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Estoppel and the Public Purse: A New Check on Government Taxing and Spending Powers in Florida Law

David K. Miller*

I. Introduction

Taxation and spending are two fundamental powers of government at every level, from the federal leviathan to the most obscure special purpose district. The exercise of these powers is a hallmark of sovereign status. Public enterprises are distinguished from private enterprises by their powers to levy taxes and to determine appropriate public purposes for expenditure of revenue. The location of these powers in the legislative body of each governmental unit has been settled in Anglo-American law and political culture for centuries; no philosophical alternative has been seriously advanced in modern times. The legislature’s powers over the purse may well be the most settled, least controversial feature of our political system.

The Florida Constitution expressly provides that the state legislature shall have exclusive authority over taxation,* public spending,§ and the extent to which government bodies can incur contract and tort liability.¶ The legislature also has the power to acquire,  

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1. Legislative preeminence in fiscal matters is frequently traced to the Magna Carta. The original Magna Carta provided:

   No scutage nor aid shall be imposed in our kingdom, unless by the common council of our kingdom [exceptions omitted]. . . .

   And also to have the common council of the kingdom, to assess an aid, otherwise than in the three cases aforesaid: and for the assessing of scutages, we will cause to be summoned the Archbishops, Bishops, Abbots, Earls, and great Barons, individually, by our letters. . . .

   Magna Carta, 1215, 17 John c. 12, 14. Parliamentary control over the purse did not spring immediately from the original Magna Carta, but evolved over centuries; it was conclusively established by the Glorious Revolution of 1688. The philosophical foundations for legislative control of the purse also include Locke’s Second Treatise of Civil Government (L. DeKoster ed. 1978), Montesquieu’s The Spirit of Laws in 38 GREAT BOOKS OF THE WESTERN WORLD 1 (C. Hutchins, ed. 1952), the Declaration of Independence, and The Federalist No. 31 (A. Hamilton), No. 33 (A. Hamilton) and No. 41 (J. Madison).

2. Fla. Const. art. VII, § 1 (a) provides: “No tax shall be levied except in pursuance of law.”

3. Fla. Const. art. VII, § 1(c) provides: “No money shall be drawn from the treasury except in pursuance of appropriation made by law.”

4. Fla. Const. art. X, § 13 states: “Provision may be made by general law for bringing
manage, use, and dispose of public assets for a proper public purpose.\(^5\) Local governing bodies such as county commissions, school boards and municipal councils exercise similar powers over their respective budgets and resources in accordance with constitutional, statutory, and charter provisions.\(^6\)

To secure control over public funds, legislative bodies have enacted many laws prescribing proper methods for collecting, reserving, investing, accounting and dispersing these funds. Legislatures have also established “watchdog” agencies to execute and enforce these laws.\(^7\) As a result, there are libraries of law, rules, and forms to govern the movement of public funds.

Because these legislative powers over the purse have constitutional dignity, they may logically be limited only by other constitutional provisions. The Florida Constitution contains a number of such limitations, including both negative limitations, which prohibit certain actions, and positive limitations, which require certain actions. To appreciate the wide scope of legislative powers, one must first become acquainted with their constitutional boundaries. For example, the Florida Constitution limits legislative power over taxation by express prohibitions against certain forms of taxation.\(^8\) The constitution imposes general requirements of suit against the state as to all liabilities now existing or hereinafter originating.”

5. See, e.g., City of West Palm Beach v. Williams, 291 So. 2d 572 (Fla. 1974); State ex rel. Gray v. Stoutamire, 179 So. 730 (Fla. 1938). The legislature has authority to sell or dispose of sovereignty lands, which are held in trust for the public use, provided such action serves the public interest. See FLA. CONST. art. X, § 11. See also Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976); Trustees of Internal Improvement Fund v. Root, 58 So. 371 (Fla. 1912).

6. The identity of the local governing body may be established by constitutional provision, statute or charter. See FLA. CONST. art. VIII, § 1(c) (county commissions); FLA. CONST. art. IX, § 4 (district school boards). See also FLA. CONST. art. VIII, § 2 (establishing municipal government as provided by law or charter). Local spending is strictly controlled by general law. See, e.g., FLA. STAT. ch. 129 (1979) (county budgets); Id. ch. 166, Part III (municipal budgets); Id. ch. 237 (school district budgets).

7. For example, a state officer charged with collecting or dispersing public funds has the duty to follow all statutorily prescribed procedures for that function. The officer’s conduct may be reviewed by a number of other agencies, including the Office of the Comptroller under FLA. STAT. ch. 17; the Department of Administration under FLA. STAT. ch. 215; the Department of General Services under FLA. STAT. chs. 255 and 287; and the Auditor General under FLA. STAT. §§ 11.41-.50. The officer’s failure to follow the law in handling public funds may cause him to hear from one of these “watchdogs.” Moreover, official misconduct concerning the use of public funds may subject the offender to penalties under FLA. STAT. ch. 112, Part III, or ch. 839.

8. See, e.g., FLA. CONST. art. VII, § 1(a) (prohibiting state ad valorem taxation on real property and tangible personal property); FLA. CONST. art. VII, § 5(a) (restricting the state’s power to levy or authorize taxes on the estates, inheritances or incomes of natural persons who are residents or citizens of the state).
fairness and due process, so that the taxing power cannot be exercised in a manner which is discriminatory, confiscatory, or disproportionate to the thing or activity taxed. The constitution also requires the legislature to raise sufficient revenue by taxation to defray the state’s expenses in each fiscal period. The legislature cannot circumvent this requirement by borrowing, because the constitution also limits the state’s power to incur indebtedness. Within these constitutional limitations the legislature may exercise a free hand in raising revenue. 

The power to spend public revenue is limited by the funds available in each fiscal period, and by the general requirement that all such spending be undertaken for a public purpose. Spending

State property and functions are immune from taxation, although this immunity is implied rather than expressed in the constitution. See State ex rel. Charlotte County v. Alford, 107 So. 2d 27, 29 (Fla. 1958) (immunity “is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government”). See also Lewis v. The Florida Bar, 372 So. 2d 1121 (Fla. 1979); Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975); and Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1958). Other constitutional restrictions on taxation include the homestead exemption from ad valorem taxation in Fla. Const. art VII, § 6.


11. Fla. Const. art. VII, § 10 limits the state’s power to pledge credit to publicly owned projects, with specified exceptions. Fla. Const. art. VII, §§ 11 & 12 limit the use of full faith and credit bonds to the financing or refinancing of capital projects, and then only upon approval of the electors by referendum. The state’s outstanding principal indebtedness on full faith and credit bonds may not exceed half of the total state tax revenues from the two preceding years. Fla. Const. art. VII, §§ 11, 12, 14, 15, and 16 authorize revenue bonds for capital projects and other specified purposes, but such bonds by their nature pledge only the revenue derived from a particular project, and not the government’s full faith and credit.


13. The legislature has considerable latitude to decide what purposes are “public.” Challenges to these legislative determinations are rarely successful. See, e.g., State v. Housing Fin. Auth. 376 So. 2d 1158 (Fla. 1979) (upholding the issuance of revenue bonds to finance the construction and rehabilitation of private housing); State v. Putnam County Dev. Auth., 249 So. 2d 6 (Fla. 1971) (upholding the issuance of revenue bonds to finance the acquisition and construction of a water treatment facility to assist private pulp and paper mill); State v. Reedy Creek Improvement Dist., 216 So. 2d 202 (Fla. 1968) (upholding the issuance of revenue bonds to drain and reclaim submerged lands for use by Disney World); State v. Inter-American Center Auth., 84 So. 2d 9 (Fla. 1955) (upholding the issuance of revenue bonds to establish and operate a cultural and trade center); Gate City Garage, Inc. v. City of Jackson-
power is further limited by state and federal constitutional requirements that just compensation be paid when the government condemns private property. This positive limitation applies not only to traditional condemnation actions, in which the government deliberately acquires property for public use, but also to relatively novel inverse condemnation actions, in which the government has rendered private property useless either by activity which amounts to continuing trespass or nuisance, or by unfair and overreaching regulatory activities. By bringing such an action, a private owner can require the government to compensate him for the value of property taken. This compensation requirement turns on the definition of "property," which is a fluid concept, the boundaries of which may never be permanently fixed. Within those boundaries, however, the legislature may spend as it chooses.

The courts recognized that some of these projects would primarily benefit private parties, and others would injure private parties by competing for previously private markets. The courts ruled, however, that an "indirect" public benefit was sufficient to sustain the expenditure, particularly where the measure was financed by revenue bonds and not full faith and credit bonds. The supreme court recently held:

Under the constitution of 1968, it is immaterial that the primary beneficiary of a project be a private party, if the public interest, even though indirect, is present and sufficiently strong. Of course, public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest. An indirect public benefit may be adequate to support the public participation in a project which imposes no obligation on the public.

State v. Housing Fin. Auth., 376 So. 2d 1158, 1160 (Fla. 1979) (citation omitted).

The courts have held, however, that some forms of taxation to benefit limited groups of persons is not a proper public purpose. See, e.g., State v. Lee, 356 So. 2d 276 (Fla. 1978), (striking, on a variety of grounds, a statute establishing a "Good Drivers' Incentive Fund").


15. See, e.g., City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. 1st Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965), which introduced inverse condemnation in Florida as an action analogous to continuing trespass or nuisance. The scope of inverse condemnation was greatly expanded to include overreaching regulatory activity in Askew v. Gables-by-the-Sea, Inc., 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976), cert. denied, 345 So. 2d 420 (Fla. 1977). There a private corporation, having purchased submerged lands from the state in reliance upon the existing bulkhead line, suffered the reestablishment of the bulkhead line inland, the revocation of its dredge and fill permit, dilatory court action by the state to contest that revocation, and a lobbying effort by the state which caused the United States Army Corps of Engineers to refuse to renew its dredge and fill permit. Id. at 57-61. The First District Court of Appeal held that state regulatory action had rendered the property useless, and commanded the state to institute condemnation proceedings. Id. at 61.

