Articles

Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis

Christopher J. Peters[†]

CONTENTS

† Bigelow Teaching Fellow and Lecturer in Law, The University of Chicago Law School. For their comments on earlier drafts, I am grateful to Dick Craswell, James Hopenfeld, Richard Posner, Brian Richter, Cass Sunstein, Steve Tigner, and Greg Zemanick. This Article is dedicated to my family.

> There is no power in Venice
> Can alter a decree established.
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state
>
> *William Shakespeare*[1]

> But because there is no Judge Subordinate, nor Soveraign, but may err in a Judgment of Equity; if afterward in another like case he find it more consonant to Equity to give a contrary Sentence, he is obliged to doe it. No mans error becomes his own Law; nor obliges him to persist in it. Neither (for the same reason) becomes it a Law to other Judges . . . .
>
> *Thomas Hobbes*[2]

> A foolish consistency is the hobgoblin of little minds . . . .
>
> *Ralph Waldo Emerson*[3]

INTRODUCTION

The rule *stare decisis et non quieta movere*[4] bemused Shakespeare, angered Hobbes, and confounds us still today.[5] It confounds us because it occasionally seems to stand justice on its head. Stare decisis demands that courts conform their decisions to decisions reached by previous courts, and sometimes those previous decisions will have been unjust. Stare decisis, that is, sometimes requires courts to reach unjust decisions. This fact may seem to us, as it did to Hobbes, a disturbing anomaly in a system ostensibly devoted to justice.

But if strictly observed, the scope of stare decisis can extend far beyond a single unjust decision. Its effects can be cumulative: A single erroneous court

---

1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, ll. 215–19 (Jay L. Halio ed., 1993).

2. THOMAS HOBBES, LEVIATHAN 192 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

3. RALPH WALDO EMERSON, *Self-Reliance*, *in* EMERSON'S ESSAYS 45, 57 (Houghton, Mifflin, & Co. 1980).

4. *Black's Law Dictionary* translates the phase: "To adhere to precedents, and not to unsettle things which are established." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). *Black's* defines "stare decisis" as "[t]o abide by, or adhere to, decided cases." *Id.*

5. Modern commentaries on stare decisis are legion. Among the more interesting are Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); the essays collected in PRECEDENT IN LAW (Laurence Goldstein ed., 1987); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 56–83 (1961); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Karl N. Llewellyn, *Case Law*, *in* 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 249 (Edwin R.A. Seligman ed., 1930); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 942–43 (1923); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

decision, if followed, becomes two erroneous decisions, then three, and soon a "line" of cases. In this way, stare decisis has the potential to import injustice irremediably into the law. In Portia's words, a single wrong decision need only be "recorded for a precedent,/ And many an error by the same example/ Will rush into the state."[6]

Of course, in practice stare decisis probably is not often as bad as all that. Just as it can institutionalize erroneous results, it also can (and certainly often does) ensure that just decisions are reproduced more often than they otherwise would be. And the rule of stare decisis as currently observed in Anglo-American law is not a strict one: Courts can decline to follow their own previous decisions when those precedents are judged to be clearly in error.[7] Lawyers and judges, moreover, regularly display amazing ingenuity in "distinguishing" unfavorable precedents that otherwise would be "controlling."[8] In the real world, then, the prospect of grievous injustice "rushing into the state" may seem rather remote.

But the prospect exists nonetheless. Courts may be adept at manipulating precedent to reach decisions they want to reach, but they are not always able or willing to do so; sometimes courts believe (or claim to believe) they are bound by stare decisis to reach results they think unjust. The opinions offered by the members of our Supreme Court in the recent case *Planned Parenthood*

---

6. SHAKESPEARE, *supra* note 1, act 4, sc. 1, ll. 217–19.

7. *See, e.g.*, *Casey*, 505 U.S. at 854–69 (declining to overrule Roe v. Wade, 410 U.S. 113 (1973), but explaining conditions under which Supreme Court believes overruling its precedent to be appropriate). Only since 1966 has the British House of Lords recognized its authority to overrule its own precedent. *See* Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234; W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967).

8. As put by Max Radin, one of this century's most elegant writers about stare decisis, modern lawyers and judges have "carried the technique of distinguishing to a very high pitch of ingenuity." Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 143 (1946). Radin was referring specifically to the British House of Lords before its 1966 rejection of rigid stare decisis. *See supra* note 7.

Incidentally, the intriguing title of Radin's article comes from a poem by a minor New England poet named Sam Walter Foss with which Radin begins his piece. Foss's poem will never sit proudly on the shelves beside those of his fellow New Englanders Dickinson, Whitman, and Frost, and it is too long to quote in full here, which is unfortunate because it perfectly encapsulates much of what I hope is the spirit of this Article. In a nutshell, the poem begins with a calf making its way home through the "primeval wood," leaving "a trail all bent askew,/ A crooked trail as all calves do." The winding trail is taken up by a dog, then by a sheep; eventually it becomes a path, then a lane, then a road, and finally a crowded city street. For hundreds of years men take the path, "utter[ing] words of righteous wrath" at its crookedness but following it just the same. The poem ends wonderfully:

> And men two centuries and a half
> Trod in the footsteps of that calf.
> * * *
> For thus such reverence is lent
> To well-established precedent.
> * * *
> But how the wise old wood-gods laugh,
> Who saw the first primeval calf!

Sam Walter Foss, *The Calf-Path*, *quoted in* Radin, *supra*, at 137–38.

For a frank discussion by a sitting federal appellate judge of the lengths to which courts will go to distinguish unfavorable precedent (or to analogize favorable precedent), see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1399–408 (1995).

v. Casey[9] illustrate this phenomenon quite strikingly, all the more so because the case involved an issue many believe to be of fundamental constitutional importance. In *Casey*, a five-Justice majority of the Court relied explicitly and almost exclusively on stare decisis to reaffirm the "essential holding" of the Court's controversial *Roe v. Wade*[10] decision. "Liberty," opined the joint authors of the plurality opinion,[11] "finds no refuge in a jurisprudence of doubt."[12] With this as its rallying cry—despite the fact that "[s]ome of [the Justices] find abortion offensive to our most basic principles of morality,"[13] and "[e]ven on the assumption that the central holding of *Roe* was in error"[14]—the Court in *Casey* refused to overturn *Roe* and to give wholesale approval to the Pennsylvania scheme of abortion regulation that was before it:

> While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given *combined with the force of stare decisis.*[15]

---

9. 505 U.S. 833 (1992).

10. 410 U.S. 113 (1973). The joint opinion in *Casey* described *Roe*'s "central" or "essential" holding as follows:

> [*Roe*'s holding] has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

505 U.S. at 845, 846. The famous (or infamous) "trimester framework" of *Roe* was "not consider[ed by the joint opinion] to be part of the essential holding of *Roe*," *id.* at 873, and indeed a majority of the Court rejected its application in *Casey*.

It should be noted that *Casey* produced no less than five separate, often interlocking opinions, and divining the judgment of the Court from them is something like navigating a maze. The joint authors of the Court's opinion, Justices O'Connor, Kennedy, and Souter, were able to muster a majority (consisting of themselves and Justices Stevens and Blackmun) for the portions of the opinion upholding the "essential holding" of *Roe*, *id.* at 844–69, and striking down the spousal notice provision of the challenged Pennsylvania statute (and a companion record keeping provision), *id.* at 887–99. They enlisted a different majority (consisting of themselves, Chief Justice Rehnquist, and Justices Scalia, White, and Thomas) for their judgment (but not the concomitant portions of their opinion) rejecting *Roe*'s "trimester" framework, *id.* at 872–73, and upholding other provisions of the Pennsylvania statute, including its requirements of "informed consent" and a 24-hour waiting period, *id.* at 881–87; its requirement of parental or judicial consent for minors seeking abortions, *id.* at 899–900; and certain other record keeping and reporting requirements, *id.* at 900–01.

When referring in this Article to a holding of the Court in *Casey*, I will speak of the "Court" or the "majority"; when referring to the contents of the joint opinion authored by Justices O'Connor, Kennedy, and Souter, I will speak of the "plurality" or the "joint opinion."

11. Justices O'Connor, Kennedy, and Souter. *See supra* note 10.

12. *Casey*, 505 U.S. at 844.

13. *Id.* at 850.

14. *Id.* at 858.

15. *Id.* at 853 (emphasis added).

The plurality opinion then indulged in a lengthy exegesis of the Court's policy on stare decisis[16] and the special force of that doctrine with respect to "rare" cases such as *Roe*.[17] Even Chief Justice Rehnquist's partial dissent,[18] which began with the bald statement that "[w]e believe that Roe was wrongly decided, and that it can and should be overruled,"[19] was quick to assure the reader that overruling *Roe* would be "consistent[] with our traditional approach to *stare decisis* in constitutional cases."[20]

Whatever one may think of the merits of *Roe* or of *Casey*, one cannot read the opinions in the latter case without feeling keenly the continuing power of stare decisis—as the plurality put it, the "*force* of stare decisis"[21]—even at the highest levels of constitutional jurisprudence.[22] As I intend to make clear later in this Article,[23] this fact in itself need not trouble us. Indeed, the approach to stare decisis taken by the *Casey* plurality—one of explicit, calculated pragmatism—is, I believe, the only defensible methodology of adjudicative consistency. But many who disagree with the result of *Casey* will find little comfort in the notion that, in perpetuating what such critics believe to be a bad rule from a bad precedent, the Court's analytical technique at least was sound. For many who take issue with *Roe*, *Casey* could hardly be a clearer example of a very foolish sort of consistency.

As *Casey* powerfully demonstrates, then, stare decisis remains far more than a mere echo in our legal culture. At the very least, it is a formidable obstacle to any court seeking to change its own law. And, of course, it still rigidly binds lower courts to much existing case law, as they have no power to overturn or ignore the precedents of their superiors.

But if stare decisis continues to play an important role in adjudication, it is a strange, uncomfortable role—one that sometimes seems to procure injustice in the name of the law, and one that therefore demands convincing explanation. What good can come of a rule that prescribes consistency even at the expense of justice? What, indeed, is the point of stare decisis?

---

16. *Id.* at 853–68.

17. *Id.* at 860–68.

18. *Id.* at 943–78 (Rehnquist, C.J., concurring in part and dissenting in part).

19. *Id.* at 943 (Rehnquist, C.J., concurring in part and dissenting in part).

20. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

21. *Id.* at 853 (emphasis added).

22. There are counterexamples, of course, among the most infamous being the Court's about-face after nine years on the issue of whether Congress may regulate the wages and hours of state employees. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)). The Court in *Casey* itself recognized—and attempted to distinguish—two reknowned instances of constitutional overruling: West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), which, in upholding minimum wage legislation, explicitly overruled Adkins v. Children's Hospital, 261 U.S. 525 (1923), and implicitly overruled Lochner v. New York, 198 U.S. 45 (1905); and Brown v. Board of Education, 347 U.S. 483 (1954), which now is universally seen to have overruled the holding of Plessy v. Ferguson, 163 U.S. 537 (1896), that legislatively mandated racial segregation does not violate equal protection. *See Casey*, 505 U.S. at 861–66 (distinguishing *West Coast Hotel* and *Brown*).

23. *See infra* notes 273–84 and accompanying text.

There are two types of answer to that question. The difference between them is crucial, and it is a foundation of this Article. One kind of answer, the kind consisting of what I will call *consequentialist* justifications of stare decisis, is that stare decisis is justified because, and only to the extent that, it serves the interests of justice in a general sense. Consequentialist theories acknowledge that stare decisis must always be tested for how well it serves the ultimate end of justice to determine whether it has value in any given case. The other kind of answer, consisting of what I will call *deontological* justifications of stare decisis, is that stare decisis (or, more precisely, the adjudicative consistency it serves) is an end in itself. Deontological theories deny that stare decisis must ever be tested for how well it serves the end of justice to determine its value; they assert that adjudicative consistency has inherent value that is entitled to be weighed *against* justice in any given case.

The mission of this Article is to demonstrate that stare decisis cannot be justified deontologically. I focus on stare decisis because it is the most important application of a theory of decisionmaking consistency in our legal culture; it is what courts actually do, or claim to do. But stare decisis (that is, stare decisis as some courts claim to apply it) is simply one manifestation of the notion that there is something inherent in decisionmaking consistency itself that has normative value and demands respect. In critiquing deontological justifications of stare decisis, I necessarily am critiquing "pure consistency" theories in this broader sense.[24]

This point could give rise to some confusion, and it is best to dispel it now. As Part I makes clear, my targets in this Article are theories holding that the application of stare decisis—the decision of court cases consistently with the decisions of other court cases[25]—has some inherent moral value, without regard to the consequences of that practice. But it is important to understand that I am only critiquing *deontological* theories of consistency; I aim only to challenge those theories that value decision-to-decision consistency *in itself.* Thus my arguments here would apply, for instance, to a theory that requires courts to decide cases consistently with legislative enactments on the ground that the bare fact of consistency between one legal decision (that of the court) and another legal decision (that of the legislature) is inherently a good thing. But my arguments would *not* apply to a theory that requires courts to decide cases consistently with legislative enactments on the ground that the structural principle of legislative supremacy dictates that result. Such a theory does not value consistency in itself; it values consistency only because it is thought to

24. The term "pure consistency" is borrowed from John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 60 (1987). Coons identifies as theories of "pure" consistency those theories in which consistency is "a distinct and active first principle of law and morals—a good in itself." *Id.*

25. An exploration of precisely how the decision in one case might be, or should be, "consistent" with the decision in another—do we care only about results, or does reasoning matter too?—is both beyond the scope of this Article and, I think, unnecessary to its conclusions.

serve the goal of preserving the proper balance of power between the judiciary and the legislature.

My focus here will be on the specific practice of stare decisis, and on those theories that find some inherent normative value in it. My conclusions may apply to broader conceptions of decisionmaking consistency as well, but an assessment of all of those would require a book, not an article—and would lack the tremendous practical advantage of having an explicit, relatively well-defined social practice like stare decisis from which to work. For convenience's sake, however, I will speak occasionally of "adjudicative consistency" in place of "stare decisis." Although "adjudicative consistency" could be read as somewhat more encompassing than "stare decisis"—it could refer to other (mostly hypothetical) conditions in which court cases are decided in a way consistent with the decisions of prior court cases—I mean the terms to be roughly interchangeable for my purposes.

I will pursue my goal—demonstrating that deontological theories of adjudicative consistency are wrong—in the following way. I will begin in Part I by explaining in greater detail the difference between consequentialist and deontological theories of stare decisis; by classifying deontological theories into two types, "consistency as equality" and "consistency as integrity"; and, crucially, by defining "justice" as I will use that term throughout the Article. As will become clear in Part I, my definition of justice will be a negative one, not a positive one: It will be a definition designed to exclude any impulses of deontological consistency but to allow for (almost) any other substantive conception of what "justice" might mean. The point of this negative definition will be to demonstrate that our reactions to inconsistent judicial decisions stem from something other than a deontological notion of consistency.

In Part II, I will consider the first type of deontological theory of stare decisis: theories of consistency as equality. Following Peter Westen, I will explain why equality, traditionally expressed, is a tautological principle incapable of producing normative prescriptions. Then I will depart from Westen's analysis to proffer a nontraditional definition of equality that, I believe, fully expresses the core normative claim of the egalitarian. Finally, I will demonstrate how this supposedly substantive principle of equality fails as a justification of stare decisis because, first, its purported effects can be explained as well by nonegalitarian justice, and, second, its application necessarily produces both internal inconsistency and injustice.

In Part III, I will consider the second type of deontological theory of adjudicative consistency: Ronald Dworkin's theory of consistency as integrity. I will describe that theory and explain how it differs, at least on the surface, from a theory of consistency as equality. Then I will critique the theory in two steps. First, I will suggest that Dworkin's theory of consistency as integrity applies better to legislation than to adjudication. Next, I will show that even if the theory applies to adjudication, it fails to support its premise that

"integrity" is a substantive norm separate and independent from justice. Dworkin's theory of consistency as integrity, I will argue, really is nothing more than a theory of consistency as (non-integrity-based) justice, and thus cannot support the application of stare decisis to produce an unjust decision in a court case.

Finally, I will conclude that if adjudicative consistency cannot be traced to any substantive norm distinct from justice, then consistency cannot stand against justice as a reason for deciding a court case in a particular way. Consistency can be nothing more than consequentially valuable; it should be sought only when doing so promotes a just decision. No court ever should fail to do justice in a case before it on grounds of stare decisis.

I. LAYING THE GROUNDWORK

A. *Two Kinds of Theory of Stare Decisis*

How to justify the practice of stare decisis? There are two fundamentally different types of answer to that question.

The first kind of answer, the kind most frequently given, has to do with ends justifying means. Those giving this brand of explanation of stare decisis contend that the sacrifice of justice the doctrine may entail in an occasional case is trumped by the justice-promoting interests the practice serves more generally. Such justifications of stare decisis include the notions that the rule allows for advantageous predictability in the ordering of private conduct,[26] that it promotes the necessary perception that law is stable and relatively unchanging,[27] that it prevents frustration of private expectations,[28] that it serves the resource-saving goal of judicial efficiency,[29] and even that it preserves the separation of powers by enforcing judicial restraint.[30] All of

26. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 80 (1964); WASSERSTROM, *supra* note 5, at 60–66; Theodore M. Benditt, *The Rule of Precedent*, *in* PRECEDENT IN LAW, *supra* note 5, at 89, 91; William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735–36 (1949); Maltz, *supra* note 5, at 369–70; Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW, *supra* note 5, at 183, 201 n.5; Schauer, *supra* note 5, at 597–98; Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW, *supra* note 5, at 73, 84; Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 37–39 (1974).

27. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 853–68 (1992); Alexander, *supra* note 5, at 14–16; Maltz, *supra* note 5, at 371–72; Gerald J. Postema, *Some Roots of our Notion of Precedent*, *in* PRECEDENT IN LAW, *supra* note 5, at 9, 24–26; Pound, *supra* note 5, at 942; Schauer, *supra* note 5, at 600–02; Winston, *supra* note 26, at 36–37.

28. *See, e.g.*, WASSERSTROM, *supra* note 5, at 66–69; Alexander, *supra* note 5, at 13–14; Maltz, *supra* note 5, at 368–69; Moore, *supra* note 26, at 201 n.5; Winston, *supra* note 26, at 37–39.

29. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); WASSERSTROM, *supra* note 5, at 60–66; Maltz, *supra* note 5, at 370–71; Moore, *supra* note 26, at 201 n.5; Schauer, *supra* note 5, at 597–98.

30. *See, e.g.*, *Casey*, 505 U.S. at 862; WASSERSTROM, *supra* note 5, at 75–79; Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Powell, *supra* note 5.

these explanations acknowledge, usually explicitly, that stare decisis sometimes requires perpetuating erroneous decisions in the name of consistency. But all of them assert that the strategic interests stare decisis serves outweigh (or may in any given case outweigh) the risk of occasional injustice. They assert, that is, that specific instances of what otherwise would be injustice may be tolerated in the interest of justice more generally.

I will refer to these notions of stare decisis as *consequentialist* theories. Such theories are consequentialist because they assign no inherent value to adjudicative consistency itself; rather, they value consistency only to the extent that consistency serves justice-related ends.[31] Consequentialist theories of stare decisis are the kind of theory most often advanced in support of the doctrine.[32]

But there is a second, fundamentally different sort of explanation of stare decisis that finds loyal (if usually unexplained) support in the cases and in the

---

31. Of course, consequentialist theorists do not always speak explicitly of "justice" as the end they believe stare decisis serves. Cardozo, for instance, famously asserted that "[t]he final cause of law is the welfare of society," CARDOZO, *supra* note 29, at 66, and favored the rejection of a precedent when it "has been found to be inconsistent with the sense of justice or with the social welfare," *id.* at 150. Contemporary pragmatists like Richard Posner also speak this language of social utility with respect to stare decisis. *See* RICHARD A. POSNER, OVERCOMING LAW 4, 11–12 (1995) [hereinafter POSNER, OVERCOMING LAW]; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 82, 86–100, 130–31, 260 (1990) [hereinafter POSNER, THE PROBLEMS OF JURISPRUDENCE]; *see also infra* note 32. Such utilitarian approaches can readily be accommodated within the definition of "justice" I will use in this Article. *See infra* Section I.C.

According to Anthony Kronman, utilitarian defenses of stare decisis hold "that respect for past decisions is desirable to the extent that it increases the sum of social welfare (by enhancing the law's predictability, economizing judicial resources, strengthening the prestige of legal institutions, etc.)." Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1038–39 (1990). It is precisely these sorts of purpose to which I refer when I speak of "consequentialist" theories of stare decisis.

32. *See supra* notes 26–31 and sources cited therein. Consequentialist theories of stare decisis might also be called "pragmatic" theories—partially in the colloquial sense that they take a practical view of stare decisis that is concerned with the effects of that doctrine in the real world, but principally because they are consistent with an approach to law and jurisprudence often called "legal pragmatism." Legal pragmatism is multifaceted, but its core themes seem to be: (1) a view of law "that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is," POSNER, OVERCOMING LAW, *supra* note 31, at 4; (2) an affinity for iconoclasm, for "kick[ing] sacred cows," POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 31, at 28, for questioning and challenging rather than taking on faith; (3) an eagerness to apply empirical, "real-world" data to the practice and study of law; and (4) a skepticism that legal decisions can be (or, at least, can be demonstrated to be) metaphysically "right," coupled with a conviction that some decisions can be seen by their effects to be better than others. Richard Posner's books, particularly *Overcoming Law* and *The Problems of Jurisprudence*, exemplify a pragmatist legal philosophy.

Legal pragmatists like Judge Posner view stare decisis consequentially; they "treat decision according to precedent . . . as a policy rather than as a duty." POSNER, OVERCOMING LAW, *supra* note 31, at 4. A reader of Posner's books encounters many of the traditional consequentialist justifications of precedent—and just as many cautious admonitions against relying on them without question. *See, e.g.*, *id.* at 142 (assessing claim that stare decisis increases efficiency by reducing judicial workloads as "plausible although not certain"); POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 31, at 82 (acknowledging that stare decisis "mak[es] judicial decisions more acceptable to the lay public and . . . reduc[es] uncertainty," but warning that it "impede[s] the search for truth").

