

PROMISSORY ESTOPPEL AND “PROPERTY” IN THE DUE PROCESS CLAUSE: TOWARD A CONSISTENT RATIONALE

INTRODUCTION

In 1972, the Supreme Court presented a new mode for defining the meaning of “property” within the Fourteenth Amendment. Rather than finding a constitutionally based meaning for the term, the Court, in two landmark cases, designated extra-constitutional laws, rules, or understandings as the definitional source for a property interest.¹ As a result of this positivist approach, state law and, in particular, state contract law has become a potential source for property interests protected by the Due Process Clause.²

Two years later, in his book *Death of Contract*, Grant Gilmore marked the emergence of promissory estoppel as a powerful new contract doctrine.³ Gilmore argued that promissory estoppel was leading contract into tort and subsequently to its death as a separate body of law because its authority and strength derived from detrimental reliance.⁴ His thesis rested on the renewed force that the doctrine of promissory estoppel was playing in contract law.⁵

Placed side-by-side, the Supreme Court’s 1972 landmark decisions defining a Fourteenth Amendment property interest through extra-constitutional sources and Gilmore’s recognition of the renewed potency of detrimental reliance in contract law pose an interesting question: What role does, and should, the contract doctrine of promissory estoppel play in establishing a constitutionally protected property interest?

Board of Regents of State Colleges v. Roth and *Perry v. Sindermann*, the definitional cases for the meaning of property within the Fourteenth Amendment, clearly establish that state contract law may be used to create a protected property interest.⁶ By simple implication, the obligations created by the contract doctrine of promissory estoppel may also be procedurally protected property interests under the Fourteenth Amendment. If so, then before these obligations may be disregarded by the state, due process must be afforded.

1. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

2. See Leonard Kreyzin, Note, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law*, 90 COLUM. L. REV. 1098, 1103 (1990).

3. GRANT GILMORE, THE DEATH OF CONTRACT 89 (1974) (arguing that promissory estoppel’s basis in reliance indicated that contract and tort were reuniting).

4. See generally *id.*

5. *Id.*

6. *Roth*, 408 U.S. at 564; *Sindermann*, 408 U.S. at 593.

Within a limited context involving individual employment contracts and zoning permits, the federal circuits have followed *Roth* and *Sindermann* in their broad definition of property and have used promissory estoppel as the basis for finding a protected property interest. However, the conflict between sovereign immunity and the practical implications of estopping the state, limit the legal applicability of basing property interests on promissory estoppel.

In addition, circuit courts are hesitant to find property interests in contracts other than employment and appear to have constrained *Roth* and *Sindermann* to their factual contexts. These courts have fashioned a number of limitations to basing a property interest on state contract law because they fear that a broad definition of contractual property would result in parties foregoing the state's contract law remedy and flooding the federal courts with constitutional claims under the auspices of a violation of due process. As a solution to this valid fear of federalizing state contract law, the second part of this Note will suggest that—short of completely redefining a property interest⁷—the degree to which a party relies on a contract could be used to distinguish between contracts which rise to the level of a protected property interest and contracts which should remain in state court. By focusing its analysis on the degree of party reliance, the court would be measuring what is both an interest worthy of constitutional protection and an essential interest in contract law.

This Note attempts to perform two related but distinct tasks. First, it presents the circuit court cases in which promissory estoppel has been used as the basis for a property interest. It then reviews some of the barriers to establishing a property interest founded on promissory or equitable estoppel outside of the limited context of these cases. The second part of the Note suggests a solution for resolving some of the inconsistent justifications that circuit courts have fashioned for limiting the types of contracts which are considered property and protected by the Due Process Clause.

This Note begins in Part I by reviewing the Supreme Court's definition of property in the Fourteenth Amendment and the emergence of promissory estoppel and its expanding importance in contract law. Part II discusses how courts have treated the establishment of a property interest based upon employment contracts founded on promissory estoppel, and it discusses the limited role promissory estoppel has played in creating property interests in the context of zoning. Part III then addresses the various barriers to expanding property interests based on promissory estoppel outside the limited employment and zoning contexts. Finally, in Part IV, this Note focuses on

7. As Leonard Kreynin points out, the dilemma of the positivist definition of a property interest is that it "often protects interests, such as contracts, that do not need additional protection." Kreynin, *supra* note 2, at 1104.

one particular barrier to establishing a property interest based on state contract law: a fear of federalizing state contract law,⁸ and suggests a possible remedy to the perceived problem of allowing all state-enforceable contracts to serve as constitutionally protected property interests. The Note concludes by suggesting that focusing on the degree of reliance in a contract would provide a consistent and constitutionally supportable standard for limiting the potentially expansive federalizing effect of the Supreme Court's definition of a property interest.

I. BACKGROUND

A. Constitutionally Protected Property Interests

The Fourteenth Amendment to the United States Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law."⁹ The government is not necessarily prohibited from depriving a person of life, liberty, or property, but when it does so it must afford a person "due process."¹⁰ Recently, one of the central questions raised by the Fourteenth Amendment has been what specifically does "property" mean. Where should the Court look to give content to the word "property?"¹¹

The notion of due process derives from the *Magna Carta*¹² and first found expression in a 1354 English statute.¹³ Well aware of the language of the *Magna Carta* and the 1354 English statute, the Framers of the Constitution

8. In the context of this Note, "federalization" is the movement of cases from state court, where the claim would be for breach of contract, to federal court, where the claim is for violation of due process. It is not the related concern with the creation of a federal body of contract law, which might result from federal courts needing to evaluate whether a state contract right exists before determining whether a property interest has been implicated.

9. U.S. CONST. amend. XIV, §1. The Fifth Amendment contains a similar provision that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

10. *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring). The Fourteenth Amendment is "a guarantee of fair procedure . . . the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards." *Id.* However, it also "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'" *Id.* (citations omitted).

11. This Note will address the question of what is property and will not address the other interests protected by the Fourteenth Amendment.

12. "No freeman shall be taken [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land." Section XXXIX, *MAGNA CARTA* (1215) (footnote omitted) (alteration in original).

13. See Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96 (1982) (referring to 28 Edw. III ch. 3 (1354)).

included the language of the Amendment in the Bill of Rights without recorded debate.¹⁴ Consequently, the Framers' definition of property is not exactly clear,¹⁵ and the Supreme Court did not address the issue for another sixty-five years.¹⁶ For the majority of due process' history, "the case law did not adhere strictly to the common law understanding, nor did it attempt to parse the language of the clause with great precision."¹⁷ For the most part, property referred to a limited collection of interests¹⁸ and the Court constrained any expansion of the meaning of property by making a distinction between an interest characterized as a "right" and an interest characterized "as a mere privilege."¹⁹ The Court held that privileges did not deserve due process protection.²⁰

Following the lead of Charles Reich, who criticized the distinction between rights and privileges in the context of the modern welfare state and a "[s]ociety . . . built around entitlement,"²¹ Justice Brennan's majority opinion in *Goldberg v. Kelly* instigated the "due process revolution."²²

14. *Id.* at 97.

15. *Id.* Easterbrook looks to Lord Coke as the drafters' source for the meaning of life, liberty, and property. *Id.* at 96-98.

Those words then described a small collection of rights. Life referred to capital punishment; liberty to freedom from physical custody; property to estates in fee and to a motley collection of interests (leases, estates) that made up the bulk of private wealth. These were largely the rights then thought to exist by virtue of natural law and not from the intervention of government.

Id. at 97-98 (footnote omitted).

16. *Id.* at 99.

17. A.C. Pritchard, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1055 (1991).

18. Easterbrook, *supra* note 13, at 97.

19. Pritchard, *supra* note 17, at 1055. The beginning of the rights-privilege distinction is credited to Justice Holmes' comment that:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness, by the implied terms of his contract.

McAuliffe v. Mayor of City of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892).

20. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required.

Id. (citations omitted).

21. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (quoting Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)) (alteration in original).

22. JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9 (1985); GERALD GUNTHER, CONSTITUTIONAL LAW 584 (12th ed. 1991).

Goldberg held that "the Due Process Clause requires that [a welfare] recipient be afforded an evidentiary hearing before the termination of [welfare] benefits."²³ Justice Brennan rejected the distinctions between "privilege," "charity," and "right"²⁴ and applied a balancing approach to decide what process was due.²⁵

However, two years later in *Board of Regents of State Colleges v. Roth*, the Court directly addressed the question of what constituted property and, in doing so, bifurcated the balancing approach used by Justice Brennan in *Goldberg*.²⁶ Roth brought suit claiming that Wisconsin State University's failure to rehire him for a second year without notice of why he was not retained or an opportunity for a hearing had deprived him of due process.²⁷ The Court concluded that the question of whether Roth had been afforded due process did not need to be answered because Roth did not have a protected property interest in his faculty position.²⁸ Thus, the Court broke the analysis into two parts. A reviewing court must first determine whether the state has infringed on a property interest protected by the Fourteenth Amendment. Only if the court determines that a protected property interest has been implicated, does it reach the second question of what process is due.²⁹ As a consequence, the definition of a property interest is a critical threshold question and one which *Roth* attempted to answer.

In setting the broad parameters to what constitutes property, the Court in *Roth* stated that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take

23. *Goldberg*, 397 U.S. at 260. The issue of whether welfare benefits were property was not directly addressed by the Court because the appellant conceded that welfare benefits were protected by due process. *Id.* at 261-62. Brennan did, however, take the opportunity to state that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'" *Id.* at 262 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)) (footnote omitted).

24. *Id.* at 262, 265. *See also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

25. *See Goldberg*, 397 U.S. at 266 (noting that "the interest of the eligible recipient . . . of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens").

26. *Roth*, 408 U.S. at 571-73.

27. *Id.* at 572.

28. *Id.* at 573-74.

29. The balancing approach of *Goldberg* became the analysis employed in answering this second question of what process is due.

many forms.”³⁰ The Court then defined property through extra-constitutional sources,³¹ stating that

[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.³²

Property interests are defined by sources such as existing state law, but the Court’s wording is a bit broader because it refers to “rules or understandings that stem” from state law.³³ The Court did provide some limitation as to what “understandings” might be considered property by observing that there must be “more than a unilateral expectation of [the benefit. The claimant] must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”³⁴

Perry v. Sindermann, a case handed down the same day, involved the respondent’s one-year contract as a professor at Odessa Junior College which was not renewed after the 1969 school year.³⁵ Sindermann claimed that the college’s failure to renew his contract constituted a violation of due process.³⁶ However, Sindermann did not have tenure and could point to no explicit source for a property interest in his position at the college.³⁷ While concluding that Sindermann had no clear property interest in his position,³⁸ the Court stated that the

absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a “property” interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has

30. *Roth*, 408 U.S. at 576.

31. The Court seems to be avoiding the substantive problems of defining property within the Constitution, a problem which might lead to such decisions as *Lochner v. New York*, 198 U.S. 45 (1905). By using state law to determine the definition of property, the Justices avoid making any determination of property based on their own opinion of what interests are essential to preserving American life.

32. *Roth*, 408 U.S. at 577.

33. *Id.*

34. *Id.*

35. *Perry v. Sindermann*, 408 U.S. 593, 594-95 (1972).

36. *Id.*

37. *See id.* at 599.

38. *Id.* The Court stated that “[a] written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher’s claim of entitlement.” *Id.* at 601.

employed a process by which agreements, though not formalized in writing, may be "implied."³⁹

Property interests may arise from "other agreements implied from 'the promisor's words and conduct in light of the surrounding circumstances.'"⁴⁰ Again, the Court looked to extra-constitutional sources, such as Texas contract law, to decide whether a party had a protected property interest and must therefore be afforded due process.⁴¹ *Roth* and *Sindermann* both firmly establish that contractual relationships, whether implied or explicit, can create constitutionally protected property interests. If a contract was formed under state law, a court may determine whether adequate procedures were followed before the obligations resulting from the contract were disregarded by the government (federal due process requirements would not resolve the underlying contract dispute or reward damages for breach of contract).

As a result of the Supreme Court's definition of property, the underlying state contract law has acquired great significance. Consequently, the state law concerning promissory or equitable estoppel may control whether a property interest has been implicated. Although these doctrines vary from state to state, they share some general features.

B. Reliance Based Estoppel: Promissory and Equitable

The Second Restatement of Contracts states that a contract may arise from a promise reasonably inducing action or forbearance.⁴²

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 such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.⁴³

39. *Id.* at 601-02 (citing 3 CORBIN ON CONTRACTS §§ 561-572A (1960)).

40. *Id.* at 602 (citing 3 CORBIN ON CONTRACTS § 562 (1960)) (emphasis added).

41. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

42. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

43. *Id.*

This doctrine of promissory estoppel and its recent rebirth⁴⁴ results from the rigidity of the nineteenth century classical approach to contracts.⁴⁵ Historically, either contractual liability existed or it did not, and judges applied the law strictly.⁴⁶ Finding this approach too rigid, many courts attempted to avoid the resulting injustices, and promissory estoppel became one of the means for circumventing the perceived formalism in classical, dichotomous contract law.⁴⁷

Gratuitous promises played a large part in establishing the early antecedents of promissory estoppel.⁴⁸ Early cases often involved gifts of land. The promisee would take possession and make improvements and the court would enforce the gift. Other equitable scenarios for reliance-based holdings involved charitable subscriptions. In *Allegheny College v. National Chautauqua County Bank*, Judge Cardozo upheld a charitable subscription and specifically referred to the new doctrine of promissory estoppel as a replacement for, or an exception to, consideration.⁴⁹

These early cases, which diverged from the formalistic approach construing contracts strictly, created a discrepancy in contract law which, under the influence of Professor Corbin, became incorporated in the First Restatement of Contracts in 1932.⁵⁰

44. “[I]n the eighteenth century promises were often enforced primarily because the promisee had relied on the promise to her detriment or to the promisor's benefit.” Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679 (1984). The nineteenth century saw the ascendancy of bargained for consideration which pushed reliance based doctrines into the periphery. *Id.* Today, the eighteenth century approach has returned.

