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Estoppel and Textualism

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ESTOPPEL AND TEXTUALISM

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I. Introduction

Courts regularly conclude that parties in lawsuits are 'estopped' - that is, involuntarily barred - from asserting claims and defenses, from seeking remedies, from presenting testimony or other evidence, or from making certain kinds of arguments.[1] The reasons for judicially imposed estoppel vary but most often the estoppel serves to prevent one party from taking a position that will cause an unjust harm to another.[2] For example, a court might decide that a person who makes a statement on which someone else has relied is estopped from later taking a legal position that contradicts the statement.[3]

Textualism is an influential school of statutory interpretation. Its tenets restrict what courts may consider when construing legislation. Under the theory of textualism, judges are to determine the objective meaning of an

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* Professor of Law, George Washington University Law School. Professors Jonathan Siegel and Peter Maggs offered many useful suggestions.

[1] See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722 (U.S. 2002) (patent holder estopped from making claims regarding patent based on patent prosecution history); In re Adoption of S.A.J., 838 A.2d 616 (Pa. 2003) (man who claimed he was not the father of a child in child support proceedings was estopped from claiming he was the father in attempting to block the child's adoption).

[2] As one state supreme court has concisely stated: 'Estoppel is a legal concept which bars a party from alleging or denying certain rights which might otherwise have existed because of the party's voluntary conduct.' Hoar v. Aetna Cas. and Sur. Co., 968 P.2d 1219, 1222 (Okla. 1998).

[3] See Black's Law Dictionary 590 (Bryan A. Garner, ed., 8th ed. 2004) (defining "equitable estoppel as a "defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. ...").

enactment from its text and its legislative context.[4] They should not allow legislative history and policy arguments to influence their interpretations or take it upon themselves to find exceptions, glosses, or creative interpretations of the plain meaning of statutes.[5]

In many lawsuits, estoppel and textualism have nothing to do with each other. For example, courts often apply principles of estoppel***168** in common law cases, where they have no occasion to interpret any legislation. [6] Likewise, in deciding statutory cases, judges often have no reason to apply principles of estoppel because neither party has caused the kind of harm that estoppel addresses. For instance, if the defendant has not made any statements or taken any position on which the plaintiff has relied, then the plaintiff generally has no grounds for seeking to estop the defendant from raising a defense.

But estoppel and textualism do sometimes appear to collide. Judges often hold that parties are estopped from asserting rights that they have under a statute, even though the statute contains no express estoppel exception. The typical statute of limitations provides the simplest and perhaps most common example. [7] The statute may say that a plaintiff must bring a particular kind of legal action, such as an intentional tort claim, within one year.[8] Ordinarily, one year means one year, and most statutes of limitation contain no express exceptions. But almost all courts - including those that ordinarily follow textualist precepts - stand ready to

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[4] See id. at 1462, 1516; Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347 (2005); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001).

[5] See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 35-36 (1997).

[6] See, e.g., Restatement (Second) of Torts § 894 illus. 1 (1979) (providing an example in which a landowner who incorrectly describes a property boundary is estopped to maintain a trespass action against his neighbor who relied on the erroneous description).

[7] A computer search for "date(>1/1/1990) and estoppel and 'statute of limitations"' in WestLaw's ALLCASES database yields more than 10,000 cases.

[8] See, e.g., N.Y. C.P.L.R. § 215 (McKinney 1999) ('The following actions shall be commenced within one year: ... an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law ....').

extend the period, based on principles of estoppel, if the defendant has done something unjust, like concealing evidence of the claim.[9]

So the question arises: How might judges who purport to adhere to textualism justify their use of estoppel to affect the application of statutes that say nothing about estoppel? Are they creating policy based exceptions to legislation? Or is the proper characterization of what they are doing more complicated than that?

This essay seeks to answer these questions. It considers six possible arguments that courts have made or might make to rationalize the recognition of unwritten exceptions to statutes in the name of estoppel. These arguments include the following:

* Even though the statutory provision at issue says nothing about estoppel, some other legislation expressly authorizes courts to invoke equitable principles, including estoppel;

* The legislation contains an implied term authorizing the application of estoppel principles;

* Courts have inherent equitable powers that allow them to apply principles of estoppel;

***169** * The legislature that enacted the statute reasonably expected that courts would interpret it in accordance with accepted canons and background principles, including estoppel;

* Estoppel creates a cause of action or other legal right that the statute, by its terms, does not address; and

* Binding precedent compels the application of estoppel principles, even if they conflict with the text of the statute.

Each of the six arguments, as discussed in part III below, has some validity. Any one of them might justify uses of estoppel in at least some instances. But as this essay will show, none of the arguments provides a general basis upon which a textualist judge can use estoppel to affect the application of statutes that do not address estoppel. The essay therefore concludes that some unresolved tension exists between traditional estoppel principles and textualism.

Before addressing this subject further, I should make two preliminary remarks. First, this essay does not advocate that judges should or should

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[9] See infra part II.A. for more detail on this point.

not follow the textualist school of statutory interpretation. Many other works address the question of how courts should interpret statutes.[10] Nor is the goal of the article to persuade judges to stop invoking principles of estoppel. This essay instead seeks only to take an academic look at the question of how judges who have already adopted a textualist jurisprudence might reconcile estoppel and their textualist views. In other words, it looks for an explanation, but does not make a prescription.