My own view of stare decisis accords with the pragmatist view as articulated (if not systematically defended) by Posner; it is, as this Article will make clear, a consequentialist view. But this Article is not a defense of a consequentialist theory of stare decisis. My project is critical, not constructive; I aim only to demonstrate why deontological theories of stare decisis are wrong, not to propose a specific pragmatist theory as an alternative.

literature. Courts and commentators sometimes have attempted to justify stare decisis *deontologically* rather than consequentially; they have claimed that a rule of stare decisis (or some similar rule of adjudicative consistency) is a necessary corollary of one or more independent first principles of inherent normative weight, and that adjudicative consistency therefore is itself an intrinsic good.[33] While consequentialist theories of stare decisis assign value to that doctrine only to the extent that it serves the interests of justice in the long run, deontological theories of stare decisis assert that the value of adjudicative consistency is inherent, and therefore unaffected by whether it results in justice. Adjudicative consistency is a good in itself, and although it might in some cases be outweighed by opposing intrinsic goods, it is always entitled to be weighed against those opposing goods. Thus whether stare decisis serves the interests of judicial efficiency, protection of expectations, maintenance of the rule of law, or preservation of judicial legitimacy is not dispositive; the goal of consistency must be given independent normative weight in the court's decisionmaking process.[34]

A few words are necessary here, I think, about the sense in which I use the terms "consequentialist" and "deontological" in this Article and about the relationship between those terms as I mean them here and the way they sometimes are used more generally in moral philosophy. Moral philosophers often describe as "consequentialist" those theories that assess the moral value of actions according to the amount of "good" (or "bad") consequences that result from them. Heidi Hurd, for instance, has written that "[c]onsequentialists are committed to the claim that right action consists in maximizing good consequences or minimizing bad consequences."[35] What amounts to a "good" or a "bad" consequence, of course, depends upon the particular consequentialist moral theory. Some familiar examples of consequentialist theories are the varieties of utilitarianism espoused by John Stuart Mill, who "accept[ed] as the foundation of morals" the principle that "actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of

33. *See, e.g.*, CARDOZO, *supra* note 29, at 33–34; RONALD DWORKIN, LAW'S EMPIRE 164–312 (1986) [hereinafter LAW'S EMPIRE]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1978) [hereinafter TAKING RIGHTS SERIOUSLY] (explaining how judges and lawyers should evaluate unsettled legal questions and arguing that decisions must respect precedent); LEVI, *supra* note 5, at vii; Richard Bronaugh, *Persuasive Precedent*, *in* PRECEDENT IN LAW, *supra* note 5, at 217, 228; Llewellyn, *supra* note 5, at 249.

34. Anthony Kronman notes the important distinction between consequentialist (what he calls "utilitarian") theories of stare decisis and deontological theories of stare decisis, but identifies only one type of deontological defense of stare decisis: "[t]he . . . claim . . . that like cases must be treated alike if a legal system is to be even minimally fair." Kronman, *supra* note 31, at 1039. This type of deontological theory is what I identify below as a theory of consistency as equality. *See infra* Part II. Unlike me, though, Kronman does not acknowledge the existence of any other type of deontological justification of stare decisis.

35. Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2209 (1992). Footnote 5 of Hurd's article lists "the classic defenses of consequentialism," including those offered by Bentham and Mill. *Id.* at 2209 n.5.

happiness,"[36] and by Jeremy Bentham, whose "principle of utility" approved of every action whose "tendency . . . to augment the happiness of the community is greater than any it has to diminish it."[37] Bentham (although perhaps not Mill) would have considered the punishment of an innocent person to be a morally "right" act if it ultimately resulted in more total happiness than would have existed if the person had not been punished. Under Bentham's form of consequentialism, the end of more total happiness justifies the means of punishing innocent persons.[38]

In contrast, "deontological" moral theories hold, in Hurd's phrase, "that the goodness of an act lies not in its consequences but in the inherent quality of the act itself."[39] Most deontologists do not ascribe inherent moral content to *every* act, choosing instead certain acts or categories of act that possess such content. Kant's is the "classic"[40] deontological moral theory; he asserted that "[a] good will is not good because of what it effects or accomplishes—because of its fitness for attaining some proposed end: it is . . . good in itself."[41] Kant would have held the punishment of an innocent person to be morally "wrong" regardless of its consequences—even, for instance, "if, in so doing, one saves a great many more innocent lives."[42] To the deontologist, acts—at least certain types of act—can never be means that may be justified by their results; they can only be ends in themselves, and must be assessed accordingly.

I do not mean in this Article to incorporate wholesale these broad strains of moral philosophy into my definitions of "consequentialist" and "deontological" theories of stare decisis. By a "consequentialist" theory of stare decisis, I mean simply a theory that assigns no inherent moral value to the act of adhering to precedent, but instead assesses that act according to the good

---

36. JOHN STUART MILL, UTILITARIANISM 7 (George Sher ed., Hackett Publishing Co. 1979) (1861).

37. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12–13 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789).

38. Bentham actually opposed the punishment of innocent people—not because the punishment of innocents was an inherent moral wrong, but because Bentham believed it would not serve the ultimate goal of the criminal law, which was deterrence. *See id.* at 158–64 (discussing cases "unmeet for punishment," including cases in which "there is no mischief for [punishment] to prevent" and cases in which threat of punishment would have no effect on the criminal because, inter alia, the criminal did not know his conduct was a crime). Had Bentham been convinced, however, that punishing innocents would produce utilitarian benefits outweighing its evils, *a fortiori* his philosophy would have compelled him to support the practice.

The logic of Mill's utilitarianism too would have condoned the punishment of an innocent person to serve the end of greater total happiness, but probably only in extreme circumstances. Unlike Bentham, Mill explicitly held that there was a qualitative difference in kinds of happiness—"that some kinds of pleasure are more desirable and more valuable than others." MILL, *supra* note 36, at 8. Thus not merely any pleasure or aggregation of pleasures would justify the pain inherent in punishing an innocent person, and presumably only a very great amount of pleasure of a very superior quality could justify something so extreme as, for example, taking an innocent life.

39. Hurd, *supra* note 35, at 2210. Hurd lists both "classic" and "more contemporary" expressions of deontological theory in her footnote 10. *Id.* at 2210 n.10.

40. *See id.*

41. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 62 (H.J. Paton trans., Harper & Row 1964) (1785).

42. Hurd, *supra* note 35, at 2211.

or bad consequences it produces; I do not mean a theory of stare decisis that necessarily would be adopted by someone who is a moral consequentialist more generally. Similarly, by a "deontological" theory of stare decisis, I mean only a theory that *does* impute inherent moral value to the act of adhering to precedent, regardless of the consequences such adherence generates; I do not mean a theory of stare decisis that necessarily would be espoused by a general moral deontologist.[43]

In attacking deontological justifications of stare decisis, then, I do not intend to impugn moral deontology in its broader sense. Nor do I mean to suggest that those who have advanced consequentialist theories of stare decisis therefore are moral consequentialists generally. I mean only to challenge those particular views that ascribe inherent moral content to the very act of adhering to judicial precedent.

Proponents of deontological theories of stare decisis fall roughly into two camps. Members of the first camp believe that some degree of adherence to precedent is entailed by the norm of equality, of "treating like cases alike" or, more precisely, "treating similarly situated persons similarly."[44] I will refer to their theories as theories of *consistency as equality*.

The other camp appears to have only one member,[45] albeit an influential one: Ronald Dworkin, specifically Ronald Dworkin in his more recent work.[46] Dworkin believes that some (significant) degree of adherence to precedent (Dworkin calls it "interpretation of" precedent[47]) is entailed by a norm he names "integrity," which requires the law to "speak with one voice,"[48] even if that single voice imperfectly reflects substantive justice. Dworkin contends that "integrity" is an independent substantive norm, distinct from both "justice"

---

43. Of course, a moral consequentialist—one who believes that every act must be judged only by its results—would not embrace a deontological theory of stare decisis (unless she held a strange consequentialist theory that recognized adjudicative consistency as the ultimate end—akin to Mill's "happiness"—to which all good acts are directed). But a moral deontologist, if she is not a "strict" one (in the sense that she ascribes inherent moral content to *every* act), might adopt a consequentialist theory of stare decisis, since she might not consider adhering (or failing to adhere) to precedent to be a type of act that possesses inherent moral content.

44. *See, e.g.*, CARDOZO, *supra* note 29, at 33–34; TAKING RIGHTS SERIOUSLY, *supra* note 33, at 113; LEVI, *supra* note 5, at vii; Bronaugh, *supra* note 33, *passim*; Llewellyn, *supra* note 5, at 249.

45. Charles Fried might be considered an ally of Dworkin in this camp; see, for instance, his account of "constitutive rationality" in Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1145 (1994), and especially his cross-references to Dworkin's theory of law as integrity in the text accompanying notes 22, 24, 36, and 55 in that piece. Dworkin's theory of "consistency as integrity" is by far the most fully articulated non-equality-based view of deontological consistency, though, and his is the theory on which I will focus in this Article.

46. *E.g.*, LAW'S EMPIRE, *supra* note 33. In his earlier work, Dworkin appeared to fall into the "consistency as equality" camp. *See, e.g.*, TAKING RIGHTS SERIOUSLY, *supra* note 33, at 87–88, 113. His articulation in *Law's Empire* of his theory of "law as integrity," however, marked a shift away from an equality-based justification of adjudicative consistency. *See* LAW'S EMPIRE, *supra* note 33, at 216. I devote Part III of this Article to a discussion of Dworkin's more recent "integrity"-based theory of adjudicative consistency.

47. *See, e.g.*, LAW'S EMPIRE, *supra* note 33, at 217–27.

48. *Id.* at 165.

and "equality," which necessitates some adherence even to unjust precedent. I will refer to Dworkin's justificatory theory of consistency as *consistency as integrity.*

B. *Consequentialist and Deontological Theories of Stare Decisis in Recent Supreme Court Cases*

Two recent Supreme Court decisions illuminate the contrast between consequentialist and deontological justifications of stare decisis. In *Planned Parenthood v. Casey*,[49] a plurality of the Court took an explicitly consequentialist approach. The joint opinion in *Casey*, authored by three Republican appointees to the Court, made no bones either about the fact that abortion was "offensive" to the "basic principles of morality" of some (unnamed) Justices[50] or about the "reservations any of us may have in reaffirming the central holding of *Roe*."[51] Nevertheless, after a relatively brief survey of how the abortion right is derived from the Due Process Clause of the Fourteenth Amendment,[52] the plurality devoted a substantial portion of the opinion to an elucidation of the Court's "customar[y]"[53] policy on stare decisis and how that policy mandated affirmance, however grudging, of the "central holding" of *Roe*.[54] Indeed, the rhetorical crux of *Casey* was "the rule of *stare decisis*"[55]—the "obligation to follow precedent."[56]

The *Casey* Court's approach to stare decisis employed the sorts of pragmatic, ends-justify-means argument that fit within the category of consequentialist justifications of stare decisis. The plurality opinion began its discussion of stare decisis with a general philosophical statement about following precedent:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.[57]

---

49. 505 U.S. 833 (1992).
50. *Id.* at 850.
51. *Id.* at 853.
52. *Id.* at 846–53.
53. *Id.* at 854.
54. *Id.* at 853, 854–69.
55. *Id.* at 854.
56. *Id.*
57. *Id.* (citations omitted).

For Justices O'Connor, Kennedy, and Souter, then, stare decisis was something of a necessary evil; its drawbacks could be justified by the important ends of efficiency ("no judicial system could do society's work if it eyed each issue afresh in every case"[58]) and the rule of law ("the very concept of the rule of law . . . requires . . . a respect for precedent"[59]) that it serves. Justice may be sacrificed in the occasional individual case so that these goals may be furthered and, consequently, justice may be done more generally. At the same time, the plurality acknowledged that stare decisis must have its limits: When a prior decision is "seen so clearly as error that its enforcement [is] for that very reason doomed,"[60] the goals of efficiency and the rule of law are outweighed by the practical drawbacks of attempting to enforce a clearly erroneous decision.

In short, the plurality's application of stare decisis was "informed by a series of prudential and pragmatic considerations"[61] that must be gauged to determine "the respective costs of reaffirming and overruling a prior case."[62] The Justices summed up the relevant factors:

> [W]e may ask whether the rule [of the prior case] has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.[63]

The *Casey* plurality then assessed the wisdom of overruling *Roe* in light of each of these "prudential and pragmatic considerations"[64] and came to what it professed to be a distasteful but necessary conclusion: "Within the bounds of normal *stare decisis* analysis . . . and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."[65] The plurality, however, went even further than this: "In a less significant case, *stare decisis* analysis could, and would, stop

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 854–55 (citations omitted).
64. *Id.* at 854.
65. *Id.* at 861.

at the point we have reached."[66] *Casey*, though, was no ordinary case: It implicated *Roe*, one of "those rare . . . cases . . . . [in which] the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"[67] and it came in the midst of "the sustained and widespread debate *Roe* has provoked."[68] In such circumstances, an especially "terrible price would be paid for overruling" *Roe*;[69] doing so "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[70] This was true because overturning *Roe* would be seen as a capitulation to "social and political pressures,"[71] not as an act of principle, and would be viewed as "nothing less than a breach of faith"[72] among those who disagreed with *Roe* but "nevertheless struggle[d] to accept it, because they respect the rule of law."[73]

The *Casey* plurality, then, cataloged the reasons it saw for upholding the rule of stare decisis: judicial efficiency, reliance, and preservation of the legitimacy of the judicial branch. It weighed these reasons against factors that might favor overruling: lack of "practical workability," doctrinal obsolescence, and significant changes in facts justifying a prior decision. The balance, the plurality found, tipped in favor of stare decisis; and so, despite the plurality's professed reservations about the justice of *Roe*, that decision was upheld in the interest of a more general justice.

The plurality's analysis of stare decisis in *Casey* was unabashedly "prudential and pragmatic."[74] Stare decisis was conceived of as a tool to accomplish certain specific goals, goals that in turn are necessary ingredients of "the rule of law," generally and consistently applied. But sometimes the tool malfunctions; sometimes stare decisis frustrates the goals it was designed to

---

66. *Id.*
67. *Id.* at 866–67.
68. *Id.* at 861.
69. *Id.* at 864.
70. *Id.* at 865.
71. *Id.* It is worth noting that this ground for not overruling a prior decision becomes absurd if taken literally: The more intense the criticism of a decision (the greater the "social and political pressures" against it), the less likely it is that a decision will be overruled. Such a principle would tend to entrench precisely those decisions least deserving of entrenchment. It might also run afoul of the First Amendment (or at least of its spirit), since it would in effect penalize opponents of certain judicial decisions for speaking out in opposition to them. I am grateful to Richard Posner for suggesting these observations.

By a more temperate (and probably correct) reading of the Court's reasoning here, it is not the danger that the Court will be perceived to be capitulating to "social and political pressures" that itself speaks against overruling; it is rather the danger that the Court will be seen to be "taking sides" in a vigorously contested public debate about morality and policy. Thus the mere existence of sustained public disapproval of a decision—arguably an index that the decision was flawed—is not a reason for upholding that decision. But the presence of sustained *division in public opinion* about a decision (certainly a feature of *Roe*) might be such a reason.
72. *Id.* at 868.
73. *Id.*
74. *Id.* at 854.

serve, or serves ill ends that outweigh its worthy ones. Stare decisis, therefore, is not an "inexorable command,"[75] and the Court must weigh its benefits against its burdens in deciding whether to overturn a precedent it thinks is unjust. The rule of stare decisis may entail the sacrifice of justice to the parties in individual cases, but, far from being immune from considerations of justice, it must always be tested against the ends of justice more generally.

Despite its generally consequentialist approach to stare decisis in recent cases like *Casey*, however, the Court has not been immune to the deontological view. A salient illustration is the line of retroactivity cases culminating most recently in *James B. Beam Distilling Co. v. Georgia*,[76] in which the Court held that when it applies a "new" constitutional rule to the litigants in the case before it, the same rule must be applied retroactively to all pending cases or cases based on facts arising before the "new" rule was articulated.

The Court in *Beam* was presented with the question of whether its 1984 ruling in *Bacchus Imports, Ltd. v. Dias*,[77] which invalidated Hawaii's discriminatory excise tax on out-of-state liquor as violative of the Commerce Clause, should be applied to require Georgia to refund taxes collected prior to the *Bacchus* decision pursuant to a similar law. The Supreme Court of Georgia, deciding the case below, had found the Georgia tax to be unconstitutional in light of *Bacchus*, but had refused to order the refund of taxes collected before *Bacchus* was decided. In so doing, the court had relied on *Chevron Oil Co. v. Huson*,[78] in which the Supreme Court established a test for retroactivity based on consequentialist factors such as reliance, workability, and the potential for "substantial inequitable results."[79]

---

75. *Id.*

76. 501 U.S. 529 (1991); *see also* Griffith v. Kentucky, 479 U.S. 314 (1987) (eliminating "clear break" exception to retroactive application in criminal cases); United States v. Johnson, 457 U.S. 537 (1982) (overruling *Johnson v. New Jersey* and holding that, with some exceptions, decisions should always apply retroactively to criminal convictions pending on direct review); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (adopting test similar to *Linkletter* test for civil cases); Johnson v. New Jersey, 384 U.S. 719 (1966) (holding that *Linkletter* test applies both in habeas corpus cases and in convictions pending on direct review); Linkletter v. Walker, 381 U.S. 618 (1965) (adopting three-pronged test to determine whether constitutional decisions of criminal procedure should be applied retroactively).

77. 468 U.S. 263 (1984).

78. 404 U.S. 97 (1971).

79. *Id.* at 106–07. In *Chevron Oil*, the Court listed "three separate factors" relevant to the retroactivity issue:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent *on which litigants may have relied*, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and *whether retrospective operation will further or retard its operation*." Finally, we have *weighed the inequity* imposed by retroactive application . . . .

Id. (emphasis added) (citations omitted). Each of these factors demanded a consequentialist inquiry; each asked whether the type of adjudicative consistency embodied in retroactive application of a decision would serve or hinder certain goals (protection of reliance, promotion of the operation of the rule, prevention of "inequity" to the litigants). None of the factors was concerned with whether consistency was a goal in its own right.

The Supreme Court reversed, holding that the *Bacchus* rule should be applied retroactively to invalidate the taxes collected by Georgia prior to the rule's articulation. Writing for the Court, Justice Souter asserted that "principles of equality and *stare decisis* here prevail[] over any claim based on a *Chevron Oil* analysis."[80] Equality—"the principle that litigants in similar situations should be treated the same"[81]—forbade the Court from "'simply pick[ing] and choos[ing] from among similarly situated [litigants] those who alone will receive the benefit of a 'new' rule of constitutional law.'"[82] The principle of equality would be violated if the Court, having applied its "new" interpretation of the Commerce Clause to benefit the plaintiff in *Bacchus*, were then to refuse to apply the same rule to benefit the similarly situated plaintiff in *Beam*. Equality, moreover, overrode the consequentialist inquiry previously endorsed by the *Chevron Oil* Court:

> Nor . . . are litigants to be distinguished . . . on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.[83]

The *Beam* Court thus rejected a consequentialist approach to retroactivity (a view that retroactivity is desirable when it serves, in any given case, the end of justice broadly defined) in favor of a deontological approach (a notion that retroactivity is inherently a good thing because it treats "similarly situated litigants . . . the same"[84]).

Although *Beam* was about retroactivity, and not about stare decisis per se, its analysis applies *a fortiori* to both. Retroactive application of a judicial decision is, after all, merely a variety of stare decisis—stare decisis applied not only to cases arising after the precedential decision, but also to pending cases and other cases arising before the decision is reached. If, as the *Beam* Court held, equality requires that litigants in pending cases be treated the same as the litigants in the precedential case, then surely it requires that litigants in *future* cases also be treated that way. Indeed, Justice Souter explicitly founded the Court's opinion on both "principles of equality and *stare decisis*."[85]

To be sure, the *Beam* decision was somewhat haphazard in its approach to "equality and stare decisis." *Beam* itself arguably overruled a piece of

---

80. *Beam*, 501 U.S. at 540. Justice Souter's opinion was joined only by Justice Stevens. Justices White, Blackmun, and Scalia each wrote separate concurring opinions, and Justice O'Connor wrote a dissent in which Chief Justice Rehnquist and Justice Kennedy joined.

81. *Id.* at 537.

82. *Id.* at 538 (quoting Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting)).

83. *Id.* at 543.

84. *Id.* at 540.

85. *Id.*

precedent, the *Chevron Oil* case, thus flouting stare decisis and raising the issue of why litigants affected by that previous rule had not thereby been treated "unequally" with respect to litigants subject to the *Beam* decision.[86] But the decision nonetheless demonstrates the force in contemporary adjudication of supposed deontological norms like equality—a force that appears in stark relief when the majority decision in *Beam* is juxtaposed against the dissent authored by Justice O'Connor and joined by the Chief Justice and Justice Kennedy.

Justice O'Connor's perspective on the retroactivity issue was, like that of the joint opinion in *Casey*,[87] entirely pragmatic. O'Connor chided Souter for relying on "equality" and "stare decisis" in retroactively applying the *Bacchus* rule; "[t]o my mind," she wrote, "both of these factors lead to precisely the opposite result."[88] But this was true for O'Connor only because, in contrast to Souter, she saw both equality and stare decisis in a consequentialist light. If Souter really was concerned with equality, O'Connor objected, he would not "ignore" the pragmatic *Chevron Oil* test, the purpose of which was "to determine the equities of retroactive application of a new rule."[89] But "equity" in O'Connor's parlance had an entirely different meaning than "equality" held for Souter. Under *Chevron Oil*, "equity" had nothing to do with whether similarly situated litigants were being treated similarly; it had everything to do with whether, given the considerations applicable with respect to a given rule, retroactive application would be generally "fair" to any litigant who might be affected by it. Thus, O'Connor's "equity" was akin to the traditional consequentialist concern that departure from precedent would prejudice parties who justifiably have relied on an existing rule. It was far from the deontological notion of "equality" advocated by Souter and the *Beam* majority, which was unconcerned with consequences and found value in the very fact of similarity of treatment.

Justice O'Connor's view of stare decisis likewise was purely instrumental. "At its core," O'Connor wrote, "*stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of stare decisis."[90] But a decision not to apply a rule retroactively is based on stare decisis only if stare decisis is viewed consequentially, as a means of promoting predictability and protecting private expectations. If stare decisis is viewed deontologically—as Justice

86. Justice Souter did attempt to explain this incongruity by pointing to the "independent interests" of "finality" that are served by refusing to reopen decided cases in the name of equality: "Finality must . . . delimit equality in a temporal sense . . . ." *Id.* at 542.

87. Recall that Justice O'Connor's collaborators in the *Casey* joint opinion were Justice Kennedy, who also joined in her *Beam* dissent, and, interestingly, Justice Souter, who wrote the Court's opinion in *Beam*.

88. *Beam*, 501 U.S. at 550 (O'Connor, J., dissenting).

89. *Id.* at 551 (O'Connor, J., dissenting).

90. *Id.* at 551–52 (O'Connor, J., dissenting) (emphasis added).

Souter viewed it in *Beam*—it *can* support retroactive application of a "new" rule, since retroactivity and stare decisis both are necessitated by "the principle that litigants in similar situations should be treated the same."[91]

The Court's opinion in *Beam*, then—in conspicuous contrast to Justice O'Connor's consequentialist dissent in that case—embodied an approach to stare decisis that differed fundamentally from the view endorsed by the Court a year later in *Casey*. To the *Casey* majority, stare decisis was a tool whose efficacy and application in any given case depended entirely on "prudential and pragmatic" concerns. To the *Beam* Court, however, stare decisis was an end in itself—an essential reflection of the basic principle that like people must be treated alike.[92]

My primary purpose in this Article is to attack the deontological view of stare decisis reflected in the *Beam* decision by demonstrating that both types of deontological theory of adjudicative consistency—consistency as equality and consistency as integrity—are wrong. Specifically, I hope to show that both theories incorrectly postulate, as a reason to follow precedent, the existence of a separate and independent substantive norm requiring consistency. In fact, I will contend, neither "equality" nor "integrity" constitutes a distinct substantive norm entitled to be weighed in any particular case against other potentially operative norms (norms I will subsume under the heading "justice"). The significance of this fact is that the doctrine of stare decisis can have only consequential, not deontological, value, and therefore can never be employed in a given case to prevent a result that is ultimately unjust.