45. See *id.* at 682-83.

46. See *id.* at 681 (“Within contract law, in turn, contractual liability was all or nothing: a person was either subject to contractual obligation (and therefore liable for expectation damages) because of an agreement supported by consideration, or subject to no contract liability at all.”).

47. This approach involved a “preference for a noninterventionist, nondiscretionary mode of abstract inquiry” characterized by the “mechanical application of general principles to reach decisions in particular cases.” *Id.* at 682, 683.

48. JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 91, at 196 (2d ed. 1974). Murray lists four categories of cases which provide the “analytical and historical support for the proposition that a promise which induces detrimental reliance should be enforced.” *Id.* These antecedent categories are: (1) cases involving “family promises where no consideration was present” but promisee reasonably relied on the promise to her detriment; (2) cases involving “gratuitous promises to convey land followed by the taking of possession and making improvements on the land by the promisee”; (3) cases involving gratuitous bailments in which a promise was made before goods were delivered; and (4) cases involving enforcement of charitable subscriptions. *Id.* at 196-98.

49. *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 174-75 (N.Y. 1927). Consideration is “[t]he inducement to a contract” in the form of a “benefit” or “forbearance.” BLACK'S LAW DICTIONARY 306 (6th ed. 1990).

50. See Feinman, *supra* note 44, at 680, 683. Section 90 of the First Restatement was “abstracted” from prior cases dealing with “gratuitous agencies and bailments, waivers, and promises of marriage settlement . . . as a substitute for consideration to ameliorate the Restatement's strict bargain requirement.” *Id.* at 680.

After the drafting of the First Restatement in 1932, courts disagreed on the appropriateness of extending the use of detrimental reliance beyond gratuities and remained reluctant to apply it in the general contract context.⁵¹ However, since the drafting of the Second Restatement of Contracts in 1973, promissory estoppel has seen a dramatic increase in use and legitimacy.⁵² Today it is an accepted contract doctrine in almost every state although it, like most contract law, may not be applied uniformly in all jurisdictions.⁵³ Promissory estoppel has been extended well beyond its early confinement to

51. *Id.* at 678. *Compare* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (holding that “[t]here is no room . . . for the doctrine of ‘promissory estoppel’” in a situation involving subcontracting bids) (Hand, J.) *with* Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958) (holding that contractor’s offer to subcontractor is irrevocable—when contractor gets the general bid based, in part, on the subcontractors subsidiary bid—because of the subcontractor’s reliance interest) (Traynor, J.).

52. Professor Murray wrote in 1974 that:

At the present time, there can be no question that the most dynamic validation device in contract law is detrimental reliance. While the progression is far from uniform, the extension of the device beyond gratuitous promises to promises contemplating bargains is a major innovation. . . . The latest extensions which may make the promise enforceable in situations involving mere preliminary negotiations or indefinite offers seem to suggest recognition for *the greater claim to protection of the reliance interest than the expectation interest*. If this case law trend continues, detrimental reliance (promissory estoppel) may replace consideration as the chief contract validation device.

MURRAY, *supra* note 48, at 206 (emphasis added). Similarly, Professor Feinman writes that:

One of the most significant developments in contract law in the past half-century has been the rise of promissory estoppel—the enforcement of unbargained-for promises that induce reliance. Despite initial judicial reluctance to apply the doctrine after its formulation in section 90 of the first *Restatement of Contracts (Restatement)* in 1932, courts and scholars have come to recognize promissory estoppel as a principle of wide application.

Feinman, *supra* note 44, at 678.

53. Feinman, *supra* note 44, at 678 n.3, 694 (noting that “[e]very American jurisdiction that has considered the issue in recent years has adopted promissory estoppel for at least some purposes”). Courts use varying levels of strictness in analyzing the promise. Courts have not only differed on what constitutes a promise but have also “applied different standards for proving the requisite reliance and have achieved different resolutions of the conflicts between the reliance principle and other contract principles.” *Id.* at 694.

The strict view holds that a statement that is not specifically demonstrative of an intention respecting future conduct or that is indefinite or limited cannot be the basis for promissory estoppel . . . [and it] carefully distinguishes promises, which are future oriented, from statements of belief, which concern only the present. . . . The strict view also requires that the promise be definite and unequivocal.

Id. at 691.

The alternative, more flexible approach to promise allows reliance recovery . . . [when] a promise [is not] explicitly expressed but may be inferred from, for example, statements about future conduct or factual representations about a present state of affairs. The standard . . . is . . . whether, given the context in which the statement at issue was made, the promisor should reasonably have expected that the promisee would infer a promise.

Id. at 692 (footnotes omitted).

gratuitous promises and now holds a respected and powerful position in state contract law.⁵⁴

Equitable estoppel has enjoyed a longer history of use than promissory estoppel and in many ways was the seed from which promissory estoppel grew.⁵⁵ Equitable estoppel, also called estoppel *in pais*, states that "a party (1) who is guilty of a misrepresentation of existing fact including concealment, (2) upon which the other party justifiably relies, (3) to his injury, is estopped from denying his utterances or acts to the detriment of the other party."⁵⁶ The vital distinction, if a true distinction really exists,

54. See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 HOFSTRA L. REV. 443 (1987). Professors Barnett and Becker found promissory estoppel used predominantly in a number of contexts. They found that: (1) "the largest single set of the cases in which liability is imposed solely on the basis of promissory estoppel involve implicit bargains," *id.* at 455; (2) promissory estoppel is also used in the traditional role as "a basis for enforcing the deal without having to find that the expressly 'gratuitous' promise was implicitly bargained-for," *id.* at 456; (3) "[p]romissory estoppel is often used to enforce implicitly firm offers in one particular factual setting: subcontractors' bids to general contractors for use by the general contractor in preparing its bid on a prime contract," *id.* at 458-59; (4) promissory estoppel "is sometimes used by courts as a basis for enforcing some contract modifications" as an exception from the pre-existing duty rule, *id.* at 460; (5) "[o]ften, courts use promissory estoppel as a basis for enforcing assurances given by one contracting party and likely to be regarded as part of the overall transaction (and therefore legally binding) by the other contracting party," *id.* at 463; (6) "[a] number of courts have used promissory estoppel to enforce employers' promises of pensions to employees at or near retirement," *id.* at 467; (7) when "[c]ourts sometimes have difficulty finding consideration in continued employment or voluntary retirement [they] use promissory estoppel to enforce the promised pension," *id.* at 469; (8) courts often use it to bar the needed requirements of the statute of frauds, *id.* at 470; (9) "[i]n some jurisdictions, promissory estoppel has been used as the remedy for breach of indefinite agreements without overruling precedents holding that as a matter of contract law such agreements are wholly unenforceable," *id.* at 476; and (10) "[p]romissory estoppel has also been used to enforce promises which traditional contract doctrine would refuse to enforce because they are illusory. For example, some courts have used promissory estoppel to enforce a promise of future employment in one particular factual setting though the employee, once employed, could be terminated at will," *id.* at 478. Professors Farber and Matheson found that

[d]espite its tentative origins and its initial restriction to donative promises, promissory estoppel is regularly applied to the gamut of commercial contexts. Classic construction bid cases appear often, as do employee compensation and pension cases[, and] promissory estoppel has also been invoked in cases involving lease agreements, stock purchases, and promissory notes.

Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 907 (1985). Professors Farber and Matheson "[s]urveyed over two hundred promissory estoppel cases decided in the last ten years" and found that "promissory estoppel is no longer merely a fall-back theory of recovery. Rather, courts are now comfortable enough with the doctrine to use it as a primary basis of enforcement." *Id.* at 904, 908.

55. See generally *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898).

56. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 11-29, at 489 (3d ed. 1987) (footnote omitted). Equitable estoppel is:

The species of estoppel which equity puts on a person who has made a false representation or a concealment of material facts, with knowledge of the facts, to a party ignorant of the truth of the matter, with the intention that the other party should act upon it, and with the result that such party is actually induced to act upon it to his damage.

between promissory and equitable estoppel is that promissory estoppel requires "a promise (that is, a statement of intention regarding future conduct) rather than a representation of present fact."⁵⁷

Recently, courts have not clearly distinguished between promissory and equitable estoppel, and legal commentators have either argued that no valid distinction remains or have simply referred to both doctrines under the heading of promissory estoppel.⁵⁸ This mixing of terms is understandable since both doctrines share three essential elements, which, regardless of their labels, are the critical components of both promissory and equitable estoppel. First, the claimant must have *relied* on the representation of another party. Secondly, they must have relied on that representation to their *detriment*. The third element, which is relevant although not always discussed, requires the reliance to be *reasonable*. However, it is important to note that these two forms of estoppel have, until recently, been viewed differently and continue to be viewed differently in one important manner. Traditionally, equitable estoppel could only be used "as a defensive plea but not as the basis of a cause of action—it was 'a shield, not a sword.'"⁵⁹ On the other hand, promissory estoppel acts more as a sword, providing the justification for creating and enforcing obligations.⁶⁰

Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 376 n.182 (1969) (quoting BLACK'S LAW DICTIONARY 632 (4th ed. 1951)).

57. Feinman, *supra* note 44, at 680-81 n.18.

58. *Id.* Feinman argues that "if the distinction between equitable and promissory estoppel was ever valid . . . it is no longer so. The similarity of the facts that give rise to equitable and promissory estoppel, the illusory nature of the definitional differences, and the courts' lack of inclination to distinguish the doctrines have substantially merged equitable and promissory estoppel into a single offensive and defensive plea." *Id.* (citations omitted). Law review articles often refer to equitable estoppel under the term promissory estoppel. *See* Barnett & Becker, *supra* note 54, at 445-46. "[P]romissory estoppel serves two of the functions served by traditional contract and tort remedies available to parties in consensual relationships: the enforcement of some promises intended as legally binding and the imposition of liability to compensate for harm caused by some misrepresentations." *Id.* *See also* Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131 (1987).

[I]n most promissory estoppel cases liability can be understood as contractual in the broad sense that the promisor intended to be legally bound under an objective standard, even though some traditional formal limit of contract liability—such as consideration or the Statute of Frauds—would bar enforcement. There are a few promissory estoppel cases, however, in which liability can be understood only on the basis of tort notions. In these cases, liability seems to be imposed because of misrepresentation, even though liability would not always lie under established tort standards for misrepresentation.

Id. at 133-34.

59. Feinman, *supra* note 44, at 680 n.18 (quoting Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALBERTA L. REV. 347, 369-73 (1971)).

60. Baden v. Koch, 638 F.2d 486, 492 n.12 (2d Cir. 1980) (stating that equitable estoppel "cannot operate to create a right") (quoting Hauben v. Goldin, 426 N.Y.S.2d 273, 273 (N.Y. App. Div. 1980)); Mortvedt v. State, 858 P.2d 1140, 1143 n.7 (Alaska 1993) ("The primary difference between promissory and equitable estoppel is that the former is offensive, and can be used for affirmative enforcement of a

II. PROMISSORY ESTOPPEL AS THE SOURCE FOR A PROPERTY INTEREST IN THE EMPLOYMENT AND ZONING CONTEXT: LIMITED ACCEPTANCE

A. The Intersection of Due Process and Promissory Estoppel: A Hypothetical Case

This Note has reviewed in isolation the foundational cases for defining a property interest and the doctrine of promissory estoppel. The following hypothetical will illustrate the intersection of promissory estoppel and a constitutionally protected property interest.

Mr. Smith is an assistant professor teaching at River College in New York. While employed at River College, he interviews for an assistant professorship at Mountain State College in Illinois. During Mr. Smith's interview for the position, he is told by the Board of Regents that they can only give him a one-year contract. Mr. Smith already has a teaching position at River college where he owns a home, is on the tenure track, and is earning more than he would at Mountain State. However, the Board of Regents at Mountain State College needs a government professor and they assure him that, while they only provide yearly contracts, his contract will be renewed after the first year. Based on these assurances, Mr. Smith packs up his family, sells his home, moves across the country, and takes a lower paying job. Although his previous employer, River College, offers to increase his salary if he agrees to return after a year's absence, Mr. Smith turns down the offer and decides to remain at Mountain State College based on the assurances concerning the renewal of his contract. However, towards the end of the year Mr. Smith gets involved in a militia group and his contract is not renewed for a second year.

Would Mr. Smith have a protected property interest in his contract renewal for purposes of due process? With respect to Illinois contract law, Mr. Smith probably has a breach of contract claim based on promissory estoppel. The Board of Regents promised that they would renew his contract. Smith relied on that promise to his detriment. He moved to Illinois and, during the year, turned down a beneficial offer from his previous employer in reliance on the extension of his one-year contract. Since the Board of Regents assured him that his contract would be renewed, his reliance seems reasonable. Promissory estoppel could be used to enforce this obligation.

