ESTOPPEL AGAINST THE GOVERNMENT

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

WRONGS WHICH ORDINARILY "SHOCK THE CONSCIENCE and justify the intervention of a court of equity," it is said, can yet not found an estoppel against the government.¹ At first sight this is strange doctrine. For equitable estoppel is based upon principles of morality and justice,² and it is scarcely debatable that government action should exhibit even "more scrupulous regard to justice and a higher morality" than is required of individuals.³

Although the government itself has stamped repudiation of an earlier position as "unconscionable,"⁴ it yet claims total immunity from equitable estoppel⁵ and some courts have echoed that sweeping claim.⁶ Some courts

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* *Menges v. Dentler*, 33 Pa. 495, 500 (1859).

¹ *Schafer v. Helvering*, 83 F. 2d 317, 320 (App. D.C., 1936).

² The ultimate principle, said Mr. Justice Cardozo, is that "no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R. H. Stearns Co. v. United States*, 291 U.S. 54, 62 (1934).

The Supreme Court earlier said: "The vital principle is, that he who . . . leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1880). See also *Morgan v. Railroad Co.*, 96 U.S. 716, 720 (1878); *Van Rensselaer v. Kearney*, 11 How. (U.S.) 297, 325, 326 (1850).

Our discussion is confined to the situation in which one party acted to his detriment in reliance upon what the other party did or said. Cf. *Helvering v. Schine Chain Theatres*, 121 F. 2d 948, 950 (C.A. 2d, 1941). For present purposes, it suffices to note that election and estoppel are often used interchangeably. Cf. *Vestal v. Commissioner*, 152 F. 2d 132, 135 (App. D.C., 1945); *Wurtsbaugh v. Commissioner*, 187 F. 2d 975 (C.A. 5th, 1951).

³ *Woodruff v. Trapnall*, 10 How. (U.S.) 190, 207 (1850); *Pawlett v. Attorney General*, *Hardres* *465, 469 (1667) (Baron Atkyns): "[I]t would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him." See also *Robinson v. South Australia*, [1931] A. C. 704, 716.

⁴ *Taylor v. Commissioner*, 89 F. 2d 465, 466 (C.A. 7th, 1937). The government's change of position was stamped as "unconscionable" in *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951).

⁵ *United States v. Coast Wineries*, 131 F. 2d 643, 650 (C.A. 9th, 1942). Apparently English administrators make similar unjustifiable claims. *Farrer, A Prerogative Fallacy—"That the Crown Is Not Bound by Estoppel,"* 49 L.Q. Rev. 511 (1933).

⁶ "Estoppel may not be invoked against the government." *West Texas Utilities Co. v. National Labor Relations Board*, 184 F. 2d 233, 239 (App. D.C., 1950); *Spencer v. Railroad Retirement Board*, 166 F. 2d 342, 343 (C.A. 3d, 1948); *United States v. Ohio Oil Co.*, 163 F. 2d

have held, on the other hand, that the government is immune from estoppel only when it has acted in a "governmental" as distinguished from "proprietary" capacity.⁷ In its most recent estoppel decision, *Merrill v. Federal Crop Insurance Corporation*,⁸ the Supreme Court, splitting five to four, held that the form in which the government functioned was not controlling if the action on which the estoppel was based was *unauthorized*. One shares Mr. Justice Jackson's lively dissatisfaction with a result that requires an Idaho farmer to search the Federal Register to learn whether he may safely purchase crop insurance from an officer of the government who offers to sell it.⁹ The courts themselves have characterized the immunity from estoppel doctrine as "harsh" and "severe,"¹⁰ and have applied it with "great reluctance,"¹¹ at times accompanied by judicial groans.¹²

633, 641 (C.A. 10th, 1947); *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911, 913 (D.D.C., 1949); *Wells v. Long*, 68 F. Supp. 671, 672 (S.D. Idaho, 1946); *Bowles v. Hansen Packing Co.*, 64 F. Supp. 131, 133 (D. Mont., 1946); *United States v. Lecony Smokeless Fuel Co.*, 64 F. Supp. 269, 270 (S.D. W.Va., 1946); *United States v. National Gypsum Co.*, 49 F. Supp. 206, 214 (W.D. N.Y., 1942); *United States v. Hess*, 41 F. Supp. 197, 217 (W.D. Pa., 1941); *O. D. Jennings & Co. v. Reinecke*, 19 F. Supp. 197, 200 (N.D. Ill., 1937); *Huron Portland Cement Co. v. Woodworth*, 19 F. 2d 530, 534 (E.D. Mich., 1921).

⁷ *United States v. City and County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal., 1953); *The Falcon*, 19 F. 2d 1009, 1014 (D. Md., 1927); *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915, 920 (D. Neb., 1944); *England National Bank v. United States*, 282 Fed. 121, 127 (C.A. 8th, 1922). For application of estoppel to government in "proprietary" capacity, see *Branch Banking and Trust Co. v. United States*, 98 F. Supp. 757, 766, 768 (Ct. Cl., 1951); *Ohio Oil Company v. United States*, 65 F. Supp. 991, 997 (D. Wyo., 1946), *rev'd*, *United States v. Ohio Oil Company*, 163 F. 2d 633, 641 (C.A. 10th, 1947) ("traditional inapplicability of the doctrine of estoppel against the United States").

⁸ 332 U.S. 380 (1947). See also *McIndoe v. United States*, 194 F. 2d 602, 603 (C.A. 9th, 1952).

⁹ Mr. Justice Jackson, in a dissent joined in by Mr. Justice Douglas (Black and Rutledge, JJ., also dissented), remarked (332 U.S. 380, 387) that: "[I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains. . . . One should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all."

¹⁰ *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911, 913 (D.D.C., 1949).

¹¹ *United States v. Globe Indemnity Co.*, 17 F. Supp. 838, 846 (S.D. N.Y., 1936); *Sternfeld v. United States*, 32 F. 2d 789, 791 (N.D. N.Y., 1929).

¹² In *Walker Hill Co. v. United States*, 162 F. 2d 259, 263 (C.A. 7th, 1947), the court, denying estoppel, declared: "It never gives us a satisfactory, reassuring feeling, however, for the government to repudiate the acts of one of its agents performed in the course of his duties."

Dissenting from a holding of estoppel against the government, Circuit Judge Prettyman said: "I wish the law were as they [the majority] find it to be, because it is my belief that the Government ought to set a high standard in its dealings and relationships with citizens and that the word of a duly authorized Government agent, acting within the scope of his authority ought to be as good as a government bond." *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951). The majority in that case declared that "[t]axpayers expect, and are entitled to receive, ordinary fair play from tax officials. We regard as unconscionable . . ." the Commissioner's change of position. *Ibid.*, at 298.

Mounting exasperation with a rule that permits repudiation of the legal advice which administrative officials are constantly giving¹³ and which government agencies often lead the public to believe such officials are authorized to give,¹⁴ led to the introduction in April 1953 of Senate bill S.1752, exempting persons who rely on written statements by responsible agencies from damages or penalties.¹⁵ But the bill does not go far enough; it fails to provide for losses incurred if claims are pressed by the government against, or denied to, persons who relied on such statements. Moreover, the legislative mills grind slowly.¹⁶

It needs to be emphasized that the courts are free to correct their own, judge-made rule without awaiting legislation,¹⁷ that there is no government immunity from estoppel if the official conduct was authorized, and that policy considerations require a realistic approach to the problem whether official conduct was "authorized." There is also need to re-examine the rule that the government may repudiate an official interpretation by reliance on the "mistake of law" doctrine, and to review the principles governing the right of an administrative officer to overrule the decision of a predecessor. Analysis of the government's "change of position" must likewise take into account the extent to which new tax rulings or regulations may be given retroactive effect in the face of a taxpayer's reliance upon the superseded regulation. It may be added that the problem of governmental immunity from estoppel is most acute in the tax field because of (1) the great volume of tax cases, (2) the unduly cautious application of estoppel to the government in such cases, and (3) statutory ambiguities which complicate the estoppel-immunity problem in the tax

¹³ See Newman, *Should Official Advice be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 Col. L. Rev. 374 (1953). Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 Iowa L. Rev. 241, 243, 246 (1941).

¹⁴ Compare the annual invitation to the public to avail itself of the services of agents of the Internal Revenue Bureau in making out tax returns.

¹⁵ Sen. 1752, 83d Cong. 1st Sess. (1953). A previously proposed bill is discussed in Newman, *op. cit. supra* note 13.

¹⁶ Compare Herman Oliphant's suggestion in 1938 of a tax code provision comparable to § 209(b) of the Securities and Exchange Act which exempts one who in good faith acts in reliance on a rule or regulation, though it later be rescinded or declared invalid. Oliphant, *Declaratory Rulings*, 24 A.B.A.J. 7, 9 (1938). Legislative inaction on such proposals is at best equivocal in light of the flood of new legislative proposals that submerges the Congress at each session.

¹⁷ "When . . . a rule is not statutory, but a rule of judiciary law, and . . . the modification will plainly serve the ends of justice, it would seem appropriate that . . . the courts themselves should do the needful." *Hammond-Knowlton v. United States*, 121 F. 2d 192, 201 (C.A. 2d, 1941).

field. Consequently special emphasis will be given to the tax aspect of the claimed immunity from estoppel.

BASIS OF THE IMMUNITY

Governmental immunity from estoppel, it has been held, is an offshoot of sovereign immunity.¹⁸ That claim may draw some comfort from early English dicta,¹⁹ but such dicta do not represent English law.²⁰ An English commentator has labelled the notion that the Crown is not bound by estoppel "a prerogative fallacy."²¹ In the United States the doctrine of sovereign immunity is in current disfavor²² and offers uneasy support to doctrines that work hardship and injustice.

A glance at the earliest and most recent Supreme Court cases will furnish a background against which to evaluate the rationalizations advanced for immunity. In *Lee v. Munroe*,²³ the Commissioners of the city of Washington, pursuant to an authorization to sell public lands, contracted with Morris and Nicholson for the sale. The latter made deposits of money with the Commissioners and from time to time advised them to convey to designated persons. Supposing that Morris and Nicholson had not received land to the value of the sum deposited by them, the Commissioners informed Lee that they would convey certain lots to him if he would obtain an order from Morris and Nicholson. Thereupon, Lee surrendered a note given by Morris and Nicholson to them in return for such an order. The Commissioners then discovered that Morris and Nicholson had received all the land to which they were entitled and refused to honor the order. The Supreme Court held that the Commissioners' promises were not binding upon the government because they were "altogether gratuitous and not being within the sphere of their official duties."²⁴ One may

¹⁸ *Trustees of Philip Exeter Academy v. Exeter*, 90 N.H. 472, 495, 27 A. 2d 569, 586 (1940). The state cases exhibit almost the same problems as the federal. See *Clark, Estoppel Against State, County and City*, 23 Wash. L. Rev. 51 (1948).

