Exchange Nat'l Bank v. Wolken, 819 S.W.2d 45, 48 (Mo. 1991) (en banc) (quoting Peerless Supply Co. v. Industrial Plumbing & Heating Co., 460 S.W.2d 651, 656 (Mo. 1970)) (private parties); *see* Van Kampen v. Missouri Highway & Trans. Comm'n, 685 S.W.2d 619 (Mo. Ct. App. 1985) (private party versus government).

291. *See* Jerry Anderson & Assocs., Inc. v. Gaylan Indus., Inc., 805 S.W.2d 733, 735-36 (Mo. Ct. App. 1991); Sisters of St. Mary v. Denningmann, 730 S.W.2d 589, 593 (Mo. Ct. App. 1987); Both cases assert the standard as "clear and convincing" citing as support earlier cases which use the term "clear and satisfactory." One case, not subsequently cited, said the proof must be "absolute and unequivocal," a level of proof virtually unachievable! Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. Ct. App. 1974).

292. *See, e.g.*, Busby v. Daws, 592 F.2d 1241, 1245 (5th Cir. 1979) (Miss.).

used to determine if each element has been met, not only with regard to private cases, but also as to the government.[293] Two of the elements, statement or act, and detriment, pose little or no problems in application to governments. Missouri cases already indicate that the statement or act can be negligent or unintentional, so no showing of culpable misconduct or intent to harm would be necessary.[294] As to detriment, no change in existing standards would seem warranted. If there has been no harm or detrimental reliance then there can be no estoppel.

As to the third element, reliance, what level should be necessary to trigger an estoppel? Easily stated, but perhaps difficult in application, the test should simply be: Was the reliance reasonable? Certainly all of the circumstances surrounding the transaction should be considered, including the hierarchical level or apparent authority of the governmental representative, the sophistication of the non-governmental party, and the ease of access to the correct information by the claimant. It might not be reasonable for a person to assume that he or she was protected by verbal assurances of a secretary or clerk to proceed on a multi-million dollar project, or that certain taxes need not be paid, or that a road maintenance supervisor could accurately mark the state's right of way.[295] But it might be reasonable reliance if the clerk or secretary said a minor filing fee was not due on application but could be paid when the application was approved.[296] Moreover, if an agency wished

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293. *See, e.g.*, Gammaitoni v. Director of Revenue, 786 S.W.2d 126 (Mo. 1990) (en banc) (not clearly stated but appears to be no reliance); Saint Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614 (Mo. 1983) (en banc) (no reliance or change in position by taxpayer as representation was made to a third party); B & D Investment. Co. v. Schneider, 646 S.W.2d 759 (Mo. 1983) (no reliance); Gammaitoni v. Director of Revenue, 786 S.W.2d 126 (Mo. 1990) (en banc) (not clearly stated but appears to be no reliance); Harrison v. State Highways & Transp. Comm'n, 732 S.W.2d 214 (Mo. Ct. App. 1987) (elements not met); Independent Stave Co. v. Missouri Highway & Transp. Comm'n, 702 S.W.2d 931 (Mo. Ct. App. 1985) (no representation to the claimant, only to a third party); Van Kampen v. Kauffman, 685 S.W.2d 619 (Mo. Ct. App. 1985) (reliance not reasonable); Patterson v. State Bd. of Optometry, 668 S.W.2d 240 (Mo. Ct. App. 1984) (all three elements missing); State *ex rel.* White Advertising Int'l v. State Highway Comm'n, 655 S.W.2d 860 (Mo. Ct. App. 1983) (misrepresentation by claimant to state!).

294. *See* discussion *supra* text accompanying notes 255-60.

295. *See, e.g.*, Van Kampen v. Kauffman, 685 S.W.2d 619, 625 (Mo. Ct. App. 1985).

296. *See, e.g.*, State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 532 (Mo. Ct. App. 1983). *See also* Rubinstein v. City of Salem, 210 S.W.2d 382 (Mo. Ct. App. 1948) (ordinance required a written application before issuance of a permit to construct a sidewalk. Plaintiff drew a sketch on the back of an envelope and talked to the mayor and city clerk about his plans. He asked if

not to be bound, "the person with whom the agent is dealing should be informed that the agent's opinions are merely advisory and are not binding upon the government."[297] If the government is to have the advantage of its employees and agents, then it must take the responsibility for them when it places them in a position where the citizenry could reasonably rely on their words or deeds.[298]