Not only does Mr. Smith probably have a valid contract claim but, following the reasoning of *Roth* and *Sindermann*, he also has a property interest protected by due process. The Court in *Roth* stated that property

promise, whereas the latter is defensive, and can be used only for preventing the opposing party from raising a particular claim or defense.").

interests are "created and their dimensions are defined by existing rules or understandings that stem from an *independent source such as state law*."⁶¹ *Sindermann* involved a situation in which an assistant professor was given a one-year contract.⁶² At the end of that year, however, his contract was not renewed and he brought suit for violation of due process.⁶³ In deciding the issue, the Court remanded the case with the instruction that the "absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'"⁶⁴ *Sindermann* explicitly refers to contract law as a source for a property interest and, although the reference is to an implied contract and this hypothetical involves promissory estoppel, both are potent and well accepted contract doctrines which create binding obligations.⁶⁵ Mr. Smith's situation fits neatly into the literal definition of a property interest presented in *Sindermann*.

In theory, as long as the applicable state law follows the doctrine of promissory estoppel, the Supreme Court's definition of a property interest provides that promissory estoppel may be used to establish a constitutionally protected interest.

B. Finding a Protected Property Interest Based on Detrimental Reliance in the Individual Employment Context

In a factual situation analogous to the Smith hypothetical above, the Seventh Circuit recognized a protected property interest based on promissory estoppel. In *Vail v. Board of Education*, the court found that Vail had a protected property interest in his job as athletic director and football coach.⁶⁶ In a decision affirmed by the Supreme Court *per curiam*, the Seventh Circuit held that the assurance of extending a one-year athletic directorship and coaching employment contract for a second year was a protected property interest subject to due process safeguards.⁶⁷ The Board of Education of Paris Union School District No. 95 needed an athletic director and attempted to hire

61. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added).

62. *Perry v. Sindermann*, 408 U.S. 593, 594-95 (1972).

63. *Id.* at 595.

64. *Id.* at 601-02 (citing 3 CORBIN ON CONTRACTS §§ 561-572A (1960)).

65. *See supra* notes 52-54 and accompanying text.

66. *Vail v. Board of Educ.*, 706 F.2d 1435, 1437 (7th Cir. 1983), *aff'd per curiam*, 466 U.S. 377 (1984).

67. *Id.* at 1438.

Vail.⁶⁸ In negotiating an employment contract, Vail expressed his concerns with giving up his present employment and having enough time to correct some of the problems in the Paris athletic program.⁶⁹ The Board met on June 24, 1980, and agreed to hire Vail for one year.⁷⁰ Also, “[i]t was the consensus of the Board that it would assure Vail of two years in that position.”⁷¹ The Superintendent informed Vail of the Board’s one-year contract offer and told him that “while the Board could not offer him more than a one[-]year contract, it could assure him of extending the contract for a second year.”⁷² Vail accepted, executed the one-year contract, and assumed his new position.⁷³ However, on March 2, 1981, the Board met and decided not to renew Vail’s contract for the second year.⁷⁴

The court first reviewed *Sindermann* and found that “case law clearly establishes that a property interest can be created through a statutory entitlement, the operation of institutional common law, or through principles of contract law.”⁷⁵ The court found that, even if it assumed that no enforceable contract existed between Vail and the Board, it was “not prepared to hold that this alone preclude[d] the establishment of a protected property interest.”⁷⁶ While not explicitly mentioning promissory estoppel, the court stated that “[l]egitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the Due Process Clause and the civil rights statutes.”⁷⁷ In reviewing the facts, the court found that:

The actions of the Board worked to deny Vail’s legitimate expectations of continued employment. The extent of his reliance on the Board’s promise is shown by the fact he left Joliet where he and his family had lived for thirteen years, left a job he had held for ten years, and even took a salary cut to take the job in Paris. The reasonableness of the reliance is illustrated by the concerns over security Vail raised from his very first

68. *Id.* at 1436.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1437.

76. *Id.* at 1440. Here the court stated that “[a]lthough the underlying substantive interest [was] created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.” *Id.* (quoting *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 9 (1978)).

77. *Id.*

meeting with Dr. Cherry to the final actions of the Board and the promises Vail received as an inducement to taking the job.⁷⁸

The court implicitly based its authority for finding a protected property interest on the contract doctrine of promissory estoppel.⁷⁹ The Board promised to provide Vail two years in which to turn the program around. Vail then "reasonably relied" on that promise and, to his "detriment," left a secure job and moved his family to Paris. Following the language of the Second Restatement of Contracts, the court found that the promise was an "inducement" on which Vail reasonably relied. Thus, a contract arising from a promise reasonably inducing action or forbearance was protected by the Fourteenth Amendment.⁸⁰

Two years later, in *Patkus v. Consortium*, the Seventh Circuit concluded that an employee had a property interest in her job based, at a minimum, on the theory of promissory estoppel.⁸¹ In *Patkus*, the Seventh Circuit relied explicitly on the theory of promissory estoppel to find that Patkus, while she had no written contract, could only be dismissed for cause.⁸² The defending state agency argued that it was in no way constrained or limited in its decision to discharge Patkus.⁸³ While describing the facts of the case as unique, the court disagreed and found that "the county's agreement to implement a dismissal-only-for-cause personnel policy provide[d] sufficient basis for Patkus' 'legitimate expectation' of the continuation of her employment and

78. *Id.*

79. Judge Posner strongly dissented in *Vail*. He was unsettled by the extension of the court's logic, an extension which would imply that "any time a school board or any other local government body [broke] a contract without first holding a hearing, the contractor—who need not be an employee, who could be a supplier of paper clips—[could] get damages in federal court." *Vail*, 706 F.2d at 1449 (Posner, J., dissenting). He stated that there was "no federal interest in this case" and that "[t]he only federal question in this case [was] whether breaches of public employment contracts [were] constitutional torts litigable in federal court." *Id.* at 1449-1450. "If ever a decision gratuitously displaced state by federal jurisdiction, it is this decision." *Id.* at 1450. Judge Posner's concerns are very similar to those found in *S & D Maintenance Co. v. Goldin*, *Brown v. Brienens*, and *San Bernadino Physicians' Servs. Medical Group, Inc. v. County of San Bernadino*. See *infra* Part III.B. Posner views the constitution "as a charter of liberty rather than an invitation to the federal courts to bring the whole business of the states under their wing." *Vail*, 706 F.2d at 1450. He is properly concerned with moving state contract claims into federal courts under the authority of the Fourteenth Amendment. Posner goes on to say that contracts have never been viewed as property and were not meant to be. See *id.* at 1450-52. However, the majority is really finding a property interest in employment and only using contract to define it. This distinction may be vacuous in terms of the results Posner is concerned about, mainly the federalization of state contract claims.

80. RESTatement (SECOND) OF CONTRACTS § 90. See also *supra* Part I.B.

81. *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1264 (7th Cir. 1985).

82. *Id.*

83. *Id.* at 1262.

that she did have a property right in her position."⁸⁴ The court determined that the rather confusing facts "would give Patkus a viable cause of action under state law on either a theory of promissory estoppel or under the changing state law regarding express commitment to employment procedures made by employers."⁸⁵

Vail and *Patkus* certainly interpret *Roth* and *Sindermann* as allowing promissory estoppel to be used in establishing a protected property interest, especially in the context of individual employment. Both cases base, at least in part, their finding of a protected property interest on the doctrine of promissory estoppel, and support its use as a viable source for a property interest. Not only does detrimental reliance establish a protected property interest in individual employment contracts, it also provides a similar function in cases claiming a property interest in specific zoning permits.

C. Finding a Protected Property Interest Based on Detrimental Reliance in the Zoning and Permitting Context

In addition to the Seventh Circuit's use of detrimental reliance as the basis for a individual employment contract, the Eleventh Circuit has looked to the state doctrine of equitable and promissory estoppel as support for determining that, in certain situations, zoning permits qualify as property interests and are protected by due process. These cases often combine a procedural due process claim with a substantive due process claim.⁸⁶ For both types of claims, however, the threshold question is whether a property interest

84. *Id.* at 1264. *See also* *Wright v. Associated Ins. Cos.*, 29 F.3d 1244 (7th Cir. 1994). The court did not find that Wright had a property interest because "even if the alleged oral promise were enforceable, and even if it conferred a constitutionally protected interest, the defendants did not deprive Wright of this interest." *Id.* at 1250. Even so the court did again state that the "alleged oral promise of employment might be enforceable under the doctrine of promissory estoppel." *Id.*

85. *Patkus*, 769 F.2d at 1264. The court described the required elements of promissory estoppel under Illinois law as "1) an unambiguous promise made to him, 2) reliance on that promise, 3) that the reliance was expected and foreseeable, and 4) injury resulting from that reliance." *Id.* The third element can be equated to the general requirement of "reasonable" reliance.

86. While procedural due process requires that government bodies provide individuals with required procedures before depriving them of protected property, substantive due process "protects the public from arbitrary and irrational governmental action." David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 774 (1995). Recently, the Eleventh Circuit held that an arbitrary and capricious termination of a state created property interest in employment did not qualify as a substantive due process claim. *McKinney v. Pate*, 20 F.3d 1550, 1558-60 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). For a criticism of the *McKinney* approach and an argument for allowing substantive due process claims for all state created property interests, see generally Armistead, *supra*.

has been implicated.⁸⁷ In conducting this inquiry, detrimental reliance was a deciding factor in establishing a property interest.

In *Reserve, Ltd. v. Town of Longboat Key*, the plaintiff acquired property on Longboat Key and obtained a building permit to construct a spa complex and condominiums.⁸⁸ At the time, the Longboat Key Code allowed that a permit could be revoked if no "substantial work" occurred after construction started.⁸⁹ Two years later, Reserve's permit was revoked after Longboat Key determined that Reserve had not completed "substantial work."⁹⁰ Reserve brought suit claiming, among other things, that the revocation of its permit violated the Fourteenth Amendment.⁹¹ In deciding whether Reserve had a constitutionally protected property interest, the court followed *Board of Regents v. Roth* and looked to state law to decide the question.⁹² Prior Eleventh Circuit cases held that under state law building permits did not constitute a protected property interest.⁹³ The court acknowledged these prior cases but found that, "[d]espite federal courts' varied interpretations of Florida law regarding building permits, Florida courts have consistently held that a landowner has a property right in a building permit 'where the landowner possesses a building permit and where the circumstances that give rise to the doctrine of equitable estoppel are present.'"⁹⁴ The court then reviewed the facts to decide "whether circumstances exist" which gave "rise to the doctrine of equitable estoppel, under Florida law,"⁹⁵ so as to give Reserve a property right in its building permit.⁹⁶ Because Reserve had spent large amounts of money in reliance on its building permit, the court held that the elements of equitable estoppel had been satisfied and that Reserve had a

87. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1375-76 (11th Cir. 1994). For an analysis of whether courts should accord state created property interests substantive due process protections, see generally *Armistead*, *supra* note 86.

88. *Reserve*, 17 F.3d at 1375-76.

89. *Id.* at 1376.

90. *Id.*

91. *Id.* Reserve brought both substantive and procedural due process claims.

92. *Id.* at 1379.

93. *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Cir. 1989); *Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1559 (11th Cir. 1991).

94. *Reserve*, 17 F.3d at 1380 (quoting *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867, 869 (Fla. Dist. Ct. App. 1973), *aff'd in part, rev'd in part on other grounds*, 329 So. 2d 10 (1976)).

95. The elements of equitable estoppel in Florida exist when a "landowner, relying '(1) in good faith (2) upon some act or omission of the government[,] (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.'" *Id.* at 1380 (quoting *City of Hollywood*, 283 So. 2d at 869) (alteration in original).

96. *Id.* Reserve spent \$6 million to buy property, design the spa, raze existing buildings, and perform initial site and construction work. *Id.*

property interest under the Fourteenth Amendment.⁹⁷ The court left some doubt as to whether the permit on its own would be a property interest,⁹⁸ but it was clear that the combination of a permit and equitable estoppel gave rise to a protected property interest.

Shortly after the *Reserve* decision, the Eleventh Circuit followed the same rationale in *Resolution Trust Corp. v. Town of Highland Beach*, concluding that a land development joint venture had a protected property interest in a certain zoning scheme.⁹⁹ In 1974, Highland Beach passed Ordinance 228 which specifically approved a residential plan unit development (RPUD) for 846 units on property acquired by the Hoffmans.¹⁰⁰ On July 1, 1975, Highland Beach passed Ordinance 282 which amended Ordinance 228 and required that construction of RPUDs be "completed within ten (10) years of the effective date of this ordinance."¹⁰¹ In 1980, the Hoffmans formed a joint venture with two other companies and, after redesigning the RPUD from 846 to 620 units, applied for approval of the new plan.¹⁰² Highland issued its first construction permit for the property on August 8, 1980 and granted approval for the redesigned RPUD on October 7, 1980.¹⁰³ However, the Town of Highland Beach and Resolution Trust were then faced with the question of when the ten year limit for completion of construction began and ended.¹⁰⁴ In response to this inquiry, the Highland Beach Commission "interpreted Ordinance 282 as requiring completion of RPUD's within ten years of the issuance of the first building permit," meaning that the construction had to be completed by August 8, 1990.¹⁰⁵ The Commission then directed the Mayor to inform the joint venture of its interpretation.¹⁰⁶ This was done, in writing, and the joint venture proceeded to invest eight million dollars to begin construction.¹⁰⁷ However, in 1984, when the Commission considered explicitly amending the Ordinance to reflect the 1990 completion date, the Commission balked and reinterpreted Ordinance 282 as requiring a completion date of July 1, 1985.¹⁰⁸ The RPUD zoning, therefore, expired before the

97. *Id.*

98. *See id.*

99. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1546 (11th Cir. 1994).