Second, this essay grew out of my assignment as the United States national reporter for the topic of 'Protecting Legitimate Expectations and Estoppel' at the XVIIth Congress of the International Academy of Comparative Law.[11] In this capacity, I prepared answers to a standard set of questions posed by Professor Bénédicte Fauvarque Cosson, the general rapporteur for the subject.[12] This essay addresses selected aspects of Professor Cosson's questions. My complete answers are filed separately with the Conference.

***170** II. Textualism and Estoppel

A. Estoppel

Black's Law Dictionary concisely defines estoppel as a 'bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.'[13] The dictionary also separately defines dozens of different kinds of estoppel that

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[10] See, e.g., Scalia, supra note 5; William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994); Guido Calabresi, A Common Law for the Age of Statutes (1982); John Manning, Constitutional Structure and Statutory Formalism, 66 U. Chi. L. Rev. 685 (1999); Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749 (1995); Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 Vand. L. Rev. 533 (1992); Richard A. Posner, Statutory Interpretation-in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800 (1983).

[11] This conference is scheduled for July 16-22, 2006, at Utrecht in the Netherlands.

[12] The questionnaire, posed to reporters from many different countries, includes inquiries such as: 'How important is the concept of legitimate expectations or estoppel in your legal system? What is the part played by such a concept in contract law? In what respect can legitimate expectations or estoppel be used in order to interpret some terms of the contract?'

[13] See Black's Law Dictionary, supra note 3, at 142.

the courts of law and equity traditionally have recognized.[14] A few examples convey the general idea:

The doctrine of 'assignor estoppel,' for example, bars a person who has assigned a patent from later attacking the patent's validity.[15] This rule serves an easily understood purpose. Suppose an inventor obtains a patent to an invention and then sells the patent to someone else. The inventor should not later have the ability to compete with the buyer of the patent in making the invention by claiming that the patent lacks validity. By selling the patent, the inventor in effect represented the validity of the patent and should have to live with that representation rather than cause the buyer to suffer a forfeiture.

'Estoppel by election' is a doctrine which says that a person who makes a choice among possible benefits cannot later claim benefits that a different choice would have afforded.[16] For example, if a plaintiff sues a defendant for breach of contract and seeks specific performance, a court might conclude that the plaintiff is thereby estopped to seek rescission of the contract.[17] Simple justice precludes taking inconsistent positions that let you have your cake and eat it too.

And 'authority by estoppel' is a doctrine that says that one person (the principal) may not deny that another person (the agent) has authority to act for him or her after giving a third party reason to believe such authority exists. For example, if a business owner sends a salesperson to make a contract with a client, the business owner cannot later back out of the contract by claiming that the salesperson lacked authority. Allowing the business owner to change positions on the issue of authority would work a hardship on the customer.[18]

***171** Judges created these and other estoppel doctrines to prevent substantive and procedural injustices. Each of the doctrines accords with

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[14] See, e.g., id. at 52, 142, 590 (defining adoption by estoppel, authority by estoppel, assignor estoppel, and many more types of estoppel).

[15] See Westinghouse Co. v. Formica Co., 266 U.S. 342, 349 (1924).

[16] See Cruz-Lovo v. Ryder System, Inc., 2003 WL 23150113, *3 (11th Cir. 2003) ('The doctrine of estoppel by election provides that, when a party adopts a certain position that affects the relationship between that party and the adverse party, i.e., a position pertaining to a contractual agreement between the parties, the party is equitably estopped from impeaching its position to the detriment of the adverse party.').

[17] See Eldridge v. Burns, 142 Cal. Rptr. 845, 870 (Cal. App. 1978).

[18] See, e.g., Herrera v. Gibbs, 499 S.W.2d 912, 915 (Tex. Civ. App. 1973).

the general tendency of courts of equity to frown on inconsistency, self-serving conduct, and the passing of burdens from the persons who created them to those who did not. And these and other examples of estoppel have become firmly established in the legal order; no one seriously contemplates doing away with what the Supreme Court has called the 'venerable doctrine of estoppel.'[19]

B. Textualism

Textualism rests on two related principles. The first is legislative supremacy. The idea is that once legislatures have enacted constitutional legislation, the judicial and executive branches must follow it.[20] They do not have the choice of reconsidering the legislation's policy or modifying the legislation to meet perceived needs. Otherwise, we would not fully have a government of laws.

The second principle concerns how legislatures work. It says that legislatures speak authoritatively only through enacted legislation.[21] In accordance with this principle, textualists consider the wording of a statute the primary basis for determining the statute's meaning. They read the statute to find 'the meaning most in accord with context and ordinary usage. '[22] In difficult cases, textualists may employ canons of construction to help parse the statutory terms.[23] They also may consult dictionaries and other sources that provide evidence of the standard meanings and usages of

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[19] Lear, Inc. v. Adkins, 395 U.S. 653, 674 (U.S. 1969).

[20] See John F. Manning, Texualism and Legislative Intent, 91 Va. L. Rev. 419, 444-445 & n. 84 (2005); Farber, supra note 10, at 283-294.