Intertwined with the issue of reliance is the problem of lack of knowledge of the party asserting the estoppel. It presents a major hurdle for the claimant. The traditional view is that a party dealing with the government is "bound" to know the extent of the government's powers[299] or the agent's authority.[300] There is dicta in some cases questioning the presumption that the party is imputed with a knowledge of the law, and, in other cases, the court has clearly ignored the opportunity to impute knowledge.[301] In *California v. Missouri Utilities Co.*,[302] the court opined that the principle that ignorance of the law is no excuse "applies principally to the criminal law. It may sometimes be disregarded in a case of equitable nature . . . ."[303] The prevailing view, however, is that where the information is equally accessible to all parties, then no estoppel can be found.[304] Several cases have held that where the non-governmental party had the same "means of knowledge" as the government, then no estoppel could arise.[305] There is, of course, a conflict between the requirement that in order to hold its citizens responsible for their actions, the government must provide notice of laws,

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written permission was needed and was told, "Well, that's all right, go ahead."—city estopped.).

297. Mary R. Alexander, Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 ST. JOHN'S L. REV. 114, 138 (1981). For an opposite view see Braunstein, *supra* note 17.

298. Jones v. State Highway Comm'n, 557 S.W.2d 225, 229 (Mo. 1977) (en banc).

299. *See, e.g.*, Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164 (Mo. 1938).

300. *See* discussion *supra* text accompanying notes 81-96.

301. *See, e.g.*, Brewen v. Leachman, 657 S.W.2d 698 (Mo. Ct. App. 1983), where the court decided that in order to achieve "fairness" it would not impute knowledge that property taxes were due regardless of notice and also ignored the fact that notice of sale was properly placed in the newspapers.

302. 96 S.W.2d 607 (Mo. 1936).

303. *Id.* at 617.

304. See, e.g., State *ex rel.* Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529 (Mo. App. 1983).

305. Van Kampen v. Kauffman, 685 S.W.2d 619, 625 (Mo. Ct. App 1985). *See also* Land Clearance for Redevelopment Auth. v. Dunn, 416 S.W.2d 948, 951 (Mo. 1967); Board of Educ. v. St. Louis County, 149 S.W.2d 878, 880 (Mo. 1941).

rules, and regulations, and then not hold those same citizens responsible if they in fact were not aware of those laws.[306] It might seem incongruous to reward the uninformed. But they are not being rewarded, they are being treated fairly, to avoid an injustice in an unfortunate situation. Moreover, the complexity of governmental regulations and the sheer volume of materials make it unrealistic to assume that any person, except perhaps the most wealthy and sophisticated, has a chance of ferreting out the legally correct answer.[307] A better approach would be to examine all of the circumstances to determine the reasonableness of the reliance, dispensing with the easy out that everyone is presumed to know the law. Where the knowledge is more accessible to the government, or particularly known[308] to the government, or involves interpretation of complex rules or laws, or comes from someone who could reasonably be viewed as having authority to speak,[309] then it seems unfair and "manifestly unjust" to impute knowledge to the party claiming estoppel.

Another point that should be addressed is the possibility of fraud, or deliberately illegal acts, by public officials or employees that would bind the government to a performance that it could not otherwise make. While this danger has been noted several times as a reason for exercising caution in considering estoppel,[310] in no Missouri case has estoppel ever been denied because of evidence of fraud or deliberately illegal acts. It is possible that fraud or collusion or "slick dealing" with the

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306. *See, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). *See also* MO. REV. STAT. § 536.021.6 (1990) (the procedure for agency rule making, including publication and notice, and the fact that a rule is void if not made as prescribed, placing a strong burden on agencies to insure proper notice of rules).

307. *Merrill*, 332 U.S. at 387 (Jackson, J., dissenting).

308. *See, e.g.*, Simpson v. Stoddard County, 73 S.W. 700, 713 (Mo. 1903).

309. It could be argued that reliance is not reasonable unless it comes from the highest available authority in the agency or governmental unit, using the administrative law analogy of exhaustion before judicial review is available. This argument, however, misses the point that, as a practical matter, individuals normally take action based on the apparent authority of the speaker in relation to the subject matter. It also overlooks the fact that if every question had to be "bucked up" to higher authority, then governmental systems simply wouldn't function. *See* Brewen v. Leachman, 657 S.W.2d 698, 702 (Mo. Ct. App. 1983), where the court recognized the danger of every landowner contacting the collector's office to confirm that tax bills were accurate.