¹⁹ *Sir Edward Coke's Case*, Godbolt *289, 299 (1623); *Queen v. Delme*, 10 Mod. *198, 200 (1713). English concepts of the royal prerogative have entered into our own political state. *Dollar Savings Bank v. United States*, 19 Wall. (U.S.) 227, 239 (1874).

²⁰ *Attorney General v. Collom*, [1916] 2 K.B. 193, 204: "A further point was raised that no estoppel binds the crown. . . . I know of no authority for the proposition as applied to estoppel in pais." See also *Plimmer v. The Mayor*, [1884] 9 App. Cas. 699.

²¹ *Farrer*, op. cit. supra note 5.

²² *Keifer and Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 391 (1939); *Wallace v. United States*, 142 F. 2d 240, 243 (C.A. 2d, 1944).

²³ 7 Cranch (U.S.) 366 (1813).

²⁴ *Ibid.*, at 369.

doubt the absence of authority under the circumstances,²⁵ but we are here concerned with the reasons advanced for this holding:

It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it should be very difficult for the public to protect itself.²⁶

In 175 years of federal administration the amount of "improper collusion" by federal officers has been remarkably small. Even if such collusion were more significant, the cost of insuring the faithfulness of its employees ought to be borne by the government, not thrust upon the luckless victims of their faithlessness.²⁷ To the extent that a deterrent against public fraud is required, it is supplied by the severe criminal sanctions imposed for defrauding the government. A democratic government which rests on consent of the governed should take care in every part of the system, as Daniel Webster said, "not only to do right, but to satisfy the community that right is done."²⁸ To preserve confidence in popular government is of higher importance than to avert occasional frauds.²⁹

In later cases, the fear that the agent may "ruin the principal"³⁰ no longer finds expression. Instead, the Supreme Court has repeatedly emphasized that an estoppel does not lie where the officer does "what the law does not sanction or permit."³¹ In other words, *unauthorized* conduct will not work an estoppel.³²

²⁵ In the words of the plaintiff, "[t]he commissioners were acting within the scope of their authority. It was their business to keep the accounts with Morris and Nicholson, to know the balance; it was also their business to convey the lots." *Ibid.*, at 367.

The Commissioners had been conveying to purchasers at the order of Morris and Nicholson; it was their business to know whether Morris and Nicholson were entitled to further conveyances. See pages 692-93 *infra*.

²⁶ *Ibid.*, at 370. In *The Floyd Acceptances*, 7 Wall. (U.S.) 666, 681 (1869), the fear that the agent might "ruin the principal" led the government to repudiate the action of the Secretary of War himself. See also *Whiteside v. United States*, 93 U.S. 247, 257 (1876).

²⁷ Pound, *The Spirit of the Common Law*, 185-89 (1921), pointed out the "increasing tendency to hold that public funds should respond for injuries to individuals by public agencies."

²⁸ 5 Writings and Speeches of Daniel Webster 163, quoted by Mr. Justice Frankfurter, concurring, in *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 149, 172 n. 19 (1951).

²⁹ Cf. *United States v. Willamette V. & C. M. Wagon-Road Co.*, 54 Fed. 807, 811 (C.C. Ore., 1892).

³⁰ See note 26 *supra*.

³¹ *United States v. San Francisco*, 310 U.S. 16, 32 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408 (1917); *Wilber National Bank v. United States*, 294 U.S. 120, 124 (1935).

³² "An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right." *United States v. Stewart*, 311 U.S. 60, 70 (1940). See also *Filor v. United States*, 9 Wall. (U.S.) 45, 49 (1870).

A striking example is furnished by the previously mentioned case, *Merrill v. Federal Crop Insurance Corporation*,³³ where the government acted in what, in view of prior cases, might be regarded as a "proprietary" rather than a governmental capacity. An Idaho farmer purchased crop insurance from Federal Crop Insurance Corporation on the faith of assurances by its agent that the crop of reseeded winter wheat was insurable. After a drought destroyed his crop, the farmer learned that his reliance was misplaced. The lower courts held that the Corporation, like a private insurance company, was bound by the acts of its agent. But, Mr. Justice Frankfurter, speaking for the majority of the Supreme Court, rejected the idea that government is "partly public or partly private,"³⁴ and held that, "whatever the form in which the Government functions,"³⁵ one deals with it at the risk of accurately ascertaining that its agent "stays within the bounds of his authority,"³⁶ that such limitations may be expressed in proper regulations as well as statutes, that the regulation precluded such insurance, and that notice of the regulations was given by publication in the Federal Register.³⁷

There can be no dissent from Mr. Justice Jackson's insistence that a federal insurance agency should be held to "the same fundamental principles of fair dealing" that progressive states apply to private companies.³⁸

³³ 332 U.S. 380 (1947).

³⁴ *Ibid.*, at 383. But the distinction has respectable authority: "[A] government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875).

In the eyes of Congress, the distinction continues to have vitality. See *Dalehite v. United States*, 346 U.S. 15, 27 (1953), where referring to a tort claims amendment, the Supreme Court said that "[w]hile Congress desired to waive the Government's immunity . . . it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

³⁵ 332 U.S. 380, 384 (1947). It had earlier been stated that "[t]he officers of the Fleet Corporation may estop that corporation by their official conduct when the officers of the sovereign by their conduct might not estop the government of the United States." *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641, 660 (C.A. 2d, 1923).

³⁶ 332 U.S. 380, 384 (1947). Mr. Justice Frankfurter adverted to Mr. Justice Holmes's dictum that "men must turn square corners when they deal with the Government." *Ibid.*, at 385. But "the Government ought to turn square corners when dealing with its citizens." *Howbert v. Penrose*, 38 F. 2d 577, 581 (C.A. 10th, 1930); *Maguire and Zimet, Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935). As Mr. Justice Jackson put it: "[T]here is no reason why the square corners should constitute a one-way street." Dissenting in 332 U.S. 380, 388 (1947).

³⁷ For immunity from estoppel because of lack of authority to waive the requirements of a regulation, see *Nichols & Co. v. Secretary of Agriculture*, 131 F. 2d 651, 659 (C.A. 1st, 1942); *Sternfeld v. United States*, 32 F. 2d 789, 791 (N.D. N.Y., 1929); *Bowles v. Lentin*, 151 F. 2d 615, 618 (C.A. 7th, 1945).

³⁸ 332 U.S. 380, 388 (1947).

As Laski points out, the modern state is "in essence a public service corporation"; like any other body, "it acts through servants who take decisions in its name," and like any such body, it should "be responsible" for the "torts," and, it may be added, the acts, of its servants.³⁹ But no separation of powers doctrine complicates corporate delegations.

Though little explicit reliance on the separation of powers is to be found in the cases,⁴⁰ judicial stress upon authority as the test of estoppel stems from that doctrine. The analysis may be articulated as follows: Administrators are clothed with authority to act and make rules by the exercise of legislative power; and such legislative power is exercisable only by Congress.⁴¹ It cannot be exercised by an administrator; no administrator may do that which is forbidden,⁴² nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, i.e., with the power to assume an authority that has been withheld or prohibited. If this analysis is valid, and if the touchstone of immunity from estoppel is the absence of authority, one must agree with Mr. Justice Frankfurter that "the form in which Government functions" is of no moment.⁴³

³⁹ Laski, *Liberty in the Modern State* 53-54 (1949). Section 161 of the Restatement of Agency (1935) states that: "A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which he is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that the agent is not so authorized." See also Holmes, *Collected Legal Papers* 81 (1920).

⁴⁰ In *Langstaff v. Lucas*, 9 F. 2d 691, 692 (W.D. Ky., 1925), the court based the government's immunity from estoppel on the fact that the Treasury Department "[w]as not . . . authorized . . . to exempt from income taxation. That power is vested in Congress. . . ." In *Municipality of Rio Piedras v. Serra, Garabis & Co.*, 65 F. 2d 691, 694 (C.A. 1st, 1932), the court said that "[e]stoppel can never be invoked against the public to create power in an officer who purported to act on behalf of the public without authority to do so." See *Securities & Exchange Commission v. Torr*, 22 F. Supp. 602, 612 (S.D. N.Y., 1938).

⁴¹ Executive power is limited to the scope of the congressional grant. *Little v. Barreme*, 2 Cranch (U.S.) 170, 177-78 (1804). On this, all the Justices were united in the recent "steel seizure" case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 602, 637-39, 660-61, 662 (1952). As Mr. Justice Douglas, paraphrasing Black and Frankfurter, JJ., said: "[T]he power to execute the laws starts and ends with the laws Congress has enacted." *Ibid.*, at 633.

Acts of administrative bodies, indeed of courts as well, which go beyond the powers delegated to them are void. *Valley v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920); *General Broadcasting System v. Bridgeport Broadcasting Station*, 53 F. 2d 664, 668 (D. Conn., 1931); *L. A. Tucker Truck Lines v. United States*, 100 F. Supp. 432, 434 (E.D. Mo., 1951).

⁴² One "may not invoke an estoppel to obtain a license which the statute forbids." *Middleboro Liquor & Wine Co. v. Berkshire*, 133 F. 2d 39, 41 (App. D.C., 1942). Compare Mr. Justice Frankfurter's statement in *Merrill v. Federal Crop Insurance Corp.*, 332 U.S. 380, 384 (1947), that an express statutory prohibition of insurance on reseeded wheat would make ignorance of the restriction immaterial.

⁴³ *Merrill v. Federal Crop Insurance Corp.*, 332 U.S. 380, 384 (1947). Notwithstanding the Supreme Court's rejection of the governmental-proprietary distinction as a test of estoppel, it

Such analysis may be logically satisfying, but the "pitiless conclusion" prompts the query whether the courts have marched "under the prod of a remorseless logic which is supposed to leave them no alternative."⁴⁴ For there has been a notable shift, in applying the separation of powers, from inflexible abstractions to the lessons of experience, witness the retreat from insistence on rigorous standards of delegation.⁴⁵ It is open to question whether the related restriction of administrators to the jurisdiction conferred inexorably requires the sacrifice of the citizen who relied on the official exercise of apparent authority.⁴⁶

However the case may be with respect to "unauthorized" conduct, estoppel clearly may be based upon "authorized" conduct. From the Supreme Court's oft-repeated formulation of the immunity from estoppel in terms of administrative action that "the law does not sanction or permit,"⁴⁷ it may be inferred that government is bound by actions within the scope of the agent's authority. A steadily growing number of federal courts have properly so held,⁴⁸ for the sole tenable argument for the im-

continues to be drawn in the lower courts. See *United States v. City and County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal., 1953); *Chapman v. Santa Fe Pac. R. Co.*, 198 F. 2d 498, 502, 519 (App. D.C., 1952) (dissenting opinion); *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757, 766 (Ct. Cl., 1951).