[21] See Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994). For general articles on textualism, see Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405 (1989); Nicholas S. Zeppos, Justice Scalia's Textualism: The 'New' New Legal Process, 12 Cardozo L. Rev. 1597, 1639 (1991).

[22] Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

[23] See Zeppos, supra note 21, at 1616. Typical examples include the 'expressio unius' canon, see National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (by expressing one thing, a statute excludes other thing), and the ejusdem generis maxim, see Breininger v. Sheet Metal Workers Int'l Ass'n, 493 U.S. 67, 91-92 & n.15 (1989) (context may narrow the meaning of a term).

words.[24] And they may look at other parts of the legislation for contextual clues.[25]

But textualists generally eschew consideration of other extrinsic sources when attempting to discern the meaning of legislation. They ***172** do not try to divine the subjective intent of Congress by looking at committee reports, floor statements, or other forms of legislative history. They also do not allow policy considerations to influence their reading of statutes.

Taken together, these two principles generally require judges to follow legislation and forbid them from treating anything other than legislation as law. Accordingly, judges cannot create exceptions or glosses or anything else that would contradict what the statute says. If a party has rights under an enactment, he or she can assert them.

Textualism has many adherents. For many years, its leading judicial advocate has been Justice Antonin Scalia. In his judicial opinions and extra-judicial writing, he has consistently advocated textualist approaches to statutory interpretation.[26] And although the Supreme Court issues some non-textualist decisions, Justice Scalia has influenced many of the members of the Court. This influence in turn has encouraged the spread of textualism in lower courts.[27]

C. The Tension

Although few courts have recognized it explicitly, a tension exists between the standard application of principles of estoppel and the textualist school of statutory interpretation. The tension is that sometimes principles of estoppel appear to lead courts to ignore the objective meaning of statutes. Although a statute may give a party in a lawsuit a claim or defense, the court may rule that the party is for one reason or another estopped to present the claim or defense, even though the statute says

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[24] See Merrill, supra note 9, at 356-357; Bradley C. Karkkainen, 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 407 (1994).

[25] See Bradley C. Karkkainen, 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 407-08 (1994).

[26] See, e.g., Scalia, supra note 5; Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 782 (1994) (Scalia, J., concurring in part and concurring in the judgment); Conroy v. Aniskoff, 507 U.S. 511, 518 (1993) (Scalia, J., concurring in the judgment); United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part).

[27] See Gregory E. Maggs, The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?, 1994 Pub. Int. L. Rev. 57, 58.

nothing about estoppel. In this way, principles of estoppel may create - or at least appear to create unwritten exceptions - to legislation.

The typical statute of limitations, as discussed above, provides an illustrative example. A statute of limitations says that a plaintiff has a set number of years in which to bring a lawsuit. Most statutes of limitations contain no express exceptions relating to the conduct of the defendant. But courts nonetheless sometimes do not permit a defendant to assert the expiration of a period of limitations as a defense, citing the judge-made doctrine of 'equitable estoppel.'[28]

***173** In the context of the statute of limitations, equitable estoppel allows a plaintiff to assert a claim against the defendant, even if the statute of limitations has expired, when the 'defendant takes active steps to prevent the plaintiff from suing on time.'[29] These active steps may include fraudulently concealing the injury that the defendant has caused or assuring the plaintiff that the statute of limitations will not be asserted as a defense.[30]

A typical statute of frauds provides another example. A statute of frauds usually says that a court may not enforce a contract unless it is evidenced by a writing signed by the party against whom enforcement is sought. [31] For instance, many states have statutes of frauds saying that a promise that cannot possibly be completed within one year is not enforceable unless evidenced by a signed writing.[32] Such a statute would, for example, prevent a plaintiff from enforcing an oral promise by the defendant to maintain a building for five years unless the defendant at some point signed a written document revealing in some way that he or she had made the promise.

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[28] See, e.g., In re International Administrative Services, Inc., 408 F.3d 689, 699 (11th Cir. 2005) (concluding that the period of limitations in the Bankruptcy Code for bringing avoidance actions is subject to tolling by equitable estoppel); Rauscher v. City of Lincoln, 691 N.W.2d 844, 851-852 (Neb. 2005) (city estopped from asserting statute of limitations to block claim for unpaid wages).

[29] Sharp v. United Airlines, Inc., 236 F.3d 368, 372 (7th Cir. 2001).

[30] Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946).

[31] See Restatement (Second) of Contracts ch. 5, stat. note (1981) (providing an informative overview of statutes of fraud in the United States).

[32] See, e.g., Cal. Civ. Code § 1624(a) (1985) ('The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof. ...').

But many courts have used principles of estoppel to overcome statutes of frauds and enable them to enforce oral promises. Under the doctrine of equitable estoppel, for instance, courts might prevent the defendant from denying the existence of a signed writing if the defendant told the plaintiff that a signed writing exists ('I have signed the offer that you sent me') or if the defendant told the plaintiff that no writing was required or that he or she would not rely on the statute of frauds.[33] And under the doctrine of promissory estoppel, some courts would enforce the promise, notwithstanding the lack of a signed writing, if the plaintiff had relied on the promise.[34]

In these examples, principles of estoppel serve in effect to create unwritten exceptions to legislation. In applying these principles, a ***174** court denies the defendant the right to assert the statute of limitations or the statute of frauds as a defense, even though the text of the statute appears to give the defendant that right. These judicially created estoppel doctrines, in other words, seem to trump the legislation.