310. *See, e.g.*, Likes v. City of Rolla, 167 S.W. 645, 647 (Mo. Ct. App. 1914); DOBBS, *supra* note 3, at 989-991. The U.S. Supreme Court asserted just such reasoning in the early cases: "by improper collusions, it would be very difficult for the public to protect itself." Lee v. Monroe, 11 U.S. (7 Cranch) 366, 370 (1813).

government could occur. It is also possible that it has not been discussed in the decisions because the courts have taken such a narrow view of when estoppel might be applied that an unknown number of such claims have remained inchoate.[311] But equity is generally available only to those with "clean hands."[312] Any indications on the record of fraudulent or collusive activities would normally be enough to defeat the claim of estoppel. The remote possibility of such an occurrence which might not appear on the record ought not be an excuse to deny the deserving claimant.

Despite the foregoing arguments to apply the doctrine, there must be some recognition that government is different from a private litigant. In some instances, even when all the traditional elements are met, public policy may require that estoppel not be applied in order to protect the public welfare or to protect some other overriding governmental interest such as the distribution of governmental powers.[313] The judiciary, however, should specifically address public policy issues and explain its reasoning in order to make clear what the greater public interest is and why, after the traditional elements have been established, it must be protected in *this* case. One author has suggested that the government should be allowed to plead and prove any public policy exceptions as affirmative defenses or "countervailing equity."[314] Whatever the approach, facing these issues squarely forces the court to clarify why the public must prevail when the traditional estoppel elements have been met.

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311. This suggestion has been made by Miller, *supra* note 10.

312. *See* DOBBS, *supra* note 3, at 45-47.

313. Some would suggest that where applying estoppel would produce an undue intrusion on the doctrine of separation of powers, that alone should be a basis for deciding in favor of the government. However, any exercise of estoppel would seem to be some intrusion on the separation of powers doctrine. At least as to federal cases, one observer suggests that the concept of sovereign immunity is too "malleable and vague" and "not particularly well suited for deciding estoppel cases." Braunstein, *supra* note 17, at 30-31. The recent decision in Office of Personnel Mgmt. v. Richmond, 496 U.S. 414 (1990), however, indicates that constitutional mandates, at least as to monetary damage claims, require the rejection of estoppel. In Missouri, the issue has never been specifically addressed, although specific constitutional language exists. *See* MO. CONST. art. II.

314. *See* Miller, *supra* note 10, at 65-66. Some areas of public policy concern noted by the author include impairment of public taxing or spending policies, fiscal uncertainty, impairment of separation of powers, and endangerment of public welfare. One can think of several other public policies that might be severely affected by application of estoppel, including loss or impairment of title to government land and foregoing criminal prosecutions.

Regardless of any judicial action that might be taken to clarify the application of estoppel, statutory changes seem desirable. The call for statutory change is not new, particularly at the federal level. In the mid-1950s, there were several attempts at legislative change. Bills were introduced in Congress, but not passed, to require estoppel of the federal government when citizens dealt with the government in good faith.[315] Scholars have tried their hands at legislative drafting,[316] and legislative proposals have been suggested without success in a few states.[317] The call for change that peaked nationally almost forty years ago has waned; however, the need for such change remains.

In Missouri, estoppel continues to be frequently raised in appellate cases, and the harshest results often occur in those situations where section 432.070 is applied.[318] The provisions of section 432.070, its interpretation by the courts, and the narrow construction of section 431.100, make legislative change appropriate. It is tempting to suggest that section 432.070 simply be repealed.[319] There are, however, good public policy reasons to require that contracts with governments generally be in writing and that the writing contain all the necessary elements set out in the statute. That policy promotes greater care in decision making, provides accountability, reduces the risk of hasty or unwise decisions,

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315. Almost 40 years ago, the Commission on Organization of the Executive Branch of the Government, Task Force on Legal Services and Procedure proposed the following good faith reliance statute:

> No sanction shall be imposed by any agency for any act done or omitted in good faith by any person in conformity with, or in reliance upon, any rule, or any advisory letter, opinion, or other written statement of the agency addressed in writing to such person and obtained by him without fraud or material misrepresentation, notwithstanding the fact that, after such act or omission has taken place, such rule, or such letter, opinion, or other written statement is modified, amended, rescinded, revoked, or held invalid by the agency for any reason.

TASK FORCE ON LEGAL SERVICES AND PROCEDURE, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE, 375 (1955).

316. *See* Newman, *supra* note 17; Loving, *supra* note 10; *see also* MICHAEL ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES (1973).

317. *See, e.g.*, Loving, *supra* note 10, at 352-54.

318. *See, e.g.*, Kennedy v. City of St. Louis, 749 S.W.2d 427 (Mo. Ct. App. 1988); Klotz v. Savannah R-III Sch. Dist., 747 S.W.2d 708 (Mo. Ct. App. 1988).