⁴⁴ Cardozo, *Selected Writings* 215 (1947).

⁴⁵ Davis, *Administrative Law*, 27-31, 44-54 (1951); Willis, *Three Approaches to Administrative Law*, 4 *Selected Essays on Constitutional Law* 36, 54, 57 (1938); *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 105 (1946).

⁴⁶ In considering the separation of powers it is well to remember that a "constitution was made for the safety and protection of the people and not to be used as an instrument for their destruction." *Kneeland v. Milwaukee*, 15 Wis. 454, 469-70 (1862) (Dixon, C.J.).

⁴⁷ See note 31 supra.

⁴⁸ "The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority." *Ritter v. United States*, 28 F. 2d 265, 267 (C.A. 3d, 1928).

The following cases in accord are listed chronologically; a few have reference to state action. *Cahn v. Barnes*, 5 Fed. 327, 334 (C.C. Ore., 1881); *Indiana v. Milk*, 11 Fed. 389, 397 (C.C. Ind., 1882); *United States v. Willamette V. & C. M. Wagon-Road Co.*, 54 Fed. 807, 811 (C.C. Ore., 1892); *Michigan v. Jackson, L. & S. R. Co.*, 69 Fed. 116, 123 (C.A. 6th, 1895); *United States v. Stinson*, 125 Fed. 907, 910 (C.A. 7th, 1903); *Walker v. United States*, 139 Fed. 409, 413 (C.C. Ala., 1905); *Western Union Telegraph Co. v. Julian*, 169 Fed. 166, 175 (C.C. Ala., 1909); *Hemmer v. United States*, 204 Fed. 898, 902 (C.A. 8th, 1912); *J. Homer Fritch, Inc. v. United States*, 236 Fed. 133, 134 (C.A. 9th, 1916); *United States v. Denver & R.G.W.R. Co.*, 16 F. 2d 374, 376 (C.A. 8th, 1926); *Dayton Airplane Co. v. United States*, 21 F. 2d 673, 674 (C.A. 6th, 1927); *Joseph Eichelberger & Co. v. Commissioner of Internal Revenue*, 88 F. 2d 874, 875 (C.A. 5th, 1937); *United States v. Big Bend Transit Co.*, 42 F. Supp. 459, 474 (E.D. Wash., 1941); *Vestal v. Commissioner of Internal Revenue*, 152 F. 2d 132, 135 (App. D.C., 1945); *United States v. Property on Pinto Island*, 74 F. Supp. 92, 102 (S.D. Ala., 1947); *David J. Joseph Co. v. United States*, 82 F. Supp. 345, 351 (Ct. Cl., 1949); compare *Lindsey v. Hawes*, 2 Black (U.S.) 554, 560 (1862). For similar cases in the tax field, see notes 92 and 93 infra.

munity derives from separation of powers considerations which have no play where administrative action is *authorized* by Congress. In such case the government should be and is estopped.

This analysis is no less applicable to the tax functions than to the other functions of government. Nevertheless, in the tax field, the courts have said that estoppel must be applied to the government with "great caution,"⁴⁹ "in only the most extraordinary case."⁵⁰ The ground upon which this is put is the "necessity inherent in [the government's] sovereign power of taxation."⁵¹ The government must have money and, it has been suggested, "can be sure of that money only if its tax scheme is stringent to the point of potential injustice. . . ."⁵² The fact is, however, that tax collection is not accomplished with the aid of thumbscrews, but rests for the most part on mutual trust between the government and the taxpayers.⁵³ Repudiation of tax rulings and interpretations damages that trust and therefore impairs our voluntary tax payment system. Given administrative authority to act, there should be no more hesitancy in applying estoppel to the government's tax, than to its other, functions.

Similarly, the binding effect of an "election" of judicial remedies⁵⁴ may likewise be explained by the plenary *authority* conferred on the Attorney General and the United States Attorneys to prosecute and defend suits,⁵⁵ so that however mistaken the government's choice of a remedy, it is nonetheless binding.⁵⁶ It is this authorization which also explains why the

⁴⁹ *Barnet Inv. Co. v. Nee*, 72 F. Supp. 81, 82 (W.D. Mo., 1947); 10A Mertens, *The Law of Federal Income Taxation* 189 (1948); *Vestal v. Commissioner*, 152 F. 2d 132, 136 (App. D.C., 1945). In *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915, 920 (D. Neb., 1944), it was held that the "collection of revenues is a governmental function" to which estoppel does not apply.

⁵⁰ *James Couzens v. Commissioner*, 11 B.T.A. 1040, 1151 (1928).

⁵¹ *Ibid.*

⁵² Maguire and Zimet, *op. cit. supra* note 36, at 1302.

⁵³ "[T]he voluntary system of tax collection rolls on successfully, year after year. The BIR is essentially a bookkeeping bureau. It cracks down occasionally, but its chief function is to accept tax payments that United States citizens—private and corporate—line up willingly to pay." What Hit Tax Collections, *Business Week*, No. 1245, July 11, 1953, pp. 25, 26.

⁵⁴ *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922).

⁵⁵ 62 Stat. 910 (1948), 28 U.S.C.A. § 507 (1949); cf. 45 Stat. 54 (1928), 5 U.S.C.A. § 309 (1949); 34 Stat. 816 (1906), 5 U.S.C.A. § 310 (1949). See *Halbach v. Markham*, 106 F. Supp. 475, 480 (D. N.J., 1952).

⁵⁶ To be sure, the judicial explanation has been made in different terms. In *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922), the Court explained that "it is not admissible to thus speculate upon the action of the court, and, having met with an adverse decision, to again vex the defendant with another and inconsistent action upon the same facts." *Ibid.*, at 296. But any government change of position after a citizen had acted on the prior position to his detriment is equally "vexing." Yet if the earlier position was unauthorized, estoppel will not lie. The rationalization of "election" must therefore be "authorized" conduct.

government is estopped by the representations made by its counsel in the course of judicial proceedings.⁵⁷ The several cases which appear to be contra rest on readily distinguishable grounds and do not affect the conclusion that representations by government counsel in the courts are binding on the government.⁵⁸

LEGAL INTERPRETATIONS, ADVICE AND RULINGS

Binding effect is often denied to administrative rulings on the ground that an interpretation of law cannot found an estoppel.⁵⁹ Whatever the merits of the rule that a "mistake of law" cannot ground equitable relief between private parties,⁶⁰ it is mechanical jurisprudence to apply this rule

⁵⁷ *United States v. Coast Wineries*, 131 F. 2d 643, 650 (C.A. 9th, 1942); *First National Bank v. United States*, 2 F. Supp. 107, 109 (E.D. Mo., 1932). In the *Wineries* case, the court placed its decision upon the ground that unless the court could rely upon statements and stipulations of government counsel, there would "be delay and confusion which would be seriously detrimental to the orderly administration of justice." 131 F. 2d 643, 650 (C.A. 9th, 1942). "Orderly administration" would inadequately explain how government counsel could be permitted by his action in court to forfeit federal land which, for example, the Secretary of the Interior was forbidden to transfer. The explanation must reside in the fact that counsel has plenary authority to conduct the suit.

⁵⁸ In *Carr v. United States*, 98 U.S. 433 (1879), government counsel appeared for federal officers sued in their "individual" capacity, and it was held that the United States was not estopped by their appearance. This is the doctrine of *United States v. Lee*, 106 U.S. 196, 222 (1882); cf. *Land v. Dollar*, 330 U.S. 731, 739 (1947), recently characterized as "a patent prostitution" of the government immunity from suit doctrine in *Land v. Dollar*, 190 F. 2d 366, 375 (App. D.C., 1951). In *United States v. Javier*, 22 F. 2d 879, 880 (App. D.C., 1927), it was held that "the United States is not estopped by an order of naturalization, although . . . it had entered its appearance in the naturalization proceeding and there unsuccessfully raised the same objection." Reliance was placed in part upon *United States v. Ness*, 245 U.S. 319 (1917). There it is explained that Section 11 of the Naturalization Act which authorizes the United States to appear in opposition in a naturalization proceeding, and Section 15 which authorizes it to bring suit to set aside a certificate of naturalization, are "cumulative," and that Congress intended by Section 11 "to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under § 15." *Ibid.*, at 327. The naturalization cases therefore represent a statutory exemption from the rule that an appearance in court binds the government.

⁵⁹ *Ross v. Commissioner*, 169 F. 2d 483, 496 (C.A. 1st, 1948) (per Frankfurter, Cir. J.); *Sturm v. Boker*, 150 U.S. 312, 336 (1893); *Commissioner v. American Light and Traction Co.*, 125 F. 2d 365, 366 (C.A. 7th, 1942); 10A Mertens, *The Law of Federal Income Taxation* 156 (1948). In Holmes's phrase, the rule is "an instance of an early statement ossifying by repetition into an absolute principle. . . ." 1 Holmes-Laski Letters 335 (1953).

⁶⁰ Criticisms of the rule are collected in Maguire and Zimet, *op. cit. supra* note 36, at 1304; *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336 (1931). See also *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. 2d 68, 71 (C.A. 2d, 1936). Consult Chafee, *Cases on Equitable Remedies* 649 et seq. (1939), for a comprehensive collection of materials on "mistake of law." 3 Pomeroy, *Equity Jurisprudence* § 849 (5th ed., 1941), concluded that the "great majority of courts" give relief for mistakes as to a person's "own antecedent existing legal rights" and that such mistakes "may be properly regarded—as in great measure they really are, and may be dealt with, as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly." See also *Order of United Commercial Travelers v. McAdam*, 125 Fed. 358, 368 (C.A. 8th, 1903).

to a pronouncement of law by a public officer charged with administering and interpreting a statute.

Apparently the rule proceeded from the facile assumption that "every man must be taken to be cognizant of the law."⁶¹ But the maxim that ignorance of the law may not be pleaded in excuse of a crime had earlier been rejected in a civil case⁶² and the presumption that everyone knows the law is now discredited.⁶³

Noting that reasons for the rule have "never been adequately stated"⁶⁴ and searching for a rationalization, one commentator has suggested that the rule seeks to preclude possible fraud since for evidence of mistake of law we are usually left to the word of the complainant himself. Since, moreover, it is difficult for a jury to assay a man's past motives and the degree of certainty with which he previously regarded the legal significance of a specific set of facts, it was suggested that an arbitrary rule of thumb excluding mistake of law is justified.⁶⁵ But such considerations are irrelevant where, for example, the Commissioner of Internal Revenue has promulgated a ruling or rendered a written interpretation to a taxpayer; in such a case strong policy considerations dictate that the Commissioner be bound by his opinions.⁶⁶ A taxpayer is entitled to rely on the interpre-

⁶¹ *Bilbie v. Lumley*, 2 East. *469, 470, 472 (K.B., 1802); see *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337 (1931).