This phenomenon seems inconsistent with textualism. If a legislature has enacted a statute of frauds, a statute of limitations, or any other statute, shouldn't the enactment prevail over unwritten judicial doctrines like estoppel? Isn't the text of the statute controlling under the doctrine of legislative supremacy? Shouldn't the legislature have responsibility for determining what exceptions should and should not exist?

Despite the existence of this tension, the use of estoppel for such purposes is common, long-standing, and accepted, even among otherwise textualist courts. And yet no court to date has offered a comprehensive explanatory theory for the practice. So the question arises whether closer analysis might reveal any possible rationalizations for using estoppel to overcome the language of statutes.

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[33] See Monarco v. Lo Greco, 220 P.2d 737, 740 (Cal. 1950) (describing how equitable 'estoppel to plead the statute of frauds can ... arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense').

[34] See Restatement (Second) of Contracts § 139(1) (1981) ('A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.'). See also Gregory E. Maggs, Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law, 66 Geo. Wash. L. Rev. 508, 523-525 (1998) (analyzing the reception of § 139 in the United States).

III. Possible Textualist Rationalizations

As the foregoing part of this article has shown, courts have relied on principles of estoppel to reach results apparently contrary to the plain language of statutes. For example, they have enforced contracts that the text of a statute of frauds says they should not enforce and they have entertained claims that the language of a statute of limitations would bar. The following discussion considers eight possible rationalizations to explain how this practice might be consistent with textualist principles.

A. Authorized by Other Legislation

Even if a particular statute does not contain any express estoppel exceptions, a textualist judge in some instances might still find the exceptions to exist on grounds that some other legislation creates them. In other words, one statutory provision might authorize courts to use principles of estoppel when applying a separate statutory provision. In such a case, a textualist judge would be following rather ignoring legislative commands when invoking estoppel principles.

Consider, for example, § 2-201 of the Uniform Commercial Code, which establishes a statute of frauds for contracts for the sale of goods.[35] This section says that no contract for the sale of goods for a ***175** price of $500 or more may be enforced absent a signed writing evidencing that the contract was made. Section 2-201 contains various express exceptions, but none of these exceptions concerns estoppel.[36] Accordingly, if a textualist judge were to look just at the language of § 2-201, he or she might conclude that estoppel cannot bar a defendant from asserting the statute of frauds.

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[35] The pre-2003 verison of this model statute says: 'Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.' U.C.C. § 2-201(1) (2002). This version of the statute is in effect in 49 states and numerous territories. The American Law Institute and the National Conference of Commissioners on Uniform State Law approved an amendment to this provision in 2003 that would raise the dollar threshold from $500 to $5000, see U.C.C. § 2-201(1) (2004), but no state has yet adopted that change. This essay therefore will refer to the pre-2003 version.

[36] See U.C.C. § 2-201(2) (2002) (creating an exception for transactions between merchants where the merchant to be charged does not respond to a memorandum confirming an oral contract); id. § 2-201(3) (creating exceptions for specially manufactured goods, formal admissions that a contract has been made, and transactions in which the goods or payment has been received).

But that analysis would not be complete. The Uniform Commercial Code contains another important statutory provision, § 1-103(b) (formerly § 1-301), which contains the following statement:

> (b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.[37]

Pursuant to this provision, some courts have concluded that the Uniform Commercial Code authorizes and indeed requires them to consider principles of estoppel when applying the statute of frauds in § 2-201, even though § 2-201 itself does not say anything about them.

When legislation specifically directs courts to make reference to principles of estoppel, textualism stands as no bar to the use of these principles. On the contrary, textualism requires it. But this possibility only rarely explains why textualist courts may supplement statutes with estoppel principles for two reasons.

First, very few enactments contain provisions that specifically authorize courts to resort to estoppel principles. Section 1-103(b) applies to the Uniform Commercial Code, but it does not apply to statutes of fraud, statutes of limitations, and other enactments outside of the Uniform Commercial Code. Consequently, this first basis upon which textualist judges might rationalize their use of estoppel principles to affect the application of statutes has a very limited application.

Second, even though provisions like § 1-103(b) exist, their application is not always clear. The text of the section says that principles of estoppel apply '[u]nless displaced by the particular provisions' of ***176** the Uniform Commercial Code.[38] Some courts have concluded that § 2-201, the statute of frauds, in fact does displace estoppel because it lists several specific exceptions and does not list estoppel.[39] These courts have concluded that the legislatures that enacted § 2-201 did not want courts to use principles of estoppel.

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[37] Id. § 1-103(b) (emphasis added).

[38] U.C.C. § 1-103(b).

[39] See, e.g., Lige Dickson Co. v. Union Oil Co. of California, 635 P.2d 103, 107 (Wash. 1981). See also Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 345 (Iowa 1979) (Reynoldson, C.J., dissenting).

B. Implied Estoppel Terms

How else might a textualist judge conclude that principles of estoppel affect the application of a statute that says nothing expressly about estoppel? In some instances, the judge might decide that the statute at issue contains an implied term concerning estoppel. For example, the court might interpret a statute of frauds or statute of limitations to have an implicit estoppel exception that the legislature intended, but did not state expressly.