16. The legislature's supremacy over public spending is acknowledged in Dickinson v. Stone, 251 So. 2d 268 (Fla. 1971); Petition of Florida Bar, 61 So. 2d 646 (Fla. 1952); State ex
Each of the foregoing restrictions is based on organic law. In many respects they interlock and reinforce one another and so are in theoretical harmony. Within these restrictions, the legislative powers over the purse are not only supreme, but exclusive. The legislature is the sovereign body and must control both taxation and spending in order to guarantee that public accounts will be balanced in each fiscal period. Accordingly, the legislature must preserve its own powers, and may not delegate them to the executive branch.\(^7\) Such delegation would violate the exclusive nature of the legislature's powers over the purse and undermine the traditional separation of powers among the three branches of government. This well defined separation of powers has an appealing logic and symmetry. The law, however, is not so logical or symmetrical.

The courts have discovered that preservation of constitutional legislative powers does not always lead to justice in individual cases. A typical case occurs when an administrative officer or agency makes a statement of policy or engages in a course of conduct at variance with the legislative policy. A private party, unaware that the administrative action is erroneous, relies upon this action by changing its position to its detriment. Upon discovery of the error, the government retracts the statement or action, asserting that it was unauthorized, unlawful and void. The injured private party sues for reinstatement of the initial statement or action,

\(^{rel.}\) Caldwell v. Lee, 27 So. 2d 84 (Fla. 1946), and \(In re\) Advisory Opinion to the Governor, 154 So. 154 (Fla. 1934). Recently, in Brown v. Firestone, 382 So. 2d 654 (Fla. 1980), the court held that restrictions and qualifications within an appropriations act, while generally permissible, must be directly or rationally related to the purpose of the appropriation, and in fact be a major motivating force behind the appropriation, and must not be an effort to change existing law on other subjects. \(Id.\) at 664.

Units of government below the state level have similar discretion in formulating their taxing and spending policies within the limitations set by constitutional, charter and statutory provisions. See note \(^6\) supra. Their discretion is subject to judicial review if they act arbitrarily or capriciously in omitting a reasonable and necessary expenditure, \(e.g.,\) an expenditure necessary to enable a constitutional officer to fulfill constitutional or statutory functions. Pinellas County v. Nelson, 362 So. 2d 279 (Fla. 1978). Local government spending is also subject to additional restrictions imposed by federal law. For example, a municipality may be required to pay damages or provide other relief when its official policies or customs deprive a person of federally protected civil rights. Monell v. Department of Social Services, 436 U.S. 658 (1978).

\(^{17.}\) See \textit{State ex rel.} Davis v. Green, 116 So. 66 (Fla. 1928) (delegation of spending powers prohibited); Stewart v. Daytona & New Smyrna Inlet Dist., 114 So. 545 (Fla. 1927) (delegation of taxing powers prohibited); Davis v. Watson, 318 So. 2d 169 (Fla. 4th Dist. Ct. App. 1975), \textit{cert. denied}, 330 So. 2d 16 (Fla. 1976) (delegation of power to waive sovereign immunity prohibited).
or to obtain other appropriate relief. These suits take a variety of forms, including requests for declaratory or injunctive relief, suits to review agency action, and damages claims based on breach of contract, tort or taking of property. Rarely do they allege estoppel directly as a cause of action. This is merely prudent pleading because estoppel is traditionally a defense rather than a cause of action. Nevertheless, estoppel is the heart of these claims. The courts have adopted the doctrine of estoppel as the rationale for decisions reinstating the erroneous governmental action, or otherwise granting the claimant relief. Thus, the courts use estoppel as a vehicle for attaining a just result in individual cases without disturbing the constitutionally based legislative powers.

The doctrine of equitable estoppel has been described as an indispensable tool of justice. Estoppel was initially an equitable doctrine used to prevent injustice arising from a party's erroneous representation of fact. The doctrine applied to one who by word or conduct willfully caused another to believe in the existence of a certain state of affairs, and thereby induced the other to act on this belief or to alter his position in a manner injurious to himself. The party misrepresenting the facts was judicially precluded from asserting an alternative state of facts. The doctrine of estoppel has proved to be so flexible and useful that its application has been expanded to cover other situations, e.g., negligent as well as willful misrepresentations and misrepresentations of law.

The doctrine of estoppel does not conflict with the constitutionally ordered scheme of legislative powers, but its application may undermine those powers. If administrative officers can, by their statements or conduct, render state taxing and spending policies unenforceable, then legislative powers exist to an extent within the executive branch. Neither the constitution nor the statutory provisions in question authorize the delegation of these powers. Ultimately, the courts must reconcile the use of estoppel jurisprudence

18. Kerivan v. Fogal, 22 So. 2d 584 (Fla. 1945). But see Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, 434 F.2d 871 (5th Cir. 1970) (recognizing estoppel as a cause of action).


with, or balance it against, the integrity of the legislature’s sovereign powers.

Nowhere is this conflict more frequent and troublesome than in the area of taxation and spending. Respectable arguments exist on both sides of the issue. One view of estoppel would require that the doctrine routinely apply to the government in the same manner that it applies to private parties. This approach would seem to satisfy the requirements of elementary justice, first by relieving the innocent party from his loss and second by placing the burden of loss on the party at fault. Comparison of the relative harm to the parties is a major consideration in favor of this approach. The government ordinarily suffers only a small relative detriment if held estopped, in comparison with the loss of the party seeking relief. Finally, one may argue that the application of estoppel jurisprudence to the government should have various salutary social effects, such as discouraging irresponsible or careless statements or actions by public officials, promoting public confidence in the reliability of government action, and perhaps even rendering public contracts more attractive to private enterprise.

Another view of estoppel would routinely deny estoppel claims in taxation and spending cases because the cumulative effect of estopping the government might jeopardize the state’s fiscal and legal integrity. The taxing and spending powers are the foundation of all other legislative powers. Every substantive legislative power or function requires the expenditure of public funds. If the taxing and spending powers become dispersed among a multitude of executive officers, administrative tribunals, and appointed arbitrators, then no single authority would control both income and spending in each fiscal period. The public budget could become ungovernable. Equally troublesome, estoppel decisions would become the vehicle for changing the constitutionally ordered structure of government through judicial redistribution of the constitutional powers of the political branches. The express constitutional reservation of certain powers to the legislative branch, so the argument goes, is the supreme law, and it binds the courts just as it does other public officials. Accordingly, even minute changes in the distribution of sovereign powers must be accomplished by constitutional amendment rather than by judicial decree.

23. See Mulkey v. Purdy, 234 So. 2d 108 (Fla. 1970); City of Dunedin v. Bense, 90 So. 2d 300 (Fla. 1956).
Because of the sharp policy and philosophical conflicts surrounding these issues, it is unlikely that either of these extreme views will prevail to the exclusion of the other, although at times one view or the other may predominate. This article reviews the history and current status of estoppel jurisprudence in Florida as a limitation on the government's taxing and spending powers. This discussion of the spending power is divided into categories dealing with contractual spending and government benefit payments. As even a most superficial review of the cases in this area will demonstrate, the decisions are turbulent, inconsistent, and most certainly unpredictable.

II. BACKGROUND

The use of estoppel as a limitation on governmental powers is a comparatively recent development. Some commentators trace the government's historical immunity from estoppel to the ancient doctrine of sovereign immunity.24 Equally plausible is the view that in the early decades of this century, the dominant trends in American jurisprudence tended to protect government against estoppel claims. The progressive or pragmatic school of jurisprudence then in favor accorded legislative expressions of policy and purpose a more sacrosanct position in the legal hierarchy of values than does modern "activist" jurisprudence. The courts championed the legislature's freedom to experiment and change in response to the public will and were reluctant to interfere with legislation in the name of natural justice, property rights, or other abstract concepts.25 Consistent with this spirit, the courts were probably not


receptive to claims which requested relief based upon the misstatements or erroneous conduct of administrative officials when those claims required the abrogation of legislative policies. In any event, early Florida cases involving estoppel of government are rare. These cases are usually limited to the particular issues of franchising, municipal jurisdiction, and bond validation. Estoppel as a general limitation on governmental activities did not exist.

The Florida Supreme Court first recognized estoppel as a general limitation in 1950 in *Daniell v. Sherrill*. There the state sought to quiet title against private owners who claimed title under tax deeds erroneously issued nearly eighty years earlier. The court held that the private owners could defend their title on both legal and equitable estoppel. As support for its holding, the court quoted a federal decision that stated: "The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals."

In the same year the Florida Supreme Court held in *Texas Co. v. Town of Miami Springs*, that a municipality issuing building permits may be estopped in the same manner as a private individual. The court enjoined the town from enforcing an ordinance which repudiated building permits that had already been issued. This case established precedent for numerous decisions applying estoppel to government zoning and environmental land use regulation.

case, however, Justice Holmes rejected the government's claim that it had no authority for its previous actions, calling the government's argument a "repudiation of responsibility." International Paper Co. v. United States, 282 U.S. 399, 406 (1931).

26. See State ex rel. Landis v. Sovereign Camp, 180 So. 33 (Fla. 1938); State ex rel. Buford v. Pinellas County Power Co., 100 So. 504 (Fla. 1924). See also City of Winter Haven v. State ex rel. Landis, 170 So. 100 (Fla. 1936), and authorities cited therein.

27. 48 So. 2d 736 (Fla. 1950).

28. Id. at 740. See Trustees of the Internal Improvement Fund v. Lobeal, 127 So. 2d 98, 102 (Fla. 1961) (distinguishing between legal and equitable estoppel).

29. Id. at 739 (quoting United States v. Stinson, 125 F. 907, 910 (7th Cir. 1903), aff'd, 197 U.S. 200 (1905)).

30. 44 So. 2d 808, 809 (Fla. 1950).