⁶² *Lansdown v. Lansdown*, Mosely *364, 365 (1730). It is one thing to reject ignorance as an excuse by one who has committed a wrong; it is something else again to employ the rejection as an instrument of inflicting a loss or hurt.

⁶³ The very existence of courts of appeal, said Justice Maule, shows that even "judges may be ignorant of law." *Martindale v. Falkner*, 2 C.B. *706, 720 (C.P., 1846). And, he declared, "[t]here is no presumption in this country that every person knows the law. It would be contrary to common sense and reason." *Ibid.*, at 719. See also *Montriou v. Jefferys*, 2 C. & P. *113, 116 (N.P., 1825).

⁶⁴ *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337 (1931). "[W]hat," asked Professor Keener, "is the public policy which demands that one who has done no injury, but simply seeks to avert a loss, shall, because of his ignorance of law, suffer a loss?" Keener, *Quasi-Contracts* 91 (1893). As a matter of analysis, "[t]he mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives." *Northrop v. Graves*, 19 Conn. 548, 554 (1849).

⁶⁵ *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336, 337-41 (1931).

⁶⁶ Policy arguments are advanced by Magill, *Finality of Determinations of the Commissioner of Internal Revenue*, 28 Col. L. Rev. 563, 575-76 (1928): "The unsettling effects of the repeated reopening of tax cases thought settled; the expense of repeated presentations of involved facts and legal arguments; the confusion and delays in the Treasury caused by the failure to dispose of old cases once for all cannot be too strongly deprecated. . . . The rapidly changing provisions of the revenue laws, grounded on little or no actual experience, call for a reasonable finality of interpretation if chaos is to be avoided. . . ." Indeed the Commissioner, recognizing the shock to public confidence, has himself halted the repudiation of prior legal rulings. See page 693 *infra*.

"[I]t must be considered an intolerable operation, after the State, through its duly consti-

tation of the officer to whom the task of interpretation is confided; he should not be at the peril of guessing whether courts will ultimately reject the interpretation.⁶⁷ Indeed, Congress itself has said that "sound administration . . . places upon the Government the responsibility and burden of interpreting the law. . . ."⁶⁸ Even in private law, equity will relieve from a "mistake of law," if it was reasonable for the plaintiff "to rely upon the presumably greater knowledge of the defendant."⁶⁹ So far as the "mistake of law" rule is concerned, it would seem that an interpretation of law by a duly authorized officer should estop the government.

The question next arises, whether the interpretations of a subordinate should be given as much effect as an authoritative agency interpretation. To my mind, the interpretation of statutes and regulations cannot be placed at the hazard of varying and conflicting interpretations by hundreds, perhaps thousands of subordinates, widely scattered over the nation. One who seeks an authoritative interpretation, common sense would suggest, should address himself to the head of the agency.⁷⁰ The recent proposal for legislative correction goes no further than to seek conclusiveness for authorized administrative interpretations.⁷¹

Legal advice, concerning the effect of a given transaction, for example, as distinguished from an interpretation of a statute or regulation, requires a different approach. The Technical Staff of the Bureau of Internal Revenue advises, for example, that for tax purposes no trust came into being.⁷² Or similar advice is rendered by a field agent. Unified administration, it is true, would be facilitated if all such legal questions were authoritatively answered by a designated, central voice. But administration would founder if every such question would be postponed for an answer from

tuted organs, has pronounced a rule of law upon which the citizen relies when, later, the State, through the same organs, takes away from that citizen the rights or liberties which he has fashioned in reliance on what has been officially declared." Kocourek and Koven, *Renovation of the Common Law Through Stare Decisis*, 29 Ill. L. Rev. 971, 972 (1935). See also note 108 *infra*.

⁶⁷ Maguire and Zimet, *op. cit. supra* note 36, at 1291-92.

⁶⁸ Quoted *infra*, page 700.

⁶⁹ *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. 2d 68, 71 (C.A. 2d, 1936); *Fidelity & Deposit Company of Maryland v. McQuade*, 123 F. 2d 337, 339 (App. D.C., 1941).

⁷⁰ Compare the procedure for obtaining official interpretations provided by the Office of Price Administration. *Bowles v. Indianapolis Glove Co.*, 150 F. 2d 597, 601 (C.A. 7th, 1945).

⁷¹ Newman, *op. cit. supra* note 13, at 382-83.

⁷² *Gilmer v. United States*, 91 F. Supp. 887 (S.D. Tex., 1950).

that voice. Taxation is "eminently practical."⁷³ It has to do with matters, "the great majority of which ought to be and usually are, disposed of informally. . . ."⁷⁴ Such dispositions should be encouraged, not vitiated.

In this area, the attitude of the courts has been too grudging. One need only recall one court's flippant dismissal of the Bureau Solicitor's advice—that on the facts the taxpayers were operating as a partnership and "would not be subject to the corporation tax"⁷⁵—as a "careless and unofficial expression of opinion"⁷⁶ Another striking illustration is furnished by *United States v. Globe Indemnity Co.*⁷⁷ There a surety had furnished a bond for a taxpayer. After a series of dealings with the taxpayer, the Collector of Internal Revenue, in response to the taxpayer's request, certified that "there are no unpaid income taxes appearing on the records of this office in your name. . . ."⁷⁸ On the faith of this letter the surety returned the collateral to the taxpayer. Thereafter, the government sued the surety for unpaid taxes. The court declared that "[t]here would seem to have been no authority on the part of the collector to furnish a tax search binding on the Commissioner."⁷⁹ What more natural than to turn to the Collector to whom taxes have been paid for advice whether any further

⁷³ *Tyler v. United States*, 281 U.S. 497, 503 (1930).

⁷⁴ *Hartwell Mills v. Rose*, 61 F. 2d 441, 444 (C.A. 5th, 1932).

⁷⁵ *F. E. McGlone v. Commissioner*, 22 B.T.A. 358, 362 (1932), reviewed in *Commissioner v. Duckwitz*, 68 F. 2d 629 (C.A. 7th, 1934).

⁷⁶ *Commissioner v. Duckwitz*, 68 F. 2d 629, 630 (C.A. 7th, 1934). Compare the Office of Price Administration regulation which authorizes official *interpretations* to be signed by the General Counsel, any Associate or Assistant General Counsel, or Regional Price Attorney. Quoted in Newman, *op. cit. supra* note 13, at 382.

⁷⁷ 94 F. 2d 576 (C.A. 2d, 1938). Compare *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911 (D. D.C., 1949), where a "responsible official of the Department of Interior" "discouraged" the claimant from taking a departmental appeal to the Secretary of the Interior. Judicial relief was denied because claimant failed to exhaust his administrative remedies and because the government was not estopped by the subordinates' advice to plead exhaustion. Exhaustion is not a creature of statute, but of equity. Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 985-86 (1939). In weighing the need for compliance with its own rule, a court of equity surely may weigh the equities. No statute forbade the "responsible official" to advise the claimant with respect to a matter of departmental procedure.

⁷⁸ 94 F. 2d 576, 577 (C.A. 2d, 1938). It may be noted that this case involves a repudiation of an earlier determination of *fact*, as did *Lee v. Munroe*, 7 Cranch (U.S.) 366 (1813). If there is "authority" to make such determinations, analysis of the immunity from estoppel is not advanced by distinguishing them from determinations of law. In the case of legal interpretations and regulations, the necessity of harmonizing with the "clear" language of a statute is a special aspect of the authority question. See page 699 *infra*.

⁷⁹ 94 F. 2d 576, 578 (C.A. 2d, 1938). Compare *Darling v. Commissioner*, 49 F. 2d 111, 113 (C.A. 4th, 1931), where a revenue agent's advice that a taxpayer should not take a loss in 1918 until the business of the company was a closed transaction, was held unauthorized. In *Searles Real Estate Trust*, 25 B.T.A. 1115, 1122 (1932), a revenue agent's advice that the filing of a belated return was unnecessary, was likewise held unauthorized.

taxes are owing? And on whom may a taxpayer more properly rely for legal advice than on the Solicitor, the chief legal officer of the Bureau? When, for example, the Bureau offers the assistance of its agents to the public in the preparation of income tax returns, it is unsound administration to repudiate such advice as unauthorized. It is submitted that unless such advice is expressly forbidden by statute or regulation, the courts should find the authority implied. The necessities of government render impracticable a statutory authorization for every act performed by an administrator, as was emphasized by Justice McLean more than 100 years ago:

A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government.⁸⁰

Such considerations are no less applicable to the effective functioning of subordinates to whom power is of necessity delegated.

Let it not be concluded, however, that the rulings of agency heads have received much more respect as a basis of estoppel than have those issued by their subordinates. So, in *Washington Market Co. v. Commissioner*,⁸¹ the taxpayer "found a written ruling [by the Commissioner], rendered after full hearings to be only a scrap of paper."⁸² In *Boykin v. Commissioner*,⁸³ the Commissioner insisted upon treating a tenancy in common as an entire taxable interest for purposes of estate tax, but was permitted to change his position to the detriment of the surviving wife for purposes of income taxes. Perhaps the most noted change of position, sustained in *Couzens v. Commissioner*,⁸⁴ involved a change in the Commissioner's valuation of Ford Motor Co. minority stock after Couzens sold his shares. It is this case, we are told by a recent Chief Counsel of the Bureau, which "did little to instill public faith and confidence in the Bureau," that led

⁸⁰ *United States v. MacDaniel*, 7 Pet. (U.S.) 1, 14-15 (1833).

⁸¹ 25 B.T.A. 576 (1932).

⁸² Maguire and Zimet, op. cit. supra note 36, at 1308 n. 92. The Commissioner was permitted to reverse his ruling that no taxable gain or loss had been realized by reason of certain transactions. *Washington Market Co. v. Commissioner*, 25 B.T.A. 576, 581 (1932).

⁸³ 16 B.T.A. 477 (1929).

⁸⁴ 11 B.T.A. 1040 (1928).

to the Bureau's present policy of honoring its rulings.⁸⁵ This belated recognition of the "policy of fair play"⁸⁶ finds support in case law that has yet to be repudiated.

But the precedents denying the power of an officer to overrule the authorized determination or ruling of a predecessor, which may be said to constitute the common law on the subject, have been given scant consideration by the courts. A review of the early cases will furnish a background against which to construe the statutory provisions which have been deemed to empower the Commissioner to overrule his predecessors.