C. *Justice Defined*

Of course, my project requires that I define the term "justice" as I will use it in this Article. By "justice" I mean: *treatment of a person in accordance with the net effect of all the relevant criteria, and only the relevant criteria; provided that considerations of "equality" or "integrity" cannot be relevant criteria.* "Treatment" within this definition bears something close to its vernacular meaning, and can refer either to the infliction of a burden on a person, to the conferment of a benefit on a person, or to the enforcement of the status quo with respect to a person (that is, to the act of refraining from additionally burdening or benefiting a person). "Person" includes collective entities like corporations, associations, partnerships, government agencies, and the like, as well as individuals. "In accordance with the net effect of all the relevant criteria" clearly is a loaded phrase; what I am trying to capture here

91. *Id.* at 537.

92. It is worth noting that Justice Souter, who wrote the Court's opinion in *Beam*, also jointly authored the Court's opinion in *Casey*. The unacknowledged presence of such fundamentally different perspectives on stare decisis within the same Court (indeed, within the same Justice) in the span of a year underscores the need to articulate and explore that difference.

is the idea that a treatment of someone is entirely "just" if, and only if, (1) it is the treatment that an omniscient judge (or other actor) would prescribe after correctly considering every relevant criterion (but no irrelevant ones) and giving each such criterion exactly its appropriate weight with respect to every other such criterion, *and* (2) it is *in fact* the result of a correct consideration of every relevant criterion but no irrelevant ones. (I explain below the proviso eliminating considerations of "equality" and "integrity.")

As the reader will see, this definition of justice is vital to my arguments in this Article, and so it is similarly vital that I explain some important aspects of the definition that might cause confusion. First, my definition of justice is designed simply as a tool to accomplish the general objective of this Article, which is to eliminate two concepts—"equality" (as I will define that term in Part II) and "integrity" (as Ronald Dworkin defines it)—from the universe of substantive norms that potentially might apply in adjudicative decisionmaking. As such, my definition of justice is intended to be a negative one (one that excludes from its purview notions of equality and integrity) rather than a positive one (one that includes any other particular substantive moral beliefs). I do not intend to offer a substantive conception of justice that specifies all, or even any, of the criteria that are relevant to a person's treatment; I do not want to foist upon the reader any particular view or views of what actually is just in any given case, or even to suggest such views if I can avoid it. My purpose in defining justice, rather, is simply to provide a formal structure for identifying those normative values potentially applicable with respect to a given treatment that are *not* values of equality or integrity. In doing so, I hope to show that equality and integrity are unnecessary to explain people's normative reactions to treatments, which reactions—assuming for the sake of argument that they exist at all—are better explained by reference to certain nonegalitarian, non-integrity-based norms. Thus "justice," as I have defined it, and as I will use it in this Article, simply stands for an undefined and potentially infinite set of nonegalitarian, non-integrity-based norms that, depending upon one's own moral beliefs, may operate with respect to any given treatment.

This point can be demonstrated by a brief example. Among other things, I will claim later in this Article that justice, not equality, explains the negative moral reaction most people have toward statutes that discriminate on the basis of race. What I mean by this claim is simply that those who oppose racial discrimination do not oppose it because of the norm of equality, that is, because they think there is something inherently wrong in treating similarly situated people differently. Rather, they oppose racial discrimination because they believe that the bare fact of race is not (in most cases, at least) a relevant criterion for the treatment of people; they oppose it, in other words, because of their own particular *substantive* conception of justice, a conception that fits within the *formal* requirements of "justice" specified in my definition. In

making this claim, I do not intend to advocate such a particular substantive conception of justice (one that includes the belief that race is not a relevant criterion for treatment[93]). I merely intend to demonstrate that there are better ways of explaining negative reactions to racially discriminatory statutes—again, assuming for the sake of argument that such reactions exist in a given case—than to refer to the supposed norm of equality. For those who oppose racially discriminatory statutes, those "better ways" stem from their belief that race is not a relevant criterion for treatment. Of course, those who believe that race *is* a relevant criterion for treatment are not excluded from my formal definition of justice; they simply have a different substantive conception of what criteria are relevant to treatment. The possibility that such people will not oppose racially discriminatory statutes does not threaten my claim, which is only that the reactions of those who *do* oppose such statutes are traceable to other roots besides equality.

"Justice" for the purposes of this Article, then, is simply a way of referring to the set of all possible norms that might, depending on one's particular substantive conception of morality, be relevant to a treatment of someone—*excluding* (and excluding *only*) norms of equality or integrity. As long as one stays within the formal boundaries of my definition—that is, as long as one accepts that a treatment based on irrelevant criteria (whatever they may be) or on an incorrect weighing of relevant criteria cannot be fully just—one's particular conception of what is just will not matter to my conclusions. "Justice" in this Article can be (almost) all things to all people ("almost" because, again, it cannot include norms of equality or integrity).[94]

This brings us to the proviso in the definition regarding considerations of "equality" and "integrity." The reader should remember throughout this Article that I intend expressly to exclude criteria based in the supposed norms of equality or integrity from the set of potentially relevant criteria under my definition of justice. If considerations of equality or integrity could be imported into my definition of justice, my conclusions that equality and integrity are substantively empty or incoherent would be merely semantic ones; those supposed norms could simply be resurrected by the critic under the label "justice." In order to emphasize the exclusion of equality and integrity from the purview of justice for purposes of this Article, I frequently will refer to justice as "nonegalitarian justice" or "non-integrity-based justice." However, my equally frequent references simply to "justice" should be understood by the reader to mean the same thing.

---

93. Although I personally happen to hold such a conception.

94. My exclusion of only equality and integrity from the purview of my "justice" does not, of course, imply an endorsement on my part of the validity of every (or indeed any) other moral prescription that someone might offer as a principle of "justice." The paring away of other invalid principles from a proper substantive conception of justice, though, is a different project entirely than the one in which I am engaged here.

A second, and equally important, aspect of my definition of justice is that it turns not merely on outcomes but also on *reasons* for outcomes: A treatment is just if and only if it is *in fact* the result of the application of all, and only, the relevant criteria. Thus a decision that happens to have the correct outcome but is made for the wrong reasons (irrelevant ones) is not a completely "just" decision. For instance, I would condemn the Nazi decision to spare most non-Jews from concentration camps as an unjust decision, just as I would condemn the Nazi decision to intern Jews in concentration camps as an unjust decision. In each case people were treated unjustly; they were treated in accordance with an irrelevant criterion (i.e., their ethnicity).

This is not to say that the internment of Jews in concentration camps was no *more* unjust than the exemption of most non-Jews from the camps. There are strong reasons of justice—strong relevant criteria—forbidding internment of *anyone* in a concentration camp, and those reasons apply to condemn the Nazis' treatment of Jews but not to condemn the Nazis' treatment of non-Jews. ("Outcome" matters in this sense; the relevant criteria disfavoring a certain outcome, coupled with the fact that irrelevant criteria were applied to reach that outcome, can make a given treatment more unjust than a treatment involving a morally correct outcome reached despite the application of irrelevant criteria.) There may also be strong reasons of justice against imposing burdens on ethnic groups that historically have been subject to inferior treatment based on their ethnicity. Indeed, there may be, under some substantive moral theories, reasons of justice that subject burdensome treatment of anyone to greater scrutiny than beneficial (or neutral) treatment of anyone. The point, however, is that under my definition of justice, both the Jews *and* the non-Jews in Nazi Europe were subjected to treatment that was, in some way, *unjust.* The reason-based nature of my definition of justice becomes important in the context of my discussions later in this Article of equality[95] and integrity[96] as aspects of justice.

Third, since under many people's ideas of morality a consideration of "all the relevant criteria" would be beyond the competence of any real actor in most cases, my definition forecloses the possibility of ever actually attaining a completely "just" result under even a moderately complex moral system. But although it describes a "justice" that may rarely, if ever, actually be achieved, the definition still serves as a standard against which attempts at justice in the real world can be roughly measured. One treatment is more just than another if that treatment is more fully in accordance than is its rival with, and/or more fully motivated than is its rival by, those "relevant criteria" that can be

95. *See infra* Subsection II.C.1.
96. *See infra* Part III.

detected with reasonable human diligence.[97] "Justice" in the real world can (indeed, must) be a matter of degree.

Fourth, some comment is necessary about the word "relevant" in my definition of justice. In an earlier draft of this Article, I used the term "morally relevant" in place of merely "relevant" in my definition. Two problems with this initial formulation were pointed out to me, however. First, I was reminded that the modifier "morally" might be read inappropriately to limit the field of potentially relevant criteria that might apply to any given treatment. For instance, is the fact that two plus two equals four a "morally" relevant criterion? Is the fact that murder is against the law a "morally" relevant criterion? Modifying "relevant" with "morally" might be thought to imply that these types of criteria can never, or only rarely, be relevant in prescribing a treatment. (Note that removing the modifier does not necessarily foreclose a conception of justice by which such criteria can never be relevant, although it is difficult to imagine such a conception.)

My second reason for eliminating "morally" from my definition of justice was the possibility that defining justice according to "morally" relevant criteria might be read to imply a natural law, or antipositivist, definition of justice. That is, it might suggest a belief that the decisions of courts cannot be "just" unless they take into account "moral" (or "natural") laws in addition to "positive" law. I do not mean, however, to make my definition of justice accessible only to natural lawyers; I mean for it potentially to encompass any particular substantive notion about justice or about law. It all depends on what one believes to be a relevant criterion, and the answer may differ depending upon whether one is a positivist or a natural lawyer. However, my definition of justice is not meant to apply only to the activities of courts; although courts are the ultimate focus of the Article, I mean my definition of justice to apply to any treatment of any person (broadly defined) by any other person (also broadly defined). Thus "relevant" means more than simply "legally relevant," although one could imagine a conception of justice that eliminates all but "legally relevant" criteria from those legitimately available to a court deciding a case.

By removing the modifier "morally" from the phrase "relevant criteria," I hope to have cleared up these potential misconceptions. But I do not believe I have changed the meaning of my formal definition of justice by doing so. The definition assumes that someone deciding on or assessing a given treatment will apply his or her own moral sense to determine what criteria are

97. Or can be "estimated" with reasonable human diligence, or "guessed" or "stipulated"; it all depends on how confident one feels about our ability to identify the substantive principles of justice. The epistemic skeptic or nihilist—and indeed the ontological skeptic or nihilist—might choose to opt out of even my formal definition of justice. But she also will choose on the same grounds to opt out of any morality that includes equality or integrity as substantive values. Sadly, this Article therefore will be of little interest to her.

relevant to that treatment, and thus "relevant criteria" necessarily will be those criteria that, in the perception of the particular actor, are "morally" relevant. Including the modifier "morally" in the definition, then, not only would have been confusing; it would have been redundant.

Finally, just as I do not intend to limit the scope of "relevant criteria" ideologically for purposes of this Article, I do not intend to limit it spatially, temporally, personally (in the sense of the persons or entities to which such criteria may relate), or even causally (although it may be difficult to imagine criteria that are "relevant" to a treatment but not causally related, however tenuously, to that treatment). Thus a "just" decision of a court need not necessarily be limited to those criteria that affect, say, the parties to the litigation in which the decision is made (although, under certain substantive conceptions of justice, it could be so limited); the court's decision could take into account considerations of general social benefit, for instance, and still be "just" under my formal definition (although, again, it need not be). When I refer, then, to "a just decision in a case" or "doing justice in a given case" or something similar, I do not mean to foreclose conceptions of justice that would assess a court's decision against a considerably broader backdrop than merely "the case" itself—so long, of course, as considerations of equality or integrity do not form part of that backdrop.

With this definition of justice in mind, let us move on to an examination of the two different types of deontological theory of adjudicative consistency: consistency as equality and consistency as integrity. My goal will be to demonstrate that consistency as integrity is substantively empty—it reflects only non-integrity-based concerns subsumed within justice as I have defined it—and that consistency as equality is quite likely to be similarly empty and certainly is normatively incoherent. Neither theory therefore should be permitted to mandate an unjust decision in a given case.

II. THE FAILURE OF CONSISTENCY AS EQUALITY

Theories of adjudicative consistency as equality hold that courts must adhere to precedent because the norm of equality—of treating similarly situated people similarly—demands it. Legal thinkers as diverse as Benjamin Cardozo,[98] Karl Llewellyn,[99] and Ronald Dworkin (in his earlier work)[100]

98. Cardozo wrote:

> It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles."

CARDOZO, *supra* note 29, at 33 (quoting WILLIAM GALBRAITH MILLER, THE DATA OF JURISPRUDENCE 335 (1903)).

99. *See* Llewellyn, *supra* note 5, at 249 ("The force of precedent in the law is heightened by . . . that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances.").

have traced the force of precedent at least in part to a concern for equality.[101] Indeed, our Supreme Court, in *Beam,* recently purported to enshrine what it called "the equality principle"—the perceived necessity of treating "similarly situated litigants . . . the same"[102]—as a foundation of adjudicative consistency.

The *Beam* plurality opinion is especially significant because, as a chapter of the high Court's gospel of adjudicative consistency, it is bound to enhance the already powerful lure of "equality" among state and lower federal courts grappling with the difficulties of whether and when to follow precedent. Courts commonly intone egalitarian mantras like "fairness" and "the principle of deciding like cases alike" in assessing stare decisis,[103] and no doubt *Beam* will fuel the fire. One suspects, moreover, that such instances of explicit deference to "equality" represent a relatively small fraction of the cases in which courts, in following precedent or reasoning by analogy or distinguishing prior decisions, honor ideas or instincts of "equality" without expressly acknowledging that they are doing so.

Whether courts should be taken seriously when they purport to rely on equality in following precedent is difficult to tell. "Equality" is precisely the sort of evocative buzzword to which one might suspect courts would turn in justifying otherwise unpopular decisions. But whether courts, in speaking of "equality" to explain stare decisis, envision the concept as an honest ideal or whether they merely use it as a crutch—as a strategic excuse to follow precedent they secretly *want* to follow—the result is the same. In resorting

---

100. *See* TAKING RIGHTS SERIOUSLY, *supra* note 33, at 113 ("The gravitational force of a precedent may be explained by appeal . . . to the fairness of treating like cases alike."). Dworkin's views on the root of judicial consistency have since changed. *See infra* Section III.A.

101. Others who explicitly have grounded the doctrine of stare decisis in concerns of equality include Justice William O. Douglas, *supra* note 26, at 736 ("[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."), Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("[O]ne of the most substantial . . . competing values [in adjudication], which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated."), Edward Levi, *supra* note 5, at vii ("The persuasion of similar situations is . . . a reflection of the principle of equality . . . ."), Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 31 (1985) ("The principle of treating like cases alike is . . . a principle of fairness since it guards against . . . a violation of individuals' moral equality . . . ."), and Richard Bronaugh, *supra* note 33, at 228 ("In a legal system, the demand for fair treatment [means that] . . . [o]ne may complain . . . that one was treated by this judge differently than another person was treated by another judge . . . .").

102. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991); *see supra* notes 76–91 and accompanying text.

103. *See, e.g.*, Cheshire Medical Ctr. v. W.R. Grace & Co., 49 F.3d 26, 34 (1st Cir. 1995); United States v. Frank, 36 F.3d 898, 902 (9th Cir. 1994); *In re* Burns, 974 F.2d 1064, 1068 (9th Cir. 1992); EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986); Gregory Constr. Co. v. Blanchard, 691 F. Supp. 17, 21 (W.D. Mich. 1988); Grimes v. North Am. Foundry, 856 S.W.2d 309, 315–16 (Ark. Ct. App. 1993) (Mayfield, J., dissenting); Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1054 n.5 (Haw. 1994); Formicove, Inc. v. Burlington N., Inc., 673 P.2d 469, 472 (Mont. 1983); McGregor Co. v. Heritage, 631 P.2d 1355, 1366 (Or. 1981) (Peterson, J., concurring in part and dissenting in part). One of the leading treatises on federal procedure, *Moore's Federal Practice*, traces the force of stare decisis both to the consequentialist value of "stability" and to the deontological norm of "equal treatment." 1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1995).

(sincerely or not) to the vague and happy idea "equality," courts neglect (or reject) the important and often difficult task of examining the many pragmatic considerations that might play into the question of whether to follow precedent in a given case. Courts that believe they are constrained by equality to adhere to precedent—or that they can get away with professing to be so constrained—need not, and (as the *Beam* opinion suggests) undoubtedly do not, engage in the kind of rational analysis of the value of stare decisis that a just decision requires. To true believers and clever rhetors alike among the judiciary, then, "equality" becomes a sort of universal trump card.

What follows is my attempt to remove that card from the deck. In doing so, I will explain the way in which "equality" (sometimes referred to as "fairness"[104] or as a principle of "justice"[105]) is said by its proponents to demand adjudicative consistency.[106] First, though, it is necessary for me to define "equality" as I will use that term here. This process of definition itself requires some exploration of another, more traditional (indeed, almost universal) conception of equality; of why that traditional conception is defective as a description of the fullest concept of equality held by those who endow equality with independent normative force; and of how the conception I will offer differs from the traditional one. That exploration in turn will produce the definition of equality I will use in this Article. Having offered my definition of equality, I will explain how equality as a distinct substantive norm is thought to necessitate adjudicative consistency. Then I will attack the premise that equality can be a distinct substantive norm in the adjudicative context.

A. *The Traditional Conception: Equality as Tautology*

The traditional conception of equality is some variation on the following: *Identically situated people are entitled to be treated identically.* This

104. *E.g.*, TAKING RIGHTS SERIOUSLY, *supra* note 33, at 113; Bronaugh, *supra* note 33, *passim*; Coons, *supra* note 24, at 101–02; Dan-Cohen, *supra* note 101, at 31; Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1231 (1977); Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 135 (1978); Schauer, *supra* note 5, at 595–97.

105. *E.g.*, Llewellyn, *supra* note 5, at 249.

106. I describe here a general theory of consistency as equality, a general theory meant to encompass most or all of the specific versions of the theory held by various courts and commentators who have written about adjudicative consistency. There is a certain amount of necessary guesswork in deriving such a general theory, because theorists appealing to equality as the foundation of stare decisis have tended to explain the supposed connection with vague references to our "sense of justice," *see id.*, rather than careful explications of precisely how equality and consistency are thought to be related. What analysis there has been of how equality might imply consistency has been performed by critics, not supporters, of the connection. *See, e.g.*, WASSERSTROM, *supra* note 5, at 69–72; PETER WESTEN, SPEAKING OF EQUALITY 210–19 (1990) [hereinafter WESTEN, SPEAKING OF EQUALITY]; Alexander, *supra* note 5, at 9–13; Coons, *supra* note 24, at 99–107; Maltz, *supra* note 5, at 369–70; Raz, *supra* note 104, at 135–36; Schauer, *supra* note 5, at 595–97.

conception is often (but misleadingly) attributed to Aristotle[107] and has been adopted in some form by nearly every jurisprudential scholar who has written about the concept of equality since, whether friend or foe of the concept.[108]

As conceived of in this way, the norm of equality has a serious problem. It is tautological; and therefore it is substantively empty. Peter Westen, in a well-known article[109] and a subsequent book,[110] has demonstrated this, I think conclusively. Borrowing from Westen's analysis, let me explain briefly why equality, traditionally conceived, is a tautological principle.

Suppose the following statute in a certain jurisdiction: "A person is entitled to practice law in this jurisdiction if, and only if, he or she achieves a passing score on the bar examination." The statute creates a rule specifying the appropriate treatment for a person who passes the bar: He or she is entitled to practice law in that jurisdiction. Conversely, the statute creates a rule specifying the necessary criterion for a person to be entitled to practice law in the jurisdiction: He or she must pass the bar exam.

Now consider our traditional expression of equality: "Identically situated people are entitled to be treated identically." How might this expression be applied to determine whether two people, *X* and *Y*, are entitled to be treated

---

107. Aristotle conceived of "equality" as the condition in which "equals," or identically situated persons, "have and are awarded" equal shares of something, and of inequality as the condition in which "either equals have and are awarded unequal shares, or unequals equal shares." ARISTOTLE, NICOMACHEAN ETHICS bk. 5, ch. 3, at 402–03 (Richard McKeon trans., 1947). But Aristotle saw equality as simply a reflection of "justice," which in turn was "a species of the proportionate"—a condition in which goods are distributed "according to merit" and in which, therefore, those of equal merit receive equal shares of the relevant goods. *Id.* Thus Aristotle's vision of equality was a self-consciously formal one: "Equality" was merely a reflection of "justice," that is, of the distribution of goods to each person according to her merit. I do not believe Aristotle would have endorsed the revised, nontautological principle of equality that I posit below, *see infra* Section II.B, as a source of distinct substantive norms. *See* WESTEN, SPEAKING OF EQUALITY, *supra* note 106, at 89–92 (analyzing modern confusion about Aristotle's conception of equality).

108. *See, e.g.*, WASSERSTROM, *supra* note 5, at 70–71; WESTEN, SPEAKING OF EQUALITY, *supra* note 106, at 181; Alexander, *supra* note 5, at 11; Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 578 (1983); Coons, *supra* note 24, at 98–100; D.J. Galligan, *Arbitrariness and Formal Justice in Discretionary Decisions*, *in* ESSAYS IN LEGAL THEORY 145, 163 (D.J. Galligan ed., 1984); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1167 (1983); Maltz, *supra* note 5, at 369; Raz, *supra* note 104, at 135; Schauer, *supra* note 5, at 595–96; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539–40 (1982). A possible exception is Joseph Raz in his book *The Morality of Freedom*, in which he attempts not to define "equality" but to discern those principles properly thought to be principles of equality. One such principle in fact avoids the trap I describe in this section of defining equality tautologically. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 217–44 (1986) (especially pp. 222–27, 229–33); *see also infra* note 127.

For a brief but excellent survey of the historical development and contemporary status of theories of equality as a substantive moral and political norm, see William B. Griffith, *Equality and Egalitarianism: Framing the Contemporary Debate*, 7 CANADIAN J.L. & JURISPRUDENCE 5 (1994).

109. Westen, *supra* note 108.

110. WESTEN, SPEAKING OF EQUALITY, *supra* note 106. Westen's book greatly expands upon, and in some ways modifies, his treatment of equality in *Empty Idea*, and it should be read by anyone seriously interested in the status of equality in contemporary debates about morals, law, and politics. Westen's exposition and analysis in *Speaking of Equality* of what he calls the "formal principle of equality"—which encompasses our statement that identically situated people should be treated identically, *see id.* at 181—remains essentially the same as his treatment in *Empty Idea*, although it has been broadened somewhat, *see id.* at 185–229.

identically under the bar admission statute (that is, are identically entitled to practice law in our jurisdiction)? First we must determine whether *X* and *Y* are "identically situated." But the question whether they are identically situated cannot be answered by reference to merely any standard; it cannot be answered, for instance, by looking to whether *X* and *Y* are the same height, or were born in the same year, or have the same taste in clothing. These comparisons might conceivably be relevant to other inquiries besides whether both people are entitled to practice law, but they are not relevant to *that* inquiry.

In other words, the bare fact that two (or more) people are (or are not) "identically situated" in any old way does not itself bring our norm of equality into operation. The two people must be identically situated *in the appropriate way, that is, measured by the appropriate standard.* How, though, do we determine what standard is the appropriate one for this measurement?

In the case of *X* and *Y* and the question of their entitlement to practice law, we know what the appropriate standard is: achievement of a passing score on the bar exam. *X* and *Y*, we understand, are "identically situated" for purposes of determining whether they are identically entitled to practice law because they are "identical" in one respect: Each has (or has not) passed the bar. But what makes this (and not height, birthdate, or taste in clothing) the appropriate standard? The answer is that the standard is appropriate because it is the standard we know (in this case, because a statute tells us so) to be relevant to the question whether a person—*X*, *Y*, or whoever—is entitled to practice law in our jurisdiction.