31. Id.

32. See, e.g., Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976); Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. 2d Dist. Ct. App. 1975); Board of County Comm'rs v. Lutz, 314 So. 2d 815 (Fla. 3d Dist. Ct. App. 1975). There is a parallel line of authority denying estoppel in zoning cases where the government's initial representations or actions were wholly without legal authority. See Willumsen v. Horton, 307 So. 2d 833 (Fla. 2d Dist. Ct. App.), cert. denied, 315 So. 2d 473 (Fla. 1975); Dade County v. Bengis Assocs., Inc., 257
In 1954 the supreme court extended the estoppel rationale beyond the realm of equity and used it to justify an award of monetary damages in *Florida Livestock Board v. Gladden*. The complainant was a livestock owner who claimed damages for the loss of hogs destroyed by the State Livestock Board. The Board relied on a statute prescribing livestock sanitation requirements, creating penalties for noncompliance, and providing an effective date. The court found that reliance on the statute was misplaced since the statute authorized and required implementing rules to become effective. Although the Board had adopted the necessary implementing rules, those rules were not in effect until after the statute went into effect and the hogs were destroyed. The court held that the Board was estopped and bound by the effective date of its rules and could not apply the rules retroactively. Therefore, the court upheld the complainant's compensation award. The *Gladden* court could have reached the same result based on unlawful taking rather than estoppel. The case shows, however, that the concept of estoppel is adaptable to a variety of situations requiring either legal or equitable relief.

In 1956 the supreme court decided another landmark estoppel case, *Trustees of Internal Improvement Fund v. Claughton*. The case presented the question of whether, through the operation of estoppel, the state could be divested of title to sovereignty land held in trust for the public use. The Trustees had deeded a five-acre tract, consisting of an island and submerged lands in Biscayne Bay, to a private owner in 1916. The legislature then by special act granted the surrounding submerged lands to the City of Miami for

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33. 76 So. 2d 291 (Fla. 1954).
34. Id. at 292.
35. Id.
36. Id. at 293.
37. 86 So. 2d 775 (Fla. 1956).
38. The special trusteeship status of sovereignty lands (lands under navigable waters) was established in *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893), and repeatedly reaffirmed thereafter. See, e.g., *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *State ex rel. Town of Crescent City v. Holland*, 10 So. 2d 577 (Fla. 1942); *Martin v. Busch*, 112 So. 274 (Fla. 1927); *Broward v. Mabry*, 50 So. 826 (Fla. 1909); *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908). These cases make it clear that the state's trusteeship over sovereignty lands is itself a sovereign governmental function.
use "for municipal purposes only." With the encouragement and permission of the United States government, the city requested the grantee of the original five-acre tract to bulkhead and deposit spoil in an additional 15.7 acres of submerged land surrounding the original tract to assist a city dredging operation. The grantee complied with the city's request and as a result created an island of 20.7 acres.

The grantee and his successors bulkheaded and improved the entire island and paid property taxes on it for some twenty-five years. The successor owners sued the Trustees in 1947 to quiet title to the whole island. The Trustees claimed title based upon the sovereignty status of the land and upon the statutory grant to the City of Miami "for municipal purposes only." The court held the Trustees estopped to assert these defenses and commented:

While the doctrine [of estoppel] is not applied against the State or its subdivision as freely as against an individual, there is no doubt that it may be invoked even against the exercise of governmental powers where it is necessary to prevent manifest injustice and wrongs to private individuals; provided that the restraint placed upon such governmental body to accomplish such purpose does not interfere with the exercise of governmental power.

The decision establishes that estoppel may be invoked as a check against any governmental action, regardless of whether the action is considered governmental or proprietary. Although Claughton did not have an immediate impact on taxation or spending law, it has become the direct ancestor of many decisions holding the state estopped by its deeds, its meander lines, or its administrative inaction to assert public title to lands, including sovereignty lands held in trust for the public. It also is midwife to estoppel decisions in

39. 86 So. 2d at 779 (citing ch. 8305, 1919 Fla. Laws 1018).
40. 86 So. 2d at 781.
41. Id. at 783.
42. Id. at 789-90.
43. The governmental-proprietary distinction was significant in determining municipal immunity from tort liability at the time Claughton was decided. See, e.g., Daly v. Stokell, 63 So. 2d 644 (Fla. 1953); City of Miami v. Oates, 10 So. 2d 721 (Fla. 1942). In the year after Claughton, the supreme court abolished the governmental-proprietary distinction in tort liability. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). The history of governmental tort immunity and the present status of the law, limiting immunity to discretionary planning, policymaking or judgmental functions, are reflected in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).
44. See Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1977); State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976); Trustees of the Internal Improvement Fund v. Wetstone, 222 So. 2d 10 (Fla. 1969); Trustees of the Internal Improvement Fund v. Lobean, 127
other areas of Florida law, including decisions involving the power of the purse.

III. TAXATION

Florida taxpayers' efforts to obtain relief from taxation based upon estoppel of the taxing authorities were initially unsuccessful. The most prominent case on this subject was *North American Co. v. Green*, in which the supreme court curtly dismissed the taxpayer's argument in the following passage:

> We have not overlooked the contention of the appellant that the appellee Green is estopped to collect the subject tax because of his earlier administrative decision to rely on an opinion of the Attorney General to the effect that the tax was not collectible. The instances are rare indeed when the doctrine of equitable estoppel can effectively be applied against state action. It will be invoked only under very exceptional circumstances.

Although the court left a loophole for the application of estoppel in "very exceptional circumstances," it made no effort to define what circumstances would qualify.

The first cases in which taxpayers successfully asserted estoppel claims were *Coppock v. Blount* and *City of Naples v. Conboy*. These were cases in which the local tax assessors had improperly granted certain property favorable tax status over a period of years. The taxpayers objected when the tax assessors sought to correct the error by reinstating the property to the tax roll at full value and by back assessing the property for taxes which should have been due for prior years. In *Coppock* the tax assessor had

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So. 2d 98 (Fla. 1961). *But see* Bryant v. Peppe, 238 So. 2d 836 (Fla. 1970). These cases are analyzed in Comment, The Public Trust Doctrine and Ownership of Florida's Navigable Lakes, 29 U. FLA. L. REV. 730 (1977). The author there concludes that the state's trusteeship over sovereignty lands has been eroded by state agencies' negligent administration, legislative policies making such lands available for development, and judicial application of the doctrine of estoppel.

45. 120 So. 2d 603 (Fla. 1960). This case was not, however, the first case to deal with this subject. The courts had previously rejected taxpayers' estoppel arguments in Gay v. Inter-County Tel. & Tel. Co., 60 So. 2d 22 (Fla. 1952), and City of Oldsmar v. Monnier, 56 So. 2d 527 (Fla. 1952). The author has not overlooked Lee v. Lang, 192 So. 490 (Fla. 1940). There the legislature itself, and not an administrative official, made the representations on which the taxpayer relied. Legislative enactments are self-sufficient expressions of public policy, upon which the public may, and must, rely.

46. 120 So. 2d at 610.

47. 145 So. 2d 279 (Fla. 3d Dist. Ct. App. 1962).

48. 182 So. 2d 412 (Fla. 1965).
erroneously granted an exemption for educational use because he misunderstood the requirement that real property had to be both owned and operated by an educational institution to qualify for the exemption. In City of Naples the city had deliberately agreed to undervalue certain property, consisting of mangrove swamp and overflowed lands, in consideration of the owners' draining, filling and subdividing the property for future development. The courts in both cases held that the grant of favorable tax treatment was unauthorized and therefore ineffective for the present tax year in question. The courts also held, however, that back assessment for taxes due in prior years was barred by equitable estoppel.

In the years following Coppock and City of Naples, taxpayers successfully asserted estoppel claims on a number of collateral issues involving the enforcement of taxes. Taxpayers did not again successfully use estoppel claims as a defense to the incidence of tax, however, until the decisions in George W. Davis & Sons, Inc. v. Askew and Department of Revenue v. Anderson. These two cases reflect the conclusion of a fourteen-year struggle between the

49. 145 So. 2d at 281.
50. 182 So. 2d at 414-15.
51. 145 So. 2d at 281-82; 182 So. 2d at 415-16.
52. Back assessment was specifically authorized by statute. See 145 So. 2d at 283 n.5. The Coppock court refused to permit assessment based on equitable principles alone. Id. at 283. The City of Naples court refused to permit assessment based on both equitable principles and on the 60-day statute of limitations in effect at that time. 182 So. 2d at 417-18. The court's reading of the statute of limitations is a strained one, however. The statute was intended to apply to taxpayer actions challenging back assessments and did not (until the court ruled) prevent the taxing authority from making corrective back assessments. Ch. 20722, § 1, 1943 Fla. Laws 867 (codified at Fla. Stat. § 193.092 (1979)). The better interpretation of the case is that equitable principles alone formed the rule of decision.
53. In Florida East Coast Ry. v. City of Miami, 186 So. 2d 533 (Fla. 3d Dist. Ct. App. 1966), the Third District Court of Appeal held the tax authorities estopped to recover interest for the portion of a disputed tax bill that had been timely paid. The city had held the taxpayer's initial check without cashing or presenting it for payment while the amount of the tax was being challenged and then sought to recover interest on the entire amount due. Id. at 534. In State ex rel. Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st Dist. Ct. App. 1974), the First District Court of Appeal held that the state could be estopped to assert the taxpayer's failure to exhaust administrative remedies as a defense to a tax refund suit. In Hardy, Hardy & Associates v. Department of Revenue, 308 So. 2d 187 (Fla. 1st Dist. Ct. App. 1975), the same court held the state estopped by its conduct to assert a statute of limitations as a defense to a refund suit.
54. 343 So. 2d 1329 (Fla. 1st Dist. Ct. App.), cert. denied, No. 51,551 (Fla. Nov. 18, 1977) (unpublished memorandum order). The Department of Revenue's unsuccessful petition for certiorari in the supreme court alleged that the district court of appeal's decision conflicted with Dominion Land & Title Co. v. Department of Revenue, 320 So. 2d 815 (Fla. 1975), North American Co. v. Green, 120 So. 2d 603 (Fla. 1960), and Austin v. Austin, 350 So. 2d 102 (Fla. 1st Dist. Ct. App. 1977), cert. denied, 357 So. 2d 184 (Fla. 1978).
55. 389 So. 2d 1034 (Fla. 1st Dist. Ct. App. 1980) (en banc).
state Department of Revenue (the Department) and the charter fishing boat industry over the incidence of an admissions tax. The admissions tax is an excise similar to a sales tax imposed on transactions admitting persons to places of amusement, sport, or recreation. Businesses which charge admissions act as tax collection agents ("dealers"), collecting the tax from their customers on each transaction and remitting the proceeds to the Department. The failure to collect taxes due renders the dealer personally liable for the tax. Thus, failure to collect the tax results in a shift of liability from the customer to the dealer. This feature was essential in the courts' resolution of the estoppel issues.