100. *Id.* at 1540.

101. *Id.*

102. *Id.* at 1540-41.

103. *Id.* at 1541.

104. The options for when the clock began to tick were: (1) the original RPUD in 1975; (2) the first construction permit in August 1980; or (3) the approval of the redesigned RPUD in October 1980.

105. *Resolution Trust*, 18 F.3d at 1541. They chose option 2 as the starting date.

106. *Id.* at 1545.

107. *Id.* at 1550.

108. *Id.* at 1542. They changed their minds and chose option 1 for the starting time.

completion of construction, and the joint venture was suddenly subject to the then-existing zoning code.¹⁰⁹

One of the questions before the court was whether the joint venture had a property interest in the RPUD zoning up until 1990, five years past the effective deadline. The Eleventh Circuit found that Highland Beach's "interpretation of Ordinance 282, its representations to the joint venture, and the joint venture's acts of reliance created a reasonable expectation rising to the level of a property right."¹¹⁰ The court stated that "[b]ecause the record supports the district court's conclusion that the Town's representations induced the joint venture to invest millions of dollars to develop the RPUD, we affirm its determination that the joint venture possessed a vested right in RPUD zoning through August 8, 1990."¹¹¹ Similar to *Reserve*, the court found that all the elements of reliance-based estoppel existed and that these elements created a constitutionally protected property interest.¹¹² The joint venture had relied on a letter informing them that they had until 1990 to complete the project. To their detriment, they invested eight million dollars in the project before being told that the zoning did not apply.

Resolution Trust differs slightly from *Reserve*. In *Reserve*, the developer had a properly acquired permit and detrimental reliance acted as the additional ingredient needed to create a protected property interest. In contrast, *Resolution Trust* leaves some question as to whether the joint venture's zoning extension was properly acquired. Highland Beach argued that Ordinance 282 was as "clear as a bell" and that it obviously started running in 1975, not 1980 as they had earlier stated.¹¹³ Ordinance 282, which was passed in 1975, explicitly states that the ten year completion deadline starts on the "effective date of *this* ordinance."¹¹⁴ Thus, the 1985 deadline seems to be the correct reading of Ordinance 282 and, under Florida law, only an amendment of the Ordinance could extend the zoning beyond 1985.¹¹⁵ Regardless, the court found that "municipal law endows the Commission with the authority to interpret its ordinances" and that "[c]learly, the Commission possessed

109. *Id.* at 1542-1543.

110. *Id.* at 1545.

111. *Id.* at 1546. This analysis falls in a section of the opinion discussing vested rights but the court refers to this analysis when discussing the due process claims and, in particular, whether a protected property interest exists. *Id.* at 1548. The court states in the due process section of its opinion that "[a]s noted above, the district court correctly found that the joint venture attained a protected property interest or 'vested right' in the RPUD through 1990." *Id.* They then proceeded to analyze whether due process requirements were met. *Id.*

112. *Id.*

113. *Id.* at 1545.

114. *Id.* at 1540 (emphasis added).

115. *Id.* at 1545.

authority to interpret its own ordinance, and the joint venture could reasonably rely on that interpretation.”¹¹⁶ The court was less concerned with whether the interpretation was correct given the language of the Ordinance and was more concerned with whether the joint venture was reasonable in its reliance on that interpretation. In light of the municipal code and the commission’s authority to interpret the code, the reliance was reasonable and a property interest existed.¹¹⁷

The distinction between the properly authorized permit in *Reserve* and the questionably authorized permit in *Resolution Trust* is important because *Resolution Trust* rests more squarely on the traditional elements of promissory estoppel than *Reserve*. Instead of a clear and valid building permit, *Resolution Trust* involved detrimental reliance and an interpretation of the code that could reasonably be relied on even if it might have been mistaken. The court found that the combination of the three essential elements of promissory estoppel—reliance, detriment, and reasonableness—established a protected property interest. Detrimental reliance in the Eleventh Circuit and in the context of zoning and permitting seems to be providing an added boost to property interests that might not otherwise rise to the level of constitutional protection.

In the context of a qualified immunity case, the Third Circuit also addressed the question of whether promissory estoppel could be used to establish a property interest.¹¹⁸ Similar to *Resolution Trust*, *Acierno v.*

116. *Id.* at 1545-46.

117. That the Commission had authority to interpret the ordinance is an important fact to establish. Courts are hesitant to enforce detrimental reliance when based on statements made by officials without authority. Remember that promissory estoppel in the Second Restatement is referred to as a “Promise Reasonably Inducing Action or Forbearance.” RESTATEMENT (SECOND) OF CONTRACTS §90 (1973). Here the court looked at whether the reliance was reasonable and concluded that it was because the Commission had authority to interpret their ordinance. *Resolution Trust*, 18 F.3d at 1546. In contrast, the Tenth Circuit refused to use detrimental reliance to find a property interest in *Lehman v. City of Louisville*. The Lehmans “attempt[ed] to base [their property interest] on an estoppel theory—that reliance to their detriment on certain statements of Louisville officials created a property interest in their proposed use of their property.” *Lehman v. City of Louisville*, 967 F.2d 1474, 1477 (10th Cir. 1992). The court rejected this argument because the “officials that spoke with [Lehman] simply lacked the authority to bind the City Council in any way.” *Id.* The court, as in *Resolution Trust*, interpreted the Municipal Code but, unlike *Resolution Trust*, found that the “zoning administrator [was] not authorized to alter an established zoning ordinance” and that Lehman’s “complaint did not allege that the Director of Community Development’s representations constitute[d] a reasonable ‘interpretation’ of an existing zoning ordinance.” *Id.* Basically, the court found that the reliance was not “reasonable” since Lehman “clearly had the resources and the access to the information that would have allowed them to determine that this particular use of the property was not allowed.” *Id.* The questions of “authority” and the “reasonableness” of the reliance is further discussed in Part III.A.3.

118. *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994). *Acierno* involved the issue of qualified immunity, but part of the analysis concerned deciding whether a municipal official “possessed a ‘clearly established’ constitutional right to develop his property which was abrogated by the County Council through

Cloutier involved an RPUD zoning scheme that was changed to a more restrictive zoning classification after the owner had relied on the RPUD zoning and had spent a great deal of money to prepare the development plans.¹¹⁹ However, unlike *Resolution Trust* and *Reserve*, no building permit was ever acquired.¹²⁰ The district court found that Delaware state law “[did] not preclude property owners from acquiring a vested right to develop as long as there ha[d] been a substantial change of position or expenditure, even though they ha[d] not obtained a building permit.”¹²¹ The district court found that equitable estoppel alone was enough to create a protected property interest.¹²² On review, the Third Circuit did not necessarily disagree with the trial court.¹²³ However, the court held that Delaware’s “permit plus” rule was not firmly established precedent. The resulting doubt about the district court’s interpretation of state law meant that the asserted property interest was not so “clearly established” as to strip the members of the County Council of their qualified immunity defense.¹²⁴

These cases clearly support the argument that a permit plus detrimental reliance rises to the level of a protected property interest. However, it is uncertain how far either *Resolution Trust* or *Acierno* may be extended to assert that reasonable detrimental reliance, without some form of a permit, may be used alone to create a protected property interest.¹²⁵

Although using detrimental reliance as a single basis for a property interest has not been clearly adopted by the courts in the zoning and permitting arena, *Resolution Trust* does suggest that, if the promise was made with the proper authorization and may therefore be reasonably relied upon, promissory estoppel could, alone, establish a property interest.

Within the limited factual context of cases such as *Vail* and *Resolution Trust*, promissory estoppel functions as the basis for constitutionally protected property interests. However, outside these narrow contexts, many courts have fashioned two predominant barriers to using promissory estoppel as the basis for a property interest: (1) barriers based on the conflicts created by

the action of voiding his record development plan and subdivision plan.” *Id.* at 615.

119. *Id.* at 603-04.

120. *Id.* at 602.

121. *Id.* at 618.

122. *See id.* at 617-18.

123. The court of appeals “decline[d] to take a position as to whether the district court’s prediction of what the Delaware Supreme Court would hold concerning vested rights, the ‘permit plus’ rule, and equitable estoppel [was] correct as a matter of law.” *Id.* at 620. The court only determined that the property interest was not “clearly established.” *Id.*

124. *Id.*

125. *See Decarion v. Monroe County*, 853 F. Supp. 1415, 1419-21 (S.D. Fla. 1994) (finding a property interest based on equitable estoppel absent a permit).

estopping a governmental entity; and (2) barriers based on the federalizing effect of constitutionalizing state breach of contract claims.

III. EXTENDING PROTECTED PROPERTY INTERESTS BASED ON PROMISSORY ESTOPPEL OUTSIDE OF THE NARROW EMPLOYMENT AND ZONING CONTEXT

The logical extension of *Roth* and *Sindermann* would seem to allow a plaintiff to base a property interest upon the obligations which arise from promissory estoppel. Promissory estoppel has become a reliable and potent doctrine, and *Sindermann* explicitly refers to state contract law as a repository for establishing a property interest.¹²⁶

However, the practicality of basing a property interest upon the obligations resulting from promissory estoppel is limited and must be measured in light of two significant barriers. First, directly binding the federal government through estoppel presents a potential constitutional conflict which severely impedes estopping the government directly, and has become an impediment in establishing a protected property interest. Similarly, elements in addition to those needed when estopping a private party are often required when applying estoppel against state or local government.

Second, many courts hesitate to use any contract, let alone one based on promissory estoppel, to establish a protected property interest outside of the employment context because of a concern with federalizing contract law.¹²⁷ While these substantial barriers do not necessarily exclude the establishment of a property interest with promissory estoppel, they seriously curtail the extensive possibilities created by *Roth* and *Sindermann*.

A. State and Federal Law Barriers: The Unique Character of the State

Because the Fourteenth Amendment only applies to state actors, one of the parties in the relationship to which promissory estoppel attaches contractual obligations will always be the state.¹²⁸ Historical notions of sovereign immunity and the constitutional limitations of our government often

126. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972); *Farber & Matheson*, *supra* note 54, at 908.

127. "Courts generally recognize, in accordance with *Roth* and *Sindermann*, that public employment contracts are the prime protected category of contract-created interests. Courts, however, have had difficulty determining what other kinds of contract 'property interests' deserve due process protection." *Henri G. Minette, San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino: Constitutionally Protected Public Contract Property Interests Under 42 U.S.C. Section 1983*, 74 MINN. L. REV. 879, 887-88 (1990) (footnotes omitted).

128. The Fourteenth Amendment only prohibits state action. "[P]rivate action is immune from the restrictions of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974).

conflict with the potential obligations arising from promissory estoppel.¹²⁹ As a result, circuit and state courts have used the prohibitions against directly estopping the government as corresponding barriers to using an equitable doctrine such as promissory estoppel to establish a protected property interest. These are state and federal law barriers. They bar the creation of a property interest because they limit the situations in which the government is constrained by promissory estoppel. If state or federal law will not enforce estoppel against the government, estoppel does not give rise to a property interest.

Although they are substantial obstacles, state and federal law barriers share a common concern with the valid authority of the promisor. Consequently, the promisor's proper authority is an essential component to establishing a property interest based on estoppel.

1. Refusing to Estop the Federal Government

The Supreme Court has dealt with the validity of applying estoppel against the federal government on a number of occasions and, to date, the Court has never allowed its enforcement.¹³⁰ In its most recent decision on the issue, *Office of Personnel Management v. Richmond*, the plaintiff received oral and written advice from a naval employee concerning the statutory limit on earnings above which a disability annuity would be discontinued.¹³¹ Richmond relied on this advice, which was mistaken, and was denied six months of benefits when his earnings exceeded the actual statutory limit.¹³² He claimed that this erroneous advice estopped the Office of Personnel Management from disqualifying his eligibility for benefits.¹³³ In deciding the case, the Court first reviewed the Appropriations Clause of the Constitution¹³⁴

129. Deborah Walrath, Note, *Estoppling The Federal Government: Still Waiting for the Right Case*, 53 GEO. WASH. L. REV. 191, 192 (1985).

130. See, e.g., *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422 (1990); *Heckler v. Community Health Servs.*, 467 U.S. 51 (1984); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (Private party relied on the misrepresentations of an agent who gave them information on the coverage of a crop insurance policy. The Court was concerned with "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."); *Immigration and Naturalization Serv. v. Hibi*, 414 U.S. 5 (1973) (denying citizenship as a result of missing a time limit because of the misrepresentations of an immigration officer); *Montana v. Kennedy*, 366 U.S. 308 (1961) (holding that the erroneous advice of a government employee was not misconduct and therefore estoppel was not available). The plaintiff claimed that his Italian mother had been told that she could not return to the United States while pregnant and the plaintiff wanted to estop the government from deporting him. *Id.*

131. *Richmond*, 496 U.S. at 417.

132. *Id.* at 418.