Whether *X* and *Y* are "identically situated," therefore, depends entirely upon whether both *X* and *Y* have satisfied the criteria (in this case, a single criterion) for the treatment to which they may be identically entitled. Identity of situation is defined by reference to criteria for the treatment in question. If persons are identically entitled to the relevant treatment, they are "identically situated" under our expression of equality.

Thus "identically situated people" in the traditional expression of equality becomes "people identically entitled to the relevant treatment." The traditional expression now reads like this: "People identically entitled to the relevant treatment are entitled to be treated identically"—that is, are identically entitled to that treatment. Traditionally expressed, equality is tautological.[111]

Westen's conclusion that equality is tautological, and therefore "empty," has spawned much retort.[112] But aside from a brief (and, I believe,

111. For Westen's rehearsal of the argument that equality is tautological, see *id.* at 185–225; Westen, *supra* note 108, at 542–48.

112. *See, e.g.*, Chemerinsky, *supra* note 108; Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Greenawalt, *supra* note 108.

unsuccessful) foray by Erwin Chemerinsky,[113] none of Westen's critics has attempted to defend the norm of equality by attacking the conclusion that it is a tautology—a fact that should not surprise us, because that conclusion is unassailable. Instead, defenders of equality as a substantive norm, most notably Professors Chemerinsky and Greenawalt, have challenged Westen's assertions that equality, tautology or no, is incapable of supporting distinct normative claims[114] and is rhetorically more harmful than useful.[115] But these defenders of equality have taken an interesting approach to arguing their case. Rather than attempt to explain logically how a tautology can produce substantive moral prescriptions,[116] they quickly have resorted to posing

---

113. Professor Chemerinsky has tried to attack Westen's conclusion that equality (conceived of traditionally) is tautological. *See* Chemerinsky, *supra* note 108, at 578–79. Professor Chemerinsky argues:

> Professor Westen says that if we focus on the statement "like people should be treated alike," we must ask who are "like people." Unfortunately, Professor Westen says, "when we ask who 'like people' are, we are told they are 'people who should be treated alike.'" From this observation, Professor Westen concludes that "equality is entirely circular."
>
> A careful examination reveals, however, that Professor Westen has in no way shown equality to be circular. True, the answer to the question, "who are 'like' people," is "those who should be treated alike." But equality is circular only if the answer to the question, "who should be treated alike," is "like people." Then, and only then, would you have a circular argument. If, however, one asks "who should be treated alike," one is not, according to Professor Westen, told "like people." Instead, one is referred to a set of values which society uses to decide which people we want to treat the same and which differently. That does not prove that equality is circular; it only shows that equality depends on other concepts to decide which differences to strike down and which to uphold.

Id. (footnotes omitted). This attack misses the mark, though. Westen has reduced the equality formula to "People who should be treated alike should be treated alike"—undeniably a tautology. Chemerinsky's analysis only suggests what Westen himself asserts: that "equality depends on other concepts" to determine which standards of "likeness" are relevant and which are not. Once those "other concepts" are applied, "people who should be treated alike" *does* reduce to "like people"—that is, to people who are "alike" in the way prescribed by the "other concepts." It is not the necessity of applying substantive standards of "likeness" that makes equality "empty" (which is what Chemerinsky appears to think Westen is saying); it is the fact that equality, expressed as Westen expresses it (an expression with which Chemerinsky does not quarrel), is tautological and thus irrelevant as a prescriptive device that makes it "empty."

114. *See id.* at 585–87; D'Amato, *supra* note 112, at 602–03; Greenawalt, *supra* note 108, at 1170–73, 1178–83.

115. *See* Chemerinsky, *supra* note 108, at 590–96; Greenawalt, *supra* note 108, at 1184–85.

116. The rhetorical use of "equality," of course, might itself effect morally significant outcomes, and might be seen as "producing substantive moral prescriptions" in that sense—a fact that both Westen and his critics acknowledge. *See* WESTEN, SPEAKING OF EQUALITY, *supra* note 106, at 257–88; Chemerinsky, *supra* note 108, at 590–91; Greenawalt, *supra* note 108, at 1183–85; Westen, *supra* note 108, at 577–96. Charging that government is violating "equality" by distributing certain benefits to some citizens but not to others, for instance, might flag the actual presence of injustice in the government's action. In this way tautologies can prove morally useful. Indeed, we encounter truisms in everyday speech that communicate substantive normative messages: "Today is the first day of the rest of your life" (meaning "Forget what happened in the past and think about your future"), or the old automobile advertising slogan "Nothing else is a Volkswagen" (meaning "Volkswagen cars have unique and desirable features, and you should purchase one"), or the ubiquitous athletic verity "The team that scores more points is going to win this game" (meaning "Each team had better concentrate on offense, because both defenses stink"). But this kind of tautology contains no normative content of its own; it merely captures some substantive moral principle in a rhetorically useful way.

I am grateful to Steve Tigner for this point.

hypotheticals meant to demonstrate that the concept of equality appeals to our intuitions in some way distinct and independent from any other value.[117]

Professor Chemerinsky, for example, mounts a shotgun attack on Westen's contention that equality is empty by offering a barrage of cases that, he claims, demonstrate the necessity of "a concept of equality to insure consistent, nondiscriminatory application of the laws."[118] Chemerinsky poses the following hypotheticals:

- The San Francisco Board of Supervisors applies a facially neutral ordinance to deny permits to operate laundries to every Chinese applicant while granting permits to 79 of 80 Caucasian applicants.[119]
- An individual is prosecuted, solely because of his race, under a criminal statute that is seldom invoked.[120]
- A state passes a statute prohibiting the sale of beer to men under age twenty-one and to women under age eighteen.[121]
- Illinois enacts a law providing that, in gubernatorial elections, every resident of Chicago can vote once while every other state resident can vote twice.[122]
- A state provides $1000 for the education of students with IQs over 120 but only $100 for the education of students with IQs under 120.[123]

None of these hypotheticals, Chemerinsky claims, can be resolved satisfactorily without employing equality as a distinct substantive norm. Equality cannot therefore be "empty," as Westen contends.

But Chemerinsky misses Westen's point. It is true that, in each of these hypothetical cases, individuals who are "similarly situated" in relevant respects are treated unequally.[124] This does not mean, however, that the norm of equality is necessary to supply the correct result; it does not mean that the bare fact of inequality of treatment is what bothers us about these examples. What bothers us is that each individual is being treated *unjustly*. The Chinese applicants for laundry permits are being treated wrongly not because of the

117. *See* Chemerinsky, *supra* note 108, at 580–85; D'Amato, *supra* note 112, at 600–01; Greenawalt, *supra* note 108, *passim*.

118. Chemerinsky, *supra* note 108, at 580.

119. *Id.*; *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

120. Chemerinsky, *supra* note 108, at 582–83.

121. *Id.* at 583; *see* Craig v. Boren, 429 U.S. 190 (1976).

122. Chemerinsky, *supra* note 108, at 583–84.

123. *Id.* at 584–85.

124. One could quarrel with this premise. For instance, it could be argued (as the State in fact argued in *Craig*, 429 U.S. at 201) that young women and young men are not in fact similarly situated with respect to the privilege of alcohol consumption, because males between the ages of 18 and 21 are more likely to drink and drive than females in the same age group. It could also be argued that more intelligent students are more deserving of education than less intelligent students, and thus that students with IQs over 120 are not situated similarly to students with IQs less than 120. But Chemerinsky apparently assumes either that all of the subjects of his hypotheticals are in fact similarly situated to one another in all relevant respects, or that any differences in situation are too insignificant to justify the degree of unequal treatment the subjects receive.

bare fact that their treatment is different from that afforded Caucasian applicants, but because of the bare fact that their treatment is unjust: They are being denied a benefit merely because they are Chinese. The same point holds for the other victims of Chemerinsky's hypotheticals: the individual who is prosecuted solely because of his race; the eighteen-year-old male who is denied the privilege of buying beer; the Chicago resident whose voting power is diluted; the less-intelligent student who is deprived of an adequate education. In each of these cases, it is not the fact that the victim is being treated differently from someone else that bothers us; it is the fact that the victim is being inflicted with a burden, or denied a benefit, because of a characteristic we deem to be irrelevant to the question of entitlement to that burden or benefit (and the concomitant and equally troubling fact that the beneficiaries in each example also are being treated in accordance with an irrelevant characteristic). In other words, it is the injustice of the victim's treatment, not its "inequality," that we believe to be wrong. The existence of a formal inequality is only a necessary reflection of the existence of a substantive injustice.[125] Chemerinsky cannot salvage equality from substantive emptiness.[126]

B. *The Equality Heuristic*

Why have Professor Chemerinsky and others remained so insistent that equality has some distinct normative weight in the face of the inescapable conclusion that the concept, traditionally defined, is tautological? I believe it is because they have assumed, without quite articulating, a conception of equality that differs from its traditionally stated expression, the one attacked by Westen. The defenders of equality as a distinct substantive norm have, I think, sensed without saying that equality as we understand it is *more* than the principle that tells us simply that "likes must be treated alike" or that "identically situated people are entitled to identical treatment."

I believe that the statement of equality Professor Chemerinsky and others who have reacted strongly to Westen's work would adopt is something like this: *Identically situated people are entitled to be treated identically merely because they are identically situated.* Put another way, the "true" norm of equality—let us call it, for purposes of this discussion, the *equality heuristic*—holds that *the bare fact that a person has been treated a certain way is a reason in itself for treating another identically situated person the same way.*[127]

---

125. I elaborate on this important point in Section II.C, *infra*.

126. The cases posed by Professor D'Amato, *see* D'Amato, *supra* note 112, at 600–01, and Professor Greenawalt, *see* Greenawalt, *supra* note 108, at 1179–81, also are vulnerable to the foregoing critique.

127. Westen in fact describes a principle of equality that captures the supposed normative force of our equality heuristic, although Westen does not acknowledge the distinction between that principle and his

This equality heuristic rescues equality from tautology. It provides us with a substantive treatment rule to apply in any given case; it tells us not only that like persons are equally entitled to just treatment—a truism, something we already know—but also that the very fact of likeness is *an independent reason* for treating a person in a certain way. It tells us that regardless of the treatment context at issue, the bare fact that a person has been subjected to a certain treatment is an *independent* substantive reason to subject an identically situated person to the same treatment. That is, it tells us something we do not already know from the treatment context.

A return to our bar admissions example will help make this point. Suppose candidate *X* fails his bar exam but, through a clerical error, is given a passing score and admitted to practice law in our jurisdiction. Suppose candidate *Y* subsequently achieves the exact same score on her bar exam but is denied—correctly, under the applicable statute—admission to the bar. Does equality, traditionally conceived, give *Y* an argument that she should be admitted to practice as *X* has been? No, it does not. The traditional conception of equality tells us only that "identically situated people are entitled to identical treatment." We know that *X* and *Y* are "identically situated" according to the relevant standard—both achieved the same failing score on their bar exams—and therefore we know that *X* and *Y* are entitled to the appropriate "identical treatment"—refusal of admission to practice law. We also know this rule was broken in the case of *X*: He was admitted to practice despite achieving an inadequate score on his exam. But our traditional expression of equality does not give us any reason for breaking the rule in the case of *Y* as well. It tells us only that *X* and *Y* are identically entitled to the *correct* treatment—*not* that *X* and *Y* are identically entitled to the *incorrect* treatment.

How about our "new" equality heuristic; does it provide *Y* with an argument that she should be (incorrectly) admitted to the bar as *X* was? It does. It tells us not only that *X* and *Y* are both entitled to the same *correct* treatment, but also that the fact of *X*'s treatment in a particular way (correctly

---

"formal principle of equality" (our "traditional definition"). Westen gives the following example of what he calls a "comparative rule":

> If *any* person is treated with a certain concern and respect, every *other* person shall be entitled to the same concern and respect.

WESTEN, SPEAKING OF EQUALITY, *supra* note 106, at 74. Westen's comparative rule is in fact a particular conception of our equality heuristic. It asserts that the bare fact of one person's treatment in a certain way ("with a certain concern and respect") is itself a substantive reason to treat other people (that is, identically situated people—although Westen's example does not explicitly state this) in the same way ("with the same concern and respect").

Joseph Raz also offers a version of our equality heuristic as "[o]ne important kind of egalitarian principle[]":

> All Fs who do not have G have a right to G if some Fs have G.

RAZ, *supra* note 108, at 225. Raz's "egalitarian principle" is simply another way of stating our equality heuristic. It asserts that the bare fact of a person's (an F's) treatment in a certain way (her receipt of G) is itself a substantive reason to treat identically situated persons (other Fs) in the same way. Raz, however, does not attempt to debunk the idea that this egalitarian principle has some substantive normative content.

or incorrectly) is *itself* a substantive reason to treat *Y* in the *same* way. In other words, it gives us a reason to treat *Y* incorrectly; that reason is that *X*, an identically situated person, has been treated incorrectly.

It is this revised definition of equality—identical treatment of identically situated people *merely because they are identically situated*—that I will adopt for the remainder of my discussion in this Article. Defined thus, equality is not a tautological principle; it is a principle that claims, without logical incoherence, to be a distinct source of prescriptive norms.

If true equality is not tautological, then it might be said to require courts to decide cases consistently. It is easy to see why this is so. Suppose that instead of an applicant for admission to the bar, person *X* is a plaintiff in a lawsuit in our jurisdiction advocating a new theory of tort liability. Suppose further that despite the dictates of justice—which, accurately assessed and weighed, would mandate a decision against Plaintiff *X* on the law—Plaintiff *X* is (wrongly) allowed to proceed with her claim and eventually wins a judgment on the merits. Suppose then that a subsequent plaintiff, Plaintiff *Y*, is situated identically to Plaintiff *X* in all relevant respects. Plaintiff *Y* files his own lawsuit on the same theory used successfully (although wrongly) by Plaintiff *X*. Does our revised equality heuristic give Plaintiff *Y* a substantive argument that he should be allowed to proceed with his suit just as Plaintiff *X* was allowed to proceed with hers? Yes, it does; the equality heuristic provides a reason why the court in Plaintiff *Y*'s case should reach an incorrect result: the fact that the court in Plaintiff *X*'s (identical) case reached an incorrect result. On this theory, equality provides a substantive reason for adjudicative consistency—a reason that may be opposed, in any given case, to the demands of justice (defined, as I have defined it,[128] to include no element of equality).[129]

Equality, then, may logically be said to necessitate adjudicative consistency. It may logically be claimed to stand in certain cases as a counterweight to nonegalitarian justice—to demand an unjust result. I believe this claim is unfounded, and I devote the next section of this part to demonstrating its lack of foundation.

---

128. *See supra* Section I.C.

129. Our revised definition of equality undercuts the argument that has been made most often against theories of adjudicative consistency as equality: that equality cannot really require adjudicative consistency because it cannot provide a reason for deciding a subsequent case incorrectly. This argument has been advanced forcefully by John Coons. *See* Coons, *supra* note 24, at 102. Coons points out that although equality, as traditionally defined, condemns an incorrect result in a given case, it provides no reason for reaching a similarly incorrect result in a subsequent identical case, and thus it provides no independent reason for adjudicative consistency. *Id.* But equality defined according to our equality heuristic *does* provide a reason for reaching an incorrect result in a subsequent case: the fact that an incorrect result was reached in a prior identical case.

C. *The Failure of Equality as a Substantive Norm in Adjudication*

I believe equality, even defined to escape tautology, cannot coherently serve as a distinct substantive norm, inside or outside of the adjudicative context. Substantiating that claim requires an analysis that is very deep, very broad, and very much beyond the scope of the current Article. I will be concerned instead in this section with establishing a more limited proposition: that equality can never operate independently to require adherence to precedent in adjudication. In adjudication, we may demand consistency; but when we do so it is for entirely consequentialist reasons of justice, and not at all for reasons of equality. We know this not only because considerations of nonegalitarian justice operate perfectly satisfactorily to reach the results we may purport to desire in adjudication, but also because equality, if applied as a substantive norm in such a context, unavoidably produces both internal incoherence and injustice.

We have seen how equality, if treated as a distinct substantive norm, might be said to require at least partial adherence to precedent in deciding cases. Plaintiff *X*, remember, has brought a complaint relying on a novel theory of tort liability. The judge in Case *X* unjustly has allowed Plaintiff *X*'s claim to proceed. We know that if the judge's decision to allow the claim was unjust, it must (by our formal definition of nonegalitarian justice) have been based in part either upon consideration of one or more irrelevant criteria, upon failure to consider one or more relevant criteria, upon an inaccurate weighing of all the relevant criteria, or upon some combination of these errors. Let us suppose that the erroneous decision of the judge in Case *X* was in fact based on an irrelevant criterion (actually, two irrelevant criteria): Let us imagine that the judge, a male sexist, decided to allow the plaintiff's claim to proceed because he thought the plaintiff to be an attractive woman. Plaintiff *X* has been treated unjustly (although beneficially) based in part upon her gender and her perceived physical attractiveness, two criteria that cannot be relevant to whether she should be allowed to state her novel tort claim (assuming, of course, that it is not a claim arising from sexual harassment or something similar).

Now Plaintiff *Y*, identically situated in every relevant way to Plaintiff *X*, files his own lawsuit based on the same tort theory successfully asserted by Plaintiff *X*. The egalitarian would hold that the bare fact of the decision in Case *X*—unjust though it was—amounts to an independent substantive reason to reach the same decision in Case *Y*. But suppose the judge in Case *Y* nonetheless rules against the plaintiff and dismisses the claim. Applying only our nonegalitarian concept of justice to this sequence of cases, Plaintiff *X* has been treated unjustly (but to her benefit) and Plaintiff *Y* has been treated justly. But the advocate of equality as a substantive norm will point out that we are quite likely to believe nonetheless that Plaintiff *Y* somehow has been treated

wrongly. Since nonegalitarian justice cannot account for this wrongness, the advocate of equality will contend, that wrongness must arise from the operation of some other norm. It must arise, that is, from equality—from our sense that the bare fact of difference between Plaintiff *X*'s and Plaintiff *Y*'s treatments, in itself, is an inherent, deontological wrong. There is no other way to explain our reaction.

This argument is flawed, however, for several reasons. The first category of reasons challenges the conclusion of the advocate of equality: that our belief that Plaintiff *Y* somehow has been treated wrongly can be explained only by equality as a substantive norm. The second category of reasons challenges the egalitarian's assumption that equality can exist coherently as a substantive norm at all.

1. *The Ontology of the "Wrongness" of Plaintiff Y's Treatment*

The advocate of equality concludes that our negative reaction (assuming, of course, that we have one) to Plaintiff *Y*'s treatment can arise only from a concern for equality—from our belief that the difference in treatment itself is a substantive wrong. But it may be that our sense of wrongness, if it exists, in fact stems not from a concern for equality, but from concerns of nonegalitarian justice in the broad sense. It may be, that is, that we believe that the fact of difference between Plaintiff *X*'s and Plaintiff *Y*'s treatments is likely to have *consequences* that disserve justice. We may believe (or sense) that the public perception of inconsistent decisions might undermine confidence in the courts, or reduce the ability of people to plan their affairs, or bring about some other socially undesirable result. If these sorts of concern are at the root of our dissatisfaction with Plaintiff *Y*'s treatment, however, then we are not really concerned with the bare fact of the *difference* between Plaintiff *X*'s and Plaintiff *Y*'s treatment—a concern of equality. We are concerned instead with the *effects* of that difference, or rather, of the general perception of that difference. We are concerned, that is, that in dismissing Plaintiff *Y*'s tort claim, the court in Case *Y* has afforded inadequate weight to certain criteria of social welfare—confidence in the rule of law, for instance—that favor allowing the claim to stand. We are concerned not with equality, but with justice.[130]

In a similar vein, it might be that despite the conclusion of the advocate of equality, it is not in fact the treatment of Plaintiff *Y* that bothers us, but the

130. Note that if these sorts of consideration are at the root of our belief that Plaintiff *Y* has been treated wrongly, then we believe that there are nonegalitarian criteria of justice that apply to Plaintiff *Y* merely because of the treatment already given Plaintiff *X*. We believe, in other words, that the fact of Plaintiff *X*'s unjust treatment has, for entirely nonegalitarian reasons, altered Plaintiff *Y*'s situation so that it is no longer identical to Plaintiff *X*'s. Allowing Plaintiff *Y* to state his claim then becomes *just*, even though allowing Plaintiff *X* to state an identical claim was unjust, because Plaintiff *Y* has become differently situated than Plaintiff *X*.

treatment of Plaintiff *X*. After all, Plaintiff *Y*'s treatment, by creating a difference in the treatments of two identically situated people, also has revealed the fact that one of those people necessarily has been treated unjustly. (They cannot both have been treated justly, remember, because the same set of relevant treatment criteria applies to each of them.) Thus the displeasure we experience when Plaintiff *Y* is treated differently than Plaintiff *X* stems not from the bare fact of the difference in treatments—a concern, again, of equality—but rather from the fact (and our perception of the fact) that someone, either Plaintiff *X* or Plaintiff *Y*, necessarily has been treated unjustly. Indeed, we might understandably misinterpret our perception of wrongness as a perception that Plaintiff *Y*, rather than Plaintiff *X*, has been treated wrongly since the result of Plaintiff *Y*'s treatment (the dismissal of his claim) is comparatively *worse* than the result of Plaintiff *X*'s treatment (the allowance of her claim). We may be conditioned to believe that favorable treatments are more likely to be "just" treatments than are unfavorable ones.

The force of these objections to the egalitarian position should not be underestimated. The objections demonstrate that any intuitive distaste we may feel upon discovering that Plaintiff *Y* has been treated differently than Plaintiff *X* can be explained quite convincingly in terms solely of nonegalitarian justice. The burden would seem to fall on advocates of equality to illustrate how equality operates separately and independently of justice in these conditions. Where our sense of justice explains so well our belief that Plaintiff *Y* has been treated "wrongly," there is reason to doubt that any sense of equality is operating independently to produce, redundantly, the same belief.

2. *Equality vs. Equality, Equality vs. Justice*

But the persistent advocate of equality will point out that, while the above arguments question the potency of equality in adjudication and perhaps even relegate equality to a position of redundancy with respect to justice, they do not *disprove* the existence of equality as a substantive norm that demands some inherent respect for precedent. The fact that we find consequentialist difficulties with the fact of difference in the treatments of Plaintiff *X* and Plaintiff *Y* does not mean there are not also deontological difficulties with that fact of difference, and the fact that we know either Plaintiff *X* or Plaintiff *Y* has been treated unjustly does not mean we do not also believe the other has been treated "wrongly" in an egalitarian sense. The advocate of equality will contend, quite rightly, that we have not attacked the validity of equality itself as a deontological principle; we have only explained in terms of justice the effects equality might be thought to produce.

There are, however, good reasons to believe that equality, besides being redundant of justice and unhelpful as an explanatory principle, also is incoherent as a substantive norm when applied to adjudication. The first of

these reasons is that equality, if applied as a substantive norm, contradicts itself; the second is that such a "substantive" equality contradicts justice (regardless of the particular substantive conception of justice one may hold).