319. Over 100 years ago, in Crutchfield v. City of Warrensburg, 30 Mo. App. 456 (1888), the court eloquently stated the quandary: "The laborer may be worthy of his hire; and the service rendered by plaintiff to the city no doubt was valuable to it, and the fee claimed is reasonable; but *we are without power to enforce mere moral precepts in contravention of positive statute.*" *Id.* at 463 (emphasis added).

makes illegal or collusive activities more difficult, clarifies the role of all parties, and allows easier public access to public records. The rigid interpretation of section 432.070, however, allows no "flex in the joints" to apply estoppel to accommodate the innocent person who is harmed.

Set out below is a proposed statutory change. Should the judiciary embrace the suggestions made above, the proposal below could be modified by listing the specific statutes to be covered (*e.g.*, section 432.070). In the final analysis, a statutory change seems desirable in that it would provide a clear mandate from the General Assembly that fair dealing by the government with its citizens is the expected norm, and that the government can be estopped like any other private party, absent overriding issues of public policy that require otherwise. The enumeration and explanation of those policies by the courts will clarify the application of estoppel to the government in a manner not previously done in this state.

TITLE: GOOD FAITH RELIANCE ACT

Section 1. All other provisions of the law heretofore or hereafter enacted to the contrary notwithstanding [except section 537.600],[320] whenever a court finds by a preponderance of the evidence[321] that a person has acted in good faith and in reasonable reliance on an action, statement (written or oral), or other behavior of a government agent, employee, or officer, to the person's detriment, the doctrine of equitable estoppel as it exists at common law between private individuals, on the date this act becomes effective, and as the doctrine is developed in the future by the courts of this state, may be applied by such court against the government, whether or not the transaction arises out of the exercise of governmental or proprietary functions, or whether or not the action, statement or other behavior of the government, agent, employee, or officer was within the scope of his or her actual authority,[322] except as set

320. It may be necessary to insert this section (and perhaps others) to indicate that no change is being suggested with regard to governmental tort immunity.

321. This standard of proof is proposed because the author believes that a higher standard is not necessary. A higher standard of proof puts an undue burden on the claimant. A "clear and convincing" standard, however, might be considered desirable in order to provide a greater level of protection to the government by requiring the claimant to produce "better" or more compelling evidence of the statement itself, if that were disputed, or why the reliance was reasonable.

322. This provision is intended to abolish the vestiges of sovereign immunity as it affects equitable estoppel and makes moot the long line of cases that impute knowledge of the law or of the government's actual authority or power to a party.

forth below.

Section 2. When the claim by the person is grounded in a contract for labor, materials, or provision of any other goods or services, recovery shall be limited to the reasonable value of the benefit conferred upon the government agency or the contract price, whichever is less.[323]

Section 3. When the court finds that the claimant established the elements of equitable estoppel and the government has shown no equitable defenses to defeat the claim, the court shall find for the claimant, if it determines that justice so requires, except where the court finds that the government should prevail because of overriding public policy reasons which shall be specifically enumerated and described by the court.[324]

VII. CONCLUSION

Arguments responding to the application of estoppel against the government are not likely to subside, and, nationally, no single view is likely to prevail. Individual cases will, however, continue to cry out for redress where innocent good faith reliance on the statements or behaviors of local, state, or federal governments has caused a hardship. No one seriously argues that citizens should not be treated fairly by government; the difficulty is that there is "tension between the desire for justice in the particular case, and the necessity for rules that benefit society as a whole, although sometimes imposing individual hardships."[325]

The changes suggested in this article would provide some modest steps toward focusing the General Assembly and the courts on that "tension" and cause the government to be treated as any other person in balancing the equities of estoppel. At the same time, the proposals recognize that there may be times when overriding public policy concerns, squarely faced and clearly explained, require that society in general must prevail over the individual.

The court must determine if the governmental representative had apparent authority and if the reliance was reasonable.

323. This provision is intended to provide a remedy for the harsh results of § 432.070 while still protecting the government. The theory is that the contract as such will not be enforced but recovery will be based on unjust enrichment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139 cmt. a & b, § 141 cmt. a (1981).

324. This section is intended to direct the courts to find for the claimant when the elements of estoppel have been established and justice requires. The court may find compelling public policy reasons to hold otherwise, however, but those reasons must be made clear. One could argue this does not significantly change existing law because courts now consider those public policies even if *sub silentio*. This provision, however, does force the courts to focus on those policies and explain them, providing better guidance for future claimants.

325. Braunstein, *supra* note 17, at 39.