133. *Id.*

134. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7.

and stated that “[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.”¹³⁵ The Court then applied this Clause in relation to the doctrine of estoppel and stated that the “judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.”¹³⁶ Because estopping the government would require appropriating funds to be paid to Richmond in violation of a congressional statute, the application of estoppel was barred by the Constitution.¹³⁷ The Court was concerned most significantly with the broader notion of separation of powers,¹³⁸ stating that “[i]f agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive.”¹³⁹ Thus, the Court has taken a clear stance¹⁴⁰ against estopping the federal government

135. *Richmond*, 496 U.S. at 424.

136. *Id.* at 426.

137. *See also Heckler*, 104 U.S. at 51. “Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds.” *Id.* at 63.

138. “[E]stoppel traditionally does not lie against the government. This distinction arose largely as a corollary to the doctrine of sovereign immunity that ‘the King can do no wrong.’” Walrath, *supra* note 129, at 192 (footnote omitted). This rationale has fallen from favor and the “justification frequently invoked to support governmental exemptions from equitable estoppel is the separation of powers doctrine.” *Id.*

139. *Richmond*, 496 U.S. at 428.

140. Previously the court had applied more of a balancing test and had remained more equivocal on the issue. *See Heckler*, 467 U.S. at 60-61 (“[W]e are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their government.”).

In the past, both the Court and commentators have debated the issue of estoppel against the government almost entirely in policy terms. Considerations of preserving confidence in the government and treating individual citizens with fairness favored permitting estoppel, while notions of preserving the public fisc, guarding against fraud and collusion, and preserving government incentives to provide information to the public counseled against it By contrast, the *Richmond* Court implicitly recognized that the issue of governmental estoppel is two-tiered: the Court must first decide when federal courts have the power to order equitable estoppel against the government; only then does the question of the substantive wisdom of estoppel in a particular case arise. By analyzing the structural limits the Constitution imposes on federal courts’ equitable powers, the Court departed from its former case-by-case approach and fashioned a rule that provides guidance to the lower courts and removes from their discretion a large class of estoppel claims.

Note, *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 286, 289-90 (1990) (citations omitted).

when it involves appropriations not provided by congressional statute.¹⁴¹ But the Court has avoided declaring that estoppel may not be applied against the government in all situations.¹⁴² Furthermore, the questions raised when the Appropriations Clause conflicts with other constitutional mandates, such as procedural due process, were not addressed by the majority.¹⁴³

While this is the most recent rationale for limiting estoppel against the government, past Supreme Court cases and circuit court cases did not limit their reasons for refusing to equitably estop the government to the Appropriations Clause. The primary barrier to estopping the government was an additional requirement of "affirmative misconduct." Prior to *Richmond*, courts refused to apply estoppel against the government unless both the traditional elements of equitable estoppel and an additional finding of "affirmative misconduct" on the part of the government were present.¹⁴⁴ The Supreme Court, in *Immigration and Naturalization Service v. Miranda*, alluded to this requirement when they found that Miranda could not avoid deportation by estopping the government.¹⁴⁵ The respondent based his estoppel claim on the INS's eighteen-month delay in processing his application, during which time the respondent's marriage to an American citizen ended.¹⁴⁶ While disagreeing with the lower court's final decision, the Supreme Court stated that "[t]he Court of Appeals . . . correctly considered

141. *Richmond*, 496 U.S. at 434. "As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution." *Id.*

142. *Id.* at 423-24. "We leave for another day whether an estoppel claim could ever succeed against the Government. A narrower ground of decision is sufficient to address the type of suit presented here, a claim for payment of money from the Public Treasury contrary to a statutory appropriation." *Id.* "Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address." *Id.* at 434. Cases involving non-monetary claims are not prohibited. There may now be an issue of what constitutes a money claim. See Note, *supra* note 140, at 292-93. Also, the question of the "affirmative misconduct" requirement in estoppel cases is left open in the non-monetary claims. *Id.* at 293. The holding also allows estoppel when "Congress has been concerned at the possibility of significant detrimental reliance on the erroneous advice of Government agents, [and] has provided appropriate legislative relief." *Richmond*, 496 U.S. at 428.

143. Justice White opines that "the Court does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution such as the Just Compensation Clause." *Id.* at 435 (White, J., with whom Blackmun, J., joins, concurring). Justice Marshall also notes that "[t]he Court does not decide whether the Appropriations Clause would bar the Judiciary from ordering payments from the Treasury contrary to a statutory appropriation either where such payment would be required to remedy a violation of another constitutional provision, such as the Due Process or Just Compensation Clauses." *Id.* at 437 n.* (Marshall, J., with whom Brennan, J., joins, dissenting).

144. *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994); *Sims v. Heckler*, 725 F.2d 1143, 1146 (7th Cir. 1984); *Leimbach v. Califano*, 596 F.2d 300, 305 (8th Cir. 1979); *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984); *Lurch v. United States*, 719 F.2d 333, 341 (10th Cir. 1983).

145. *Immigration and Naturalization Serv. v. Miranda*, 459 U.S. 14, 19 (1982).

146. *Id.* at 15.

whether, as an initial matter, there was a showing of affirmative misconduct.”¹⁴⁷ The requirement of affirmative misconduct, although unaddressed by the *Richmond* decision, remains a critical criterion to many courts and a significant barrier to estopping the government.¹⁴⁸

As one might expect, the reasons why promissory or equitable estoppel may not be used to create a property interest for purposes of due process are often the same reasons why estoppel may not be used directly against the federal government. In *Dun & Bradstreet Corporation Foundation v. United States Postal Service*, the plaintiff (D&B) claimed that it had a protected property interest in a refund granted by the United States Post Office and, therefore, was entitled to the procedural protections of the Fifth Amendment before the refund could be revoked.¹⁴⁹ One of the reasons it gave for having a property interest in its refund was that it “detrimentally relied on Postal Service employees’ representations that it would be entitled to a refund for the New York mailings if it made these mailings at regular, rather than special, rates.”¹⁵⁰ The Second Circuit dispensed with the claim based on *Richmond*.¹⁵¹ The court found that “because the federal government appropriates money to account for the difference between the special and the regular bulk third-class rates, any refund that D&B would receive will come from the public Treasury.”¹⁵² Therefore, any appropriations had to conform with statutory authority. Because D&B had used bulk rate indicia rather than the special rate, it was “clear the St. Louis mailings did not conform to Domestic Mail Manual Requirements.”¹⁵³ Lacking statutory authority, the appropriations for

147. *Id.* at 17.

148. *United States v. French*, 46 F.3d 710, 717 (8th Cir. 1995) (“Because we find no ‘affirmative misconduct’ and we find a factual dispute that was resolved by the jury, we reject French’s contention that the government is estopped from prosecuting him.”). A less often used limit to estopping the government is to simply apply a balancing approach and frame the arguments in policy concerns both for and against allowing the government to be equitably estopped. *Schraeger v. City of San Francisco*, No. 92-15554, 1993 U.S. App. LEXIS 24453, at *15 (9th Cir. 1993) (prohibiting promissory estoppel against the government because the detrimental effect of “[t]he possibility of contracting by oral assurances raises the spectre of rash decisions, corruption, and secret dealings” which outweighed “any interest the appellants ha[d] in invoking estoppel”); Note, *supra* note 140, at 289-90. Courts have balanced “preserving confidence in the government and treating individual citizens with fairness” with “preserving the public fisc, guarding against fraud and collusion, and preserving government incentives to provide information to the public.” *Id.* (footnotes omitted).

149. *Dun & Bradstreet Corp. Found. v. United States Postal Serv.*, 496 F.2d 189, 190-91 (2d Cir. 1991).

150. *Id.* at 195.

151. *Id.* The court stated that *Richmond* “held that a claimant may not assert a monetary claim of estoppel against the government when the funds used to pay this claim will come from the Federal Treasury, but are not authorized by statute.” *Id.*

152. *Id.*

153. *Id.* at 196.

a refund were precluded by *Richmond* and D&B did not have a property interest based on equitable estoppel.¹⁵⁴ Thus, the obstacle in this case was a lack of authority. Only Congress has the authority to appropriate money from the public treasury. The postal employees who had granted a refund without an authorizing statute lacked the authority to appropriate money and, therefore, D&B could not bring a claim based on estoppel.

The District of Columbia Circuit, in *Kizas v. Webster*, rejected promissory estoppel and contract law as a source for a property interest even in relation to employment.¹⁵⁵ The lower court in *Kizas* held that federal employees had a property interest in special preferences (deferred compensation) because the "history of representation, reliance, and mutual exchange of benefits contain[] all the elements of a classic contract implied in fact or of promissory estoppel" regardless of the fact that the employer was the government.¹⁵⁶ Reversing the district court's decision, the federal court of appeals in *Kizas* rejected the use of a contract doctrine such as promissory estoppel to find a property interest and held that "[w]ith limited exceptions . . . federal workers serve by appointment, and their rights are therefore a matter of 'legal status even where compacts are made.'"¹⁵⁷ The circuit court found that federal employees' "entitlement to pay and other benefits 'must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles.'"¹⁵⁸ The court went on to state that "courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel"¹⁵⁹ and, "[b]ecause the special preference at issue here was not defined as an element of compensation by any statute or regulation, the employees' argument that they had a vested right to its retention must fail."¹⁶⁰

McCauley v. Thygerson followed the same reasoning to reject a claim made by an employee of the Federal Home Loan Mortgage Corporation who was discharged from an at-will position.¹⁶¹ *McCauley* brought a claim for deprivation of due process, basing his property interest on the obligations

154. *Id.*

155. *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983).

156. *Id.* at 534-35 (quoting *Kizas v. Webster*, 492 F. Supp. 1135, 1147 (D.D.C. 1980)).

157. *Id.* at 535 (quoting *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981)).

158. *Id.* (quoting *United States v. Larionoff*, 431 U.S. 864, 869 (1977)) (alteration in original).

159. *Id.*

160. *Id.* at 537. The employees were subject to Title 5 of the USC and its implementing regulations (which govern "basic salaries; salary increases; overtime, holiday and sick pay; life and health insurance benefits; retirement benefits; travel and subsistence allowances") and the court found that "[t]hese provisions are the *exclusive* source of employee's compensation rights." *Id.* at 536.

161. *McCauley v. Thygerson*, 732 F.2d 978, 979 (D.C. Cir. 1984).

arising from promissory estoppel.¹⁶² In deciding whether McCauley had a valid contract on which to base a property interest, the court stated that estoppel was limited because “federal government employees serve by appointment, not contract, and their employment rights ‘must be determined by reference to the statutes and regulations governing [terms of employment] rather than to ordinary contract principles.’”¹⁶³ The court, however, did not entirely rule out the possibility that promissory estoppel might apply when “the federal official making the promise acted within the scope of his or her authority in doing so.”¹⁶⁴

Both of these cases limit the use of contract doctrines, such as promissory estoppel, as the source of a protected property interest when involving a federal employee. The general premise of this limitation revolves around whether the promisor had authority to make the promise which was relied upon. These cases assert that the authority for government employment rests in statutory law, not private contract theory.

These cases demonstrate how the obstacles to directly estopping the government also bar basing a protected property interest on promissory or equitable estoppel. The hurdles to estopping the government directly—the Appropriations Clause and the affirmative-misconduct requirement—are also barriers to basing a property interest in the contract doctrine of promissory or equitable estoppel.

2. Refusing to Estop State and Local Government

Courts are often just as hesitant to apply estoppel, particularly equitable estoppel, against state government as they are to apply it against the federal government.¹⁶⁵ Again, notions of sovereign immunity and protecting state power create a strong reluctance on the part of courts to impose estoppel

162. *Id.* at 979-980. McCauley also brought a breach of contract claim which the court rejected. *Id.* at 980. Because he was not successful in the contract claim, the court summarily dismissed the due process claim because McCauley had no property interest to base it on. *Id.*

163. *Id.* at 981 (quoting *Larionoff*, 431 U.S. at 869) (alteration in original).

164. *Id.*

165. *Petrelli v. City of Mount Vernon*, 9 F.3d 250, 256 (2d Cir. 1993) (“Even if Petrelli could prove that he had reasonably relied to his detriment on Mount Vernon’s statements, the law requires more than that when a party invokes equitable estoppel against a government (or its agent) acting in a governmental capacity. This is true whether State, or federal law is applied. . . . Under either federal law or New York law, Petrelli’s claim must fail.”); *Hanley v. Donovan*, 734 F.2d 473, 476 (9th Cir. 1984) (finding that “equitable estoppel should be applied against the government with utmost restraint”); *United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982) (noting that “[e]quitable estoppel as a defense is not available against the United States”); *Equibank v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 88 (3d Cir. 1989) (finding that “courts invoke the doctrine of estoppel against the government with great reluctance” (quoting *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980)).

against local and state government.¹⁶⁶ Although estoppel may arise by legislative action, and although courts allow equitable and promissory estoppel of the state, doing so usually involves requirements in addition to those needed when estoppel is applied to private parties.¹⁶⁷

For example, the California Supreme Court addressed equitable estoppel against the state in *State v. Superior Court of Placer County* and set forth the standard elements of estoppel.¹⁶⁸ However, it also held that estoppel would not "be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public."¹⁶⁹ This rationale for limiting estoppel against the state has found support in other jurisdictions. In *Mortvedt v. State*, the Supreme Court of Alaska stated that promissory estoppel could be invoked against a public entity, but that the doctrine's equity element limited its application when the "public interest would be significantly prejudiced."¹⁷⁰

In *Department of Transportation v. La Salle National Bank*, an Illinois court stated that equitable estoppel should be applied against the state only when "there are some positive acts by State officials which may have induced the action of the adverse party under circumstances where it would be inequitable" to allow the state to rescind.¹⁷¹ Many states apply a pure equity approach when analyzing estoppel against the state. These jurisdictions enforce estoppel only when required by either "exceptional circumstances"¹⁷² or to "prevent manifest injustice."¹⁷³ The authority of the decision-maker will also be an essential element in estopping the state. States, such as Minnesota, allow promissory estoppel to be used against the government, but only when the state official has made a promise within her authority.¹⁷⁴

166. C. Maison Heidelberg, Note, *Closing the Book on the School Trust Lands*, 45 VAND. L. REV. 1581, 1608 (1992).

167. *See Trustees v. Rye*, 521 So. 2d 900, 908-09 (Miss. 1988); *Kuge v. State Dep't of Admin.*, 449 So. 2d 389 (Fla. Dist. Ct. App. 1984).