The charter fishing boat industry's long odyssey concerning the admissions tax began in 1966 in Straughn v. Kelly Boat Service, Inc. (Kelly I), when the Department made an assessment against Kelly Boat Service. The assessment included taxes imposed on the customer's initial admission, on the sale of food and beverages aboard ship, and on the rental of fishing equipment. The taxpayer sought relief on the grounds that the taxed transactions occurred on the open sea beyond the state's jurisdictional limits. The First District Court of Appeal agreed and held the entire assessment invalid. In doing so, the court overlooked the fact that the initial admission transaction took place at dockside in Florida.

The Department raised the issue again in Department of Revenue v. Pelican Ship Corp., when it assessed Pelican Ship, another charter boat business, for admissions tax only. The district court of appeal receded from its initial decision in Kelly I and upheld this assessment. In the meantime, prior to the resolution of Pelican Ship, the Department's representative affirmatively told Davis & Sons, a third charter boat business, that no tax would be enforced upon its operations. Apparently this representation, and

56. See Fla. Stat. §§ 212.02(16), 212.04 (1979). The charter boat industry has now prevailed in the legislature also, winning a statutory exemption from the admissions tax. See Ch. 80-213, 1980 Fla. Laws 679 (codified at Fla. Stat. § 212.02(16) (1980)).
59. Id.
60. Id. at 267.
61. 257 So. 2d 56 (Fla. 1st Dist. Ct. App.), cert. denied, 262 So. 2d 682 (Fla. 1972), cert. dismissed, 287 So. 2d 93 (Fla. 1974). See also, Department of Revenue v. Kelly Boat Serv., Inc. (Kelly II), 324 So. 2d 651 (Fla. 1st Dist. Ct. App. 1976), which authorized the Department to back assess the Kelly Boat Service for admissions taxes due during the period between Kelly I and Pelican Ship.
62. 257 So. 2d at 58.
63. Davis, 343 So. 2d at 1330.
the *Kelly I* decision, became common knowledge among the other charter boat businesses along the Gulf Coast. Davis & Sons relied on the Department’s representations, failed to collect taxes from its customers, and in fact lost all opportunity to do so.  

When the Department obtained the *Pelican Ship* decision holding charter boat admissions taxable, it sought to back assess Davis & Sons for the previously uncollected tax. The First District Court of Appeal held that the Department’s representations estopped it to recover the tax.  

The court, with one judge dissenting, ruled:

> While as a general rule, substantive tax liability may not be discharged by estoppel, here we do not have the usual tax situation in which an estoppel has been denied. This is not a tax which the taxing authority, through error or mistake in interpreting the law, failed to assess against a taxpayer and upon later discovering the error, seeks to now require the taxpayer to pay what he should have paid at the previous time. Here, the tax is one which the law requires the taxpayer to collect for the state. The taxpayer is, in a sense, collecting agent for the state. During the interim between the court’s final opinion in *Kelly I* and its opinion in *Pelican* reversing its decision in *Kelly I*, appellant had no authority to collect tax. As the trial court pointed out in its final judgment:

> “Had plaintiff continued to collect the tax, and had *Kelly* not been ‘distinguished’ by *Pelican*, plaintiff would have been collecting money which, under *Kelly*, did not belong to the state, and which plaintiff would have been legally and morally obligated to return to its customers upon demand.” There is no way that appellant can now reverse time and go back and collect this tax from its past patrons. Under these circumstances, we find that the trial court was correct in ruling that the state is estopped to now require that Davis pay these taxes from its own pocket.

On this reasoning, the court held the Department barred from collecting admissions tax accruing prior to the issuance of the mandate in *Pelican Ship*.

Several other charter boat businesses had indirect knowledge of the *Kelly I* decision and the Department’s representations. These

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64. *Id.*
65. *Id.* at 1332-33.
66. *Id.*
67. *Id.* at 1333.
businesses also sought relief from their admissions tax assessments for the interval between the *Kelly I* and *Pelican Ship* decisions. They prevailed in the trial courts based upon a theory of estoppel.

*Department of Revenue v. Hobbs* 68 was the first such case to be appealed. The First District Court of Appeal reversed, holding estoppel was not a proper grounds for relief. 69 This decision reaches a satisfactory result, but suffers from technical infirmities in that it announces not one but three rules of decision. Initially, the court held that the taxpayer's pleadings did not properly raise the issue of estoppel and that the circuit court erred in granting relief on that ground. 70 This observation was not the rule of decision because the court thereafter turned to the merits of the estoppel issue and held that "[t]he general rule is that administrative officers are not estopped through mistaken statements of the law." 71 This pronouncement is not the rule of decision either, because it would require overruling *Davis* in which the state was estopped by a mistaken statement of the law. Rather than overruling *Davis*, the *Hobbs* court distinguished it in the following passage:

Unlike the situation in *Davis*, where direct representations were made to the taxpayer that the Department would not, for the time being, attempt to enforce collection of the tax upon plaintiff’s operations, and Davis’ reliance to his detriment caused by the representations, 4 no such representations were made by DOR to any of the appellees that it would not collect the tax. . . . Strangers to transactions from which an estoppel arises cannot take advantage of the estoppel . . . .

4 To justify a claim of estoppel against the state there must be (1) a representation by the party estopped to the party claiming estoppel as to some material fact, (2) a reliance upon the representation by the party claiming the estoppel and (3) a change in such party’s position, caused by his reliance upon the representation to his detriment. 72

This is the true rule of decision in *Hobbs*: the party claiming estoppel must be in privity with the party estopped or otherwise be the contemplated object of the statements or actions forming the basis

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68. 368 So. 2d 367 (Fla. 1st Dist. Ct. App.), appeal dismissed, 378 So. 2d 345 (Fla. 1979).
69. 368 So. 2d at 369.
70. Id. at 368-69.
71. Id. at 369.
72. Id. (citation omitted).
for estoppel.\textsuperscript{73}

A similar case, \textit{Department of Revenue v. Anderson},\textsuperscript{74} was also appealed to the First District Court of Appeal, and that court, sitting en banc, effectively overruled \textit{Hobbs}. The facts in \textit{Anderson} are indistinguishable from those in \textit{Hobbs}. Specifically, the charter boat businesses were not in privity with the Department, and had received no direct representations that the tax would not be enforced. In fact, one plaintiff had been specifically advised to continue to collect the tax.\textsuperscript{75} These businesses nevertheless alleged the Department was estopped to enforce the tax, based on the common understanding of the Department's position.\textsuperscript{76} The district court of appeal majority upheld this claim. The court limited the \textit{Hobbs} decision to its narrowest and least important grounds, \textit{i.e.}, that the pleadings there failed to raise the estoppel issue properly, and ruled that the \textit{Anderson} taxpayers had correctly alleged estoppel.\textsuperscript{77} After stating that the trial court had properly applied \textit{Davis} to bar collection of the tax, the court attempted to explain \textit{Davis}, not in terms of estoppel, but in terms of "property or contract rights" vested under the initial erroneous \textit{Kelly I} decision.\textsuperscript{78} The taxpayers had acquired, by virtue of their reliance on this decision and their inability to recover the tax from their customers, an immunity from the tax which extended until the \textit{Pelican Ship} mandate issued. The court further held that \textit{Pelican Ship} must be construed as operating prospectively only.\textsuperscript{79} Thus, while reaffirming

\textsuperscript{73} This rule leaves two major questions unanswered. The elements of estoppel defined here are indistinguishable from the elements required for estoppel of a private party. \textit{See} note 20 and accompanying text \textit{supra}. These elements are therefore not "exceptional circumstances," but ordinary circumstances where estoppel is applied. \textit{See} City of Coral Springs v. Broward County, 387 So. 2d 389, 390 (Fla. 4th Dist. Ct. App. 1980) (citing the \textit{Hobbs} rule to support an estoppel decision). What then are the "exceptional circumstances" necessary to estop the government? \textit{See}, \textit{e.g.}, North American Co. v. Green, 120 So. 2d 603 (Fla. 1960), First Nat'l Bank v. Department of Revenue, 364 So. 2d 38 (Fla. 1st Dist. Ct. App. 1978), \textit{appeal dismissed}, 368 So. 2d 1368 (Fla. 1979), (all holding that "exceptional circumstances" are required), and George W. Davis & Sons v. Askew, 343 So. 2d 1329 (Fla. 1st Dist. Ct. App.), \textit{cert. denied}, No. 51,561 (Fla. Nov. 18, 1977) (unpublished memorandum order).

Second, the rule does not square with the general observation in the same decision that "administrative officers are not estopped through mistaken statements of the law." 368 So. 2d at 369. Presumably, if these elements are present, then administrative officers \textit{can} estop the state by mistaken statements of the law.