The principles of textualism do not categorically preclude the finding of implied terms in legislation. But under textualist theory, the conclusion that an act contains an implied term must rest on the language, structure, and evident purpose of the statute. The implied term cannot arise from policy considerations, legislative history, or other extrinsic evidence.

Justice Scalia addressed the textualist approach to implied terms in his dissent in Zadvydas v. Davis.[40] In that case, the government detained an alien named Zadvydas pursuant to a section of the federal Immigration and Naturalization Act allowing the Attorney General to detain an alien who is removable from the country based on violations of criminal law.[41] The statute contained no express limitation on the duration of the detention; on the contrary, the statute appeared to permit the government to hold the alien until his or her removal to a foreign country, however long that might take.

But when the United States could find no other country to which it could remove Zadvydas, he challenged his continued detention. Concerned that a statute authorizing indefinite detention might violate Due Process, the majority of the Supreme Court construed the statue to contain a 'reasonable time' limitation.[42] Justice Scalia dissented,***177** addressing the question from a textualist perspective.[43] Although he appeared to agreed that statutes may contain implied terms, he found no basis for concluding that the Immigration and Naturalization Act contained an implied term that

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[40] 533 U.S. 678 (2001).

[41] See 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V) ('An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).').

[42] 533 U.S. at 699-700.

[43] Id. at 706-07 (Scalia, J., dissenting).

would help Zadvydas.[44] He saw nothing in the text, structure, or purpose of the Act that would support the majority's view. Instead, he lamented that the Court 'simply amends the statute to impose a time limit.'[45]

In actual practice, courts that have concluded that principles of estoppel affect the application of statutes generally have not followed textualist principles concerning implied terms. Consider, for example, the famous decision of the California Supreme Court in Monarco v. Lo Greco. [46] In that case, a rancher orally promised his stepson that he would change his will to leave him the family ranch if the stepson worked on the property after he turned 18. The stepson complied, laboring for many years on the ranch. But after the rancher died, the stepson learned that he had not kept his promise to change his will, and the property was to go to someone else.

The stepson brought a lawsuit, which in effect sought to enforce the rancher's oral promise to change his will. California at the time had a statute of frauds preventing the enforcement of promises to change a will unless evidenced by a signed writing.[47] This statute, in the ordinary course, would have prevented the stepson from enforcing the rancher's promise. But Chief Justice Roger Traynor concluded that the rancher's estate was estopped from asserting the statute of frauds because of the stepson's reliance on the rancher's promise.

The decision did not rest on grounds that the statute of frauds contained an implied exception for reliance. Chief Justice Traynor's opinion did not even address the text of the applicable statute of frauds. Instead, the opinion simply concluded that refusing to enforce the rancher's promise would be unconscionable and that estoppel therefore should apply.[48] If the California Supreme Court had considered the issue from a textualist perspective, it would have had to look at the statute carefully to decide whether the language, structure,***178** or purpose of the act would justify finding the existence of an implied estoppel exception.

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[44] See id.

[45] Id. at 708.

[46] 220 P.2d 737 (Cal. 1950).

[47] See Cal. Civ. Code § 1624 (1950) (listing "an agreement ... to devise or bequeath any property, or to make any provision for any person by will" as one of the kinds of contracts that is invalid unless evidenced by a signed writing").

[48] 220 P.2d at 741 (asserting that 'estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result ... in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract ....').

Courts that have taken a textualist approach with respect to implied terms generally have not identified implied estoppel exceptions. For example, in C.G. Campbell & Sons, Inc. v. Comdeq Corp.,[49] the court had to consider whether a plaintiff could use promissory estoppel to overcome the statute of frauds in Uniform Commercial Code § 2-201. The court observed that § 2-201 already stated several exceptions to the statute of frauds, but did not have one related to reliance.[50] So the court concluded that the legislature did not desire additional exceptions, and refused to find an implied exception for reliance.

C. Inherent Equitable Power of the Courts

Textualist judges also might rationalize using principles of estoppel to affect the application of a statute on grounds that courts have 'inherent' equitable powers. Inherent powers are powers that exist even though no legislation specifically grants them. The Supreme Court long has maintained that the federal courts have inherent equitable powers. As early as 1888, the Court declared that 'the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise.'[51]

But with these inherent equitable powers, may courts override the text of statutes? The Supreme Court appeared to do that in United States v. Young,[52] where it relied on inherent equitable powers to conclude that a bankruptcy court could toll a limitation period under the Federal Bankruptcy Code. In that case, Mr. and Mrs. Young filed a bankruptcy petition in 1997 and received a discharge. The IRS subsequently sought to collect from the Youngs a tax debt from 1993. The Youngs asserted that the tax debt was discharged in their 1997 bankruptcy, but the IRS contended that it was not discharged pursuant to an exception found in the Bankruptcy Code.

Under the exception, if the IRS has a claim for taxes 'for which the return was due within three years before the bankruptcy petition was filed,'

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[49] 586 S.W.2d 40 (Ky. Ct. App. 1979).

[50] See id. at 41.

[51] Gumbel v. Pitkin, 124 U.S. 131, 145-146 (1888).