Equality contradicts itself because it is not possible to treat certain people equally in one way without treating other people unequally in another way. The sequential results of Cases *X* and *Y* illustrate this point. Suppose that the judge presented with Plaintiff *Y*'s claim believes that equality has substantive normative force. She considers the "substantive" demands of equality, finds them to be controlling, and allows Plaintiff *Y*'s claim to proceed just as Plaintiff *X*'s claim has (unjustly) been allowed to proceed. Now Plaintiff *Y* has been treated equally with respect to Plaintiff *X*. But Plaintiff *Y* has at the same time been treated *unequally* with respect to a different group of persons: everyone who, according to a nonegalitarian notion of justice, has ever been treated *justly*.[131] Every person in the world is situated identically with respect to his or her entitlement to be treated justly. But to treat Plaintiff *Y* equally with respect to Plaintiff *X* is to treat Plaintiff *Y* *unjustly* (according to nonegalitarian justice); and to treat Plaintiff *Y* unjustly is to treat him *unequally* with respect to everyone who ever has been (or ever will be) treated justly. Thus equality cannot be applied in the only case in which it can ever matter—the case in which an identically situated person already has been treated unjustly—without rejecting its application with respect to an entirely different category of cases. Equality contradicts itself.

Equality also contradicts nonegalitarian justice. It does so because it requires that persons be treated in accordance with irrelevant criteria (or in accordance with relevant criteria incorrectly weighed). This is true in two related ways. First, equality requires that random chance be considered as a criterion for the treatment of people. Equality is sequentially arbitrary: It makes the rightness or wrongness of a person's treatment contingent upon the sequence in which that person is treated with respect to other identically situated people. If Plaintiff *Y* is treated differently than identically situated Plaintiff *X*, equality requires us to appraise the treatment of Plaintiff *Y* as in some sense *wrong* simply because it does not accord with the prior treatment of Plaintiff *X*.[132] But if Plaintiff *Y* had been first to the courthouse door—if Plaintiff *X*'s case had not yet been decided—then the exact same treatment of Plaintiff *Y* would be entirely *right* in the egalitarian view.

The fact that Plaintiff *X*'s case was decided before Plaintiff *Y*'s, however, usually will be a matter purely of happenstance—a fortuity that cannot have any relevance to the question of what treatment Plaintiff *X* or Plaintiff *Y* is

131. *See* Alexander, *supra* note 5, at 10 ("[T]reating someone equally with another who was treated immorally is to deny that person equality with those who have been treated morally correctly.").

132. Of course, the advocate of equality need not believe that a decision to treat Plaintiff *Y* differently from Plaintiff *X* ultimately is a "wrong" decision; she may believe that reasons of nonegalitarian justice outweigh reasons of equality to require such a result.

morally entitled to receive.[133] Chance cannot be a relevant treatment criterion.[134] But obeisance to equality requires us to consider the happenstance of sequence as a relevant factor in the treatment of both Plaintiff *X* and Plaintiff *Y*; it conditions Plaintiff *Y*'s treatment on the fact that Plaintiff *X* already has received a certain treatment, and thereby incorporates the random fact of the sequence of their treatments as a criterion that must be considered in determining how to treat Plaintiff *Y*. Equality, that is, requires application of an irrelevant criterion—chance—in determining how someone should be treated.[135] As such, it necessarily violates justice.

---

133. Here I am bending the rule I established in the Introduction to this Article: that my definition of justice would not assume the relevance or irrelevance of any particular criterion for treatment (other than egalitarian and integrity-based criteria). I am assuming here that chance is, in most instances, an irrelevant criterion for treatment. *But see infra* note 234 (acknowledging that chance may justly be used to distribute scarce resources, e.g., in lotteries). I believe most people will accept this presumption as I explain it in the text and in footnotes 134 and 135. However, someone who believes that chance *is* relevant in determining how people are morally entitled to be treated (outside the special case of scarce resources) will not accept my conclusion here that equality necessarily contradicts nonegalitarian justice by requiring treatment according to chance. (But such a person will have no argument with my conclusion that equality necessarily offends justice in a second way as well. *See infra* text accompanying note 136.)

134. This statement should not be misunderstood. Chance can *give rise* to relevant treatment criteria. For instance, the fact that a person, "by chance," has been struck by lightning and is in need of emergency medical attention unquestionably gives rise to relevant criteria for her treatment, e.g., that people in need of emergency medical attention should get it if possible. These kinds of random events have real, causal, physical effects on people, effects that bring into operation criteria relevant to how such people should be treated.

In contrast, the accident of the sequence in which Plaintiffs *X* and *Y* have been treated has no real, causal, physical effect on either Plaintiff *X* or Plaintiff *Y*. Its effect is only upon the *logical relationship* between Plaintiff *X* and Plaintiff *Y*; it produces the merely logical, not causal, fact that Plaintiff *Y* has been treated subsequently to Plaintiff *X*. Unlike a physical event, a logical relationship cannot produce effects in the real world (although someone's *perception* of a logical relationship can, as a physical event, produce real-world effects). As such, the chance fact that Plaintiff *X*'s case already has been decided, because it itself does not affect Plaintiff *Y* in any real, physical way, cannot give rise to relevant criteria in determining how Plaintiff Y should be treated.

135. In the language of social choice theory, applying equality as a substantive norm in adjudication necessarily results in outcomes that are "path dependent"—that is, decisions whose content is caused in part by the content of prior decisions and the order in which those prior decisions were rendered. *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (explaining, inter alia, how stare decisis produces path dependency and how doctrine of standing ameliorates potentially unjust effects of path dependency). An egalitarian might contend (a) that path dependency almost always entails some degree of injustice because the order in which otherwise identical cases are decided almost always will be determined, at least in part, by the irrelevant criterion of chance, and (b) that path dependency results even when stare decisis is applied for consequentialist reasons—stability, judicial legitimacy, or what have you. On this view, consistency as equality is no more offensive to justice than consequentialist consistency.

But path dependency is not inherently unjust when caused by consequentialist considerations because, unlike consistency as equality, consequentialist consistency does not treat the mere (random) fact of the sequence of decisions *itself* as a reason for deciding a subsequent case a certain way. Consequentialist consistency recognizes that the chance fact of a prior decision may, like a bolt of lightning, serve as a legitimate foundation of relevant criteria because, like a bolt of lightning, the fact of a prior decision may have causal, physical effects in the real world (reliance, perceptions about the rule of law, etc.) for which one must account. But consistency as equality purports to ground path dependency in the logical relationship of the sequence of decisions, not in the causal relationship between a prior decision and the real-world effects of disregarding that decision. *See supra* note 134. In other words, where consistency as equality requires that people be treated according to the causally irrelevant fact of sequence of decisions, consequentialist consistency requires that people be treated according to causally relevant considerations arising from the existence of a prior decision.

Equality inevitably contradicts nonegalitarian justice in a second way as well: It necessitates the treatment of a person according to the same irrelevant criterion (or according to the same incorrect balancing of relevant criteria) that has been applied in the unjust treatment of an identically situated person. Recall that Plaintiff *X* unjustly was allowed to state her claim because the judge relied upon irrelevant criteria in deciding the motion to dismiss: the fact that she was a woman and the fact that the judge perceived her to be physically attractive. Advocates of equality contend that in treating identically situated Plaintiff *Y*, the judge in Case *Y* now must consider the bare fact of the decision in Case *X* as a relevant criterion in determining how to rule on Plaintiff *Y*'s claim. They assert, in other words, that the judge's treatment of Plaintiff *Y* must in part be *caused* by the previous judge's treatment of Plaintiff *X*—that *but for* the (erroneous) treatment of Plaintiff *X*, the "right" treatment of Plaintiff *Y* would be different.[136] Thus equality dictates that Plaintiff *Y*'s treatment be caused in part by Plaintiff *X*'s treatment. And, since we know that Plaintiff *X*'s treatment has itself been caused in part by the Case *X* judge's application of two irrelevant treatment criteria to Plaintiff *X*, we also know that Plaintiff *Y*'s treatment has been caused in part by the Case *X* judge's application of those irrelevant treatment criteria to Plaintiff *X*. We know, that is, that Plaintiff *Y* quite literally has been treated in accordance with the same irrelevant criteria—the gender and physical appearance of Plaintiff *X*—that were responsible for Plaintiff *X*'s treatment. If equality, then, has been assumed to be a substantive adjudicative norm and has been obeyed as such, both Plaintiff *X* and Plaintiff *Y* have been treated according to the same irrelevant criteria. *Both Plaintiff* X *and Plaintiff* Y *have been treated unjustly.*

Equality as a substantive norm therefore necessarily requires that injustice be done in every case in which it is said to apply. Equality demands that people be treated in accordance with the irrelevant fact of the sequence of their treatments. It also dictates that people be treated in accordance with whatever erroneous assessment of criteria caused other identically situated people to be treated unjustly. Equality thus requires, without exception, that people be treated according to irrelevant criteria—that people be treated unjustly.

If equality always requires injustice when applied in adjudication, then one will have difficulty adhering to a normative view of adjudication that includes

---

Consequentialist theories of adjudicative consistency also differ from consistency as equality in another crucial respect: They demand that some reasons of justice, aside from the mere sameness between people, be offered to justify following unjust precedent. Even if path dependency is seen as inherently unjust to some degree, consequentialist consistency requires that good reasons exist for treating someone in a path-dependent way; it requires that justice *on the whole* support path dependency. Consistency as equality makes no such demand.

136. Note that if equality is obeyed, the treatment given Plaintiff *X* is a cause of the treatment given Plaintiff *Y* even if the judge ruling on Plaintiff *Y*'s claim believes that other criteria of justice outweigh equality in that case and therefore dismisses it. As long as the judge, in treating Plaintiff *Y*, considers the goal of consistency with the treatment of Plaintiff X among the criteria she applies in deciding Case *Y*, Plaintiff *Y* is being "treated" based in part on that criterion.

both equality and nonegalitarian justice (that is, any nonegalitarian substantive norm or combination of norms). Under such a view, equality will in every case contradict nonegalitarian justice to some degree; it will never be possible to achieve both complete justice and complete equality when an unjustly decided prior case exists. In such instances, one will face a clash of absolutes—a contradiction of first principles—and one must make a choice between egalitarianism and a concept of justice that pays no homage to equality as a distinct normative principle. If one chooses the former, one sacrifices all standards of morality except comparative ones; one concedes, in the words of Joseph Raz, that "the happiness of a person does not matter except if there are other happy people"[137] and that there is no reason to avoid harming a person "except on the ground that there are others who are unharmed."[138] In short, one's idea of morality collapses into something that most would recognize as absurdity.

Of course, the egalitarian need not sacrifice every nonegalitarian norm in the name of equality. The egalitarian could view the principle of equality as simply another goal that must be balanced with and against principles of nonegalitarian justice in deciding any given case; sometimes equality will win in such an assessment, and sometimes it will lose. But even if equality is not given preemptive value in every case, we have special reason to suspect its validity as a substantive norm. Many nonegalitarian values that would amount to relevant criteria under this Article's expansive definition of justice might, in a given moral system, come into conflict in a particular case. For instance, someone might believe both (a) that people, as a rule, should not be punished in a degree exceeding the degree of their culpability, and (b) that the interests of the individual may be sacrificed to promote the welfare of society. These two moral beliefs might clash in certain cases—as, for instance, when excessive punishment would serve the social goal of deterrence. In such a case, the contradictory principles could be weighed against each other to produce the most just (or the least unjust) decision. But equality contradicts justice in *every* case in which equality can be claimed to have any operation at all—in other words, in cases where an identically situated person already has been treated unjustly. As such, a commitment to equality as a substantive norm, if coupled with a commitment to any nonegalitarian notion of justice, is equivalent to a concession that one's moral system can *never* be fully coherent. There seems good reason to question the validity of such an inherently incoherent morality.

Equality's position becomes even more tenuous when we recall our conclusion that every intuitive reaction to adjudicative inconsistency that might be attributed to equality can be explained as well, or better, by nonegalitarian justice. Our distaste for adjudicative inconsistency (if we have one) can be

137. RAZ, *supra* note 108, at 235.
138. *Id.*

explained by appreciating the unjust effects we might believe such inconsistency will produce—contempt for the judiciary, or inability to plan private conduct, or frustration of expectations—or by realizing that inconsistency between two decisions always signals the presence of injustice in at least one of them. Adjudicative consistency, that is, can be justified by conceptions of nonegalitarian justice that are not inherently and universally self-contradictory. But using equality to justify consistency implies a necessary conflict with justice—and, we will recall, with equality itself. Equality thus seems indefensible when compared with the alternatives.

The fact that "substantive" equality necessitates injustice also means that the wrongness of someone's treatment cannot be vitiated merely by eliminating the fact of its inequality with respect to the treatment of another. If the court deciding whether to allow Plaintiff *Y*'s claim bows to equality and conforms its decision to the unjust decision in Case *X*, the court eradicates only the inequality between the two decisions; the court does not extirpate the *injustice* in either person's treatment. Each person's treatment remains contingent on the fortuity of its sequence with respect to the other person's treatment, what I have assumed to be an irrelevant criterion. Moreover, each person's treatment remains the result of an application of irrelevant treatment criteria. And recall again that treating Plaintiff *Y* unjustly for the sake of equality with Plaintiff *X* paradoxically results in treating Plaintiff *Y* *unequally* with respect to every person who has ever been treated justly. Despite the elimination of the particular inequality, then, the wrongness of Plaintiff *Y*'s treatment remains. Application of "substantive" equality, in fact, has done more harm than good.

In adjudication, equality therefore fails as a substantive norm. The ills it is said to address can be addressed as well by conceptions of nonegalitarian justice. And the cure it is said to provide is worse than the disease, for it produces injustice even as it eliminates "inequality."

D. *A Brief Summation*

When equality is afforded its fullest definition as an allegedly substantive norm, it is not tautological. It is a principle, rather, that purports to assign some inherent normative value to the bare fact of difference or sameness in the treatments of similarly situated people. "Substantive" equality purports to condemn the differential treatment of such people, and to laud their similar treatment, without regard to the consequences of the difference or similarity.

If applied to adjudication, "substantive" equality would demand adherence to precedent, in some degree at least. Different results in similar cases would mean differential treatment of similarly situated parties, always an evil to the egalitarian. But applying equality in such a way suffers from two dilemmas. At best, it is entirely redundant, and therefore unnecessary; nonegalitarian justice does all our work for us in adjudication, explaining satisfactorily why

we might believe inconsistent decisions to be a "wrong." Worse, equality is incoherent. Not only does its application necessitate the very evil it purports to address—unequal treatment; its application also invariably results in injustice.

Equality thus has no place as a justification of stare decisis. But equality is not the only deontological source that has been offered for that doctrine. Ronald Dworkin has claimed that adjudicative consistency is necessitated by another, distinct norm that he calls "integrity." Part III is an exploration of this claim.

III. THE FAILURE OF CONSISTENCY AS INTEGRITY

Ronald Dworkin's important normative and descriptive theories about legal decisionmaking are complex, and they have evolved considerably over time. Volumes have been written about them and in response to them.[139] No single article can hope to (or should want to) capture and respond to all their subtleties. As they relate to consistency in legal decisionmaking, however, Dworkin's views can, I think, readily be understood.

In this part, I begin by describing generally Dworkin's theory of "law as integrity," which prescribes a certain kind of adherence to precedent that Dworkin believes is necessary for a deontologically normative reason. Dworkin calls that reason "integrity," an independent moral virtue that, he believes, requires government, through law, to "speak with one voice." I recount Dworkin's case for the existence of integrity, which he makes by analyzing our reactions to what he calls "checkerboard statutes." Finally, I undertake a critique of Dworkin's "integrity" as a distinct substantive norm and conclude that integrity is not a distinct norm at all; it is merely an aspect of justice as I have defined it.

A. *The Evolution of Law as Integrity*

The model of legal decisionmaking that Dworkin offers as the best description of what legal decisionmakers actually do (and, more important, what we actually want legal decisionmakers to do) in the Anglo-American tradition he calls "law as integrity."[140] As applied to adjudication, law as integrity requires a judge to view the entire body of existing legal decisions

139. For a small sample, see STEPHEN GUEST, RONALD DWORKIN (1992); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 229–64 (1978); Symposium, *Jurisprudence*, 11 GA. L. REV. 969 (1977); George C. Christie, *Dworkin's 'Empire,'* 1987 DUKE L.J. 157 (book review); Barbara Baum Levenbook, *The Sustained Dworkin*, 53 U. CHI. L. REV. 1108 (1986) (book review); Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987) (book review); Philip Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166 (1987) (book review).

140. LAW'S EMPIRE, *supra* note 33, at 164–67, 176–275.

within a jurisdiction—its statutes, its case law, and presumably its administrative rules and decisions—as a whole.[141] The judge (Dworkin calls his superhuman judge "Hercules"[142]) must interpret this entire body of law in its most coherent light;[143] the judge then must extract from this coherent or nearly coherent system the principles it produces that apply to the case the judge is deciding.[144] As Dworkin himself describes the judge's task, the judge must, "so far as this is possible, . . . treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, . . . interpret these standards to find implicit standards between and beneath the explicit ones."[145] The judge then follows these interpreted "implicit standards" in deciding a "hard" case.[146]

Dworkin's "law as integrity" assigns a vital role to judicial precedent, but it does not require courts to "adhere to" or "follow" precedent in the sense in which those concepts commonly are understood. Under law as integrity, judicial precedent is among the data upon which a judge must rely in interpreting "our present system of public standards"[147] and extracting the principles she will apply in a difficult case. Previous judicial decisions may have articulated some of the principles the judge is attempting to discover in holistically interpreting the legal system. To the extent that the principles discovered by the judge and applicable to the case before her have been articulated by prior decisions, the judge, who is bound to follow those principles, must "adhere" to those prior decisions.[148] The fact of the existence of prior judicial decisions relevant to a certain issue thus has independent normative weight in law as integrity, although the exact weight this fact will bear in a particular case depends on the extent to which the

141. *Id.* at 217–75. My explanation of law as integrity here is a rough and truncated one; it ignores many of the subtleties of Dworkin's views. For purposes of this Article, though, I think my description is both accurate and sufficient.

142. *Id.* at 239 & *passim*; *see also* TAKING RIGHTS SERIOUSLY, *supra* note 33, at 105–30.

143. LAW'S EMPIRE, *supra* note 33, at 217–27.

144. *Id.* The case before the judge might be either a common law case—one not expressly governed by statute—or a case involving statutory interpretation and application. Law as integrity would require the judge in either sort of case to interpret the law (whether case law, statutory law, or prior judicial interpretation of statutory law) as coherently as possible and extract and apply the underlying principles gleaned from this process of interpretation. *See id.* at 276–312 (applying law as integrity to common law adjudication); *id.* at 313–54 (applying law as integrity to statutory adjudication). The explication of law as integrity in this section, and my critique of it in the ensuing sections, thus apply to law as integrity as it might be employed both in common law and in statutory adjudication.

145. *Id.* at 217.

146. TAKING RIGHTS SERIOUSLY, *supra* note 33, at 81–130; *see also* LAW'S EMPIRE, *supra* note 33, at 216–24.

147. LAW'S EMPIRE, *supra* note 33, at 217–18.

148. Whether Dworkin actually believes courts "articulate" or "discover" legal principles or, rather, somehow "create" or "supplement" legal principles is, I think, unclear (although Dworkin probably would deny that courts "create" or "supplement" law within his theory). I discuss this ambiguity, and its implications for law as integrity, in connection with my critique of Dworkin's application of "integrity" to judicial decisionmaking below. *See infra* notes 206–07 and accompanying text.

principles applicable to the case have been articulated by those prior judicial decisions (rather than, for instance, by statutes enacted by the legislature).[149]

Dworkin's theory of law as integrity is animated by his belief in a distinct substantive norm—"integrity"—that applies to legal (and other types of) decisionmaking, a norm that requires decisionmakers to be consistent in the principles upon which they base decisions. Dworkin's belief in "integrity" can, I think, best be understood as a descendant of his prior belief in what he called "the doctrine of political responsibility,"[150] a concept similarly concerned with consistency in legal decisionmaking but rooted in the more traditionally recognized norm of equality. As articulated in *Hard Cases*, a germinal essay originally published in the *Harvard Law Review*[151] and reprinted in his 1978 collection of essays, *Taking Rights Seriously*, Dworkin's notion of "political responsibility" condemned

> the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions thought right. . . .
>
> The doctrine demands, we might say, articulate consistency. . . . [T]he doctrine insists on distributional consistency from one case to the next, because it does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question.[152]

For the "old" Dworkin of *Hard Cases,* the concept of "political responsibility" thus required consistency in decisionmaking because the alternative, decisionmaking inconsistency, would in turn result in "distributional inconsistency," an unequal distribution of benefits from case to case. Consistency in decisionmaking was a means rather than an end under the doctrine of political responsibility; it was necessary not for its own sake, but for its effects—equal distribution of benefits and burdens.

Dworkin's general doctrine of political responsibility, when applied specifically to adjudication, demanded that a judge deciding a case give a previous judicial decision[153] what Dworkin called "gravitational force,"[154] an influence generated by the principle of the previous case and entitled to independent normative weight in the subsequent court's decisionmaking process. Gravitational force too was grounded in the necessity of equality, not

---

149. The exact weight prior judicial decisions will have in a given case also depends on whether, and to what extent, Dworkin's "principle of integrity" is outweighed in that case by other normative principles—principles of justice, for instance. Dworkin acknowledges that cases may exist where integrity is outweighed by justice. *See* LAW'S EMPIRE, *supra* note 33, at 218–19.

150. TAKING RIGHTS SERIOUSLY, *supra* note 33, at 87–88.

151. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

152. TAKING RIGHTS SERIOUSLY, *supra* note 33, at 87–88.

153. That is, a previous decision based on "principle" rather than on "policy"—a distinction that is very important to Dworkin (*see, e.g., id.* at 82–86, 294–327) but not important for our purposes here.

154. *Id.* at 111–15.

in strategic means of achieving justice; it was demanded, "not [by] the wisdom of enforcing enactments"—a strategic concern—"but [by] the fairness of treating like cases alike":[155]

> A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future. . . . We may test the weight of that reason . . . by asking the . . . question whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second.[156]

The "government" with whose "intervention" Dworkin was concerned in this passage was government acting through the courts and the common law. The evil that respect for the "gravitational force" of precedents served to prevent was, for Dworkin, the evil of "unfairness," of "treating like cases unalike"—the evil of inequality.

For the earlier Dworkin, then, adjudicative consistency was a simple function of the (supposed) norm of equality. But the theory of "law as integrity," first articulated by Dworkin in his 1986 book, *Law's Empire*, is different, and more subtle, in its implications for consistency. The version of adjudicative consistency advocated in *Law's Empire* is necessitated, Dworkin claims, not by equality, but by a distinct substantive norm, "integrity," which is a sort of "kissing cousin" to equality.[157] Integrity is that norm, Dworkin asserts, that "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some."[158]

This description of integrity appears on its surface to contain elements of equality; it purports to express a concern for how citizens are treated with respect to one another, for whether government "extend[s] to everyone" the same treatment it extends to "some."[159] But a full reading of *Law's Empire*, I think, provides another, more complex picture of integrity. While the "old" Dworkin, in writing of "political responsibility," primarily was concerned with the *effects* of legal decisionmaking (Were similarly situated people being treated alike? Were benefits being distributed "fairly"?), the "new" Dworkin,

---

155. *Id.* at 113.

156. *Id.*

157. Larry Alexander has described Dworkin's "integrity" as "a particular conception of the value of equality, one that requires that everyone be treated by government in accordance with the same set of principles." Alexander, *supra* note 5, at 39. I disagree with Professor Alexander's assessment of integrity (although it may be merely a semantic disagreement); as I discuss below (*see infra* notes 173–75 and accompanying text), I think Dworkin has, or thinks he has, something other than equality in mind when he speaks of integrity.