\textsuperscript{74} 389 So. 2d 1034 (Fla. 1st Dist. Ct. App. 1980).
\textsuperscript{75} \textit{Id.} at 1036.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} at 1037.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 1038.
Davis, the court’s decision was based both on vested rights arising from Kelly I and on estoppel arising from administrative representations. The court’s conclusion does not disclose which factor predominated in the decision:

We conclude, after a careful examination of Kelly I, Pelican, and succeeding cases, that a highly unique set of circumstances and precedents has developed during this prolonged admissions tax controversy. . . . The existence of these diverse interpretations and the futility of efforts, even on the part of the trial judges, to apply them in some rational manner furnishes ample reason, in our opinion, to uphold the trial judge’s finding of “exceptional circumstances” upon which to base his estoppel ruling. Under the highly unusual and complex circumstances presented by this controversy, we have determined to leave undisturbed the ruling of the trial judge, who found the facts sufficiently compelling to apply the equitable doctrine of estoppel to enjoin collection of admissions taxes from appellees accruing prior to February 6, 1972, the date of our Pelican mandate.80

This final passage may reflect the majority’s inability to agree upon a clear rule of decision, based on either estoppel alone or vested rights alone. The use of the undefined element “exceptional circumstances” and the reliance on the trial court’s determination of that element suggest that the court is keeping its options open. Judge Ervin, who authored the now emasculated Hobbs decision, dissenting vigorously in Anderson joined by two other judges.81

There are several reasons why Davis and Anderson should not be interpreted as a blanket authorization for estoppel whenever the tax authorities have erroneously applied the tax laws in the taxpayer’s favor. First, the two cases apply only to the collection of excise taxes (such as admissions tax) in which failure to collect the tax at the proper moment shifts both the economic burden and the legal liability to a party not primarily liable. The First District Court of Appeal pointed out this feature in Davis as an “exceptional circumstance” justifying estoppel of the state.82 Moreover, the court has reinforced the importance of this feature by holding the state not estopped to collect tax in two cases where the shift in

80. Id. (footnotes omitted).
81. Id.
82. 343 So. 2d at 1332-33. One may question whether this circumstance is really “exceptional.” The essence of estoppel is a change in position resulting in an injury which could otherwise have been avoided. See note 20 and accompanying text supra.
liability was not sufficiently shown.

In *First National Bank v. Department of Revenue*, the court ruled that the Department was not estopped to collect intangible personal property taxes on recorded mortgages held by the taxpayer bank. The bank had been led to believe that no tax was due by the Department's own administrative rules, by advisory opinions of the Attorney General, and by the failure of the court clerk to demand the tax. Because the bank was primarily liable for the tax anyway, the tax authorities' erroneous acts and omissions did not cause a shift in primary liability. The court therefore ruled that the taxpayer had not presented adequate proof of reliance, i.e., that it would have required the mortgagor to assume the tax, if it had been properly informed. Likewise, in *Realty Management Corp. v. Kemp*, the court ruled the state was not estopped to collect unemployment compensation tax where the taxpayer's reliance on erroneous representations was only speculative.

A second reason why *Davis* and *Anderson* should be conservatively applied is that the Florida Supreme Court has yet to review the issue. The supreme court has, however, denied taxpayers' estoppel claims in two cases which involved colorable elements of reliance. In *Dominion Land & Title Corp. v. Department of Reve-

84. 364 So. 2d at 41.
85. *Id.* The court also observed that:

> It is only in very exceptional circumstances that the rule of estoppel may be imputed to the state in taxation matters. . . . For example, a rule or regulation of a state tax commission purporting to exempt a taxpayer from the payment of his tax, where no authority to do so was granted to it by the legislature, cannot operate as an estoppel against the state to collect such tax in the case of transactions which have closed so that the seller cannot collect the tax from the purchaser.

*Id.* (citation omitted). The court further stated that "administrative officials cannot estop the state through mistaken statements of the law." *Id.* at 42 (citing Austin v. Austin, 350 So. 2d 102, 105 (Fla. 1st Dist. Ct. App. 1977)). This statement is not the rule of decision, however, for it would have required overruling the *Davis* decision. See notes 71 and 72 and accompanying text *supra*.

The court's observation that the taxpayer bank presented insufficient proof that it could have avoided the tax, had it known the tax applied, by passing the tax on to the mortgagor is difficult to reconcile with the same court's observations in *Florida Bar v. Lewis*, 358 So. 2d 897 (Fla. 1st Dist. Ct. App. 1978), *aff'd*, 372 So. 2d 1121 (Fla. 1979). There the district court of appeal took judicial notice that creditors pass documentary stamp taxes levied on promissory notes on to the debtor. 358 So. 2d at 899. The court apparently determined in *First Nat'l Bank* that creditors treat intangible property taxes on promissory notes differently from documentary stamp taxes.

86. 380 So. 2d 1114, 1117 (Fla. 1st Dist. Ct. App. 1980).
the court held a taxpayer liable for documentary stamp taxes and a 100% penalty imposed for failure to affix the stamps to recorded deeds. The taxpayer’s assertion that the clerk of court had failed to inform it that the tax was due at recordation was held insufficient to support a claim of estoppel. In *Lykes Bros. v. City of Plant City,* the court held the city was not estopped to tax property leased to a private industry in the city’s industrial park, notwithstanding a covenant in the lease agreement that the city would exonerate the leasehold property from taxation. The industry claimed that the covenant was an inducement to attract new industry into the city and that it had literally changed its position in reliance thereon. The court upheld the city’s claim that the lease covenant was ultra vires and void and enforced the tax. In each of these cases the taxpayer could reasonably argue that it would have avoided liability if it had been properly informed. There is considerable uncertainty as to how the Florida Supreme Court would decide a case like *Davis* or *Anderson.*

Even if it were possible to synthesize all the various appellate decisions into a single set of rules, that synthesis would probably not be used. The courts are likely to continue to decide cases according to conscience without particular regard for consistency. For the present the following rules appear to be established: (1) the taxpayer may prevail on an estoppel claim if he affirmatively pleads this claim and establishes that reliance upon the tax authorities’ erroneous statements or actions resulted in tax liability which otherwise would have been borne by others, from whom recovery has become impossible; and (2) the taxpayer need not show that he is in privity with the tax authorities or is the specific recipient of their erroneous representations, so long as their representations are sufficiently notorious and commonly accepted. Even these rules remain open to doubt, however, if countervailing “exceptional circumstances” should appear.

**IV. Contractual Spending**

As a practical matter, legislative bodies cannot negotiate, bid, or approve government contracts, except in the most superficial man-

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87. 320 So. 2d 815 (Fla. 1975).
88. Id. at 818-19.
89. 354 So. 2d 878 (Fla. 1978).
90. Id. at 879.
91. Id. at 880.
This authority must be delegated to administrative officers or agencies. The delegation ordinarily includes a waiver of sovereign immunity in contracts and a grant of authority to the officer or agency involved to enter contracts for specified governmental purposes. The legislative body must also appropriate the funds necessary to carry out these purposes. The administrative officer or agency has authority to commit funds only within the amounts granted in the current appropriation and must return to the legis-

92. A thorough discussion of the doctrine of sovereign immunity in contract is beyond the scope of this article. Other scholars have recently analyzed, criticized, and defended the doctrine in connection with debate over the 1978 proposed constitutional amendment abolishing sovereign immunity. See Little, *In Defense of the 1968 Florida Constitution's Statement on Sovereign Immunity*, 52 Fla. B.J. 660 (1978); Ostrow & Lowe, *Sovereign Immunity*, 33 U. Miami L. Rev. 1297 (1979); Spence, *Abolition of Sovereign Immunity in Florida: An Idea Whose Time Has Come*, 52 Fla. B.J. 655 (1978). A brief review of Florida decisions on sovereign immunity reveals that its history has run a course parallel to that of estoppel jurisprudence. Specifically, the government's previously well-established immunity began to erode in the 1950's, and after a period of some uncertainty, was completely demolished in the late 1970's. The legislature contributed substantially to these developments, however, which was not the case in estoppel.

Sovereign immunity in contract appeared to be an established defense in cases like *State ex rel. Florida Dry Cleaning & Laundry Bd. v. Atkinson*, 188 So. 834 (Fla. 1938) and *Hampton v. State Bd. of Educ.*, 105 So. 323 (Fla. 1925). It later apparently fell into disfavor with the courts. For example, in *Gay v. Southern Builders, Inc.*, 66 So. 2d 499 (Fla. 1953), the court upheld a contractor's claim for payment and damages, suggesting that the comptroller's sovereign immunity defense was inconsistent with "[d]ecency and fair play." *Id.* at 501.


The *Graham Contracting* decision is a dramatic exercise in raw judicial power. The First District Court of Appeal demolished sovereign immunity in contract, notwithstanding the following arguments by the state: (1) the text and title of the Administrative Procedure Act say absolutely nothing about contracts or sovereign immunity; (2) the general rule of statutory construction is that waiver of sovereign immunity must be clear and unequivocal to be effective, *see Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968); and (3) the same court had previously ruled that the predecessor Administrative Procedure Act did not waive sovereign immunity, in *State Road Dep't v. Cone Bros. Contracting Co.*, 207 So. 2d 489 (Fla. 1st Dist. Ct. App. 1968), 363 So. 2d at 814. The court either did not consider federal authority or declined to follow it. Federal sovereign immunity survived the enactment of the federal Administrative Procedure Act. *See Annot.*, 30 A.L.R. Fed. 714 (1976).