[52] 535 U.S. 43 (2002).

the claim is nondischargeable.[53] Although the tax claim ***179** at issue in the case was in fact more than three years old in 1997 when the Youngs received their discharge, the IRS argued that the Youngs should be estopped to assert the three-year look-back period. The IRS pointed out that the Youngs had filed but withdrawn another bankruptcy petition, after 1993 and before 1997, preventing the IRS from pursuing the tax debt earlier.

Although the Youngs correctly argued that the Bankruptcy Code contained no provision expressly providing for tolling, the Supreme Court sided with the IRS. Writing for a unanimous Court, Justice Scalia - the leading textualist jurist - concluded that equitable tolling extended the three-year look-back period specified in the exception. Justice Scalia explained the decision by saying that it was reasonable to conclude that Congress was 'assuming that bankruptcy courts will use their inherent equitable powers to toll the federal limitations periods within the Code.'[54] Given that courts have these inherent equitable powers, Justice Scalia apparently saw the text of the statute as no impediment to tolling the limitation period.

The Young decision may appear to provide a general rationalization for the use of estoppel to affect the application of statutes that do not provide for estoppel. But the case raises two questions. The first concerns the scope of a court's 'inherent' equitable powers. The opinion does not say exactly when a court can find equitable tolling appropriate and when it cannot. It also does not make clear whether a court may use its inherent equitable powers to address only procedural and jurisdictional questions - like the application of the statute of limitations - or whether the courts also can employ them more generally to affect the substance of the law.

Consider another bankruptcy decision from the Supreme Court, Taylor v. Freeland & Kronz,[55] which took a very different approach. In that case, when a debtor named Davis declared bankruptcy, she filed a list of her property that she claimed to be exempt from distribution to creditors. Everyone subsequently agreed that Davis did not have a legal basis for claiming some of the listed property as exempt. But § 522(l) of the

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[53] See 11 U.S.C. § 523 ('(a) A discharge ... does not discharge an individual debtor from any debt - (1) for a tax or a customs duty - ... (B) with respect to which a return, if required - ... (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition ....').

[54] 535 U.S. at 52.

[55] 503 U.S. 638 (1992).

Bankruptcy Code said that property claimed as exempt is exempt, unless the bankruptcy trustee or a creditor objects.[56] Federal Bankruptcy Rule 4003(b) gave the bankruptcy trustee and creditors exactly 30 days for submitting objections. In the case, no one objected within this time.[57]

***180** Later, when the trustee realized that Davis did not have a basis for claiming some of the property as exempt, he filed an untimely objection. The majority of the Supreme Court refused to allow the bankruptcy trustee to make a late objection given the plain language of Rule 4003 and § 522(l). The Court recognized that its decision allowed Davis to keep property that he otherwise could not keep from his creditors. But the Court saw no grounds for intervening. 'Deadlines may lead to unwelcome results,' the Court said, 'but they prompt parties to act and they produce finality.'[58]

The dissent disagreed, expressing a view more like that of the Court in Young. The dissent would have allowed the bankruptcy court to disallow claims based on equitable considerations even after the 30-day period if the debtor did not have a good faith basis for asserting the exemption. Quoting a bankruptcy court that had adopted this view, the dissent said: "'[e]quitable considerations dictate that a debtor should not be allowed exemptions to which she is obviously not entitled.'"[59]

Why the Court thought that the bankruptcy court could use its equitable powers to toll the three-year look-back period in Young but could not use those same powers to toll the 30-day objection period in Taylor remains unclear. Maybe a court's inherent equitable powers have some sort of relevant limits, but the Court has not said what they are, or why they would lead to different results in the two cases. At the very least, Taylor shows that courts cannot always cite inherent equitable powers as a basis for using estoppel to affect the application of a statute that does not address estoppel.

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[56] 11 U.S.C. § 522(l) ('The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. ... Unless a party in interest objects, the property claimed as exempt on such list is exempt.').

[57] Fed. R. Bankr. P. 4003(b) ('A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.').

[58] 503 U.S. at 643-644.

[59] Id. at 648-649 (Stephens, J., dissenting) (quoting In re Hackett, 13 B.R. 755, 756 (Bankr. E.D. Pa. 1981)).

Second, the Young decision leaves open the issue of whether legislatures might limit the inherent equitable power of courts. For example, suppose that Congress had expressly said in § 522 that a court cannot toll the three-year look-back period. Could a court nonetheless use its equitable power to toll the period? Justice Scalia's opinion for the Court in Young does not address this question precisely. But it does suggests that the answer is no. Justice Scalia ruled that the Youngs were estopped on ground that it was 'reasonable' to conclude that Congress had assumed courts would have that power.[60] If the statute had prohibited tolling, the Court could not have found it reasonable to conclude that Congress had wanted courts to engage in equitable tolling.

***181** D. Background Principles and Canons

A textualist judge also might rationalize using principles of estoppel to affect the application of statutes on grounds that no one statute re-creates the entire legal universe. The theory is that, when a legislature passes a new act, it assumes that the act will fit into the existing legal system. Congress, for example, does not specify in each new federal law the circumstances in which the federal courts will have jurisdiction over the law; it already has enacted a general statute regarding jurisdiction over federal acts.[61] Similarly, the legislature may presume that courts will interpret any new law that it enacts in accordance with existing canons of construction. And likewise, the reasoning goes, a legislature may expect that courts will apply traditional equitable principles in interpreting a new law, even if legislature does not say anything about them.