In 1841, the Supreme Court, considering the right of a Postmaster General to disallow an allowance made by his predecessor within the scope of his authority, held that the

right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a Department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made. . . . It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment or a credit so given, but by the intervention of a Court to pass upon his right.⁸⁷

The rule is reiterated in a series of Supreme Court cases,⁸⁸ among them *United States v. Kaufman*,⁸⁹ which held that the allowance of a tax refund by the Commissioner could only be impeached for fraud or mistake, and that, not administratively. Citing these decisions, a district court held that the Commissioner of Internal Revenue is without authority to reverse his predecessor's determination of a question of fact,⁹⁰ and another district judge declared that "[a]ny other conclusion would bring chaos in governmental administration and cause untold annoyance to our citizens."⁹¹

⁸⁵ Wenchel, *Taxpayer's Rulings*, 5 *Tax. L. Rev.* 105, 112, 113-14, 115 (1950). The policy has been in effect for more than a decade. *Ibid.*, at 113.

⁸⁶ *Ibid.*, at 115. It has "been the unvarying policy of the Bureau for a decade or more." *Ibid.*

⁸⁷ *United States v. Bank of the Metropolis*, 15 *Pet. (U.S.)* 377, 401 (1841).

⁸⁸ *Stone v. United States*, 2 *Wall. (U.S.)* 525, 535 (1864) (successor cannot annul patent issued by his predecessor); *United States v. Real Estate Savings Bank*, 104 *U.S.* 728, 733-34 (1882) (allowance of claim by Commissioner can only be impeached in court for fraud or mistake); cf. *United States v. Great Northern Ry. Co.*, 287 *U.S.* 144 (1932).

⁸⁹ 96 *U.S.* 567 (1878).

⁹⁰ *Penrose v. Skinner*, 278 *Fed.* 284, 286 (*D. Colo.*, 1921).

⁹¹ *Penrose v. Skinner*, 298 *Fed.* 335, 337 (*D. Colo.*, 1923). See also note 66 *supra*. Compare a consul's absence of implied power to revoke a visa once issued to an alien, *United States v. Reimer*, 101 *F.2d* 267, 269 (*C.A. 2d*, 1939), on the ground that it would "involve the possession of an essentially arbitrary discretion."

In a number of subsequent tax cases, some courts have denied both the power of the Commissioner to change the position taken by a predecessor⁹² and his power to change his own position.⁹³ Other courts have taken a contrary view,⁹⁴ traceable ultimately to an article published in 1928 by Professor Magill.⁹⁵ The views there expressed have been so influential as to require detailed examination.

Magill sought to distinguish a number of opinions of Attorneys General as well as some lower court decisions "indicating that an administrative officer may not reverse the action of his predecessor, even for an erroneous construction of the law. . . ."⁹⁶ There is no occasion to dwell on these opinions and decisions,⁹⁷ for the Supreme Court cases here discussed contain no intimation that the distinguishing factors stressed by Magill played any role.

⁹² *H. S. D. Co. v. Kavanagh*, 191 F. 2d 831, 846 (C.A. 6th, 1951); *Stockstrom v. Commissioner*, 190 F. 2d 283, 288-89 (App. D.C., 1951); *Woodworth v. Kales*, 26 F. 2d 178, 181 (C.A. 6th, 1928); *Boyne City Lumber Co. v. Doyle*, 47 F. 2d 772, 774 (D. Mich., 1930).

⁹³ *Vestal v. Commissioner*, 152 F. 2d 132, 136-37 (App. D.C., 1945); *Norton Coe v. Commissioner*, 50 F. 2d 664, 669 (C.A. 1st, 1931); see *Wurtsbaugh v. Commissioner*, 187 F. 2d 975, 977 (C.A. 5th, 1951); *United States v. Brown*, 86 F. 2d 798 (C.A. 6th, 1936); *Joseph Eichelberger & Co. v. Commissioner*, 88 F. 2d 875 (C.A. 5th, 1937); *United States v. Borg-Warner Corporation*, 108 F. 2d 424, 428 (C.A. 7th, 1939); *Ford Motor Co. v. United States*, 9 F. Supp. 590, 601 (Ct. Cl., 1935); *Potter v. Fahs*, 71 F. Supp. 675, 678 (S.D. Fla., 1947). See also note 117 *infra*.

⁹⁴ We set to one side the cases holding that a prior interpretation of law is not binding on the Commissioner. See authorities cited note 59 *supra*.

McIlhenny v. Commissioner, 39 F. 2d 356 (C.A. 3d, 1930); *Burnet v. Porter*, 283 U.S. 230 (1931); *Page v. Lafayette Worsted Co.*, 66 F. 2d 339 (C.A. 1st, 1933); *L. Loewy & Son v. Commissioner*, 31 F. 2d 652 (C.A. 2d, 1929); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863 (C.A. 8th, 1944); *Tonnigsen v. Commissioner*, 61 F. 2d 199 (C.A. 9th, 1932); *Stanford University Book Store v. Helvering*, 83 F. 2d 710 (App. D.C., 1936); *Washington Market Co. v. Commissioner*, 25 B.T.A. 576 (1932).

⁹⁵ Magill, *op. cit.* *supra* note 66.

⁹⁶ *Ibid.*, at 568.

⁹⁷ Magill stated with respect to some of them that Congress had "conferred the power to determine a claim upon a particular individual; thereby inferentially at least precluding a review by his successor," and that the underlying policy was that there "was no statute of limitations to prevent an indefinite succession of reopenings. . . ." *Ibid.*, at 568. These factors played no role in the Supreme Court cases earlier cited. Other cases are distinguished by Magill on the ground that interests in patents or land "had been vested by the act of the former administrative officer." *Ibid.* In *Stone v. United States*, 2 Wall. (U.S.) 525, 535 (1860), the Court indicated that even a patent "void for want of authority" could not be annulled by a successor. Such void patent in legal contemplation never "vests" title. Compare note 41 *supra*. Finally, Magill urges that an administrative decision that an admiral was not in the naval service at a given time and a Commissioner's decision, setting the value of Ford Motor Co. stock at a given time, exhibit such "tremendous differences in the facts . . . and in the potential effect of the two decisions" as to counsel "that a legal analogy between the cases should not be lightly drawn." 28 Col. L. Rev. 563, 573 (1928). To the contrary, we submit, the fact that the Ford decision shook public confidence in the Commissioner (page 693 *supra*) and that such a tax decision adversely affected the rights of others similarly situated indicates that the reversal of a tax decision has less to commend it than that of a decision concerning an Admiral's standing.

A more weighty argument to support the view that the Commissioner may overrule a predecessor is based by Magill upon the fact that the Internal Revenue statute, in providing that a "closing agreement" shall be "final and conclusive," furnished the exclusive mechanism for finality.⁹⁸ This argument was adopted in *McIlhenny v. Commissioner*, expressed in terms of the rule that "when a statute limits a thing to be done in a particular way, it includes a negative of any other mode."⁹⁹

Mechanical reliance on rules of construction has given way to the view that they "are not rules of law but merely axioms of experience. . . . They do not solve the special difficulties in construing a particular statute."¹⁰⁰ Then, too, there is competition amongst such rules. In the presence of a long line of cases precluding the reversal of a predecessor's determination, the court, for example, might well have concluded, as did the Supreme Court, in *Transcontinental & Western Air v. Civil Aeronautics Board*,¹⁰¹ that Congress, in enacting the "closing agreement" provision, had not plainly exhibited any intention to "make a radical break with tradition," or that Congress had not "clearly" shown an intention to depart from the common law.¹⁰²

⁹⁸ 28 Col. L. Rev. 563, 567 n. 27 (1928). This provision is now found in 53 Stat. 462 (1939), 26 U.S.C.A. § 3760 (1940).

Still another argument by Magill is that the definition of a "deficiency" [now contained in 53 Stat. 82 (1939), 26 U.S.C.A. § 271 (1945)] "contemplates the possibility of previous determinations." 28 Col. L. Rev. 563, 567 (1928). The then provision that the deficiency shall "first be increased by the amounts previously assessed . . . as a deficiency, and decreased by the amounts previously abated . . .," quoted by Magill, *ibid.*, at 568, indicates, however, that past administrative action in this regard must be respected. Moreover, recognition of the mere "possibility of previous determinations" does not clearly disclose a purpose to depart from the common-law rule which precludes a successor from overruling the determination of a predecessor.

⁹⁹ 39 F. 2d 356, 358 (C.A. 3d, 1930); see also *L. Loewy & Sons v. Commissioner*, 31 F. 2d 652, 654 (C.A. 2d, 1929); *Knapp-Monarch Co. v. Commissioner*, 139 F. 2d 863, 864 (C.A. 8th, 1944). Cf. *Burnet v. Porter*, 283 U.S. 230, 231 (1931).

¹⁰⁰ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1953); *Springer v. Philippine Islands*, 277 U.S. 189, 206 (1928); *United States v. Gilliland*, 312 U.S. 86, 93 (1941). Compare the pioneer utterance of Chief Justice Doe: "Legal rules of construction, so called, suggest natural methods of finding and weighing the evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in the mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof." *Edes v. Boardman*, 58 N.H. 580, 592 (1879). Compare cases cited note 127 *infra*.

¹⁰¹ 336 U.S. 601 (1949). There retroactive effect was denied to a provision authorizing the Board "to make such rates effective from such date as it shall determine to be proper" on the ground that traditionally rate-making is prospective and because the Court found no "[c]ongressional purpose to make a radical break with tradition" and was therefore "most reluctant to give the 'make effective' clause the broad meaning [of retroactivity] which petitioner urges." *Ibid.*, at 605.

¹⁰² *Northern Securities Co. v. United States*, 193 U.S. 197, 361 (1904) (Brewer, J., concurring); *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880); *Jones v. Jones*, 72 F. 2d 829 (App. D.C., 1934). That the "expressio unius" rule does not foreclose the matter may be gathered

That intention, it may be thought, can be found in an extract from the legislative history of the "closing agreement" provision, first noted by Magill:

Under the present method of procedure, a taxpayer never knows when he is through, as a tax case may be opened at any time because of a change in ruling by the Treasury Department.¹⁰³

This statement does not reflect the *law* as expressed in the Supreme Court cases earlier discussed, but rather the Treasury *procedure*, contrary to that law. At most, it therefore expresses a Congressional misapprehension of existing law to which little weight would attach.¹⁰⁴ More significant is the legislative statement accompanying the provisions in the same Act respecting retroactivity of regulations, which is in *pari materia*, whereby Congress unequivocally exhibited its intention to relieve taxpayers who relied upon existing practices of the inequities of retroactive charges and to make the government responsible for interpretations upon which taxpayers may rely.¹⁰⁵

RETROACTIVITY OF NEW REGULATIONS

Reliance upon a regulation promulgated by the head of an agency, one would think, should be free from the doubts that surround reliance on a subordinate's interpretation. Yet such confidence too may prove costly to the citizen. It is all too easy to explain retroactive displacement of an old regulation by a new one in terms of a "continuing rule-making" power,¹⁰⁶ or of the absence of power to commit the government to a mistaken inter-

from *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929), where, in a parallel situation, the Supreme Court was at pains to save the question whether an agreement by subordinates outside the statutory mechanism, "though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel."