This decision surprised many state government attorneys who thought the Administrative Procedure Act provided only procedural remedies, and did not alter substantive law. The decision also fathered many procedural and jurisdictional issues as to how contract suits should be litigated in the administrative forum. These issues remain unresolved. In any event, it is no coincidence that sovereign immunity in contract should disappear at the same time as estoppel jurisprudence against government is developing as an accepted legal theory.
lative body to request new funds in each fiscal period. This system assures that the legislative body can periodically review and control contractual spending, based on the funds available and its own spending priorities. Private contractors, on the other hand, expect and require a firm "commitment" from the contracting officer that the government will honor the bargain. There is a natural tension between the government's requirement for periodic review and the contractor's requirement for a commitment.\(^9\)

One variety of estoppel problem concerns whether the administrative officer has authority (or a sufficient appropriation) to contract. For example, when the contracting officer expresses a belief that the governing body will authorize the contract (appropriate funds) or when there has been a course of dealing in which his contracts have always been ratified, he may acquire apparent authority which exceeds his legal authority to contract.\(^9\) A private contractor may contend that the government is estopped to deny the officer's authority or repudiate the contract. The traditional rule is that the governing body may repudiate any contract which remains subject to its approval or appropriation, regardless of the conduct or representations of the contracting officer. In 1939 the Florida Supreme Court stated this rule in Ramsey v. City of Kissimmee.\(^9\) The city mayor, who was also a member of the city commission, executed an amendment to a contract for engineering services. The full city commission did not ratify the amendment, as required by the requirement of the city charter.\(^9\) The engineer, who had already performed his obligations under the amended

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93. A multi-year government contract is not invalid per se. If the contract extends beyond the initial year, as in the case of construction or lease agreements, it will be understood that the government anticipates future budget revenues to pay the accounts due in future years. See Hathaway v. Munroe, 119 So. 149 (Fla. 1929). A state agency may not incur contractual liability, however, in any one year in excess of its appropriation for that year. FLA. CONST. art. VII, § 1(c); FLA. STAT. § 216.311 (1979).

94. The term "apparent authority" is commonly used in this context, although the common usage may not be correct. "Apparent authority [is] such authority as the principal wrongfully permits the agent to assume . . . " or which the principal invites third parties to believe has been granted. An agent's actions within his apparent authority bind the principal by operation of estoppel. Stiles v. Gordon Land Co., 44 So. 2d 417, 421-22 (Fla. 1950).

Administrative contracting agents should not be deemed to have "apparent authority" in most cases, because the legislative body does not knowingly permit them to exercise such authority (outside the limit of the appropriation), nor does it invite third parties to assume the authority has been granted. See State v. O'Connell, 523 P.2d 872, 888-97 (Wash. 1974), for a thorough discussion of the terminological and policy problems concerning the authority of governmental agents to contract.

95. 190 So. 474 (Fla. 1939).

96. Id. at 476.
contract, brought suit for breach of that contract. The supreme court held that the amendment was unenforceable because the mayor lacked the authority to make the amendment binding on the city, and stated: "Persons contracting with a municipality must at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated." The court did allow that recovery might be had in quantum meruit for the value of services rendered.

Several recent appellate decisions maintain the traditional rule. In School Board v. Goodson, the First District Court of Appeal held that the failure of the school board, as governing body, to approve an employment contract between a teacher and school administrative officials rendered that contract unenforceable. The court stated that since the school board has exclusive authority regarding such contracts, school officials may only enter into contracts that are expressly approved by the board.

More recently, in United Faculty of Florida v. Board of Regents, the same court held that the legislature's failure to fund completely a collective bargaining agreement between the union and the Board of Regents rendered that agreement unenforceable to the extent it was not funded. The court reviewed the constitutional and statutory provisions which preserve the legislature's authority to approve or reject funding in collective bargaining agreements and ruled:

That the Legislature might not provide full funding for the collective bargaining agreement was a contingency well known to the parties before, during and after negotiations. The agreement was entered into with full knowledge and in contemplation of the Legislature's appropriative prerogatives vis-a-vis the negotiated product. The agreement embodied the contingency of under-

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97. Id. at 477. Accord, Town of Madison v. Newsome, 22 So. 270 (Fla. 1897). See generally Cone v. Wakulla County, 197 So. 536 (Fla. 1940); State ex rel. Kurz v. Lee, 163 So. 859 (Fla. 1935); State ex rel. Davis v. Green, 116 So. 66 (Fla. 1928); Camp v. McLin, 32 So. 927 (Fla. 1902), all describing limitations on executive authority to contract.

98. 190 So. at 478. See also Universal Constr. Co. v. City of Ft. Lauderdale, 68 So. 2d 366 (Fla. 1953); Knappen v. City of Hialeah, 45 So. 2d 179 (Fla. 1950); Webb v. Hillsborough County, 175 So. 874 (Fla. 1937); Jones v. Pinellas County, 88 So. 388 (Fla. 1921); Pinellas County v. Guarantee Abstract & Title Co., 184 So. 2d 670 (Fla. 2d Dist. Ct. App. 1966).


100. 335 So. 2d at 310-11.

101. Id. at 310.

funding just as surely as if it had been expressly recited therein.\textsuperscript{103}

The mere existence of the bargaining agreement did not affect the constitutional power of the legislature to make appropriations. The parties knew that the agreement would be administered within whatever legislative appropriation was actually made, regardless of the amount requested for full funding of the agreement.

Finally, in \textit{Town of Indian River Shores v. Coll},\textsuperscript{104} the Fourth District Court of Appeal followed the \textit{Ramsey} decision in holding that a contract between the town mayor and a public employee under a federal grant was ultra vires until approved by the town council.

Under these authorities, an aggrieved party cannot recover under a contract which remains subject to approval or funding by a superior governing body, no matter how reasonable his expectation that approval or funding would be granted. He does, however, have other avenues of recourse. If the government has already accepted the benefits of his performance, the contractor may recover under quantum meruit. This type of action was recognized in \textit{Ramsey} and has been upheld on several other occasions.\textsuperscript{105} This rule is well reasoned. Where the government has accepted the benefits of a private contractor's performance, undertaken in the reasonable expectation of payment, the equities in favor of the contractor are overwhelming. Moreover, the government's fiscal integrity is arguably preserved since it pays only for the value conferred upon it.\textsuperscript{106}

A more difficult case arises where the government accepts no tangible benefits, such as actual possession and use of materials or services, but merely has the materials or services \textit{available} for use. The courts are divided over the availability of quantum meruit relief in this situation.\textsuperscript{107} The better rule is that the contractor should have to show that the government actually took possession

\begin{thebibliography}{99}
\bibitem{103} Id. at 1078.
\bibitem{104} 378 So. 2d 53 (Fla. 4th Dist. Ct. App. 1980).
\bibitem{105} See Webb v. Hillsborough County, 175 So. 874 (Fla. 1937); Pinellas County v. Guarantee Abstract & Title Co., 184 So. 2d 670 (Fla. 2d Dist. Ct. App. 1966).
\bibitem{106} A party held liable under quantum meruit pays only for the value received. Universal Constr. Co. v. City of Ft. Lauderdale, 68 So. 2d 366 (Fla. 1953).
\bibitem{107} Compare Knappen v. City of Hialeah, 45 So. 2d 179 (Fla. 1950), and Jones v. Pinellas County, 88 So. 388 (Fla. 1921) with Webb v. Hillsborough County, 175 So. 874 (Fla. 1937); and Pinellas County v. Guarantee Abstract & Title Co., 184 So. 2d 670 (Fla. 2d Dist. Ct. App. 1966).
\end{thebibliography}
or made use of the materials or services furnished in order to recover in quantum meruit. This approach would positively confirm that the government intended or desired to obtain the materials or services furnished, and would limit the government's liability to the value of the goods or services actually possessed or used. If liability is limited to value conferred, the government's fiscal integrity remains intact.

A second avenue of recourse for the aggrieved contractor is an action for damages in the event the administrative contracting officer failed to use a reasonable effort to obtain the required approval or funding from the legislative body. This cause of action was recently recognized in Cartee v. Florida Department of Health and Rehabilitative Services. There, a developer had negotiated and signed a multi-year lease agreement with the Department and, in reliance on the validity of this lease agreement, obtained construction financing and commenced construction of a new office building in Tallahassee for the agency's occupancy. The lease was to commence in the next fiscal year and was expressly subject to funding by the legislature. The legislature not only refused to fund the lease but also reorganized and decentralized the Department. The developer was left with an empty building which it ultimately lost by foreclosure. The developer sued for breach of lease, acknowledging that although an appropriation was a necessary precondition to the lease, the Department had assured it that

108. 354 So. 2d 81 (Fla. 1st Dist. Ct. App.), cert. denied, 366 So. 2d 885 (Fla. 1978).

109. The details of the case merit discussion. The developer of a Tallahassee office park had leased some 318,000 square feet of space in the office park to the Florida Department of Health and Rehabilitative Services (HRS). In 1974 he signed an additional multi-year lease agreement with HRS in which the agency agreed to lease some 157,000 square feet in a new building to be constructed at the park. This new lease was to commence upon completion of the building which was expected in the next fiscal year (1975-76). Although the lease contained a standard form covenant that its obligations were subject to legislative funding, the developer believed he had sufficient assurances that HRS would obtain the required appropriation, based on his prior course of dealing and on informal discussions with HRS officials.

110. The 1975 legislative session began shortly after the developer obtained construction financing and began construction. The House of Representatives Appropriations Subcommittee which reviewed the HRS budget discovered the lease agreement and launched an investigation of the Department's leasing practices. The subcommittee concluded that HRS did not need additional space at the office park, and rejected the agency's budget request for additional funds to lease the building. Ch. 75-280, 1975 Fla. Laws 859 (the 1975 Appropriations Act). The 1975 legislature also enacted laws which reorganized and decentralized HRS and removed the adult corrections program. Chs. 75-48 and 75-49, 1975 Fla. Laws 85-127. HRS had neither the staff nor an appropriation with which to occupy the new building.

111. Housing Inv. Corp. v. Winewood Inv., No. 77-261 (Fla. Cir. Ct. Leon County, Mar. 21, 1977).
the new office space would be needed, yet had failed to request and actively pursue the appropriation. The developer concluded that this combination of events constituted a breach of the lease agreement.

The First District Court of Appeal held that these allegations stated a cause of action and reversed the trial court’s dismissal of the complaint. The court ruled that if the Department failed to seek the required funding, the developer could recover resulting damages. The court allowed that if the appropriation failed because of other factors, such as a shortage of revenue or legislatively-imposed reorganization, the Department could assert these matters in defense. In summary, the court ruled that an agency had an implied duty to pursue legislative approval and funding for its agreements relating to future fiscal years and that a private contractor could recover damages for breach of this duty.