Justice Scalia articulated this idea concisely in the Young bankruptcy case,[62] discussed above, as an additional justification for concluding that estoppel could toll the 'look-back period' for making tax debts non-dischargeable. He said:

It is hornbook law that limitations periods are "customarily subject to 'equitable tolling,'" . . ., unless tolling would be "inconsistent with the text of the relevant statute" . . . . Congress must be presumed to draft limitations periods in light of this background principle. . . . That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and "appl[y] the principles and rules of equity

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[60] See 535 U.S. at 52.

[61] See, e.g., 28 U.S.C. § 1331 ('The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.').

[62] Young v. United States, 535 U.S. 43 (2002).

jurisprudence."[63] In this instance, as Justice Scalia explains, estoppel does not seem inconsistent with the principles of textualism. But the idea that Congress understands that courts will interpret new legislation subject to existing canons can be more problematic for textualists. Some of the canons of construction that courts have identified, especially in the past, may conflict with the idea that the text of statutes binds the courts.

Consider the famous case of Sorrells v. United States.[64] In that case, the government prosecuted Sorrells for violating federal liquor laws during the prohibition era. Sorrells wanted to raise a defense of entrapment, but the government argued that the criminal statute at ***182** issue did not make entrapment a defense. The statute, in fact, was silent on the subject.

The Supreme Court, though, sided with Sorrells, relying both on estoppel and on the idea that Congress enacts legislation subject to the expectation that courts will interpret it in accordance with existing canons of construction. The Court cited a general canon saying that the criminal laws should be construed as narrowly as possible to accomplish their objective. It then said:

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the government in such a case is estopped to prosecute or that the courts should bar the prosecution.[65] So because Congress had no need to punish people whom the government lured into criminal wrongdoing, estoppel prevented the government from prosecuting such people.

Is Sorrells a textualist decision? In a subsequent decision, Justice Scalia seemed to think so, but expressed a caution. Citing Sorrells and similar decisions, he said:

It is one thing to acknowledge and accept such well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but

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[63] Id. at 49-50 (citations omitted).
[64] 287 U.S. 435 (1932).
[65] Id. at 442 (emphasis added).

are subject to case-by-case exceptions.[66] In other words, according to Justice Scalia, judges may use canons and background principles of law to interpret statutes, but only if the canons and background principles are not intrinsically inconsistent with textualism.

It turns out that the Court has not applied the approach of Sorrells consistently. On the contrary, the Court sometimes simply declares that there is no estoppel exception to a statute, regardless of whether estoppel is a general background principle. In Reiter v. Cooper, for example, the Court considered a federal statute requiring shippers to pay the tariff rate that freight carriers had filed with the ***183** Interstate Commerce Commission. [67] In the case, a common carrier declared bankruptcy. The bankruptcy trustee then brought a lawsuit against a shipper who had paid the carrier less than the filed rate, seeking to collect the underpayment. The shipper argued that the trustee should be estopped to collect the underpayment. But the Court, citing precedent, simply held: 'The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate.'[68] The Court offered no explanation for why estoppel might apply in a case like Sorrells but not in this case.

Even if the Court did apply Sorrells consistently, the idea that courts always may use canons of construction raises three difficult questions. The first question is how to identify canons. Consider, for instance, the question of whether a court may hold that a defendant is estopped from asserting the statute of frauds as a defense when the plaintiff has relied on the defendant's promise. Can a canon of construction exist on a long disputed issue of this kind? That seems a little unlikely. As a result, a textualist judge would have to rationalize using estoppel to reach this result on some other ground.

The second question is how to distinguish between permissible and impermissible canons, especially those concerning estoppel. Justice Scalia says that canons of construction cannot simply allow judges to create exceptions to statutory language on a case by case basis. But the exact content of the restriction remains unclear, especially when cases likes Sorrells and Reiter reach contrary conclusions on whether estoppel may prevent the application of a statute.

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[66] Brogan v. United States, 522 U.S. 398, 405 (U.S. 1998).

[67] 507 U.S. 258, 261 (1992) (addressing 49 U.S.C. § 10762, since repealed).

[68] Id. at 266.

The third question is whether legislatures can abrogate canons of construction and background principles. For example, if a criminal statute expressly says that entrapment is not a defense, may a court read the defense into the statute through principles of estoppel? The Sorrells opinion suggests that the answer is no. The Court emphasized in that decision that it was not 'doing violence to the statute' by reading in the defense based on principles of estoppel.[69] But the issue remains how clearly Congress must speak if silence on the issue is not enough.

E. Outside the Statute

A textualist judge also might justify the application of estoppel by concluding that estoppel creates a cause of action or other legal right that the statute, by its terms, does not address. For example, suppose that a statute of limitations requires a particular kind of legal***184** claim to be brought within three years and the statute contains no mention of exceptions resting on estoppel. A textualist judge might worry about estopping a defendant to rely on the statute of limitations as a defense to the claim. But if the court concludes that the plaintiff is actually bringing a different claim, and that the statute of limitations therefore does not apply, then the judge may find the defendant estopped.