158. LAW'S EMPIRE, *supra* note 33, at 165.

159. *Id.*

writing of law as integrity, is concerned mostly with the *decisions themselves*:[160] Are they being arrived at coherently? Is government picking its principles and sticking with them, or is it vacillating between morally inconsistent principles? Putting aside the effects of government's actions, are the actions themselves morally consonant?

Dworkin's earlier idea of consistency as equality and his more recent notion of consistency as integrity both entail some form of adherence to precedent as a means of avoiding the evils to which those principles are addressed. For the old Dworkin, following precedent ensured, by definition, that similarly situated litigants would be treated alike—the essence of equality.[161] For the new Dworkin, following precedent (in the more subtle and complex sense in which he now advocates that practice[162]) ensures that government, through its courts, will "speak with one voice"[163] in applying principles to its citizens—the essence of "integrity."

B. *Checkerboards and Invisible Planets*

How does the "new" Dworkin go about convincing us that integrity does in fact exist as a distinct substantive norm? He attempts this demonstration by invoking the (mostly hypothetical) example of what he calls "checkerboard" statutes.[164] Suppose that the American public is divided equally on the question of abortion: Half the population believes that, as a matter of principle, abortion always is wrong, while the other half believes, also as a matter of principle, that women always should be given unfettered access to abortions.[165] Recognizing this division of opinion, Congress passes a statute providing that pregnant women who were born in even-numbered years never shall be entitled to abortions, while pregnant women who were born in odd-numbered years always shall be entitled to abortions. The statute reflects precisely our hypothetically even division of popular opinion on the issue of abortion, for it enacts a regime in which half the potential abortions are legal while half are not. This is an example of Dworkin's "checkerboard" statute—it

160. This does not mean that the "new" Dworkin is unconcerned with the effects of government decisions. It means only that much of the work of ensuring "fair" government decisions that formerly was performed in his theory by his concept of consistency in decisionmaking now is performed by Dworkin's concept of substantive justice. *See, e.g.*, *id.* at 177.

161. *See* TAKING RIGHTS SERIOUSLY, *supra* note 33, at 113–15.

162. *See supra* notes 140–49, 153–57 and accompanying text.

163. LAW'S EMPIRE, *supra* note 33, at 165.

164. *Id.* at 178–79. Dworkin does not contend that many actual examples of checkerboard statutes exist, although he believes that the "three-fifths" representation compromise with respect to slaves expressed in the Constitution is one. *Id.* at 184; *see* U.S. CONST. art. I, § 2, cl. 3. His contention that checkerboard statutes offend our notion of integrity, of course, is not threatened by the fact that we cannot identify many such statutes in the real world; quite the contrary.

165. Needless to say, this is a vastly oversimplified example. Few people really hold views this narrowly drawn and extreme, and the actual spectrum of opinions on any issue of principle (including abortion) seems likely to be much more diverse than this.

creates different squares on the same playing surface and places morally inconsistent rules in every other square—and he believes that "we" (that is, presumably, most Americans and Britons) would take offense at the very idea of it.[166]

Dworkin wonders, rhetorically, *why* we are offended by the idea of checkerboard statutes. Our offense, he claims, cannot be explained by our concern for "justice."[167] Dworkin's definition of justice, which in some ways (but not in one crucial way) resembles the one I use in this Article,[168] is as follows: "Justice is a matter of outcomes: a political decision causes injustice . . . when it denies people some resource, liberty, or opportunity that the best theories of justice entitle them to have."[169] Checkerboard statutes do not violate this sense of justice, Dworkin asserts. Although a checkerboard solution will produce more injustice than one of the two "winner take all" alternatives[170]—i.e., the "correct" or "just" one—it also will produce *less* injustice than the *other* "winner take all" alternative (the unjust one). The problem, Dworkin says, is that people will disagree about *which* alternative is the unjust one (this, indeed, is the very reason behind the idea of a checkerboard statute in the first place).[171] The appropriate question therefore must be whether, knowing *in advance* that we will have disagreements over these kinds of principled issues, our sense of justice prohibits us from effectively hedging our political bets—"whether we collectively have a reason of justice for not agreeing, in *advance* of these particular disagreements, to the checkerboard strategy for resolving them."[172]

Having tailored the question this way, Dworkin answers it in the negative. He does so by rejecting two potential justice-based concerns we may have, in

---

166. LAW'S EMPIRE, *supra* note 33, at 179.

167. *Id.* at 182.

168. *See supra* Section I.C. Dworkin's definition of justice differs from my own in this important way: For Dworkin, justice is solely "a matter of outcomes," LAW'S EMPIRE, *supra* note 33, at 180; as long as the outcome of a decision is that outcome that would be dictated by "the best theories of justice," *id.*, the decision, for Dworkin, is a just one—regardless of whether "the best theories of justice" *actually* were responsible for the decision. The decision could have been made by coin-flip or, indeed, with evil intent, but Dworkin apparently believes that the reasons upon which a decision is based are irrelevant to the question of whether "justice" has been served. Only the outcome matters to that question. Thus a decision by a Nazi regime to spare non-Jewish citizens from concentration camps is, for Dworkin, a *just* decision with respect to those non-Jewish citizens, regardless of the fact that the decision was made on irrelevant grounds (i.e., the ethnicity of the people subject to the treatment).

In contrast to Dworkin's, my definition of justice turns not only on outcomes but on reasons for outcomes as well. *See supra* Section I.C. The reader, however, may notice that much of the discussion in this part of the Article proceeds according to Dworkin's wholly teleological definition of justice. I have taken this approach because I believe that my conclusions about "integrity" apply whether Dworkin's definition of justice or my own is used. I also believe, however, that my conclusions apply with greater force if my own conception of justice is adopted. This will become clear in Subsection III.C.2.c, below, when I discuss what I believe to be the central fallacy of Dworkin's use of a Rawlsian "original position" to calculate the impact on justice of checkerboard statutes.

169. LAW'S EMPIRE, *supra* note 33, at 180.

170. *Id.* at 179–80.

171. *Id.* at 180.

172. *Id.*

advance, with checkerboard statutes. First he asserts that such statutes do not offend our notion of equality,[173] because our concern for equality cannot stop us from agreeing—again, "in *advance* of [any] particular disagreements"[174]—to ensure that at least *some* justice will be done by allowing for checkerboard solutions. Equality, concludes Dworkin, can never stand in the way of partial justice where complete justice is impossible.[175]

Dworkin then asks whether we would reject checkerboard statutes because of "our conviction that no one should actively engage in producing what he believes to be injustice"[176]—because, that is, we do not approve of "legislators vot[ing] for provisions they [think] unjust."[177] But this conviction cannot be the source of our offense at checkerboard legislation either, Dworkin asserts, because it does "not explain why we should reject the compromise as an *outcome*."[178] We would, Dworkin offers, be offended at checkerboard statutes even if they were generated by a computer programmed with the results of public opinion polls, "without any legislator being asked or required to vote for the compromise as a package."[179]

From these arguments Dworkin concludes that "we have no reason of justice for rejecting the checkerboard strategy in advance, and strong reasons of fairness for endorsing it. Yet our instincts condemn it."[180] From where do these instincts arise? The source, Dworkin insists, is invisible but unavoidable, an entity whose existence can be detected not because we can see it, but because we can see the results of the forces it exerts: "Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behavior of the nearer planets. Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune."[181]

For Dworkin, then, integrity is an invisible planet, a hidden "political ideal" that compels government to act consistently from case to case just as justice compels government to act correctly in each case. Integrity is a distinct,

---

173. In so doing, Dworkin assumes, of course, that "equality" in fact has some distinct moral content.

174. LAW'S EMPIRE, *supra* note 33, at 180.

175. *Id.* at 180–82. To prove this point, Dworkin posits,

> Suppose we can only rescue some prisoners of tyranny; justice hardly requires rescuing none even when only luck, not any principle, will decide whom we save and whom we leave to torture. Rejecting a checkerboard solution seems perverse in the same way when the alternative will be the general triumph of the principle we oppose.

Id. at 181. Thus Dworkin rejects equality as a reason to disfavor checkerboard statutes not because equality itself has no moral force in such conditions, but because he believes that equality clearly is outweighed by considerations of nonegalitarian justice in them.

176. *Id.*

177. *Id.*

178. *Id.* at 182.

179. *Id.*

180. *Id.*

181. *Id.* at 183.

independent, self-contained, substantive norm. As such, it can stand, in any given case, as a counterweight to justice.

C. *Integrity as an Aspect of Justice*

Dworkin's argument for a value he calls "integrity" as a distinct, freestanding substantive norm is clever and thought-provoking. I believe it is wrong, however, and I think there are two reasons why.

First, Dworkin's theory fails to explain how integrity as a standard applicable to legislative decisionmaking (if indeed it exists in that capacity) can be transposed to integrity as a standard applicable to the materially different activity of judicial decisionmaking, the activity with which Dworkin chiefly is concerned in *Law's Empire* and other works. I believe that the idea of integrity transposes quite poorly to the adjudicative context, and I so argue below.

Second, Dworkin's argument for integrity mistakes justice for another, separate norm. What Dworkin calls "integrity"—the virtue of government "speak[ing] with one voice,"[182] applying the same principles from case to case—really is merely a byproduct of particular conceptions of justice, the virtue of government treating people correctly in *each* case. When we are dismayed at government inconsistency on matters of principle, we really are dismayed at what we know, because of the inconsistency, to be government's perpetration of injustice in each case.

Let us examine in detail each of these critiques of Dworkin's notion of integrity as an independent substantive norm.

1. *Integrity and the Courts: Repairing the Ship One Plank at a Time*

Dworkin means integrity to be a norm recognized and applied by the courts. Integrity "asks those responsible for deciding what the law is"—judges—"to see and enforce it as coherent" in principle.[183] Dworkin, however, does not attempt to prove his case for the existence of integrity as a distinct norm by exploring our intuitions about how courts should behave. Rather, he attempts to prove his case by exploring our intuitions about how *legislatures* should—or rather, should not—behave. He writes about checkerboard statutes, not about "checkerboard" case law.[184]

I believe there are reasons why Dworkin takes this approach, and I believe those reasons also are reasons why, even if we accept Dworkin's explication of legislative integrity, we should question his conclusions about adjudicative

182. *Id.* at 165.
183. *Id.* at 167.
184. *See id.* at 178–86.

integrity. The reasons stem from the fact that judicial decisions typically have very different effects than legislative ones.

The philosopher Otto Neurath, writing of the impossibility of reducing language to a set of conclusively established, nonvague elements, compared us to "sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials."[185] This "happy image"[186] will serve us well, I think, as a metaphor for courts in less-than-perfect legal systems like ours, and it may help illustrate the difficulty of superimposing a requirement of integrity onto the adjudicative process.

While at sea, of course, a sailor cannot dismantle his ship and rebuild it from scratch to make it more seaworthy. He must instead go about repairing the ship one plank at a time, removing the most rotten boards and replacing them gradually with new ones, all while the ship is underway. Eventually the ship on which he is sailing may be an entirely different one than the ship on which he left port. But this rebuilding process must be gradual and piecemeal.

The judge, too, cannot simply dismantle the law as a whole, or even the whole of a discrete area of the law, if she believes it is decrepit and ought to be replaced. She can make her decisions only in the context of individual cases and the individual issues they raise. In that context, she can repair rotted planks (unjust or outdated prior decisions); but she can do so only one plank at a time. Moreover, and crucially, she never will be able to repair the whole ship alone, because her reach extends only to those planks surrounding her "duty station," the jurisdiction in which she serves. Even if she is fortunate enough to be able to repair all the dry rot within her reach, weakened planks, or planks that were poorly constructed to begin with, may remain at her colleague's station, inches beyond her grasp.

The legislature is different. The legislature, spotting a ship taking on water, can tow it to dry dock and rebuild it from scratch. The legislature can completely revamp entire areas of the law at one time—securities law, tax law, consumer protection law, antitrust law. And, having renovated one area, the legislature can move on to others—any others—minding as it goes that the different sections of the ship it is rebuilding hold together and that the ship, as a whole, will stay afloat.

In other words, the legislature (ideally, at least) can achieve both consistency *and* repair. The legislature can make the law *better* by making it

185. Otto Neurath, *Protocol Sentences* (George Shick trans.), *in* LOGICAL POSITIVISM 199, 201 (A.J. Ayer ed., 1959). Neurath's metaphor is a variant of the fabled "ship of Theseus." *See, e.g.*, THOMAS HOBBES, ELEMENTS OF PHILOSOPHY, THE FIRST SECTION, CONCERNING BODY 100 (London, R. & W. Leybourn 1656) (trans. unknown). The metaphor has been applied before in discussions of law and consistency, including by Dworkin himself. *See, e.g.*, LAW'S EMPIRE, *supra* note 33, at 111, 139; Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 274–75 (1992).

186. LAW'S EMPIRE, *supra* note 33, at 111.

more just while at the same time preserving the law's integrity. Four features of the legislature's power make this possible.

First, the legislature's power is *plenary*; it can affect all areas of the law.[187] No subject matter within the political community it represents is beyond its reach. The legislature can, if it chooses, repair the entire ship, not just pieces of it.

Second, the legislature's power is *exclusive*; once it decides to occupy a field of law, it is the only decisionmaker within its political community that can make decisions in that field.[188] The legislature need not worry whether the new planks it lays will fit together with the planks laid by other not-so-handy sailors; only *it* is replacing planks, and it can see to it that the planks it sets down are compatible with one another.

Third, the legislature's power is, more or less, *instantaneous*; it can renovate entire areas of the law all at once, and even can repair different areas of the law at (roughly) the same time. It need not rebuild the ship plank by plank or even section by section; it can rebuild the whole vessel all at once.[189]

Finally, the legislature's power is *supersessive*; when it enacts a new statutory scheme it can jettison the old one entirely. It need not patch rotting boards together; it can throw them away and replace them with brand new planks.

From the perspective of consistency, each of these features of legislative decisionmaking power gives the legislature a distinct advantage over the judiciary. Where the legislature can attack entire substantive areas of the law at one time, and can tailor its remedies in those areas to its remedies in other areas, a court must repair (or advance, or articulate[190]) the law case by case. A court faced with the question whether to allow recovery for emotional distress to an accident victim's relative who was not at the scene of the

187. This feature, of course, is limited in America's federal system. Congress cannot exceed its enumerated powers, and the state legislatures cannot infringe the powers of Congress or the sovereignty of other states. But these really are interjurisdictional issues, and Dworkin does not contend that integrity demands consistency across different jurisdictions.

188. That is to say, it is the only decisionmaker that can make the *ultimate* decisions in that field; the legislature may delegate decisions to administrative agencies, or courts, or political subdivisions within the legislature's jurisdiction, but the legislature retains the ability to override those decisions or revoke its delegation of power. This feature, too, is of course limited in some specific—and, for purposes of the arguments here, irrelevant—ways by our constitutional system.

189. Practical considerations necessarily limit this feature, but the important point is that legislatures, *compared with courts*, can act relatively instantaneously.

190. Exactly what courts do with or to the law when they decide difficult cases is, of course, the central question with which Dworkin and others engaged in the positivist-antipositivist debate are concerned. I do not think this debate matters to my analysis here. If courts "make" law when they decide hard cases, then subsequent courts can be seen to be "repairing" the law itself when they decide the same or a similar issue differently. If courts merely "articulate" and "apply" the law when they decide hard cases, then subsequent courts can be seen to be "repairing" a faulty *articulation or application of the law* when they decide the same or a similar issue differently. *See infra* note 206 and accompanying text. Either way, courts can only go about this process of repair one case at a time.

accident[191] can decide only *that* question. If the judge believes, and so decides, that the law requires compensation for this kind of injury because the injury is of a type that is reasonably foreseeable by tortfeasors, consistency of principle would dictate conforming resolutions of similar questions involving reasonable, if extenuated, foreseeability—for instance, questions involving products liability, defamation, even contract damages. *But the judge cannot actually decide those questions*—at least not unless, and until, she is presented with those questions in another case on her docket. The court cannot rebuild the entire ship at once; it must operate one plank at a time.

But the court's position is even more tenuous than the disadvantage of deciding issues on a case-by-case basis. For, unlike the legislature, a court will not be the only one trying to rebuild the ship on which it is sailing. Other courts deciding other cases touching on the same issues of principle may decide to use different lengths or widths of plank, or even different kinds of wood. (Or they may decide to let the hull continue to rot in the hope that the legislature will step in for a complete overhaul.) The judge sitting in the courtroom down the hall from our judge, or in a courtroom halfway across the country, may believe the law requires that a tortfeasor's liability be limited by a stricter concept of foreseeability or proximate cause; he may apply that principle to deny recovery in, say, a medical malpractice case. The principles of his decision and those of our judge's decision will then be in conflict, but if this second judge wants to decide his case as he believes the law really requires, there is nothing either judge can do about the resulting inconsistency. This inconsistency necessarily remains; some planks of the ship inevitably will not fit well together.

This problem is not limited to contemporaneous judicial decisionmaking. Our judge also must worry about every sailor who has worked on her ship before her. Unless the results of their work—the legal rules articulated by their prior decisions—fortuitously are thrust in front of her thanks to the vagaries of her docket, she cannot begin to repair their workmanship if it is faulty. Even when one of her cases presents her with an issue of legal principle that she believes has been wrongly decided in the past, she may only be able to jury-rig a repair, to patch over the leaky boards without replacing them altogether. The cumulative weight of the rotten precedents, stacked one on the other for decades or even centuries, may be more than she can overcome with the limited tools allowed her in a given case.

The point of all this nautical metaphor is simply that the legislative decisionmaking power is very different in scope and impact from the judicial decisionmaking power. For the legislature considering a statute, it is

191. *See* McLoughlin v. O'Brian, [1983] 1 App. Cas. 410. *McLoughlin* serves as a case study for Dworkin throughout *Law's Empire*. *See, e.g.*, LAW'S EMPIRE, *supra* note 33, at 23–29, 36–39, 118–64, 220, 238–71, & *passim*.

theoretically possible simultaneously to achieve both justice *and* consistency.[192] For a court deciding a case, though, consistency and justice are possible simultaneously only when the bulk of the prior judicial decisions implicating the same issue of principle are *just* decisions. If they are not—if the "majority rule" in a given area of judge-made[193] law is unjust, an incorrect application of principle—the court is faced with a choice between consistency and justice. The court must either do justice in the case before it by ignoring the wrongly decided precedents, or it must be consistent with respect to the decisions of prior courts by following the precedents and ignoring justice. Unlike the legislature, the court cannot have it both ways.

What does this fact tell us about Dworkin's theory of integrity as applied to adjudication? It tells us that there is much less reason to suppose that we would insist on integrity in adjudication than there is to suppose that we would insist on integrity in legislation. When a shipbuilder is constructing for us a vessel from the ground up, we may have every reason to insist that she build the vessel to hold together, to meet our criteria of aesthetic and functional coherence. We may question the shipbuilder's choice to use oak in one part of the hull and pine in another, or to build the bow in the style of a schooner and the stern in the style of a junk, or to make the officers' quarters opulent and the crew's spartan. But when a sailor is repairing our ship at sea, surely we will insist first and foremost that he patch the leaks, and the sooner the better. We are unlikely to care much if he uses a different material than another sailor used in patching a previous leak; in fact we are likely to insist that he use the best material he can find and do the best repair job he can do, regardless of the sort of job the previous sailor did.

In assessing the decisionmaking of the legislature, we might take much the same approach that we would bring to bear in appraising the work of our shipbuilder in dry dock. We might insist, so far as is possible in ordinary politics, that the programs our legislature enacts be both internally consistent and consistent with other programs it has enacted. We will not know for sure whether the legislature's programs are just ones, in the same way we would not be able to tell for certain whether a ship sitting in dry dock will sink or float on its maiden voyage. But, lacking that certain knowledge, we may nonetheless demand that the legislative programs be coherent—just as we might demand that our shipwright use the same kinds of material from stem to stern and ensure that all of the boards fit together snugly. Such consistency,

192. This is an idealized picture, of course. The realities of politics may jeopardize justice, consistency, or both in any given piece of legislation. *See infra* note 195.

193. Again, this term, while part of the typical lawyer's vocabulary, begs the eternal question whether judges actually "make" the law in any sense. Perhaps a less controversial term would be "judge-articulated," but this is verbally clumsy.

On a related point: I use "judge-made law" here to refer not only to judicial decisions implicating those (dwindling) issues left entirely to the common law, but also to judicial decisions interpreting statutes.

at least, is a thing we can measure and be reasonably sure of; and, experience tells us, it often stands in as a rough-and-ready proxy for justice itself. After all, a completely just system will of necessity also be completely consistent.[194] If (measurable) consistency is present, then we may reasonably infer that (indeterminate) justice cannot be far away.

In assessing the decisionmaking of a court, though, we will be less concerned with consistency and more concerned that justice be done, here and now. Although we will care, in the abstract, whether justice has been done in similar circumstances before or elsewhere, we will not let the answers to those questions determine whether (or how) justice should be done in the case at hand. We will expect our judge, like a sailor in mid-ocean, to go ahead and fix the leak, and to fix it as well as she can.

If Dworkin is right that checkerboard statutes and other legislative compromises of principle offend us in some special way, it remains for him to demonstrate that our offense also encompasses "inconsistent" decisionmaking by the judiciary—that we have an independent normative reason, and a strong one, to prefer that *courts* as well as legislatures strive for consistent results even at the expense of what they believe to be just ones. But our analysis thus far suggests the opposite; it implies that we have a strong reason to prefer that courts strive for justice over consistency. Our analysis demonstrates that we never have reason to suppose that a legislature, in making a particular decision, faces a stark choice between consistency on the one hand and justice on the other. This is because the legislature has the ability to make its decision on a given issue the *only* decision that matters. In contrast, as our analysis also shows, there is always reason to suppose that a court, in deciding a particular case, faces an outright choice between consistency and justice. This is so because for every decision a court must make on a given issue, there will always be *other* decisions (or the potential for other decisions) that matter touching on the same issue. Because a court cannot preempt all these other decisions, there is always the risk that its decision will sacrifice consistency to justice, or justice to consistency.

If a legislature, then, is perceived to be making decisions in an inconsistent way, we may very well be offended, because we know the legislature *can* be consistent and still serve what it believes to be the ends of justice. If the legislature chooses inconsistency, it cannot be making that choice out of a concern for justice.[195] The legislative "choice" against consistency must

194. *See* LAW'S EMPIRE, *supra* note 33, at 176 ("Integrity would not be needed as a distinct political virtue in a utopian state. Coherence would be guaranteed because officials would always do what was perfectly just and fair.").

195. In the real world, of course, this is a considerable overstatement. Because of the realities of politics, legislatures often face choices between a compromise statute and no statute at all; if legislatures always chose complete consistency in these cases, very few statutes ever would be passed. But real-world legislatures still can *attempt* to achieve both complete consistency and complete justice in every instance;

rather be an example of legislative laziness (the legislature did not bother to root out all the inconsistencies in its program), or interest-group politics (the legislature compromised to appease a special segment of its constituency), or something else that we perceive to be an example of legislative failure. But if a *court* is perceived to be making decisions in a way inconsistent with those made by other courts, we are less likely to be offended—because we know the court might be acting in what it believes to be the interest of justice. (Indeed, unless there is some reason to suspect judicial feeble-mindedness or corruption or mean-spiritedness or some other decisionmaking infirmity, we know the court *must* be acting in what it believes to be the interest of justice.) Because we know that the court may, in good faith, perceive its decision to entail a choice between consistency and justice, we are unlikely to be offended when the court chooses against the former.