¹⁰³ Report of Committee on Finance on the Revenue Bill of 1921, Report No. 275, 67th Cong. 1st Sess. 31 (1921), quoted by Magill, *op. cit.* supra note 66, at 567 n. 26.

¹⁰⁴ In *Salomon Bros. & Hutzler v. Pedrick*, 105 F. Supp. 210, 213 (S.D. N.Y., 1952), the Congress had enacted a law adopting a view contrary to the prior Bureau interpretation, but stated in a Report that "under the present law," the law was as the Bureau interpreted it. The court held that "such reference to the 'present law' in the Committee Reports is not final nor dispositive. A mere reference to what the 'law' presently is, in a Committee Report, is not necessarily accurate nor always free from error."

¹⁰⁵ These legislative materials are discussed at page 700 *infra*.

"Instead of balancing the various generalized axioms of experience [i.e., rules of construction], in construing legislation, regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952).

See also Magill's citation to provisions indicating "a legislative desire to prevent repeated reopenings of tax cases," note 108 *infra*.

¹⁰⁶ *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939).

pretation,¹⁰⁷ or, as Professor Magill suggested, of the Commissioner's duty to collect taxes due which compels him to reverse an erroneous interpretation.¹⁰⁸ But these are shaky conclusions. Was the Commissioner in contemplation of law necessarily "wrong the first time"?¹⁰⁹

Suppose that the displaced regulations represent a contemporaneous construction of the statute. Such interpretations carry "great weight."¹¹⁰ Given an ambiguous statute, a regulation that is substantially contemporaneous with the statute is regarded as evidence of the probable general understanding of the times and of the opinions of men "who probably were active in the drafting of the statute."¹¹¹ From Mr. Justice Story onwards, the Supreme Court has yielded its doubts in the face of a long-continued administrative construction;¹¹² it has considered that construction "binding on past transactions";¹¹³ it has viewed "with disfavor" a retroactive change which would work injury upon those who relied upon a former con-

¹⁰⁷ *Schafer v. Helvering*, 83 F. 2d 317, 320 (App. D.C., 1939). See also *Commissioner v. American Light & Traction Co.*, 125 F. 2d 365, 366 (C.A. 7th, 1942).

¹⁰⁸ Magill states that the "Commissioner's duty to collect taxes due would compel him to reverse a prior ruling of law in a particular case, if he concluded it was an erroneous interpretation." Magill, *op. cit. supra* note 66, at 568. (Emphasis added.) This was put upon the then provision that the "Commissioner . . . shall make . . . the determinations and assessments of all taxes. . . ." *Ibid.*, at 564 n. 7. Parenthetically, today the Commissioner merely has "general superintendence of the assessment and collection of all taxes. . . ." 53 Stat. 477 (1940), 26 U.S.C.A. § 3901 (1947). The word "shall" is as often permissive as mandatory, and given the huge volume of tax collections, a large area of discretion in the re-"determination" and re-"assessment" of taxes must necessarily reside in the Commissioner, a necessity which bars the notion of mandatory duty. More important, the administrators themselves recognize no such duty once they have given a ruling, for they adhere thereto "even where a Supreme Court decision changes the Bureau's previous interpretation of the law, and such change operates to the benefit of the Government. . . ." *Wenchel, op. cit. supra* note 85, at 115. Despite the "duty to collect taxes that are due," Magill himself states that "a reasonable finality of interpretation" is called for "if chaos is to be avoided," that "at the very least it would seem that there should be a considerable reluctance to reopen old cases, in the absence of fraud, a material mistake in fact, a controlling court decision, or perhaps a serious error in the interpretation of the law. The provisions for a formal declaration from which the taxpayer can appeal to the Board of Tax Appeals; the provision denying the Commissioner power to make a redetermination for a particular year where an appeal has been taken for that year; the provision authorizing final statement; all indicate a legislative desire to prevent repeated reopenings of tax cases. A decent respect may properly be paid to this desire. . . ." Magill, *op. cit. supra* note 66, at 575.

¹⁰⁹ *Stockstrom v. Commissioner*, 190 F. 2d 283, 289 (App. D.C., 1951) (Prettyman, J., dissenting).

¹¹⁰ *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

¹¹¹ *White v. Winchester Country Club*, 315 U.S. 32, 41 (1942); *Augustus v. Commissioner*, 118 F. 2d 38 (C.A. 6th, 1941); Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 405 (1941).

¹¹² *United States v. State Bank of North Carolina*, 6 Pet. (U.S.) 29, 39-40 (1832).

¹¹³ *United States v. MacDaniel*, 7 Pet. (U.S.) 1, 15 (1833).

struction;¹¹⁴ and it has said that such a construction "ought not to be disturbed now unless it be plainly wrong."¹¹⁵ Indeed, a long-continued construction under a statute which Congress has left untouched is said to have the force of law.¹¹⁶ If the courts are thus under a duty to swallow their doubts when confronted by a contemporaneous construction of an ambiguous statute, all the less should the Commissioner or any other officer be permitted to turn interpretive somersaults.¹¹⁷ In such case, surely, the Court, in choosing between the earlier and later regulations, is no less free than it formerly was in determining what the state law was¹¹⁸ when it held that "where gross injustice would be otherwise done," the federal courts would follow "the earlier [state decisions] rather than the later decisions as to what it was."¹¹⁹

Against this, it has been argued that Section 3791(b) of the Internal Revenue Code authorizes retroactive regulations.¹²⁰ Section 3791(b) authorizes the Commissioner to "prescribe the extent, if any, to which any

¹¹⁴ *United States v. Alabama G.S.R. Co.*, 142 U.S. 615, 621 (1892).

¹¹⁵ *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1930). See also *Griswold*, op. cit. supra note 111, at 409. In the tax field, there is the additional rule that doubts in the construction of a tax statute are resolved in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Cloister Printing Corp. v. United States*, 100 F. 2d 355, 357 (C.A. 2d, 1938).

¹¹⁶ "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313 (1933) (per Cardozo, J.). See also *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); *Stout v. Hancock*, 146 F. 2d 741, 744 (C.A. 4th, 1944).

¹¹⁷ Courts are not bound to give retrospective effect to a regulation not retroactive in terms though the Commissioner announced he would give it retroactive effect. *Kay v. Commissioner*, 178 F. 2d 772 (C.A. 3d, 1950). Compare the rejection of an additional tax "based upon a theory at variance with established administrative interpretation." *United Fruit Co. v. Hassett*, 61 F. Supp. 1013, 1019 (D. Mass., 1945), and see requirement that published ruling be repealed by formal action and publication, and note rejection of departure from ruling prior thereto in *James v. Germania Iron Co.*, 107 Fed. 597, 609-10 (C.A. 8th, 1901).

In *Hirshon v. United States*, 113 F. Supp. 444, 445 (Ct. Cl., 1953), the Court said: "[T]he Bureau itself, for two years after its enactment, interpreted the statute as making these taxes deductible. . . . Then, without amendment of the statute, or the publication of any Treasury Regulation, we have the Bureau issuing an I.T. which says the opposite. As we understand it, an I.T. is an instruction issued to the staff of the Bureau, as to how the law should be administered by the staff. The Bureau has no power to make law by such an instruction, even to the extent that the Secretary of the Treasury may make law by regulation."

¹¹⁸ *Gelpcke v. Dubuque*, 1 Wall. (U.S.) 175 (1863).

¹¹⁹ *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 452 (1924). The Supreme Court has indicated that "it may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons. . . ." *Sanford's Estate v. Commissioner*, 308 U.S. 39, 53 (1939).

¹²⁰ 53 Stat. 467 (1939), 26 U.S.C.A. § 3791 (1940); consult *Magill*, op. cit. supra note 66, at 570-71 for predecessor section. See also *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892, 897 (C.A. 2d, 1935). It is worth noting that the predecessor statute to which *Magill* refers was expressly couched in terms of "the discretion of the Commissioner." *Magill*, op. cit. supra note 66, at 570. That phrase is absent from § 3791(b).

ruling, regulation . . . shall be applied without retroactive effect." Although the literal terms suggest recognition of the existence of retroactive regulations,¹²¹ the legislative history of this provision discloses an intention to curb retroactivity. The Conference Committee stated with respect to the predecessor of Section 3791(b) that:

It is hoped that this provision *will prevent* the constant *reopening* of cases on account of changes in regulations or Treasury decisions, and it is believed that sound administration properly *places upon the Government* the *responsibility* and burden of *interpreting* the law and of *prescribing regulations upon which the taxpayers may rely*.¹²²

The Supreme Court noted that the Committee Reports respecting the 1934 amendment of this provision stated that it "was intended to permit the Treasury to *avoid inequities* to persons who had closed transactions in reliance upon existing practice. . . ." ¹²³ Thus the Congress plainly manifested its intention to relieve taxpayers who relied upon "existing practice" of retroactive inequities and to compel the government to prescribe regulations upon which taxpayers may rely. In the words of the Supreme Court, Section 3791(b) and its predecessors were designed to relieve the Treasury from the view that "each change in administrative construction must be given retroactive effect," a view that "deprived both the Government and the taxpayer of any assurance that cases once settled would stay settled."¹²⁴

The Bureau, for upwards of ten years, has not retroactively applied changes in *rulings*, also a component of Section 3791(b), "even where a Supreme Court decision changes the Bureau's previous interpretation of the law. . . ." ¹²⁵ This course has been followed under the "policy of fair play,"¹²⁶ but, it is suggested, this is tantamount to a long-continued administrative construction of Section 3791(b), a construction that gives effect to the legislative history. If this falls short of a settled administrative construction, the courts ought nonetheless to give effect to the plainly dis-

¹²¹ For present purposes, it is unnecessary to determine whether this section authorizes the issuance of retroactive regulations as Magill suggests, *op. cit. supra* note 66, at 570-71, and as *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939), would seem to indicate. It suffices that the literal terms imply recognition of the existence of such a power. *Surrey, The Scope and Effect of Treasury Regulations Under the Income, Estate and Gift Taxes*, 88 U. of Pa. L. Rev. 556, 567 (1940); and see *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943): "Thus it appears that this legislation was intended to permit escape from the retroactive effects of administrative action by the Treasury, rather than to increase its power to make retroactive rulings."

¹²² H.R. Rep. No. 1882, 70th Cong. 1st Sess. 22 (1928), quoted in *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943). (Emphasis added.)

¹²³ *Helvering v. Griffiths*, 318 U.S. 371, 397 n. 49 (1943). (Emphasis added.)

¹²⁴ *Ibid.*

¹²⁵ *Wenchel, op. cit. supra* note 85, at 115.