168. *State v. Superior Court of Placer County*, 625 P.2d 256 (Cal. 1981).

169. *Id.* at 259 (citing *City of Long Beach v. Mansell*, 476 P.2d 423, 441-43 (Cal. 1970)).

170. *Mortvedt v. State*, 858 P.2d 1140, 1142-43 (Alaska 1993) (quoting *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 97 (Alaska 1984)).

171. *Department of Transp. v. La Salle Nat'l Bank*, 623 N.E.2d 390, 401 (Ill. App. Ct. 1993). *See also In re Joseph B.*, 630 N.E.2d 1180, 1196 (Ill. App. Ct. 1994) ("Although the doctrine of equitable estoppel can be asserted against the State, courts do not generally favor a finding of estoppel against a public body.").

172. *Trustees of Internal Improvement Fund v. Lobeau*, 127 So. 2d 98, 104 (Fla. 1961).

173. *State v. Zimring*, 566 P.2d 725, 737 (Haw. 1977) (quoting *Yamada v. Natural Disaster Claims Comm'n*, 513 P.2d 1001, 1006 (Haw. 1973)); *Ex parte Four Seasons, Ltd.*, 450 So. 2d 110, 111 (Ala. 1984); *Outdoor Sys. v. Arizona Dep't of Transp.*, 830 P.2d 475, 477 (Ariz. Ct. App. 1992).

174. *Axelson v. Minneapolis Teacher's Retirement Fund Assoc.*, 532 N.W.2d 594, 597 (Minn. Ct. App. 1995).

Underlying these cases is each state's concern for the free exercise of its state powers and sovereignty. The degree to which courts will allow promissory and equitable estoppel to interfere with that sovereignty will depend on the individual state. Consequently, the ability to create a protected property interest with promissory or equitable estoppel is contingent on the state's legislative and judicial assent to those doctrines when applied to state bodies.

3. Authority: Avoiding the State and Federal Law Barriers to Promissory Estoppel as a Property Interest

Promissory estoppel has become a major doctrine in contract law, is established in almost every state, and is used as the authority for enforcing contracts based on a promise.¹⁷⁵ Under *Roth* and *Sindermann*, it also provides the basis for a property interest.¹⁷⁶ In *Vail*, the Seventh Circuit found a property interest based on a promise which induced the plaintiff to leave his former employment and move his family in order to take a new job.¹⁷⁷ Although promissory estoppel was never mentioned, the elements for the doctrine were clear and the court found that a property interest existed in the promised second year of employment. In addition, the *Patkus* decision explicitly mentioned promissory estoppel when finding that the plaintiff had a property interest in her employment.¹⁷⁸ Although its holding was not as clear, the Eleventh Circuit in *Resolution Trust* used Florida's equitable estoppel doctrine to find a protected property interest in certain zoning schemes.¹⁷⁹ These two narrow lines of cases followed the dictates of *Roth* and *Sindermann* and allowed estoppel to trigger due process.¹⁸⁰

While courts have mentioned the state contract law of promissory estoppel as a source for a property interest, a number of obstacles exist to applying estoppel directly against the government.¹⁸¹ These obstacles apply in the due process analysis as barriers to estoppel-based property interests.¹⁸²

175. See *supra* Part I.B.

176. See *supra* Parts I.A, II.B.

177. See *supra* Part II.B.

178. *Id.*

179. See *supra* Part II.C.

180. Circuit courts have not dealt a great deal with claims involving the use of estoppel to create a property interest and, often, parties fail to incorporate the estoppel claim into the due process argument. See *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Ewing v. Board of Regents*, 742 F.2d 913 (6th Cir. 1984); *Shahawy v. Harrison*, 778 F.2d 636 (11th Cir. 1985); *Amendola v. Schliewe*, 732 F.2d 79 (7th Cir. 1984).

181. See *supra* Part III.A.

182. *Id.*

Therefore, some of the explicit barriers used to prohibit estoppel directly against the government—the Appropriations Clause,¹⁸³ the nature of federal employment,¹⁸⁴ and affirmative misconduct¹⁸⁵—are found in decisions such as *Dun & Bradstreet* as reasons why estoppel may not be used to find a property interest. If the doctrine may not be used directly against the government, then it secures no right and may not be used to find a property interest.

The modern constraints to using estoppel as the basis of a protected property interest revolve around the importance of authority. The requirement of general authority is central to the Supreme Court's holding in *Richmond* that estoppel could not be applied against the government when it involves appropriations not authorized by Congress. Similar concerns over a lack of authority compelled the Tenth Circuit in *Lehman v. City of Louisville* to disallow an equitable estoppel claim brought against the City of Louisville.¹⁸⁶ The plaintiffs in *Lehman* claimed that reliance to their detriment on certain statements made by a city official created a property interest in their proposed use of the land.¹⁸⁷ Because the zoning administrator, whose statements Lehman relied on, lacked authority to interpret the zoning ordinance, the court held that no property interest could be created by equitable estoppel.¹⁸⁸ Using similar reasoning but arriving at a different conclusion, the court in *Resolution Trust* based its finding of a property interest on the fact that, although the Zoning Commission's interpretation of the governing ordinance may have been incorrect, the Commission had the authority to interpret the ordinance and the plaintiff was reasonable in relying on that interpretation.¹⁸⁹

Proper authority was also an important ingredient in assessing why the court in *Vail* found a property interest based on promissory estoppel.¹⁹⁰ Much like the Smith hypothetical,¹⁹¹ the plaintiff in *Vail* was assured that his contract would be renewed by the Board of Regents, the decision-making body in the state school system.¹⁹² Thus, the proper authority of the promisor was not at issue and the claim was successful.

183. *Richmond*, 496 U.S. at 426. This prohibition seems to apply equally to equitable and promissory estoppel.

184. *See supra* Part III.A.1.

185. *Hulsey*, 22 F.3d at 1489.

186. *Lehman v. City of Louisville*, 967 F.2d 1474 (10th Cir. 1992).

187. *See supra* note 117.

188. *Id.* at 1477. The court also stated that Lehman had the resources to know that the zoning interpretation was incorrect and, therefore, his reliance was unreasonable. *Id.*

189. *Resolution Trust*, 18 F.3d at 1545-46.

190. *See also Axelson*, 532 N.W.2d at 597.

191. *See supra* Part II.A

192. *Vail*, 706 F.2d at 1436. *See also supra* Part II.B.

Authority is the essential element in estopping the government, and the principle inquiry is whether enforcement of the promise or representation would violate a statute or guarantee a commitment made by an agency or administrator acting *ultra vires*.¹⁹³ Valid authority is the distinguishing feature between decisions allowing promissory estoppel as the source for a property interest and decisions which do not.

While a number of barriers exist to using estoppel to create a property interest, the majority operate against equitable estoppel. Because of two underlying differences between promissory and equitable estoppel, establishing a property interest is more likely when it is based on promissory estoppel.

First, equitable estoppel involves a misrepresentation. Misrepresentations by government officials must, almost by definition, violate an established rule or statute. Promissory estoppel, by contrast, is not a misrepresentation and, therefore, does not carry an immediate presumption of unenforceability against the government. There is less chance it will violate a statute or agency mandate and, as a result, it can provide a stronger argument for creating a protected property interest. Again, the authority of the promisor is an essential question. As the zoning cases demonstrate, courts often hide the relevance of authority by incorporating it into the internal question of whether the reliance on the promise was "reasonable."¹⁹⁴ Regardless of the designation, authority is the prominent barrier to using promissory estoppel to create a protected property interest, whether it is incorporated into the question of reasonableness, which focuses on the party relying on the promise, or whether it is discussed as a general question of appropriations and separation of powers.

Second, historically equitable estoppel has been considered a shield rather than a sword.¹⁹⁵ Unlike promissory estoppel, equitable estoppel has been used to bar opposing assertions and not to create affirmative interests. Promissory estoppel is more powerful because it can create contractual obligations.¹⁹⁶ As

193. *Transohio Sav. Bank v. Director*, 967 F.2d 598, 620 (D.C. Cir. 1992). While this case dealt with the more extreme case of binding future government action, the court stated that "[e]ven if the agencies unmistakably promised Transohio that the thrift could count goodwill as capital regardless of any future congressional action, we strongly doubt that such a promise would be binding on Congress. That agency promise would be *ultra vires* and unenforceable." *Id.* at 620. The court found two requirements for contracts with administrative agencies to be binding against future laws. *Id.* at 621. The agency must have "unmistakably waived Congress' regulatory authority" and "Congress [must], in a statute, ha[ve] unmistakably delegated to the agency the power to surrender Congress' regulatory authority." *Id.*

194. *See supra* Part III.C.

195. *See supra* notes 59-60 and accompanying text.

196. *Mortvedt*, 858 P.2d at 1143. "The primary difference between promissory and equitable estoppels is that the former is offensive, and can be used for affirmative enforcement of a promise, whereas the latter is defensive, and can be used only for preventing the opposing party from raising a particular claim or defense." *Id.* at 1143 n.7 (quoting *James v. State*, 815 P.2d 352, 355 n.9 (Alaska 1991)).

long as the promisor is authorized to make the promise, it will be enforced if it is detrimentally relied on. This sword should not be disregarded as a potential source for a property interest and, when possible, arguments should be formed within promissory estoppel boundaries.

The first significant barrier to using promissory estoppel as the basis for a protected property interest revolve around the question of authority and the contractual requirements for proving promissory estoppel. The second significant barrier, however, applies to contract law in general and centers on the circuit courts' policy concern with moving numerous cases from state court into federal court. Consequently, these courts have fashioned a variety of tests for determining when a contract meets the level of a protected property interest and when it does not.

B. Constitutional Barriers: The Courts' Reluctance to Use General Contract Law as the Source for a Constitutionally Protected Property Interest

The extent to which general state contract law, not just promissory estoppel, may be used to define a property interest protected by procedural due process remains controversial, especially outside individual employment contracts.¹⁹⁷ The Supreme Court created a large reservoir of state law and extra-constitutional statutes, rules, understandings, and regulations from which a property interest may be drawn, and contract law was explicitly included within this reservoir.¹⁹⁸ *Sindermann* generated the possibility that any contract with a state actor, either written or implied, could create a protected property interest.¹⁹⁹ As a result, potential plaintiffs have a choice between bringing a contract claim in state court or a due process claim in federal court. For a number of reasons, plaintiffs often choose to bring their claims in federal court as a due process violation.²⁰⁰ This shift from the state forum to a

197. *Lim v. Central DuPage Hosp.*, 871 F.2d 644, 646 (7th Cir. 1989). "The main controversy over the meaning of 'property' in the Due Process Clause concerns the extent to which contractual rights, such as the rights created by an employment contract, shall be deemed a form of property protected by the clause." *Id.*

198. *Sindermann*, 408 U.S. at 601-02 (citing 3 CORBIN ON CONTRACTS §§ 561-572A (1960)).

199. The Fourteenth Amendment only prohibits state action: "[P]rivate action is immune from the restrictions of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974).

200. Leonard Kreyzin points to a number of advantages to bringing breach of contract claims as claims for due process violations. Kreyzin, *supra* note 2, at 1099. First, "the plaintiff can seek to enjoin the state's breach of contract until the state conducts a pretermination hearing" and "imposing a due process hearing requirement on the state tilts the balance of power in the contractual relationship toward the contractors." *Id.* at 1099-1100. Second, "violations of due process rights are redressed in the federal courts within the statutory framework of section 1983" which allows attorney fees, punitive damages, and

federal forum has troubled many federal appellate court judges who, as a result, have placed various limitations on the type of contracts which qualify as protected property interests. In defining a property interest, the Supreme Court in *Memphis Light, Gas & Water Division v. Craft* stated that “[a]lthough the underlying substantive interest is created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.”²⁰¹ Circuit courts have exploited this allowance to limit the types of contracts which give rise to a property interest. However, federal courts have disagreed on the breadth of contract law which may be used to find a property interest and the rationale for why the contract does not reach the level of a protected property interest.²⁰²

Because circuit courts are reluctant to use state contract law to find a property interest subject to due process, especially outside the employment context,²⁰³ they have limited the use of contract law in this arena by either denying “that contract rights rise to the level of ‘property interests’” or by “recogniz[ing] government contract rights as property, but hold[ing] that a contract action in state court constitutes all the required ‘due process.’”²⁰⁴

S & D Maintenance Co. v. Goldin typifies courts’ refusal to recognize contract law as a source for a property interest.²⁰⁵ In *S & D Maintenance*, the plaintiff claimed that New York City’s failure to pay for services provided under a two-year contract for maintaining parking meters violated the Due

procedural advantages. *Id.* at 1100. *See also* *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part* by *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978) (holding that Section 1983 created a federal remedy for violation of a constitutional right by a state official); *Armistead, supra* note 86, at 785 (mentioning that many victims of a wrongful deprivation of a property interest would rather bring their claims under the Fourteenth Amendment and in federal court because of their perception that federal courts are more receptive to constitutional claims against state and local officials).

201. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

202. *See generally* *Kreynin, supra* note 2 (setting forth a clear analysis of how courts have handled contract as a source for a property interest).

203. *Id.* at 1102. “Extension of [Supreme Court] cases to a wide variety of contractual claims appears conceptually easy because the property interest these successful claimants had in their jobs can best be described as an employment contract. Nevertheless, the courts of appeals have refused to make this extension.” *Id.* at 1101-02 (footnote omitted).

204. *Id.* at 1102, 1115.

205. *S & D Maintenance Co. v. Goldin*, 844 F.2d 962 (2d Cir. 1988). *See also* *Costello v. Town of Fairfield*, 811 F.2d 782 (2d Cir. 1987) (finding no constitutionally protected property interest in municipal retirement benefits). For an analysis of why this reasoning is not consistent with due process see, *Kreynin, supra* note 2, at 1102-11. This approach conflicts with the Supreme Court’s “positivist mode of analysis.” *Id.* at 1104. Also, “[t]he great variety of cases in which contractual claims of various kinds, causes of action based on contract rights and other similar interest were granted ‘property’ status indicates the impossibility of separating contract claims from property claims for due process purposes.” *Id.* at 1107.

Process Clause.²⁰⁶ The court disagreed and characterized the Supreme Court's definition of property in *Roth* and *Sindermann* as protecting "something more than an ordinary contractual right."²⁰⁷ The Second Circuit stated that it was "hesita[nt] to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor."²⁰⁸ The court based its decision on its concern for moving basic contract claims into federal court as constitutional violations.²⁰⁹

The Seventh Circuit took a similarly restrictive view in *Brown v. Brienens*, finding that accrued compensatory time off granted to state employees was not a property interest.²¹⁰ The court worried about trivializing the Constitution and "shift[ing] the whole of the public law of the states into the federal courts."²¹¹ The court limited the property interest derived from breach of contract to situations in which the employee was actually discharged.²¹²

Similarly, in *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, the plaintiff claimed that the San Bernardino County Supervisors breached the plaintiff's contract to provide professional services and, therefore, deprived the plaintiff of a property interest in violation of the Due Process Clause.²¹³ The Ninth Circuit, motivated by similar concerns as the *Brienens* court, found that without an employment contract, the plaintiff did not have a contractual interest rising to the level of "property."²¹⁴ The court recognized that "deprivation of contractual rights may create" a due process claim but concluded that it was "faced with an equally compelling necessity to recognize that not *every* interference with contractual expectations does so."²¹⁵ The court stated that it was "neither workable nor within the intent of section 1983 to convert every breach of

206. *S & D Maintenance*, 844 F.2d at 964.

207. *Id.* at 966. The court characterized the Supreme Court cases as protecting "an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits." *Id.*

208. *Id.* at 967.

209. *Id.*

210. *Brown v. Brienens*, 722 F.2d 360, 362 (7th Cir. 1983).

211. *Id.* at 364-65.

212. *See id.* at 363-64.

213. *San Bernardino Physicians' Servs. Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987).

214. *Id.* at 1410. "Yet the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend its constitutional protection without subsuming the entire state law of public contracts." *Id.* at 1409-10.

215. *Id.* at 1408.

contract claim against a state into a federal claim.”²¹⁶ By focusing “upon the importance of the interest to the holder *as an individual*,” the court refused to find that a non-employment contract could be considered a property interest.²¹⁷ The court considered employment contracts important enough to the holder to be a property interest, while holding that the professional service contract at issue was not of sufficient importance.²¹⁸

In the context of zoning and permits, the Fourth Circuit, in *Biser v. Town of Bel Air*, also seemed to ignore the broad dictates of *Roth* and *Sindermann* in their refusal to base a property interest on the contract doctrine of equitable estoppel.²¹⁹ Biser wished to get a “special exception” from a residentially zoned area in order to build two commercial buildings.²²⁰ He was told by the Director of Planning and Community Development in Bel Air that he had to construct the building before he could apply for the “special exception.”²²¹ However, after almost completing the building, Biser was denied the special exception.²²² Biser decided to appeal the decision and took the case to the circuit court for Hartford County. The state court “found that Biser had relied to his detriment on the Town’s approval of his building permits, and went on to hold that the Town was equitably estopped from denying Biser his special exception.”²²³ Biser then completed the building and brought suit in federal court for violation of due process and sought money damages for the delay.²²⁴

The Fourth Circuit held that Biser’s equitable estoppel claim, which was recognized and enforced by the state court for Hartford County, did not constitute a property interest.²²⁵ The court did not disagree that the elements of estoppel existed and that the state court had made the proper decision, but it found that the obligations arising from equitable estoppel did not rise to the level of a property interest.²²⁶ In particular, the court stated that “[e]quitable estoppel does not recognize a pre-existing legal right; rather estoppel bars a defendant from asserting a legal right that it would otherwise be entitled to

216. *Id.*

217. *Id.* at 1409.

218. For a in-depth analysis and criticism of *San Bernardino Physicians'*, see Minette, *supra* note 127.

219. *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993).

220. *Id.* at 102.

221. *Id.*

222. *Id.* at 103.

223. *Id.*

224. *Id.*

225. *Id.* at 104.

226. *Id.*

enforce.²²⁷ The court ignored the fact that such a doctrine arguably created a property interest under *Roth* and, instead, based its decision on a concern for turning every state decision into a protected property interest. The court stated that “[e]very state court judgment does not provide a would-be plaintiff with a cognizable property right. . . . To hold otherwise would assign the federal courts the role of ombudsmen in monitoring the execution of state judgments.”²²⁸ The court articulated the same concerns found in *S & D Maintenance, Brienen, and San Bernardino Physicians*—the danger of moving all of state law into federal court under the guise of a property interest subject to due process.²²⁹

Federal courts have used a second, and fundamentally conflicting, rationale to limit the need for requiring procedures beyond the state breach of contract claim. This rationale allows contracts to provide a property interest and to trigger due process, but then determines that a state contract claim provides all the process required.²³⁰ These courts hold that contractual obligations are property interests, but then reason that the post-deprivation claim, that is, the state breach-of-contract claim, provides adequate process. These cases rely on *Parratt v. Taylor*, which designated state remedies as an adequate substitute for due process when the deprivation was random and unauthorized.²³¹ The Sixth Circuit in *Ramsey v. Board of Education* found that the reduction of a teacher’s accumulated sick leave days from 142 to 29 days amounted to a protected property interest.²³² However, the court went on to find that summary judgment for the defendant was appropriate because

227. *Id.* This is the sword/shield analysis mentioned in Part I.B. One question arising from this decision is whether the court would have reached the same conclusion if the decision were based on promissory rather than equitable estoppel. Equitable estoppel is considered a shield or a bar, and promissory estoppel a sword. As discussed *supra* Part I.B, promissory estoppel is an affirmative contract doctrine.

228. *Biser*, 991 F.2d at 105 n.2.

229. *Biser* actually presents an additional danger to just moving a case from state court to federal court: it presents the possibility that two separate claims could be filed, one claim in state court for breach of contract and a second in federal court for violation of due process.

230. For an analysis of why this rational is inadequate, see Kreyzin, *supra* note 2, at 1113-15.

231. *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981). *See also* *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that tort remedy for spanking a child in school is adequate in terms of protecting liberty interest). For an analysis of recent Supreme Court cases which have limited *Parratt*’s use in this context, see Kreyzin, *supra* note 2, at 1102-17. Kreyzin argues that “[a]pplying *Parratt* as a complete defense to contract-based suits destroys the rationale of the decision and transforms it into a state action doctrine holding that no due process violation occurs until the state courts refuse all remedies.” *Id.* at 1115.

232. *Ramsey v. Board of Educ.*, 844 F.2d 1268, 1271-72 (6th Cir. 1988) (reviewing summary judgment decision and construing the facts in a light most favorable to Ramsey).

adequate state law remedies for breach of contract were available.²³³ Thus, a property interest existed and due process was required, but because a state contract claim was available, no further process was required by the Constitution.²³⁴

Brown v. Brienens rests, in part, on this same rationale. The court first stated that the breach of contract did not rise to the level required for a protected property interest and then offered the alternative holding that “[e]ven if the deprivation in this case had been of a more substantial form of property and had had greater finality, it would not follow that the plaintiffs were entitled to a pre-deprivation administrative hearing in addition to their common law judicial remedy.”²³⁵

The courts appear fearful of “constitutionalizing all public contract rights”²³⁶ but, at the same time, they fail to explicitly say so in the face of the Supreme Court’s broad definition of property.²³⁷ Thus, the extent to which state contract law may be used to find a property interest remains an open question. The Supreme Court’s line of cases setting up the positivist approach to defining a property interest compels the conclusion that state contract law

233. *Id.* at 1273. The court explained:

Supreme Court decisions that state law provides an adequate remedy for a liberty or property deprivation have, to date, all involved deprivations which could be remedied by a state tort action for damages. However, a state breach of contract action may also provide an adequate remedy for some deprivations of a contractually created property interest. Therefore, the reasoning of those cases should also bar a section 1983 action when the deprivation is a simple breach of contract and there is adequate state breach of contract action available as a remedy.

Id.

234. *See also Boucvalt v. Board of Comm’rs*, 862 F.2d 414 (2d Cir. 1988).

235. *Brienens*, 722 F.2d at 366. *See also Signet Constr. Corp. v. Borg*, 775 F.2d 486, 489 (2d Cir. 1985) (holding that a private contractor’s right to prompt payment for work performed under a contract with the city was a protected property interest but that a post-deprivation hearing was all the process that was required).

236. *S & D Maintenance*, 844 F.2d at 966. *See also Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983). “[A] ‘mere breach of contractual right is not a deprivation of property without *constitutional* due process of law Otherwise, virtually every controversy involving an alleged breach of contract by a government or a governmental institution or agency or instrumentality would be a constitutional case.” *Id.* at 23 (quoting *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981)). Similarly, the Third Circuit expressed concern with federal courts being “called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities” if due process protections were afforded to all breaches of public contracts. *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989).

237. *See S & D Maintenance*, 844 F.2d at 966. The court refused to address the issue of whether *Roth* meant to “constitutionalize all public contract rights.” *Id.* *See also Minette, supra* note 127, at 911 (“If followed by other courts, the *San Bernardino Physicians’* decision would effectively restrict protected property status to those contracts that are indistinguishable from individually held employment contracts. This approach conflicts with the Supreme Court’s direction in *Roth* and *Sindermann*”) (footnote omitted).

is a secure source for a property interest.²³⁸ However, circuit court cases have divergent holdings and rationales for the extent to which contractual rights give rise to process-protected property interests.

This barrier to contract-created property interests may limit the ability of promissory estoppel to give rise to a protected property interest, not because the state law does not confine the discretion of the decision-maker, but because of the circuit courts' policy concerns with moving cases from state court into federal court. While this may be a valid concern, circuit courts have fashioned differing rationales and criteria for assessing whether a contract rises to the level of a protected property interest. Circuit courts need to find a coherent limiting principle that is consistent with *Roth* and *Sindermann*. The next part of this Note illustrates the inconsistencies between the circuit courts regarding limiting contractually-based property interests, and will suggest a unifying focus for determining when a contract rises to the level of a protected property interest.

IV. THE RELIANCE INTEREST AND CONTRACTUALLY-CREATED PROPERTY: CREATING A COHERENT FOCUS

Even if the state and federal barriers to creating a protected property interest are avoided, courts have often required more than a mere contract to establish a protected property interest because of their concern for moving state claims into federal court under a constitutional claim. While not settling on any standard, they all seem to be looking for a distinction that might be used to differentiate between most contracts and those that rise to the level of a property interest. Reliance should be the underlying focus for the circuit courts' determination of when a contract provides the basis for a protected property interest and when it does not.

Supreme Court cases such as *Roth* and *Sindermann* designate state law as the source for a property interest and, in doing so, expand the possible obligations which are now constitutionally protected by the Due Process Clause.²³⁹ By designating state law and explicitly referring to contract principles as a source for a property interest, *Sindermann* opened up the possibility that simple contracts that would normally be litigated in state court as contractual disputes could now be moved to federal court under the auspices of the Fourteenth Amendment and the Due Process Clause. Using *Sindermann* and *Roth*, obligations arising from a contract are also property interests and cannot be deprived without due process of law.