112. 354 So. 2d at 82.
113. Id. at 83.
114. Id. This decision left many questions about how the developer might prove, or the agency might disprove, allegations that certain factors “caused” the appropriation to fail. No one individual is competent to testify conclusively on this subject, although influential budget officials and legislators can presumably state what factors were significant in their individual decisions.

Although the appropriations process begins with a formal agency budget request, it is not a straightforward or routine operation. Agency personnel, budget officials, lobbyists and legislators may engage in tactical maneuvers, “posturing,” compromises and rhetoric, which may or may not reflect their true wishes with respect to a particular budget item. Their efforts to obtain or defeat an appropriation are seldom recorded for posterity. Appropriations decisions therefore result from the interaction of various personalties, interests and events, without any clearly identifiable cause. Until Cartee, the courts wisely avoided any review of the motives of political actors in the process of policymaking. See, e.g., Schauer v. City of Miami Beach, 112 So. 2d 838 ( Fla. 1959); Crandon v. Hazlett, 26 So. 2d 638 (Fla. 1946). The Cartee decision opened a Pandora’s box of evidentiary problems on causation in the political arena.

Furthermore, the decision provided no guidance as to how damages could be measured for the failure to obtain an appropriation, or how the award would be enforced against an obstinate legislature. These questions were not directly presented to the district court of appeal in the briefs and argument, but they necessarily arose as a result of the decision. The court’s opinion denying rehearing suggests that these matters were not considered in the initial opinion, and would not be considered because they were belatedly raised. Cartee, 354 So. 2d at 83. One judge, concurring in the denial of the petition for rehearing, considered them insubstantial issues not affecting the original opinion. Id.

These questions remain unresolved. On remand, the Department filed an answer denying that it had failed to pursue the required appropriation. The Department also asserted, as defenses, that the developer had acted deceitfully in using the conditional lease to obtain financing, and that he had acted recklessly in commencing (and completing) construction without any commitment of funds by the legislature. Cartee v. Florida Dep’t of Health and Rehabilitative Servs. No. 78-1412, Answer and Amended Defenses dated March 27, 1980. The trial court held these defenses were legally sufficient against the developer’s motion to
A third avenue of recourse for the aggrieved contractor would be a suit for damages if the action needed for an appropriation is purely formal or ministerial. This unusual situation arose in *City of Homestead v. Raney Construction, Inc.* where, despite considerable controversy regarding the authorization procedure, the city council orally approved a contract in substance and notified the contractor. A subsequent city council sought to repudiate the contract on grounds that a procedurally proper appropriation was required. The Third District Court of Appeal sustained the contractor’s claim for damages.

A final avenue of recourse may be available in certain cases where a statute expressly authorizes administrative or arbitration proceedings in which aggrieved private parties may present claims. Several decisions have allowed such proceedings to go forward over the government’s objection that no appropriation existed to fund an award to the claimant. None of these cases reached the troublesome issue of whether statutes authorizing administrative or arbitration proceedings would be constitutional if such proceedings resulted in an award of compensation from the public treasury to a claimant without an appropriation.

The courts have not, in any of these decisions, sustained a direct challenge to legislative supremacy over fiscal matters. They have not sustained an unlimited delegation of the spending power.
nor sought to enforce a judgment by mandatory process against a governmental body which refuses to appropriate funds to pay it. Nevertheless, the courts have indicated some dissatisfaction with the policies which allow government officials to make contracts which bind only one side and they are receptive to doctrines such as estoppel or agency by which they can justify compensating an aggrieved private claimant. Courts appear willing to risk some erosion of the legislature's authority to review and control spending policies in each fiscal period in order to accommodate the private contractor's need for a "commitment."

A different type of estoppel problem arises when the contracting officer has undisputed authority to contract, but has failed to observe a procedure required by law such as competitive bidding. These procedures and conditions are usually prescribed by law to protect the treasury against unwise or corrupt contracting practices. They are usually held to be mandatory and nonwaivable. The private contractor may contend that the government cannot use its own failure to follow required procedures as a basis to repudiate the contract. Nevertheless, the courts have generally allowed the government to repudiate contracts in which the statutory competitive bidding requirements have not been met. They have so held even when the contracting officer is responsible for the failure to follow the bidding requirements, the private contractor has performed in good faith, and the government has accepted the benefits of the contract. This rule is apparently predicated upon the absence of authority to enter into the contract and its consequent illegality. In Robert G. Lassiter & Co. v. Taylor, the Florida Supreme Court upheld a taxpayer's demand to enjoin a city from making payment under a paving contract where the contract had

120. A legislative body's adamant refusal to pay a judgment would create a constitutional impasse. Public policy traditionally prohibits any judicial levy on public property. City of Coral Gables v. Hepkins, 144 So. 385 (Fla. 1932). The courts' contempt power might be sufficient to enforce the judgment, although presumably the courts would be reluctant to exercise this power.


122. Robert G. Lassiter & Co. v. Taylor, 128 So. 14 (Fla. 1930); Greenhut Constr. Co. v. Henry A. Knott, Inc, 247 So. 2d 517 (Fla. 1st Dist. Ct. App. 1971); Armco Drainage & Metal Prods., Inc. v. County of Pinellas, 137 So. 2d 234 (Fla. 2d Dist. Ct. App. 1962). But see Dade County v. Dobbs Houses, Inc., 283 So. 2d 886 (Fla. 3d Dist. Ct. App. 1973), in which the court held the county estopped to enforce competitive bidding requirements on a franchise which had been renewed and ratified repeatedly over a period of years.


124. 128 So. 14 (Fla. 1930).
been let in violation of the city charter's bidding requirements. The court explained:

The intent of the charter provision, requiring such contracts to be let or awarded to the lowest bidder for the work, is to secure the best improvement at the lowest possible cost to the taxpayer and to prevent fraud, favoritism, and extravagance in the expenditure of public funds.

The charter mandatorily required as a condition precedent to the making of the contract that it be let to the lowest responsible bidder. In cases where [the] contract amounts to more than $200, section 13, article 8, of the city charter is a limitation, so to speak, upon the general power of the municipality to make contracts for public improvements.

If the charter or the statute applicable requires certain steps to be taken before making a contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid, and ordinarily cannot be ratified, and usually there is no implied liability for the reasonable value of the property or services of which the municipality has had the benefit. The settled rule is "that persons contracting with a municipality to make improvements must, at their peril, inquire into the power of the municipality and its officers to make such contract."125

More recently, in *Greenhut Construction Co. v. Henry A. Knott, Inc.*,126 a nonresident contractor had submitted a competitive bid to construct state buildings prior to obtaining the statutorily required certification from the State Construction Industry Licensing Board. When the state declined to consider the bid, the nonresident contractor sued, alleging the state was estopped to enforce the certification requirement because a state contracting official had indicated that it was satisfactory to submit a bid without certification.127 Although some circumstances surrounding the official's statement suggested that it was unreliable, the court did not dispose of the case on that basis.128 Rather, the court ruled that the statement was unauthorized and concluded, "Under no circumstances may the state be estopped by the unauthorized acts or rep-

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125. *Id.* at 17 (citations omitted).
126. 247 So. 2d 517 (Fla. 1st Dist. Ct. App. 1971).
127. *Id.* at 523.
128. The contractor had notice from the bid instructions that certification was required. *Id.* at 521. Furthermore, the state official's erroneous statements were made in a "casual and offhand" manner. *Id.* at 524.
resentations of its officers." For similar reasons, the courts have held that government is not estopped to repudiate a contract which violates statutory prohibitions against self-dealing, even though the contractor has performed.

In 1979, the First District Court of Appeal rejected this general principle in *Killearn Properties, Inc. v. City of Tallahassee*. The city had entered an agreement to provide utility services to a suburban development beyond the city limits. The city later sought to repudiate the agreement on the grounds that, *inter alia*, it had been adopted in violation of the open meetings requirement of the Sunshine Law. The Sunshine Law, like competitive bidding requirements and self-dealing restrictions, is intended to assure that public business is carried out in an honest and open manner. It specifically provides that all actions taken in violation of the law are voidable. The court nevertheless held the city estopped to repudiate the agreement. The court lamented, "Unhappily, this case is but another example of the utter disregard with which a government views its sacred obligations to its people. . . . Basic morality, integrity and honesty appear to no longer have any meaning to governments and their agencies. . . . A more flagrant act of dishonor can hardly be imagined." Although there was no Sunshine Law violation, stated the court, if there had been such a violation, "the City would be estopped to itself assert it." The careful reader can find ways to distinguish *Killearn Properties, Inc.* from *Lassiter* and *Greenhut*, but factual distinctions do not seem to have weighed heavily in the court's opinion. The fact is that *Killearn Properties, Inc.* points the way to estoppel jurisprudence in this previously unexplored area.

**V. Government Benefit Payments**

The courts have had fewer occasions to consider estoppel claims with respect to government benefit payments. In several cases concerning pension rights, however, they have held the government

129. *Id.* (footnote omitted).
130. Fruchtl v. Foley, 84 So. 2d 906 (Fla. 1956); Hooten v. Lake County, 177 So. 2d 696 (Fla. 2d Dist. Ct. App. 1965).
131. 366 So. 2d 172 (Fla. 1st Dist. Ct. App.), *cert. denied*, 378 So. 2d 343 (Fla. 1979).
133. *See Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).
134. FLA. STAT. § 286.011(1) (1979) provides in part "no resolution, rule, or formal action shall be considered binding except as taken or made at such [public] meeting."
135. 366 So. 2d at 181 (citations omitted).
136. *Id.*
may not be estopped to enforce its own rules.

In Purdy v. Covert, the Second District Court of Appeal considered the claim of a former city policeman who was entitled to both worker's compensation and retirement benefits. The city had granted him a lump sum worker's compensation award in lieu of periodic payments. The city then reduced his monthly retirement benefit payment by an amount equal to the periodic worker's compensation payments to which he would have been entitled had there been no lump sum award. The court upheld the reduction over the policeman's estoppel claim, saying, "Public funds may not be prejudiced or impaired by waivers or agreements which ignore regulations adopted for the protection of the fund. Otherwise, a 'give-away' of public funds might result."