¹²⁶ *Ibid.*

closed intention of Congress, however imperfectly expressed in the literal terms of the Act.¹²⁷

Thus far we have considered regulations under an ambiguous statute. Suppose the superseded regulation is inconsistent with the literal terms of that statute. In such case, it has been said, the ability of an administrator to prescribe a retroactive rule "is measured by the ability of Congress itself to make the retroactive command."¹²⁸ But, had Congress itself enacted a successor statute which would alter pre-existing rights, a retrospective effect would be rejected unless required by the "unequivocal and inflexible import of the terms, and the manifest intention of the legislature."¹²⁹ In more recent terms, "[r]etroactivity, even where permissible, is not favored except upon the clearest mandate."¹³⁰ The mere grant of power to make regulations need not be read to authorize retroactive regulations when an amendatory act by Congress itself would be jealously read for the "clearest mandate" of retroactivity.¹³¹

But how, it may be asked, can estoppel be founded upon a regulation that is void and of no effect because inconsistent with the "plain" terms of the statute?¹³² This doctrine of absolute retroactive invalidity has been "eroded" in an analogous case with the aid of a "realistic approach."¹³³ In *Chicot County Drainage District v. Baxter State Bank*,¹³⁴ where a decree was

¹²⁷ "But the fair interpretation of a statute is often 'the art of proliferating a purpose,' . . . revealed more by the demonstrable forces that produced it than by its precise phrasing." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 489 (1951). If, said Mr. Justice Holmes on circuit, a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute . . . may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32 (C.A. 1st, 1908), quoted with approval in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391 (1939).

¹²⁸ *Surrey*, op. cit. supra note 121, at 569. See also *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892, 896 (C.A. 2d, 1935).

¹²⁹ *United States v. Heth*, 3 Cranch (U.S.) 399, 413 (1806).

¹³⁰ *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

¹³¹ Compare note 101 supra. It is argued that if the old regulation is invalid, "the new regulation should be given full retroactive effect, as otherwise the statute would be incomplete and unworkable." *Surrey*, op. cit. supra note 121, at 569. The statute can become complete and workable from the time the new regulation takes effect. An amendatory statute which was not retroactive in express terms could accomplish no more.

¹³² *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *Miller v. United States*, 294 U.S. 435, 439 (1935).

¹³³ *Warring v. Colpoys*, 122 F. 2d 642, 646 (App. D.C., 1941) (per Vinson, J.).

¹³⁴ 308 U.S. 371 (1940). The reluctance with which courts overrule a prior decision on a constitutional question suggests that the overruled decision no less departs from the "plain" meaning of the Constitution than does a rejected regulation from the "plain" meaning of the statute. "Absolute invalidity" is no more required in the one case than the other.

attacked as lacking basis because the underlying statute was subsequently declared unconstitutional, Chief Justice Hughes declared:

The actual existence of a statute, prior to such a determination, is an operative fact and may have *consequences which cannot justly be ignored*. The past cannot always be erased by a new judicial declaration . . . it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.¹³⁵

In the mentioned "decisions," the great majority of the state courts have refused to give retroactive effect to an overruling decision which construed a statute or constitution, when intermediate rights would be prejudiced thereby.¹³⁶ Such cases often cite *Gelpcke v. Dubuque*¹³⁷ and related federal cases. Because the reasoning of that decision is now suspect and because the anti-retrospective doctrine is frequently phrased in restrictive terms, it is essential to examine whether these cases furnish a safe analogy for refusal to give retroactive effect to a declaration that a regulation or authoritative administrative interpretation is invalid.

Gelpcke v. Dubuque was a suit in a federal court upon municipal bonds issued under state court decisions sustaining the power of issuance, which decisions were later overruled by the state court. The Supreme Court's intimation,¹³⁸ later made explicit,¹³⁹ that such a change of decision was an unconstitutional impairment of contract met with vigorous dissent from Mr. Justice Miller and has since been repudiated.¹⁴⁰ For purposes

¹³⁵ *Ibid.*, at 374.

¹³⁶ The cases are collected in Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121, 130 n. 101 (1940). For recent cases, see *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 S. 2d 251 (1944); *Swank v. Tyndall*, 226 Ind. 204, 78 N.E. 2d 535 (1948); *German Gymnastic Association v. City of Louisville*, 306 Ky. 810, 209 S.W. 2d 75 (1948); *Gentzler v. Constantine Village Clerk*, 320 Mich. 394, 398, 31 N.W. 2d 668, 669 (1948); *Mississippi State Tax Comm. v. Brown*, 188 Miss. 483, 509, 195 So. 465, 470 (1940); *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 156 P. 2d 340 (1945).

¹³⁷ 1 Wall. (U.S.) 175 (1864). Consult Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Col. L. Rev. 230, 243 (1918).

¹³⁸ 1 Wall. (U.S.) 175, 206 (1864): "[I]f the contract, when made, was valid . . . its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." [Quoting Chief Justice Taney in *Ohio Life & Trust Co. v. Debolt*, 16 How. (U.S.) 416, 432 (1853).]

¹³⁹ *Douglass v. County of Pike*, 101 U.S. 677, 687 (1880), per Waite, C. J.: "[W]e cannot give them [new decisions] a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution . . . from doing."

¹⁴⁰ The impairment clause "is directed only against impairment by legislation, and not by judgments of courts." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1923). Chief Justice Taft's rationalization of the *Gelpcke* case—that the federal courts under diversity jurisdiction "held themselves free to decide what the state law was" and to choose the earlier rather than later decision (*ibid.*, at 452)—is hopelessly irreconcilable, as Mr. Justice Miller saw from the outset [1 Wall. (U.S.) 175, 213 (1864)], with the established rule that in construing state

of determining whether federal courts may refuse to give retroactivity to *their own* decisions, it is of no moment that their constitutional power to *compel state courts* similarly to act is today doubtful.¹⁴¹ Still relevant, however, is Mr. Justice Miller's insistence that the *Gelpcke* decision scuttled the theory that courts merely declare and do not make law when they overrule a decision.¹⁴²

Despite the fact that this "declaratory" theory is manifestly a "childish fiction,"¹⁴³ that, as Sir Frederick Pollock said in 1906, "no intelligent lawyer would at this day pretend that the decisions of the Courts do not add to and alter the law,"¹⁴⁴ the "ancient dogma" that the law declared by the courts "had a Platonic or ideal existence before the act of declaration"¹⁴⁵ continues to be reiterated with unquestioning judicial fidelity.¹⁴⁶ But, the "dogma" is riddled by exceptions which are actually irrecon-

statutes or constitutions state courts have the last word. *Leffingwell v. Warren*, 2 Black (U.S.) 599, 603 (1862); *Watson v. Buck*, 313 U.S. 387, 401 (1941); cf. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

¹⁴¹ In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), Mr. Justice Cardozo said that a state "may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Indeed there are cases intimating, too broadly, that it *must* give them that effect. . . ."

¹⁴² 1 Wall. (U.S.) 175, 211 (1864). His view was adopted by Mr. Justice Holmes, dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910), and by Gray, *Nature and Sources of the Law*, 256-57 (2d ed., 1921).

¹⁴³ 2 Austin, *Jurisprudence*, 655 (4th ed., 1873); see also Kocourek and Koven, *op. cit.* supra note 66, at 986.

¹⁴⁴ Notes by Frederick Pollock to Maine, *Ancient Law* 48 (1930). Holmes "regarded those who doubted that the judges made law . . . as simply incompetent or else carried away by a hobby." 1 Holmes-Laski Letters 183 (1953). Holmes' early remark that "what the courts declare to have always been the law is in fact new," Holmes, *The Common Law* 35-36 (1881), had been anticipated: Bentham, *A Comment on the Commentaries* 190, 198 (Everett ed., 1928); Austin *op. cit.* supra note 143, at 655; Maine, *supra*, 37-38. See also Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 Harv. L. Rev. 344, 366 (1914).

¹⁴⁵ *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

¹⁴⁶ A number of examples must suffice: *Sunray Oil Co. v. C.I.R.*, 147 F. 2d 962 (C.A. 10th, 1945); *Ruppert v. Ruppert*, 134 F. 2d 497 (App. D.C., 1943); *Peterson v. John Hancock Mutual Insurance Co.*, 116 F. 2d 148 (C.A. 8th, 1940); *Chelsea v. R. T. Green Co.*, 318 Mass. 85, 60 N.E. 2d 351 (1945).

A recent commentator, despairing "of succeeding where the mighty have failed, accepts the [declaratory] theory," Snyder *op. cit.* supra note 136, at 122, and attempts by involved reasoning to show that it squares with a denial of retrospective operation to overruling decisions. *Ibid.*, at 145-53. Anticipating criticism that his synthesis "is merely a subterfuge to avoid admitting that the judges 'make' law," he defends it because "it enlists habitual modes of thought." *Ibid.*, at 152. But "the refusal to admit the reality of judicial legislation does not improve the process." Frank, *Law and the Modern Mind* 215 (1930). See also *Blackstone v. Miller*, 188 U.S. 189, 204 (1903); *Hammond-Knowlton v. United States*, 121 F. 2d 192, 199 (C.A. 2d, 1941).

cilable with the "declaratory theory"¹⁴⁷ and represent a revolt from conceptualism at the call of justice.¹⁴⁸

The mistaken notion that retroactivity of overruling decisions collides with the constitutional restriction on laws impairing the obligation of contracts¹⁴⁹ frequently led the courts to phrase the "exception" in terms confined to contracts.¹⁵⁰ Nevertheless, the exception has lustily expanded beyond these narrow confines,¹⁵¹ the reason being that it was from the beginning rested "upon the plainest principles of justice."¹⁵² The "exceptions" merely called on the courts themselves to observe the ban on retroactivity which they had laid down for the legislatures.¹⁵³ Men have a right, in-

¹⁴⁷ Though "most of the courts express nominal allegiance" to the declaratory theory, "the hardship and mischief in its strict application has led many courts . . . to depart widely from it in so-called 'exceptions.'" Freeman, *op. cit. supra* note 137, at 233; Snyder, *op. cit. supra* note 136, at 130-33.

¹⁴⁸ "It is difficult to sustain the exception on principle. . . . It is plainly an exception made by the courts, at the call of justice." Falconer v. Simmons, 51 W.Va. 172, 178, 41 S.E. 193, 196 (1902). See also Laabs v. Tax Comm., 218 Wis. 414, 417, 261 N.W. 404, 405 (1935). Mr. Justice Cardozo has referred to the "spirit of realism" with which the courts have dealt with the problem, saying that the result "may be hard to square . . . with abstract dogmas," but that the line was drawn because "the injustice and oppression of a refusal to draw it would be so great as to be intolerable." Cardozo, *Selected Writings* 170 (1947).