238. See *supra* Part I.A.

239. See *supra* Part I.A.

A. Inconsistencies in the Federal Courts

Circuit courts have been understandably uncomfortable with the ramifications of the Supreme Court's broad definition of property and the federalizing effect that such holdings could have on contract claims.²⁴⁰ Courts refer to the danger of trivializing the Constitution or moving the "whole of the public law of the states into the federal courts."²⁴¹ Because of these concerns, courts have used a number of different rationale for refusing to allow normal contracts to rise to the level of a protected property interest, or courts have disagreed more fundamentally on whether contracts provide the basis for a property interest at all. In *S & D Maintenance*, the Second Circuit limited the use of contract law as a source of property by requiring "something more than an ordinary contractual right."²⁴² Rather, the state had to deprive a party of something "characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits."²⁴³ In *San Bernardino Physicians'*, the Ninth Circuit held that a service contract was not a property interest by focusing "upon the importance of the interest to the holder *as an individual*."²⁴⁴ The court set up a scale in which "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts."²⁴⁵ In *Brienen*, the court limited those contracts which rose to the level of a property interest by requiring that the employee be fired for breach of contract.²⁴⁶ The court required more than "[a] breach of contract that does not terminate the employment relationship."²⁴⁷ Finally, the court in *Ramsey*,

240. Some of the problems with this result are adverse economic effects, the workload of the federal courts, and the concern for federalism. *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988); Kreyzin, *supra* note 2, at 1119-20.

241. *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983); *Casey v. Depetrillo*, 697 F.2d 22, 23 (1st Cir. 1983). The *Casey* court noted that a "mere breach of contractual right is not a deprivation of property without *constitutional* due process of law Otherwise, virtually every controversy involving an alleged breach of contract by a government or a governmental institution or agency or instrumentality would be a constitutional case." *Id.* (quoting *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981)). *See also supra* Part III.B.

242. *S & D Maintenance*, 844 F.2d at 966.

243. *Id.*

244. *San Bernardino Physicians' Servs. Medical Group v. County of San Bernardino*, 825 F.2d 1404, 1409 (9th Cir. 1987).

245. *Id.* at 1409-10.

246. *Brienen*, 722 F.2d at 364.

247. *Id.*

took a fundamentally different approach, holding that contracts were protected property interests but determining that state contract law remedies provided all the process required by the Fourteenth Amendment.²⁴⁸ The circuits differ widely in their reasoning and decisions on whether certain contracts are protected property interests, but they agree on the underlying concern for allowing all contracts to be protected by the Due Process Clause.

B. Focusing on Reliance

Rather than referring to a series of inconsistent reasons for why a contract is not a protected property interest, or is a protected interest but requires no further process protections, circuit courts should focus on reliance. Courts should first measure the degree of reliance on the contract, either in terms of out-of-pocket expenses or lost alternative opportunity, and then determine that the greater the degree of reliance, the more likely the contract creates a protected property interest. Contracts on which parties have placed very little reliance would not rise to the level of a protected property interest and could not be moved from state court into federal court.

This approach is supported by two considerations. First, reliance is one of the fundamental interests in contract law—an interest which has spawned the rapid ascendancy of promissory estoppel. By focusing on reliance, courts would be following the positivist definition of property in *Roth* and *Sindermann* because they would be using an extra-constitutional rationale to limit the broad definition of property in *Roth* and *Sindermann*. If the Supreme Court has designated extra-constitutional law as the source of a property interest, federal courts should refer to that same extra-constitutional law for their limitations. Second, reliance is not only of paramount importance in contract law, but it is a highly relevant interest in constitutional law. By centering their analysis on reliance, courts could address their concern for limiting the types of contracts which create protected property interests while also adhering to the underlying positivism of *Roth* and *Sindermann* and the prominence of reliance in constitutional jurisprudence.

1. Following the Positivism of *Roth* and *Sindermann*: Protecting the Reliance Interest in Contract Law

In 1937, Lon Fuller and William Perdue wrote *The Reliance Interest in Contract Damages*.²⁴⁹ The article is considered one of the most influential

248. *Ramsey v. Board of Educ.*, 844 F.2d 1268, 1271-72 (6th Cir. 1988).

249. Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1937).

and important articles ever written in contract law.²⁵⁰ In the first of two assertions, Fuller and Purdue's article argued that common law courts, although often claiming to protect people's expectations, were really compensating their reliance losses.²⁵¹ Fuller and Purdue claimed that contracts were enforced and damages awarded to "encourag[e] reliance on promises, including both out-of-pocket reliance and the refusal of alternative opportunities."²⁵²

From Grant Gilmore's book *The Death of Contract*²⁵³ to law review articles such as *Enforcing Promises: An Examination of the Basis of Contract*,²⁵⁴ commentators have continued to mark the ascendancy of reliance in contract law.²⁵⁵ Professor Murray observed that the rise of promissory estoppel "seem[s] to suggest recognition for the greater claim to protection of the reliance interest than the expectation interest" in contract.²⁵⁶ Contract law has seen a dramatic increase in the binding authority of detrimental reliance, exercised through promissory estoppel. Hand in hand with the increased role of detrimental reliance in providing evidence of a binding contract has been a recognition that contract law and contract damages have centered around protecting a party's reliance.²⁵⁷ Goetz and Scott observed in their article that

250. Avery Katz, *Reflections on Fuller and Purdue's The Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U. MICH. J.L. REF. 541, 541 (1988) (stating that the article is "regarded by many contemporary contracts scholars as the single most influential law review article in the field"); Todd D. Rakoff, *Fuller and Purdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, 204 ("The Reliance Interest is often acclaimed as the best, or the most influential, or the most important, contracts article ever written.") (footnote omitted).

251. Katz, *supra* note 250, at 541.

252. Rakoff, *supra* note 250, at 205. *See also* Katz, *supra* note 250, at 557 (stating that Fuller and Purdue's principle theme was "the primacy of the reliance interest and the importance of protecting it").

253. GILMORE, *supra* note 3.

254. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

255. *See also* Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417 (1987).

On the other hand, it would be worthwhile to declare explicitly that protecting expectation is not the goal but simply a rough method of achieving the goal of protecting against reliance loss. If we are careful not to undervalue reliance loss, and if we conclude that in particular cases we can, without inordinate costs, come closer to compensating for reliance loss by a direct approach than by using the expectation measure as a surrogate, then we should abandon the expectation measure and award the value of the reliance loss including any lost opportunity.

Id. at 468 (footnote omitted).

256. MURRAY, *supra* note 48, at 206.

257. There are three types of damages in contract law: reliance, restitution, and expectation. Reliance damages attempt to place the plaintiff in the same position as if the promise had never been made. Expectation damages try to put the plaintiff in the same position as she would have been had the promisor kept his promise. And restitution damages attempt to keep the promisor from gaining anything from the breached promise. Therefore, if contract law has increasingly awarded reliance damages rather than the

"reliance is the organizing principle that supports all contractual obligation."²⁵⁸ Although not unanimously agreed upon,²⁵⁹ reliance holds a paramount position as the underlying protected interest.

Without apparent limitation, *Roth* and *Sindermann* referred to extra-constitutional authority for the source of a property interest. Consequently, circuit courts have endeavored to reconcile the limitations they place on the types of contracts which create property interests with the Supreme Court's directions. To avoid the inconsistency between these various limitations and the positivist definition of property in *Roth* and *Sindermann*, courts should focus on the degree of reliance when deciding if the contract creates a protected property interest. By using reliance as the standard, courts would look to the extra-constitutional source of law that was originally used as the potential basis of the property interest. They would follow the positivist directions of *Roth* and *Sindermann* and would base their decisions on the underlying objective of contract law, protecting the reliance interest. If *Roth* and *Sindermann* are to be heeded at all, the reasons that courts provide for limiting the types of interests which reach the level of property must derive from the extra-constitutional source itself. The Supreme Court designated the values of state law as determinative of what is property, and any limitation to this definition should also derive from the values underlying that state's law. Reliance is the underlying value in contract law, as evidenced by the types of damages awarded and the prominence of promissory estoppel. Focusing on the degree of reliance to determine when a contract is a property interest would protect the essential interest in contracts and, therefore, would adhere to the extra-constitutional definition of property.

2. Protecting the Reliance Interest in Property and the Constitution

Not only is reliance the essential interest in contract law, but it also plays a role in constitutional jurisprudence. In *Roth*, the Supreme Court stated that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, *reliance* that must not be arbitrarily undermined."²⁶⁰

The Eleventh Circuit did not ignore the Supreme Court's pointed remark. In the context of zoning, the Eleventh Circuit has often referred to the

other two types of damages, then the protected interest is in the party's reliance on a contract.

258. Goetz & Scott, *supra* note 254, at 1291.

259. See CHARLES FRIED, CONTRACT AS PROMISE 14-17 (1981) (providing a moral reason for protecting the expectancy interest in contracts); Robert Birmingham, *Notes on the Reliance Interest*, 60 WASH. L. REV. 217, 218 (1985).

260. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added).

plaintiff's degree of reliance on a zoning permit as an indicator of whether a protected property interest has been established.²⁶¹ The court in *Reserve* held that the combination of a building permit and the expenditure of large sums of money in reliance on that permit created a property interest that was protected under the Fourteenth Amendment.²⁶² In *Resolution Trust*, the Eleventh Circuit again found that a zoning extension on which the Resolution Trust Corp. had relied to its detriment was a property interest protected by the Due Process Clause.²⁶³ Both *Reserve* and *Resolution Trust* require more than a permit to establish a property interest. Detrimental reliance acted as an additional element which propelled the interest to a constitutional level. The Eleventh Circuit seems to focus on the plaintiff's degree of reliance to decide whether an interest requires constitutional protection.²⁶⁴ These cases reflect the court's underlying concern with protecting the reliance interest, a concern which appears in a number of different contexts.²⁶⁵

An inquiry into property interests based on the added component of reliance provides a number of benefits to present approaches. First, it addresses the concern with allowing any valid contract to serve as the basis for a protected property interest. By requiring both a contract and a high degree of reliance, courts could limit the types of contracts which establish a property interest. A threshold level of reliance would remedy the judicial concern with federalizing simple contract claims. Second, and most importantly, by focusing on the degree of reliance, courts would be following the positivist dictates of *Roth* and *Sindermann*. Reliance has become the primary interest protected by contract law and, by using a limitation grounded in the value's of the extra-constitutional source of the property interest, courts would be adhering more closely to the definition of property provided in *Roth* and *Sindermann*. Third, a limitation based on reliance incorporates the

261. See *supra* Part II.C.

262. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994).

263. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1545 (11th Cir. 1994).

264. See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 239 n.22 (1977) (arguing that the property interest in a building permit revocation is not dependent on the content of state law regarding vested rights to build, but that a "property" right is established when the claimant has incurred substantial obligations in reliance on the permit).

265. See Robert A. Graham, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV 398 (1993). Graham points out that the Supreme Court's early decisions regarding the Contract Clause in article I, §10, cl. 1 "highlighted the clause's original purpose of ensuring that states not defeat private parties reliance interest." *Id.* at 399. With *Home Building and Loan Ass'n v. Blaisdell*, the Court "shifted its emphasis from party reliance to an examination of state prerogative." *Id.* at 407. However, Graham points out that the Court's recent treatment of the Contract Clause has departed from the balancing approach used after *Blaisdell* and has partially returned to an expectation-based approach founded on reasonable reliance. *Id.* at 413, 436. Using the heavily regulated industry doctrine as the "springboard," Graham calls for a return to a reliance-based test for the Contract Clause. *Id.* at 347.

Supreme Court's recurring concern with protecting the reliance interest in property and the Constitution. Fourth, focusing on the degree of reliance provides a unifying approach among the circuits for deciding which interests defined by state contract law rise to the level of protected property under the Fourteenth Amendment. Finally, the degree of reliance provides a flexible and equitable means for making these important decisions. The degree of reliance is a standard which encompasses a wide range of factual situations and which allows the courts some flexibility in their determination, while maintaining a consistent framework for the analysis. Promissory estoppel grew out of the rigid, classical approach to contract as a more flexible alternative to consideration. The natural flexibility of an analysis based on reliance would allow courts some measure of elasticity in their analysis of whether the required degree of reliance-needed to transfer a contract into a property interest-exists. However, it would do so within the confines of the rationale of *Roth* and in a language which can retain some consistency separate from the factual distinctions found in cases such as *San Bernardino Physicians'* and *Brienen*. Courts should adopt an approach which looks to state law not only for the source of the property interest but also for the proper means for limiting that interest and avoiding the federalization of state law.

CONCLUSION

The rebirth of promissory estoppel as a binding contract doctrine in the early seventies coincided with the new positivist approach to the Fourteenth Amendment's definition of property presented by the Supreme Court in *Roth* and *Sindermann*. Theoretically, contracts, including those created by the doctrine of promissory estoppel, could provide the basis for property interests protected by the Due Process Clause.

Courts have occasionally used promissory estoppel to establish property interests, usually in the limited context of individual employment and zoning. More frequently, however, courts have rejected property interests founded on promissory estoppel because of the underlying state and federal barriers to estopping the sovereign. At a minimum, basing a property interest on promissory estoppel is limited to situations in which the authority of the promisor is clearly established.

However, no readily available constraints exist for the majority of traditional contract claims which seemingly require due process protection under *Roth* and *Sindermann*. As a result, courts have fashioned inconsistent obstacles to all contract-based property interests in order to avoid the federalizing effect of *Roth* and *Sindermann*. As an alternative, courts would be better served by focusing on reliance to distinguish between contracts

which should be protected by the Due Process Clause and contracts which should remain protected only by state law remedies. Reliance is both the underlying interest in contract law and an important concern in constitutional jurisprudence, and it would provide a positivist, flexible, and consistent framework for deciding which contract interests rise to the level of property and must be afforded the protections of the Due Process Clause.

Rowland Richards III