Likewise, in Austin v. Austin, the First District Court of Appeal rejected the death benefit claim of a deceased state employee's surviving spouse. The deceased employee had originally designated his first wife as beneficiary, and upon remarriage, had failed to change the designated beneficiary to his second wife. He allegedly relied on a pamphlet issued by the Division of Retirement stating that the surviving spouse would be considered the beneficiary. The court held that the Division was not estopped by its pamphlet, and upheld the award of death benefits to the designated beneficiary (the first wife). The court reiterated, "Administrative officers of the state cannot estop the state through mistaken statements of the law."

Finally, in Department of Administration v. Flowers, the First District Court of Appeal rejected the claim of a state employee who had apparently retired in reliance upon the Division of Retirement's estimation of his prospective retirement benefits. The Division then revised its computation of his retirement benefits to an amount below the original estimate. The court reluctantly held that the retiree's estoppel claim was defective for failure to prove "exceptional circumstances and some positive act on the part of a..."

137. 151 So. 2d 891 (Fla. 2d Dist. Ct. App.), appeal dismissed, 159 So. 2d 652 (Fla. 1963).
138. 151 So. 2d at 893.
139. Id.
140. 350 So. 2d 102 (Fla. 1st Dist. Ct. App. 1977), cert. denied, 357 So. 2d 184 (Fla. 1978).
141. 350 So. 2d at 104-05.
142. Id. at 105.
Although government benefit programs form a substantial part of the public budget, these programs will probably be subject to fewer estoppel claims than government contractual spending programs. One reason may be that benefits are offered on a take-it or leave-it basis; claimants have few opportunities to bargain or offer consideration to the government. Accordingly, claimants may have difficulty establishing that they acted to their detriment in reliance upon an expectancy of benefits. Furthermore, a claimant who alleges a substantial voluntary change in position to obtain more favorable benefits may lack the equitable appeal of a contractor who has conferred a benefit on the government. Nevertheless, it seems unlikely that the Purdy, Austin, and Flowers decisions have completely foreclosed the operation of estoppel jurisprudence in the area of government benefit payments. It remains a matter of time before the courts extend estoppel jurisprudence to this area as well.

VI. CONCLUSIONS

This article began with the premise that the Florida Constitution secures the state’s power of the public purse exclusively in the state legislature, and that local governing bodies exercise comparable powers in accordance with the constitution, statutes, and charters. These powers are limited only by restrictions of equal dignity in the applicable body of positive law. The courts have adopted estoppel jurisprudence as a vehicle to give this system some “play in its joints,” allowing them to reach a just result in individual cases without disturbing the basic structure. The courts have discovered that estoppel jurisprudence can be a powerful remedy for much of the government conduct which is constitutionally permitted but inequitable. There is a substantial temptation to apply it in every situation to accomplish justice and redress private injury. This temptation is particularly strong when a comparison of the relative harm to the parties shows that the government’s conduct has slight value to the government, but works a hardship upon the innocent private party.

144. Id. at 15.
145. The Florida Constitution is generally considered a limitation on the lawmaking power of the legislature, so that body may exercise whatever lawmaking power is not forbidden by organic law. City of Miami Beach v. Crandon, 35 So. 2d 285 (Fla. 1948). See also Shad v. DeWitt, 27 So. 2d 517 (Fla. 1946).
Nevertheless, if the courts do not apply this remedy sparingly, the cure will be worse than the disease. The use of estoppel jurisprudence against the government should not become so regular and extensive that it undermines the separation of powers, significantly impairs public taxing or spending policies, or creates fiscal uncertainty. An overdose of estoppel will create side effects which will inevitably frustrate the very purposes of justice which the remedy purports to serve.

Much of this article focuses on the uncertainty and inconsistency of estoppel jurisprudence in Florida. The extraordinary turnover among appellate judges during the last decade, and occasional poorly reasoned opinions have contributed to these problems. The judicial system is not entirely to blame, however. The modern expansion of government activity beyond its traditional and most fundamental functions invites and requires the development of new legal theories to redress instances of inequitable conduct while preserving essential public rights. Estoppel jurisprudence, however imperfect, is a reasonable attempt to satisfy this need. It is understandable that this developing legal theory should be applied uncertainly and inconsistently in its formative years.

Some improvement toward clarity and consistency in the application of the estoppel doctrine is nevertheless possible and desirable. As a modest beginning, the courts could consider the following suggestions:

(1) The frequently repeated rule that estoppel of the government requires "exceptional circumstances" should be given some definite meaning or be abandoned. It is embarrassing to see this rule repeated as an empty explanation for a decision.

(2) The courts should stop declaring that "administrative officials cannot estop the state by unauthorized statements of the law." Government lawyers (including this author) may, in appropriate cases, argue that this should be the law. At present the statement does not accurately reflect the law.

(3) The courts should consistently hold that estoppel of the


government requires a positive act or statement by a government official. This is a sound rule, and it should be required in all cases as an element of the claimant's prima facie case. If the government is to be estopped to enforce its public policies, the estoppel should rest on a positive act or statement, and not on a mere inadvertence, ignorance or silence. Such a positive act or statement provides a concrete evidentiary basis for holding the government at fault when constitutional or statutory policy is not fulfilled.

(4) Estoppel of the government should not be allowed if its application would significantly interfere with the distribution of sovereign powers or endanger the public welfare. The government undoubtedly has the incentive and the specialized knowledge to assert these offsetting factors. The courts should allow the government to plead and prove them as an affirmative defense or countervailing equity against a claim based on estoppel.

Some courts undoubtedly do consider, sub silentio, the extent to which use of the estoppel doctrine may interfere with sovereign powers or endanger public welfare. These factors have no precise weight in the balancing of equities, however, and some courts may not consider them at all. By making these factors explicit in their decisions the courts will more fairly and consistently define the situations where estoppel will lie. They will also authorize the presentation of evidence and argument concerning the ultimate political and economic effects of their decisions.

In the related area of sovereign immunity in tort, the Florida Supreme Court recently displayed an extraordinary sensitivity to

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150. This author is not the first to suggest that such matters be explicitly considered. See Trustees of Internal Improvement Fund v. Claufton, 86 So. 2d 775, 789-90 (Fla. 1956); Florida East Coast Ry. v. City of Miami, 186 So. 2d 533, 534 (Fla. 3d Dist. Ct. App. 1966). See also Note, Equitable Estoppel of the Government, 79 COLUM. L. REV. 551 (1979). There the author concludes that estoppel concerning government spending power interferes less with the distribution of sovereign powers than estoppel in disputes over title to government lands or criminal prosecutions. Id. at 566-67. This author would suggest that estoppel concerning government taxing and spending power may substantially interfere with state and local fiscal operations in view of the necessity for a balanced budget in each fiscal period. This is particularly true if strangers to the estoppel statement or action may invoke the protection of the estoppel doctrine, as in Department of Revenue v. Anderson, 389 So. 2d 1034 (Fla. 1st Dist. Ct. App. 1980).
the need for preserving sovereign powers in the political branches of government. In deciding Commercial Carrier Corp. v. Indian River County, the court construed statutory provisions which permit actions in tort against the state and its agencies or subdivisions under circumstances in which a private person "would be liable to the claimant in accordance with the general laws of this state. . . ." The court discussed the difficulties previously experienced in determining what government functions, if any, should be immune from tort liability. It concluded that the statute waived immunity for all "operational" government functions, and preserved immunity only for certain discretionary "planning" functions. The court recognized that the "planning-operational" distinction would have to be defined case-by-case. Nevertheless, the court recommended the following four-part threshold test to be used to identify the immune "planning" functions:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? 
(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction or the policy, program, or objective? 
(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? 
(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

The court determined that if any of these issues can be clearly and unequivocally answered in the affirmative, the challenged act, omission or decision could be classified as a discretionary governmental process. This analysis is based on a healthy respect for the constitutional separation of powers and the necessity for the

152. Id. at 1016 (citing FLA. STAT. § 768.28 (1979)).
153. Id. at 1022.
154. Id.
155. Id. at 1019 and 1022. The court's four-part test was initially formulated by the Supreme Court of Washington in Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1966).
156. 371 So. 2d at 1019 (citing Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1966)).
political branches to exercise their sovereign powers unfettered.

The courts need to adopt a similar analysis in the field of estoppel jurisprudence where issues affecting the distribution of sovereign powers over taxation and spending are concerned. At this moment in history, the public is demanding that government at all levels be responsible and accountable in its fiscal policy. In order to respond to this demand, elected legislative bodies must reestablish full control over their respective budgets, as the constitution authorizes and requires. The courts should reexamine those decisions which permit significant erosion of the exclusive legislative fiscal power. The public can ill afford to have the courts limit their attention in estoppel cases to the equities of the immediate factual situation, without also explicitly considering and balancing the effects of their decisions on the distribution of sovereign fiscal powers. As responsible public institutions for resolving disputes in an orderly and consistent fashion, the courts should do no less.

157. Several of the court decisions discussed in this article have, in this author's view, permitted significant erosion of legislative control over the budget. In Department of Revenue v. Anderson, notes 74-81 and accompanying text supra, the court allowed strangers to the government's statements to claim the benefits of estoppel arising from those statements. This decision raises the spectre of unlimited reduction in revenue whenever a public officer misstates taxation policy to one member of an affected group of taxpayers. In Graham Contracting, Inc. v. Department of Gen. Servs., note 92 supra, the court held the Administrative Procedure Act constitutes a waiver of sovereign immunity in contract. In Cartee v. Florida Department of Health and Rehabilitative Servs., notes 108-114 supra, the court held that a private developer could recover contract damages if the contracting agency failed to use a reasonable effort to secure the necessary appropriation for the contract. If public liability in contract is not limited by either the doctrine of sovereign immunity or periodic appropriations legislation, then the public coffers face potential unlimited liability.