¹⁴⁹ Freeman, *op. cit. supra* note 137, at 236; Snyder, *op. cit. supra* note 136, at 133-34; see, e.g., *Thomas v. State*, 76 Ohio St. 341, 81 N.E. 437 (1907); *Harmon v. Auditors of Public Accounts*, 123 Ill. 122, 135, 13 N.E. 161, 165 (1887).

¹⁵⁰ See *Lewis v. Symmes*, 61 Ohio St. 471, 485, 56 N.E. 194, 196 (1900); *Falconer v. Simmons*, 51 W.Va. 172, 178, 41 S.E. 193, 196 (1902); *Haskett v. Maxey*, 134 Ind. 182, 191, 33 N.E. 358, 360 (1892); Snyder, *op. cit. supra* note 136, at 131.

¹⁵¹ Snyder, *op. cit. supra* note 136, at 130-33. For non-contract applications, see *Copper v. Hawkins*, 234 Ala. 636, 176 So. 329 (1937) (de facto officer protected against salary suit); *German Gymnastic Association v. City of Louisville*, 306 Ky. 810, 209 S.W. 2d 75 (1948) (taxes); *Montana Horse Products Co. v. Great Northern Railway Co.*, 91 Mont. 194, 211, 7 P. 2d 919, 925 (1931) (remedy); *State v. Haid*, 327 Mo. 567, 586, 38 S.W. 2d 44, 53 (1931) (procedure); *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 156 P. 2d 340, 362 (1945); *Kelley v. Rhoads*, 7 Wyo. 237, 239, 51 P. 593 (1898) (remedy). For broad phrasing of the exception to retroactivity, see *Mississippi State Tax Comm. v. Brown*, 188 Miss. 483, 509, 195 So. 465, 470 (1940); *Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 477, 18 S. 2d 251, 253 (1944); *Payne v. City of Covington*, 276 Ky. 380, 392, 123 S.W. 2d 1045, 1051 (1938). But some courts continue to read the "exception" narrowly: *Donohue v. Russell*, 264 Mich. 217, 219, 249 N.W. 830, 831 (1933); *Jackson v. Harris*, 43 F. 2d 513, 516-17 (C.A. 10th, 1930); *Linn County v. Rozelle*, 177 Ore. 245, 283, 162 P. 2d 150, 165 (1945).

¹⁵² *Gelpcke v. Dubuque*, 1 Wall. (U.S.) 175, 206 (1864). The cases are collected in Snyder, *op. cit. supra* note 136, at 140-42. The "singularly feeble" reasoning of the Gelpcke decision, Gray, *op. cit. supra* note 142, at 257, was but an obeisance to judicial conventions. The motivation nakedly appears in the statement that "[w]e shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." *Gelpcke v. Dubuque*, *supra*, at 206. In the words of the then Supreme Court Reporter, Wallace, in his preface to the volume reporting *Gelpcke v. Dubuque*, the case was one "[w]here high moral duties were enforced upon a whole community, seeking apparently to violate them. . . ." 1 Wall. (U.S.) xiv (1864).

¹⁵³ *Geddes v. Brown*, 5 Phila. 180, 187 (1863).

deed, they are under a duty, to respect the decision of a supreme court,¹⁵⁴ and they ought not to suffer for it.¹⁵⁵

Absolute retroactive invalidity was thus rejected to avoid "injustice and oppression."¹⁵⁶ True, the rejection has thus far been applied only to overruled decisions by courts of last resort, the reason assigned by Mr. Justice Cardozo being that men know they cannot safely assume that lower courts have finally settled general propositions.¹⁵⁷ But an administrative regulation or an authoritative legal interpretation must be distinguished¹⁵⁸ if we are not to invite litigation as a preliminary to compliance. Such an invitation could hamstring administration. To encourage reliance on the highest administrative pronouncement is to advance good government.¹⁵⁹ Unless a man's trust in his government is protected, an early court wisely observed,

every man is bound to question every act of government that affects him, and to resist whatever he does not approve—a doctrine that would make government impossible.¹⁶⁰

In a word, retroactivity, whether of judicial decisions, of legislation, or of administrative regulations or interpretations, has little to commend it.¹⁶¹ The anti-retroactive "exception" fashioned by the courts with respect to their own decisions at the call of justice furnishes a sound analogy for protecting citizens who relied on regulations or authoritative interpretations

¹⁵⁴ *Harris v. Jex*, 55 N.Y. 421, 424 (1874); *Menges v. Dentler*, 33 Pa. 495, 500 (1859); *Warring v. Colpoys*, 122 F. 2d 642, 645 (App. D.C., 1941) (per Vinson, J.).

¹⁵⁵ *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 180, 9 So. 532, 533 (1891); *Kelley v. Rhoads*, 7 Wyo. 237, 239 (1898); *Menges v. Dentler*, 33 Pa. 495, 500 (1859); *Hollinshead v. von Glahn*, 4 Minn. *190, *191 (1860); *Swank v. Tyndall*, 226 Ind. 204, 222, 78 N.E. 2d 535, 543 (1948).

¹⁵⁶ Authorities cited note 148 *supra*.

¹⁵⁷ Cardozo, *Selected Writings* 170 (1947).

¹⁵⁸ Judge Paine stated in *Kneeland v. Milwaukee*, 15 Wis. 454*, 694* (1862) that "there are many cases which would almost sustain the proposition, that the practical construction of mere administrative officers, which have been acquiesced in for a long time, without any judicial decision whatever, should in such cases be followed, though in conflict with the Constitution." But these cases have not come across this writer's ken.

¹⁵⁹ Maguire and Zimet, *op. cit. supra* note 36, at 1305.

¹⁶⁰ *Menges v. Dentler*, 33 Pa. 495, 500 (1859).

¹⁶¹ "Retroactivity is not favored in law. . . . There are few occasions when retroactivity does not work more unfairly than fairly. Congress, the state legislatures and the courts apply the principle sparingly, even where they may." *Addison v. Holly Hill Company*, 322 U.S. 607, 641 (1944) (dissenting opinion of Rutledge, Black, and Murphy, JJ.).

See 1 Kent's *Commentaries* 455 (14th ed., 1896); and authorities cited notes 129 and 130 *supra*. 1 Crosskey, *Politics and the Constitution*, 324-51 (1953), persuasively shows that the constitutional "ex post facto" clause was originally designed to prohibit retroactive civil as well as criminal laws.

from declarations of retroactive invalidity. The drawing of the line in this field, as Mr. Justice Cardozo pointed out, should

be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers,¹⁶² but by considerations of convenience, of utility, and of the deepest sentiments of justice.¹⁶³

Whether application of these principles to the tax field is precluded by Section 3791(b)¹⁶⁴ remains to be decided.¹⁶⁵ Reliance on the literal terms of that section¹⁶⁶ is, I believe, mistaken. Be the initial regulation "legislative"

¹⁶² A refusal to give retroactive effect to a judicial decision raises no separation of powers problem. The separation of powers is to be viewed in terms of what judges were actually doing at the adoption of the Constitution, not in terms of descriptive labels that might be attached to their activity by doctrinaires. Then, as now, judges made new law when they announced a rule. Hence the courts are in no wise prevented by the separation of powers from limiting the effect of a decision to the future.

¹⁶³ Cardozo, *Selected Writings* 170 (1947). In *United States v. Alabama G. & S. R. Co.*, 142 U.S. 615, 621 (1892), a contemporaneous construction, "though inconsistent with the literalism of the act" was "considered as decisive in this suit" by the Supreme Court because it "consort[ed] with the equities" and avoided retroactivity which was "especially objectionable" because prejudicial to a citizen.

Dean Griswold, *op. cit. supra* note 111, at 411, states that "[a]s a matter of wise tax administration, the Treasury should be held to have no power to amend a legislative regulation retroactively," and that after "an interpretative regulation becomes seasoned it becomes something upon which people justifiably rely; and then the principle of retroactivity should be given controlling force." *Ibid.*, at 413.

¹⁶⁴ See page 699 *supra*.

¹⁶⁵ In *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), and *Helvering v. Griffiths*, 318 U.S. 371 (1943), the Supreme Court held that reenactment of a statute in the face of an existing regulation deprives the Treasury of the right to give a superseding regulation retroactive effect. But the Court's elaborate analysis of the legislative history in the Griffiths case, *ibid.*, at 397 n. 49, which is the most recent case examining "3791," and its invocation of the "principle" that "a long period of accommodation to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change," *ibid.*, at 403, suggests that the promulgation of retroactive regulations may not be sustained. See 10A Mertens, *op. cit. supra* note 49, at 109.

¹⁶⁶ In *Manhattan General Equipment Co. v. Commissioner*, 76 F. 2d 892 (C.A. 2d, 1935), a divided court rejected the contention that a retroactive "legislative" regulation was invalid under *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), on the ground that § 3791(b) reserved power to make retroactive regulations and disclosed that regulations were provisional and therefore subject to modification under *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 361-62 (1932). The Court of Appeals relied on the literal terms of § 3791(b), and cited *Titsworth v. Commissioner*, 73 F. 2d 385 (C.A. 3d, 1934). The reasoning of the latter is obscure, unsatisfactory and in part untenable in light of *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), holding that reenactment of a statute deprives the Commissioner of power to supersede a regulation retroactively. In *Manhattan General Electric Co. v. Commissioner*, 297 U.S. 129 (1936), the Supreme Court held that the initial regulation was void because in conflict with the statute, that the superseding regulation therefore became the "primary" rule and was no more retroactive than a judicial decision applying the statute to a case in hand. For analysis of these considerations, see page 701 *supra*.

or "interpretive" in character, be the underlying statute ambiguous or clearly in conflict with the terms of the regulation, I believe that it should be conclusive with respect to those who relied upon it to their detriment.

CONCLUSION

Repudiation of representations is dirty business, no less at the hands of the government than of its citizens. Hence the claim of immunity for governmental repudiation is tolerable only to the extent that it rests on inescapable compulsions arising out of the needs of government. The sole arguable compulsion resides in the separation of powers, which is said to deny efficacy to administrative acts that are prohibited or beyond the authority conferred. Whether this compulsion is inescapable may be doubted in view of the judicial trend toward realism in applying the separation of powers.

Certainly the absence of authority marks the furthest boundary of the immunity from estoppel. Since government itself would bog down if statutory "authority" had to be spelled out for each of myriad administrative acts, judicial inquiry into the existence of "authority" must not be captious.

Nor is governmental irresponsibility for legal interpretations to be condoned by resort to the mistake of law doctrine. To demand that a taxpayer should prophetically foresee that courts will declare the administrator wrong is to forsake reality for Alice in Wonderland. Reliance by a taxpayer on published regulations or rulings stands on even higher ground. There is no clear-cut mandate to swallow retroactive repudiation in such case. To the contrary, the express legislative intention to relieve from retroactivity merely echoes the basic requirement of "fair-play" to which the Commissioner of Internal Revenue has himself adhered.

The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealously scrutinized at every step. Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.