So we have identified an important difference between the way courts relate to consistency and the way legislatures relate to it. Legislatures never have a good reason to sacrifice consistency;[196] but courts often may have such a reason. This difference gives us, in turn, a powerful reason to suspect that inconsistency in adjudication does not offend us in the way that inconsistency in legislation might—a powerful reason, that is, to reject the application of Dworkin's "integrity" as an adjudicative as well as a legislative virtue. Whatever integrity's validity as a standard for legislation, it serves poorly as a standard for adjudication.

I should clarify two things at this juncture. First, what I have written so far suggests that integrity does not provide a forceful reason for courts to follow precedent. But my argument does not undercut the notion that a court, like a legislature, should practice "internal" integrity—that is, should strive to make every decision *within its control* consistent in principle with every other decision simultaneously within its control. This kind of "integrity," however, is not the only kind Dworkin has in mind for the courts. Dworkin clearly believes that "integrity in adjudication" requires courts to strive for "external" as well as internal consistency, to conform their decisions to decisions made by other courts (and to decisions made in the past by the same court).[197] One way of looking at this prescription of Dworkin's in light of our discussion to this point is to note that because Dworkin's arguments, even if we accept them, require at most only *internal* integrity in both legislation and

---

although that goal often may be *practically* unattainable, it never will be *logically* impossible. That goal will, however, often be logically impossible for courts to achieve.

In any case, to the extent we prefer legislative compromises to legislative inaction, the strength of any commitment we may have to "integrity" as an independent normative virtue of *legislation* is open to question.

196. But see my caveat to this broad statement, *supra* note 195.

197. *See* LAW'S EMPIRE, *supra* note 33, at 167 (contending that adjudicative integrity requires that "the past . . . be allowed some special power of its own in court"); *id.* at 217, 227–75, & *passim*.

adjudication, they cannot support his conclusion that courts must strive for *external* integrity.

Second, my argument also does not imply that courts interpreting and applying *statutes* should not strive for consistency with the legislative intent behind the statute (or with some other index of the statute's meaning, depending upon one's theory of statutory interpretation). Of course courts should attempt to remain consistent with the legislature; but this fact is simply a function of our constitutional system of separation of powers and its attendant legislative supremacy. My argument thus far, however, *does* imply that courts interpreting statutes—like courts working within the common law—may often be faced with stark choices between justice on the one hand and consistency *with prior courts' interpretations of a statute* on the other.

I can imagine a rejoinder to everything I have written in this section, along the following lines. Integrity requires the legislature to act as consistently as possible in creating the law of a particular political community. This is Dworkin's "principle of integrity in legislation":[198] "[T]hose who create law by legislation [must] keep that law coherent in principle."[199] Once we accept the validity of this principle,[200] the rejoinder goes, we must accept the "principle of integrity in adjudication"[201] as well—not as an independent norm whose validity is demonstrable by the same means we have used to demonstrate the validity of the legislative principle, but as a necessary corollary of the legislative principle itself. Integrity requires the legislature to create law that is consistent in principle; integrity thus requires the courts to *recognize* the law's consistency, to *interpret and apply* the law as consistent, and to "see and enforce [the law] as coherent in that way."[202] This, the objection goes, is the principle of "consistency in adjudication"—nothing more and nothing less.

One point to be made about this objection, however, is that, if we take it at face value, it tells us nothing about some value called "integrity." It merely tells us what we already know, a truism: Courts must interpret and apply the law.[203] But, if the law is coherent, of course courts must interpret and apply it as coherent; otherwise they would not be applying "the law." The objection, then, tells us only that courts are compelled to obey the law—which, if the law

198. *Id.* at 167.

199. *Id.*

200. I do not accept the validity of this principle, at least not its validity as a normative principle distinct from justice. *See infra* Subsection III.C.2. Nevertheless, I will continue to grant its validity for purposes of my arguments in this section.

201. LAW'S EMPIRE, *supra* note 33, at 167.

202. *Id.*; *see also id.* at 217 (arguing that integrity "requires our judges . . . to treat our present system of public standards as expressing and respecting a coherent set of principles").

203. Of course, our particular conception of justice may require courts to do something other than merely "interpret and apply the law" in a given case. But it is a necessary premise of the objection to which I am responding that courts simply interpret and apply the (legislatively created) law, and nothing more. Thus, the objection's conclusion is merely a restatement of its premise.

itself is coherent, will necessarily (but incidentally) produce coherence in judicial decisionmaking. The objection is a tautology.

More importantly, this objection pulls the rug out from underneath Dworkin's entire theory of law as integrity. For the objection begs the question: If courts merely interpret and apply—"see and enforce," in Dworkin's own phrase[204]—the law created by the legislature, *why must courts be bound to any extent by decisions of other courts?* The objection assumes that previous decisions can serve only facilitatively, as sometimes helpful but never constraining renderings of what the (legislatively created) "law" actually is. Courts bear to other courts much the same relationship that early Protestants saw between the clergy and the laity:[205] The clergy's interpretations of scripture (or law) may be thoughtful and therefore relevant, but ultimately the believer must make up her own mind about the meaning of the text. A court deciding a case need not interpret and conform to past judicial decisions at all, because the one and only real "law"—the legislative law, and the principles derivable from the legislatively enacted law—is there for the court to discern and apply directly.

The objection assumes all of this; but Dworkin's law as integrity denies it. Dworkin's judge, Hercules, is not free to disregard decisions of prior judges that he believes rest on incorrect interpretations of the law. Hercules instead "must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be."[206] Hercules, that is, must derive his principles from the

---

204. LAW'S EMPIRE, *supra* note 33, at 167.

205. *See generally* CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN 152 (1972) (describing this relationship); DE LAMAR JENSEN, REFORMATION EUROPE 42–43, 60 (1981) (same). Interestingly, Martin Luther, whose doctrine of "the priesthood of all believers" was one of the basic tenets of early Protestantism, studied law before suddenly abandoning it in 1505 and entering a monastery to begin his career as a cleric. *See id.* at 44.

206. LAW'S EMPIRE, *supra* note 33, at 239. Dworkin's theory of adjudication is a sophisticated version of what has been called a "declaratory theory," *see* Wesley-Smith, *supra* note 26, at 73, 79–80; at bottom, Dworkin holds that judges deciding cases merely "declare" and apply preexisting law rather than create or supplement law. *See* LAW'S EMPIRE, *supra* note 33, at 154–275, & *passim*; TAKING RIGHTS SERIOUSLY, *supra* note 33, at 81, 81–130 & *passim* ("[E]ven when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively."). This is the core of Dworkin's famous "rights thesis": Parties have existing legal rights that need only be identified and declared by the court.

But if the rights thesis is correct, how can precedent bind—how can it exert some "gravitational force on later decisions," *id.* at 111? If courts merely discover and declare rights, their decisions—the results of this process of discovery and declaration—are at best only evidence of what the rights themselves are, potentially imperfect attempts at locating and articulating rights. A prior judicial decision then cannot have independent weight with respect to the decision of a later court; if it is an imperfect articulation of a right, it cannot stand as a reason for a later court to articulate the same right in a similarly imperfect way. Dworkin's rights thesis "presupposes the possibility of rights which may outweigh any particular precedent." Wesley-Smith, *supra* note 26, at 80.

In order to support a requirement of adjudicative consistency, then, Dworkin's theory itself must become internally contradictory. A requirement that courts seek consistency by attributing some "gravitational force" to decisions of prior courts necessarily supposes that judicial decisions amount to a source of law rather than merely a declaration of law. But Dworkin's rights thesis denies that courts do

decisions of other courts as well as from the decisions of the legislature. He must act upon law from multiple sources—and therefore upon law that might on occasion be inconsistent in principle.[207]

Hercules, then, cannot be said under law as integrity to be mirroring the legislature, applying the law as coherent, because the law necessarily *is* coherent. Hercules is doing something else: He is synthesizing law from several sources. If he is to be required to act with "integrity" in doing so, that requirement cannot be justified on the ground that it is a necessary corollary of the requirement that the legislature act with integrity. The requirement of adjudicative integrity must be justified independently. As the discussion to now has suggested, though, the independent justification Dworkin has offered is far from convincing.

---

more than identify and declare the law; it denies that judicial decisions are sources of law. As such, it denies the basis of the adjudicative consistency it espouses.

Dworkin could eliminate this paradox simply by discarding his requirement that courts act with consistency. He could do so, I think, even without sacrificing his commitment to the value he calls "integrity"; by characterizing unjust judicial decisions as incorrect articulations of the law rather than as imperfect parts of the law, he could avoid any claim that courts departing from incorrect precedent are acting without integrity. Law would not be "speaking with more than one voice" in such a case, because incorrect precedents would not really represent the true voice of the law at all.

I suspect that Dworkin does not take such an approach because, or partly because, he fears that a court acting (or seen to be acting) without the constraint of precedent is a court acting (or seen to be acting) without any constraints at all. (This fear underscores a problem of constraints common to positivism and antipositivism: Positivism begs the question how to constrain courts deciding hard cases not clearly governed by noncontroversial positive legal rules, while antipositivism begs the similar question how to constrain courts divining "the law" from sources other than noncontroversial positive legal rules.) But adherence to precedent hardly solves the problem of unconstrained judicial discretion (if it is a problem at all—a big "if"); it merely shifts the focus of the problem from the discretion of the judge deciding a pending case to the discretion of the judge who decided the precedent case. Why should we have less reason to fear the discretion of dead judges than of live ones?

These issues are beyond the scope of my discussion here. After all, Dworkin *does* claim that adjudicative consistency is deontologically important, and he does offer integrity as the reason why this is so—all of which necessitates this portion of my Article.

207. A similar objection might hold that integrity, for Dworkin, is not a norm to be valued in itself, but is simply a byproduct of the project of interpretation in which Dworkin believes courts are engaged—a structural feature of the process of "find[ing] implicit [legal] standards between and beneath the explicit ones." LAW'S EMPIRE, *supra* note 33, at 217. On this view, Dworkin simply is concerned that courts interpret "the law" (including its "implicit standards") in a rational way; doing so necessarily will result in a large measure of decisionmaking consistency, of "integrity."

This would, I believe, be a serious misreading of Dworkin. Dworkin believes that there is law "out there," waiting merely to be discovered by courts and dictating the result of every case; this, again, is his "rights thesis." But, as Dworkin recognizes, this belief does not imply that the law "out there" is *coherent*. To say that the law "out there" is, in the main, coherent—because courts generally have sought consistency from case to case—would be to beg the question: *Why* do courts act that way (or, more to the point, why *should* courts act that way)? Dworkin cannot simply beg this question, because his project is one of justification, not merely description. Dworkin wants to show *why* courts have sought consistency in their decisionmaking, and why they should continue to do so. In order to make this showing, he needs to identify a substantive norm that requires adjudicative consistency. That norm is integrity.

Part of Dworkin's project, then, is to posit and defend integrity as an independent substantive norm that requires decisionmaking consistency, and Dworkin recognizes this necessity quite explicitly. The entirety of chapter six of *Law's Empire* is a conscious effort to explain why integrity is a substantive norm, an "ideal standing beside justice and fairness" in our political pantheon, *id.* at 183, that "*requires* our judges" to decide cases consistently, *id.* at 217 (emphasis added). For Dworkin, integrity is an end in itself—not merely a structural feature of the pursuit of other ends.

2. *Empty Integrity*

The arguments in the previous subsection demonstrated, I think, that Dworkin's idea of integrity, even accepting on Dworkin's terms that idea and his justification for it, fits poorly with adjudicative as opposed to legislative decisionmaking. Because we believe courts may often be put to a choice between consistency and justice, we do not believe courts violate some strong political norm when they choose justice over consistency.

But might not integrity still play a role in the adjudicative process? Might it not create a presumption of consistency—a makeweight that pushes courts, in hard cases where they are not convinced about what justice requires, toward decisions that conform with decisions made by previous courts?[208] Might it not at least force courts to articulate good, convincing reasons for departing from precedent in the name of what a court believes to be justice (as the dissenters in *Planned Parenthood v. Casey*[209] attempted to do in arguing that *Roe v. Wade*[210] should be overruled[211])?

It might. But I believe that if integrity is understood in this capacity, it is because integrity is a strategy, not an independent norm; "integrity" in this light is merely an embodiment of the consequentialist considerations that may bear on whether justice is being done in a given case. "Integrity," that is, is a code word for considerations of predictability, or efficiency, or justified reliance, or judicial restraint, or some combination of them. These strategic elements combined may indeed justify a presumption of "integrity," of conformity with previous judicial decisions. But that presumption cannot arise from any notion of integrity as an independent moral virtue.

In order to prove the conclusion I have just stated, I have to do more than I have done so far in writing about Dworkin's idea of integrity. I have to show not only that integrity is not something we believe should constrain courts to anywhere near the degree it might constrain legislatures; I have to show that

---

208. A similar objection asks whether, in cases where there is more than one equally good way for the judge to "do justice" (that is, more than one equally just result), integrity might require the judge to choose that way of doing justice that is most consistent with the way prior courts have decided cases. The argument for adjudicative integrity that this possibility supports, though, is a weak one indeed. To say that judges faced with two equally just alternatives should choose the one most consistent with prior decisions is to claim only that integrity requires consistency only so long as consistency does not contradict non-integrity-based justice. Integrity becomes a near irrelevancy when relegated to such a limited role. For Dworkin, however, integrity is more than a makeweight in the rare case where justice allows more than one answer; indeed, Dworkin believes there is almost never more than one "right answer" in a given case. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985). According to Dworkin, "justice must sometimes be sacrificed to integrity." LAW'S EMPIRE, *supra* note 33, at 178. Thus, Dworkin clearly views adjudicative integrity as something more than a tiebreaker among equally just alternatives.

209. Planned Parenthood v. Casey, 505 U.S. 833, 944–1002 (1992) (Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part).

210. 410 U.S. 113 (1973).

211. *See supra* notes 9–23, 49–75 and accompanying text.

integrity is an "empty" idea—a mere reflection of the real object of our concern, non-integrity-based justice. I will try to do this in several steps.

First, I will take a preliminary look at Dworkin's crucial demand that we evaluate that bane of integrity, the checkerboard statute, from an *ex ante* perspective, before we know to what principles such a statute might apply or how we personally might feel about those principles.[212] I hope to sow the seeds of doubt about the validity of this *ex ante* approach. Next, I will parse the notion of a "checkerboard" statute in considerably more detail than Dworkin does, analyzing the different possible manifestations of that concept and exploring what I believe to be the actual nature of our reactions to each manifestation. Finally, I will return to Dworkin's *ex ante* approach and explain why that perspective ultimately makes no difference to our evaluation of checkerboard statutes. I will conclude that our reason for condemning checkerboard solutions, if we have one, is not a concern for an independent norm called "integrity"; it is a concern for justice.

a. *Checkerboard Statutes from the Original Position*

Dworkin believes that in order fully to understand our intuitions about checkerboard statutes, we must imagine ourselves assessing that kind of statute "in advance"—apart from the context of any particular disagreement of principle such a statute might embody, and indeed without knowing what sorts of principle might be implicated in checkerboard statutes or how we might feel about those principles.[213] We must imagine, Dworkin asserts, that we know only that there *will* be stark divisions of public opinion on important issues of principle.[214] Only from this constructive *ex ante* perspective, Dworkin believes, can we separate our reactions to the notion of a checkerboard statute itself from our reactions to any particular issue of principle that such a statute might concern.[215]

This notion of constructive ignorance borrows from the famous ideas of the "original position" and its accompanying "veil of ignorance" conceived by John Rawls.[216] Rawls contends that the first principles of justice are those that would be selected by people in an "original position of equality,"[217] an imaginary condition in which "no one knows his place in society, his class

212. *See* LAW'S EMPIRE, *supra* note 33, at 180–81.

213. *See id.*

214. *See id.* Dworkin also assumes, I think, that we must imagine the existence of something like our present system of representative democracy—a system in which public opinions are reflected to some degree in legislation, and in which the alternatives to checkerboard legislation are (1) "winner-take-all" legislation on one side of the issue, (2) "winner take all" legislation on the other side of the issue, or (3) no legislation. *See id.*

215. *See id.*

216. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

217. *Id.* at 12.

position or social status . . . his fortune in the distribution of natural assets and abilities . . . [his] conception[] of the good or [his] special psychological propensities."[218] People in Rawls's (imaginary) original position thus operate behind a "veil of ignorance"; "[t]hey do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations."[219] Although Dworkin does not make specific reference to Rawls's theory, he would have us evaluate checkerboard statutes—or rather, our intuitions about checkerboard statutes—by imagining ourselves in this sort of original position, standing behind a "veil of ignorance" that shrouds the opinions we actually would have about issues of principle.[220]

Once we imagine ourselves looking at the possibility of checkerboard solutions from behind a veil of ignorance, Dworkin contends, we can see that our discomfort with such solutions does not emanate from our concern for justice. For the norm of justice does not require a stark choice between doing justice in every case and doing justice in no case. From behind our veil of ignorance, Dworkin insists, we might hedge our bets and choose a checkerboard approach over an all-or-nothing approach without offending our notion of justice, just as we would prefer to "rescue only some prisoners of tyranny" than to rescue none when we know we cannot rescue them all.[221]

I think there are some fundamentally false assumptions about justice (and our views of it) underlying this approach, and I will discuss them below.[222] But there is also, I think, an important problem with the approach itself. Dworkin's descriptions of our intuitive reactions to checkerboard statutes, what "we" believe and feel about those statutes, lose much of their credibility when Dworkin asks us to make the leap from the real to the imaginary, from actual issues of principle to the constructive original position.

Let me explain. Dworkin's mission, remember, is to convince his readers that "we" have normative objections to checkerboard statutory solutions, but that those objections are rooted in something other than our sense of justice. He begins his mission by positing a rogues' gallery of potential checkerboard schemes, each one more fearsome than the last: imposition of strict liability on automobile manufacturers but not on washing machine manufacturers;[223] prohibition of racial discrimination on buses but not in restaurants;[224]

---

218. *Id.*

219. *Id.* at 136–37.

220. Of course, the particular type of original position Dworkin invokes is much more limited than the general structure posited by Rawls. Dworkin cares only that we imagine ourselves uprooted from particular views on matters of principle; blindness to characteristics like class, social status, and natural ability is not strictly necessary to Dworkin's construct.

221. *Id.*; *see supra* Section III.B.

222. *See infra* Subsection III.C.2.c.

223. LAW'S EMPIRE, *supra* note 33, at 178. This example is by far the least fearsome of the bunch.

224. *Id.*

criminalization of abortion for women born in even years but not for women born in odd ones.[225] "Most of us," he says, "would be dismayed by 'checkerboard' laws that treat similar accidents or occasions of racial discrimination or abortion differently on arbitrary grounds."[226] Indeed, it is not difficult to agree with this conclusion; most of us *would* be afraid of these particular specters. So far, so good.

But then Dworkin makes what I believe to be an illegitimate move. He asks us to explore the nature of our offense at checkerboard laws, not by assessing our reactions to particular (if hypothetical) examples of such laws, *but by imagining that we are offended at such laws in the abstract*—from behind a veil of ignorance. If we are offended at checkerboard laws in the abstract, Dworkin tells us, it cannot be because of our sense of justice.[227] Notice, however, the key "if" here—*if* we are offended at checkerboard laws in the abstract. Dworkin never legitimately answers the question posed by this "if." Instead, he answers, or attempts to answer, an altogether different question: whether we are offended at *particular* checkerboard statutes involving all-too-*real* (not abstract) sorts of issues.

This misdirection play has serious consequences for Dworkin's exegesis of integrity. For that exegesis rests on the assumption that the idea of checkerboard statutes would offend us in (Dworkin's version of) the original position. But Dworkin has given us no reason to suppose that this is the case. Dworkin has given us no reason to suppose, that is, that our offense at a checkerboard solution to abortion stems from an offense at checkerboard solutions generally and not from an offense at the particular idea of a checkerboard statute in the freighted context of abortion.[228]

It is difficult, if not impossible, to imagine how we might react to the concept of checkerboard solutions from the original position—an imaginary condition in which we will not know how strongly we will feel in the real world about the issues such solutions might affect or even how often we will

---

225. *Id.*

226. *Id.* at 179.

227. Again, this is because we would prefer (Dworkin contends) a guarantee that some justice will be done to the possibility that *no* justice will be done. *See supra* note 175 and accompanying text; *see also infra* notes 259–68 and accompanying text (suggesting that we may in fact reject checkerboard solutions from the original position for reasons of justice).

228. From the original position, we might rationally choose a checkerboard approach to legislation even knowing that such an approach in practice sometimes (even often) will offend us when applied to particularly sensitive issues—even knowing, that is, that if presented in the real world with a checkerboard solution to some issue about which we felt strongly, we would reject it out of hand. We might view such potential real-world reactions as inevitable displays of weakness, and we might thus choose checkerboard solutions from the original position as a precommitment strategy designed to force the best result upon us at a later time, even if we will not believe then that it is the best result. (Indeed, this sort of tie-me-to-the-mast approach underlies the very notion of an original position.) *Cf.* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1154 (1995) (suggesting that Constitution is a paradigm of a strategy of written commitment, a strategy designed to "hold[] . . . oneself, against day-to-day interest and even against will, to something that gives purpose or meaning to one's life: for example, to a goal, a relation with another, a principle, a profession, or a cause").

feel strongly about them. Dworkin asks us to imagine our general intuitions about checkerboard statutes in a situation of complete deracination from specific intuitions about matters of principle, and I am not sure we can say even that intuition can *exist* in such a vacuum, let alone what it would look like if it did exist.[229] I am fairly confident, though, that we cannot legitimately make the move Dworkin has tried to make in justifying integrity; we cannot casually draw conclusions about our intuitions in an *ex ante* original position from observations firmly rooted in our *ex post* reality.

Once we recognize the incoherence of judging checkerboard statutes from a hypothetical world of abstraction, we are forced to assess them from the real world—and this spells trouble for Dworkin's project. For rational, justice-seeking people in the real world might *not* reject checkerboard solutions out of hand. Even accepting Dworkin's outcome-focused definition of justice,[230] it seems that rational, justice-seeking people in the real world might not concede that justice is more likely to be served by a checkerboard approach than by a winner-take-all system.[231] Indeed, it seems likely that people in the real world generally do not in fact believe that a winner-take-all legislation

229. The general objection that valid real-world political prescriptions cannot be produced from an abstract, Rawlsian original position certainly does not originate with me. Perhaps the most powerful variation on this critique has been that of feminist theorists, who have challenged the Rawlsian assumption of gender-neutral, nonfamilial, noncommunitarian individuals in the original position. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 89–101 (1989); CAROLE PATEMAN, THE SEXUAL CONTRACT 41–43, 223 (1988); Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860 (1994); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986); Susan Moller Okin, *Reason and Feeling in Thinking about Justice*, 99 ETHICS 229, 235–49 (1989). Mari Matsuda's critique is perhaps most similar among the feminists to the point I make here. Matsuda takes issue with the abstraction required by the concept of a "veil of ignorance," which, she protests, amounts to a "refusal to acknowledge context—to acknowledge the actual lives of human beings affected by a particular abstract principle." Matsuda, *supra*, at 619. "What we really have to do," Matsuda writes, "is to leave the original position, and argue on the common ground of this planet earth." *Id.* at 628. In a similar spirit, Carole Pateman describes Rawls's original position as "a logical abstraction of such rigour that nothing happens there." PATEMAN, *supra*, at 43. To paraphrase Matsuda, my point here about Dworkin's exegesis of integrity is simply that he begins his argument on planet Earth and ends it somewhere else—without justifying his journey or even acknowledging that he has made it.