This kind of reasoning appears in the famous contracts case of Hoffman v. Red Owl Stores.[70] In that case, a grocery store chain made vague assurances to a prospective franchisee named Hoffman. When no franchise agreement resulted, Hoffman sued the chain, claiming that he had relied on the assurances in various ways. The chain argued that the assurances could not be enforced under contract law because they were too uncertain.[71] The court fully agreed with that proposition,[72] but enforced the assurances anyway. The Court explained, simply, 'this is not a breach of contract action';[73] instead, according to the court, Hoffman was bringing an action based on promissory estoppel. And the court said the same requirements of definiteness did not apply.

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[69] 287 U.S. at 448.

[70] 133 N.W.2d 267 (1965).

[71] See id. at 275.

[72] See id.

[73] Id. at 276.

In Hoffman, as in most states, the requirement of definiteness apparently was specified by the common law rather than by a statute.[74] Thus the case does not actually provide an example of using estoppel to overcome legislation. But the point remains that the court justified using estoppel to overcome a defense that would have required a different result. If the state had required definiteness in contracts by statute, a textualist judge could have used the same reasoning.

But this possible rationalization for using estoppel to overcome the application of a defense has a significant limitation. It only works when a plaintiff can invoke estoppel as a basis for a legal claim to which the defense does not apply. That possibility arises in the field of contracts, but not many other areas of the law. In most instances, estoppel bars a party from taking a legal position, but does not create a cause of action.

***185** F. Pre-Textualist Precedent

Finally, a textualist judge might justify using estoppel to affect the application of a statute based on precedent. Although the general idea of legislative supremacy has been around for a long time, the case reports contain countless non-textualist decisions. Textualist judges may decide to follow these precedents on grounds of stare decisis, even though they might disagree with their reasoning.

Consider for example, the Florida Supreme Court's recent decision in Florida Department of Health and Rehabilitative Services v. S.A.P.[75] In that case, a former foster child sued a state agency, claiming that it had negligently overlooked child abuse. Although the period of limitations had run, the plaintiff sought to prevent the state agency from asserting the statute based on equitable estoppel. The court ruled for the plaintiff, citing previous decisions. The court said: 'It is well settled in Florida and other jurisdictions that the statutes of limitation can be deflected by the doctrine of equitable estoppel. This proposition is supported by vast precedent . . . .'[76]

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[74] The Wisconsin Supreme Court cited no statute requiring definiteness. Definiteness or certainty is typically a common law requirement. See Restatement (Second) of Contracts § 33(1) (1981) ('Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.').

[75] 835 So.2d 1091 (Fla. 2002).

[76] Id. at 1097-98 (footnotes omitted).

Statements of this kind are typical because precedent supports the use of estoppel in most states. But this case was made somewhat more interesting because the state attempted to distinguish the precedent that the court relied on. Apparently, no prior case had specifically addressed the particular statute of limitations that governed the case.[77] And the state argued that the precedent concerning other statutes was distinguishable because the statute at issue applied only to suits filed against the government. But the court ultimately rejected the argument, following the precedent concerning other statutes.[78]

This decision shows that textualist judges cannot always find easy refuge in precedent when deciding whether estoppel should affect the application of a statute. If the precedent is not directly on point, judges have a choice of how broadly to read it. A commitment to principles of textualism might lead some courts to construe the estoppel precedent narrowly. The Florida Supreme Court did not follow this course, but a more committed court might have done so. Thus, precedent does not provide a complete justification for applying principles of estoppel when they lead to results contrary to the language of legislation.

***186** IV. Conclusion

Textualist judges generally strive to follow the text of statutes. They do not attempt to create exceptions to what the statute says based on policy arguments, remarks made by legislators, or other extrinsic evidence. And yet, they often apply principles of estoppel in ways that affect the application of statutes, even though the statutes say nothing about estoppel. How can this be?

This essay has offered six possible rationalizations for how to square accepted principles of estoppel with textualism. Sometimes legislation outside the statute being interpreted expressly authorizes courts to resort to principles of estoppel. At other times courts may conclude that the statute contains an implied term concerning estoppel. Or courts may decide that they have inherent equitable powers that authorize them to rely on estoppel. Alternatively, courts might conclude that the legislature enacted the statute subject to background principles, including estoppel. More creatively, courts might determine that the estoppel operates outside the scope of the statute. And commonly, courts simply cite precedent.

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[77] See id.

[78] See id.

Several aspects of these rationalizations stand out. First, the courts have made express reference to each of them, but more often they simply apply principles of estoppel without considering the tension with textualism. Second, none of the rationalizations can reconcile all uses of estoppel with principles of textualism. Indeed, some applications of estoppel appear unwarranted under textualist theory by any of the rationalizations. Third, several of the rationalizations seem so open-ended that it is difficult to perceive what limits they have; they might authorize not only estoppel, but all kinds of exceptions to the statutory language. For these reasons, they do not provide a fully satisfactory explanation of how textualist judges should apply principles of estoppel.

This essay has not sought to argue that a judge must or even should adhere to textualism in statutory cases. That is a subject many others have addressed. But if judges do choose to follow that course, doctrines of estoppel continue to present a challenge.