Other interesting critiques of the use of abstraction in the Rawlsian original position include Michael D. Weiss, *A Jurisprudence of Blindness: Rawls' Justice and Legal Theory*, 42 DRAKE L. REV. 565, 569 (1993), which questions the possibility of meaningful language (and thus rational thought) "under the extremely abstract conditions of the original position," and Anthony J. Fejfar, *In Search of Reality: A Critical Realist Critique of John Rawls'* A Theory of Justice, 9 ST. LOUIS U. PUB. L. REV. 227 (1990), which draws on theories of developmental psychology to challenge Rawls's assumption that humans could effectively reason in the isolation and complete autonomy of the original position.

For a spirited defense of the device of the original position against such attacks, see Robert K. Fullinwider, *Citizenship, Individualism, and Democratic Politics*, 105 ETHICS 497 (1995).

230. Recall that the definition of justice I use in this Article, though purely formal in most respects, relies upon reasons for outcomes as well as outcomes in assessing whether a treatment of someone is just. *See supra* Section I.C; *see also supra* note 168. This fact becomes significant with respect to my critique, in Subsection III.C.2.c, *infra*, of Dworkin's assumptions about the hypothetical calculus from his original position.

231. There are reasons to believe a rational, justice-seeking person in the original position likewise might conclude that a winner-take-all approach will result in more justice than a checkerboard approach. *See infra* notes 267–77 and accompanying text.

system produces unjust results as a rule or on a regular basis. Opponents of abortion may believe that the current legal regime produces more injustice than would be produced by a regime in which abortion is outlawed; but this does not mean that they believe injustice is *inevitable* under a winner-take-all system. (The fact that "pro-life" advocates continue to agitate for their position strongly suggests that they do not believe this.) Faced with real-world issues that are important to them, people are unlikely to accept the idea that complete or nearly complete justice is impossible; they are unlikely to give up the fight and settle for partial justice.

Dworkin's analysis, then, is at home only in the world of abstraction. In his imaginary original position, calculations of justice will be made by passionless people. But, in the real world, people might well be more likely to take their chances on the possibility of full justice—or to strive for full justice with respect to some issues (the ones they find most important) and to accept partial justice with respect to others. In the real world, that is, people might in fact reject checkerboard solutions out of a sense of justice.

b. *Different Kinds of Checkerboard Solution*

In the real world, it seems, we are more likely to reject a checkerboard solution on grounds of justice—because we believe a more fully just solution is possible—than we might be in Dworkin's version of the imaginary original position. But that does not mean that we do not also have, either in the real world or in the original position, some *other* principled reason in addition to reasons of justice for rejecting the checkerboard approach. Dworkin, of course, believes we do have such an independent reason, and he calls it integrity.

I believe Dworkin is wrong in thinking integrity to be an independent substantive norm, and to explain why he is wrong I want to take a closer look at the concept of a checkerboard statutory solution. For reasons suggested by the preceding discussion, moreover, I want to do so with our feet firmly "on the common ground of this planet earth."[232] I want to explore our intuitions about different possible types of checkerboard statute using examples taken from real-world issues, because only by this approach can an evaluation of our intuitions make any sense.

We can imagine three different types of checkerboard statutory scheme, one of which is not really a checkerboard scheme at all. I will call these types, respectively, *inequitable checkerboard schemes*, *equitable checkerboard schemes*, and *false checkerboard schemes.*

An *inequitable checkerboard scheme* is a checkerboard scheme that requires differential treatment of similarly situated people. An example is the

232. Matsuda, *supra* note 229, at 628.

checkerboard abortion statute I posited earlier in this Article.[233] That statute, in an attempt to reflect the (hypothetically) even split in public opinion on abortion, made abortions illegal for pregnant women born in even-numbered years but legal for pregnant women born in odd-numbered years. It treated women born in even-numbered years differently from women born in odd-numbered years. As such, the statute treated these two groups of women inequitably.

Inequitable checkerboard schemes themselves have two subcategories. The first subcategory, inequitable checkerboard schemes based on *arbitrary* criteria, is exemplified by the odd-even abortion statute, which treats people differently depending on the arbitrary criterion of whether the year of a person's birth ends in an even or an odd digit.[234] The second subcategory, inequitable checkerboard schemes based on *impermissible* criteria, is exemplified by a hypothetical statute allowing abortions to women who are white but forbidding abortions to women who are African-American. Such a statute treats people differently based on the impermissible (not merely arbitrary[235]) criterion of race. (I intend "impermissible" here to describe criteria that are generally recognized in society to be especially abhorrent arbitrary bases for treatment of individuals in most cases, e.g., race, gender, sexual orientation, and religious belief.[236])

Our reasons for disliking inequitable checkerboard schemes are not reasons of "integrity"; they are reasons of non-integrity-based justice. We disapprove of such schemes when they are based on arbitrary criteria because we know they require unjust treatment of people; we know they require that, in every case falling under the rule, a person will be subject to treatment based on an

---

233. *See supra* Section III.B.

234. This is not to say that treating a person based on the year of her birth necessarily violates justice. The fact that a person was born in a certain year might indeed be relevant (and thus not arbitrary) with respect to a decision about some kinds of treatment, as in the case of a legislative decision to prohibit the sale of alcohol to persons under the age of 21. We also could imagine cases in which an "arbitrary" characteristic like the year of a person's birth might justly be used as a means of distributing scarce treatments—e.g., sweepstakes awards, exemptions from military service, or radio broadcasting frequencies—in an unbiased, random way. Year of birth, of course, would seem a strange method of achieving stochastic distribution in these sorts of circumstance—why not simply employ a lottery system?—but it would not be inherently unjust to use it in this way. See, however, my description of a "lottery" system as a variant of an (unjust) equitable checkerboard scheme for regulating abortions, *infra* note 239.

235. By my definition of justice (*see supra* Section I.C), of course, any criterion for treatment that is arbitrary—i.e., irrelevant—also is "impermissible" in the sense that treatments based upon it are unjust.

236. Impermissible treatment in this context may also include treatments for which one of these especially abhorrent grounds actually is a relevant criterion, but with respect to which the abhorrent ground in question has been incorrectly weighed in the treatment decision. An example of this latter kind of impermissible treatment (in a non-checkerboard context) would be a blanket rule prohibiting women from serving in combat positions in the military on the ground that women are less physically suited to combat than men. (Another—and perhaps more accurate—way of viewing these kinds of treatments is to evaluate them as conflating a relevant criterion for a particular treatment—in the previous example, the fact that women on average are less physically strong than men—with an irrelevant criterion for that particular treatment—the simple fact that a given person subject to the treatment is a woman rather than a man. Evaluated this way, the ban on female combat personnel is unjust because it purports to be grounded in a relevant criterion but is in fact grounded in an irrelevant one.)

irrelevant criterion. This offends our notion of justice, which requires every person to be treated in accordance with all of the relevant, and *only* the relevant, criteria.[237] We believe the final digit of the year in which a person was born cannot be relevant to the question whether that person is or is not entitled to an abortion.

Note the crucial fact here that our checkerboard abortion statute treats *everyone* within its purview according to an arbitrary criterion (year of birth), including those women who are allowed abortions under the statute. The reason for distinguishing between women subject to different treatment under the statute—and thus part of the reason for the treatment of such women—is the irrelevant fact of date of birth. We may call this reason the *differentiating criterion*, because it is the criterion employed by the statute to determine who is entitled to a certain treatment and who is entitled to a different treatment. Everyone within the purview of an inequitable checkerboard statute is treated in accordance with such a differentiating criterion, and thus everyone subject to such a statute is treated unjustly, although the results of treatment of some may be more just than the results of treatment of others.

Similarly, we disapprove of checkerboard schemes based on impermissible criteria because we know that they too require unjust treatment of people, treatment based in every case on an irrelevant factor. We dislike these kinds of scheme with a special vehemence, because we believe that in every case there are strong independent reasons of justice—relevant criteria of extraordinary weight—against relying on these impermissible criteria in deciding on treatments of people. We believe not only that the differentiating criterion in such cases—for instance, the color of a person's skin—cannot be relevant to the question whether that person is entitled to an abortion, but also that historical and sociological conditions in our society provide powerful affirmative reasons of justice to forbid treatments based on that criterion.[238]

---

237. Note that this might not offend our notion of justice as Dworkin has defined it—that is, a notion of justice that is strictly outcome based. *See* LAW'S EMPIRE, *supra* note 33, at 180; *see also supra* note 168. Dworkin's justice is threatened only by outcomes; and so, if allowance of an abortion is a "just" outcome in any given case, our hypothetical 50-50 checkerboard solution to the abortion dilemma would offend justice only in 50% of the cases (regardless of the fact that the threshold choice of *which* cases will have "just" outcomes turns on an irrelevant criterion).

But even under Dworkin's outcome-based concept of justice, an inequitable checkerboard scheme always will result in some injustice. Half of the outcomes dictated by a 50-50 checkerboard abortion statute will be, by definition, unjust. Inequitable checkerboard solutions will, then, offend our notion of justice whether we focus solely on outcomes or on reasons for outcomes as well.

As we have seen, Dworkin attempts to avoid the conclusion that inequitable checkerboard schemes therefore are unjust (as opposed to lacking integrity) by imagining our risk-benefit calculations from the original position about such statutes and their bottom-line effects on justice. *See supra* Section III.B; *see also* LAW'S EMPIRE, *supra* note 33, at 180–82. I have suggested reasons why this attempt is invalid. *See supra* Subsection III.C.2.a. I will take a step further later in this Article when I describe the results of assuming a reason-based conception of justice rather than an outcome-based conception of justice from the original position. *See infra* Subsection III.C.2.c.

238. Some might contend that historical and sociological conditions in our society provide powerful affirmative reasons of justice to *permit* (or even require) treatment of people based on the color of their skin—that race can in fact be a relevant criterion in deciding, for instance, to award a competitive

Our reasons for taking offense at inequitable checkerboard schemes, then, are reasons of justice, pure and simple. Such schemes entail injustice in every case within their purview because they always require the treatment of people according to irrelevant differentiating criteria. We take offense at such schemes for exactly the same reason we take offense at schemes that treat everyone the *same* but according to irrelevant criteria. The inconsistency embodied in inequitable checkerboard schemes matters only because it flags the existence of irrelevant criteria underlying the treatments of people (and, of course, because it reminds us that some of those people are suffering the additional injustice brought about by the application to them of the incorrect principle embodied in the statute—whichever of the statute's conflicting principles that might be).

Another type of checkerboard solution is an *equitable checkerboard scheme*—a checkerboard (really, a compromise) scheme that treats similarly situated people subject to the scheme in similar ways but requires a compromise in principle with respect to each incidence of treatment. As an example, suppose (again) that public opinion is evenly divided (again, in a mutually exclusive way) on the issue of abortion. But suppose that instead of reflecting this division in legislation that requires differential treatment of similarly situated pregnant women, the legislature decides to reflect the division in legislation that imposes the same compromise on every pregnant woman. To accomplish this, the legislature conducts a study by which it is determined that the average number of lifetime pregnancies for a woman in its jurisdiction is two. The legislature then enacts a statute allowing every woman in the jurisdiction one, but only one, abortion during her lifetime.[239]

Equitable checkerboard schemes also might be thought to be divisible into two subcategories. The first, *false* equitable checkerboard schemes, is (as the

---

employment position to a member of a traditionally disenfranchised minority. I would suggest, however, that this contention is in fact based not on a belief that race *itself* is a relevant criterion for treatment, but rather on the belief that the historical and sociological conditions that have (illegitimately) built up around the irrelevant fact of race have *produced* relevant criteria for treatment. What is relevant is not the fact that the applicant is African-American; what is relevant is the fact that the applicant, *as* an African-American, has been relegated by illegitimate social and historical factors to a disadvantageous competitive position with respect to the job. Regardless, any dispute on this point would not be a dispute about whether checkerboard statutes based on illegitimate criteria necessarily treat people unjustly. It would be a dispute, rather, about what criteria are "illegitimate" with respect to certain kinds of treatment.

239. Such a scheme probably would not accurately reflect the 50-50 division of public opinion on the issue of abortion—that is, it probably would not forbid half of the potential abortions and allow the other half—because few women will want to have abortions every time they become pregnant. But, in the interest of avoiding a complicated mathematical formula that would achieve a more accurate result for our hypothetical statute, let us suppose that this scheme reflects the division of public opinion in more or less the correct proportions.

A checkerboard scheme that probably would achieve a more accurate result and that might be called an equitable checkerboard scheme would be an abortion "lottery" or similar concept, whereby each woman desiring an abortion at any given time would have a 50% chance, determined entirely at random, of receiving one. Whether we classify such a scheme as an "equitable" checkerboard scheme or as an "inequitable" one depends on whether we view the treatment people subject to the scheme would receive as the *chance* to have a legal abortion or as the actual allowance or denial of a legal abortion itself.

name I have given it suggests) not really a type of equitable scheme at all. A false equitable checkerboard scheme is one that treats every person subject to it similarly when all such people are not really similarly situated. An example would be a statute allowing only one abortion to every woman, where some women desire[240] more abortions than others do.[241] In these circumstances, women "desiring" different numbers of abortions would be treated "similarly" by the statute in the sense that each would be entitled to the same number of abortions, but would be treated dissimilarly in the sense that some will receive exactly the number of abortions they "desire" while others will not. (An example that might be less taxing on the imagination would be an "equitable" checkerboard statute imposing a limit of twenty gallons of gasoline per week on every car owner. Some car owners—those who drive more often, or who drive farther, or whose cars get worse gas mileage—will be more burdened by this scheme than others.)

It is not difficult to see why this type of "equitable" checkerboard statute does not really belong within our classification of equitable schemes at all. In fact, it is an example of an inequitable checkerboard statute. Although this kind of checkerboard scheme appears to treat differently situated people similarly rather than treating similarly situated people differently as inequitable checkerboard schemes do, this distinction is an illusion. The people subject to treatment under such statutes—the women "desiring" different numbers of abortions, or the car owners desiring different amounts of gasoline—in fact are similarly situated in one respect: Each such person has a desire[242] for something that may or may not be denied her by the statute. The woman who "desires" three abortions is similarly situated, *as measured by the intensity and quality of the desire itself*, to the woman who "desires" only one abortion. Each woman is equal in her desire that she receive the precise number of abortions she wants to receive.[243]

---

240. I use this word cautiously; I do not mean to imply that, in the real world, women are likely to "desire" an abortion as an end in itself.

241. Again, this almost certainly will be the case in the real world. *See supra* note 239.

242. Or a need; the analysis is the same whether the statute in question affects "desires" or "needs."

243. Of course, many government decisions have inequitable effects similar to those of our hypothetical abortion statute; government often allocates the same quantity of a scarce good (by, for example, issuing Social Security checks in particular standardized amounts) to people who in fact need or desire different amounts of that good. But the mere fact that such decisions affect similarly situated people differently does not mean they are examples of checkerboard statutes. In order for a statute to be a checkerboard statute, it must incorporate conflicting principles in an attempt to reflect a division in public opinion about those principles. *See infra* text accompanying note 245. The reason the amounts of Social Security benefits are standardized, however, is not the fact that some members of the public believe the elderly are entitled to unlimited benefits while others believe they are entitled to no benefits; the reason is the fact that the Social Security Administration has determined (presumably in a consistently principled way) that those amounts reflect the best possible reconciliation of the fund's limited resources with the needs of its beneficiaries.

Suppose, however, that we are offended even by these non-checkerboard government decisions that treat similarly situated people differently. If so, the same analysis I apply in the text to our offense at checkerboard schemes also applies to our offense at these non-checkerboard decisions: Such decisions

The false equitable checkerboard scheme thus treats similarly situated people differently. It allows one woman the number of abortions she wants while denying another woman the number of abortions she wants with equal intensity. We must, then, assess such a scheme as we would assess an inequitable checkerboard scheme: We must ask whether the reasons for giving one person the treatment she desires while denying another the treatment she desires—the reasons for making a distinction between two apparently similarly situated persons, the differentiating criteria—are arbitrary, impermissible, or legitimate. If those reasons are legitimate, the people being treated differently are not really similarly situated at all, and the statute therefore is not really a checkerboard statute in the sense in which we (and Dworkin) understand that term. If the reasons for treatment are arbitrary or impermissible, the statute must be assessed exactly as we have assessed inequitable checkerboard statutes,[244] and we must reach the same conclusion: Such statutes offend us not because of some sense of integrity, but because of our concern for justice.

The second subcategory of equitable checkerboard scheme, *true* equitable schemes, simply includes those schemes that are applied so as to treat people similarly when the people subject to the scheme actually are similarly situated in the relevant respects. Our hypothetical statute limiting every woman to one abortion would be such a scheme if, in practice, every woman "desired" the same number of abortions as every other woman. Equitable checkerboard schemes represent compromises of principle whose burdens and benefits are distributed equally among every person subject to the scheme.

A threshold question with respect to true equitable checkerboard schemes is whether they are the kind of "checkerboard" scheme that offends Dworkin (or, rather, that Dworkin thinks would offend "us"). I believe they are. Although Dworkin is vague about precisely what characteristics a statutory scheme must possess in order to offend what Dworkin believes is our notion of integrity, the essence of such a scheme appears to be a legislative attempt simultaneously to reflect inconsistent views on matters of principle within the same statutory regime. According to Dworkin, we believe "that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority."[245]

True equitable checkerboard schemes violate this supposed belief because they do not finally adopt a single coherent principle "whose influence then extends to the natural limits of its authority." Instead they adopt two (or more) principles that are inconsistent with one another and fit them into the same statutory scheme, delineating the influence of each principle according to its

---

offend us because we believe they make distinctions between (i.e., treat) similarly situated people on arbitrary or impermissible grounds, not because we believe they violate some separate norm of integrity.

244. *See supra* notes 233–37 and accompanying text.

245. LAW'S EMPIRE, *supra* note 33, at 179.

proportional degree of support among the population. Our hypothetical one-abortion compromise recognizes the principle that women should be allowed abortions, but only to a point; it allows women only one abortion, not unlimited ones. It also recognizes the principle that women should *not* be allowed abortions, again only to a point; it forbids only some abortions, not every abortion. The statute thus incorporates conflicting principles, and therefore necessarily cuts off the influence of each principle before it has reached "the natural limits of its authority." Therefore, I think, it meets Dworkin's criteria of offensiveness as fully as would an inequitable checkerboard scheme.

But is our offense at true equitable checkerboard schemes, like our offense at inequitable checkerboard schemes, ultimately traceable to our concern for justice? Again, the answer is yes. Recall that justice requires that people be treated in accordance with all of the relevant criteria, and only the relevant criteria, applicable to them with respect to a certain issue of treatment.[246] But these criteria are not met with respect to any person affected by an equitable checkerboard scheme. This is because each person under such a scheme necessarily must be treated in accordance with an irrelevant factor.

Examine again our statute imposing a one-abortion limit on every woman. Under such a statute, the treatment of each woman will be determined in part by the consideration that women always are entitled to abortions. That consideration results in the allowance to every woman of one abortion. But the treatment of each woman also will be determined in part by the *inconsistent* consideration that women *never* are entitled to abortions. That consideration results in the prohibition upon every woman of more than one abortion. By definition, one of these considerations must be wrong;[247] they cannot both be right because they are logically inconsistent with one another. Therefore, every woman is, by definition, being treated according to an incorrect consideration. If a consideration is incorrect, it cannot be relevant; and so every woman under our statutory scheme is being treated in accordance with an irrelevant consideration. Every woman is being treated unjustly.[248]

---

246. *See supra* Section I.C.

247. What if a correct moral consideration for treatment is that every woman is entitled to exactly one abortion? Someone in the real world may believe this to be true as a matter of objective morality; but remember that in the world we have hypothesized, no one believes this to be true. The world we have hypothesized is divided equally among those who believe that abortion is wrong without exception and those who believe that woman are always entitled to abortions without exception. Thus no one in our hypothetical world will believe that a statute allowing one, and only one, abortion to each woman achieves the completely "just" result.

In any case, the crucial fact here—that the two opposing considerations upon which our hypothetical abortion statute is based are logically inconsistent with one another, and thus *at least* one of them must be wrong—is not altered by the possibility that *both* of them are wrong.

248. This result is the same if we assume, as Dworkin does, *see supra* note 168 and accompanying text, an outcome-based definition of justice. If justice depends entirely on outcomes, either the outcome favored by those who absolutely oppose abortion in our hypothetical world (that is, complete prohibition of abortion) or the outcome favored by those who absolutely support abortion rights (that is, complete

Our offense at equitable checkerboard schemes, like our offense at inequitable checkerboard schemes, thus flows directly from our sense of justice. We know by definition that such schemes require treatment of every person subject to them according to a morally incorrect principle. Again, the inconsistency embodied in the checkerboard scheme matters only because it flags the fact that one of the reasons being applied to every person's treatment under the scheme must be irrelevant. The fact of inconsistency underscores the fact of injustice.

The final category of checkerboard schemes is not really a category of checkerboard schemes at all; these are *false checkerboard schemes.* False checkerboard schemes are schemes that treat different people differently but do so on the basis of legitimate considerations; that is, they treat differently people who are not in fact similarly situated. An example would be a statute that prohibits all abortions except those deemed necessary to save the life of the mother. Such a scheme would allow abortions only to some women, but would do so based on the legitimate criterion that those women will die if they are not allowed abortions. This particular scheme will offend our notion of justice if we believe that government should never prohibit abortion; but it is not a checkerboard scheme. It does not meet one of the criteria we have established for a checkerboard scheme: compromise between (or among) mutually inconsistent principles. In fact it is perfectly consistent in principle; it is based on a single principle produced by weighing the perceived right to life of the fetus against the perceived right to life of the mother. Such a scheme treats women differently based upon a consideration that is perceived to be relevant, namely, whether their lives are at stake. As such, it is not a true checkerboard scheme, and thus it cannot possibly implicate some notion of "integrity" separate from our notion of justice.

I hope the foregoing discussion has made it clear that our discomfort with checkerboard schemes, in whatever variety they are conceived, stems from our notion of justice, specifically from the fact that such schemes require treatment of people according to irrelevant criteria.[249] But does this eliminate the

---

toleration of abortion) must be the just one. But the equitable checkerboard approach to abortion achieves neither of these outcomes; it achieves partial prohibition and partial tolerance. Thus there is no case in which it will achieve a "just" outcome, and for that reason it cannot be a just statute.

There is an exception to this conclusion. Suppose again that the morally correct outcome is the one the statute actually prescribes: one abortion per woman. *See supra* note 247. In such a case, justice in actuality would not be offended by the statute's results (but, of course, neither would integrity). Assuming we take one of the two mutually exclusive positions on abortion embodied in the statute, though, we will *believe* that justice has been offended. Integrity will play no part in our reaction to the statute.

249. Of course, throughout this discussion we have been assuming the truth of Dworkin's contention that we do in fact feel some discomfort with the idea of checkerboard statutes. Some of us might not. Some might prefer to hedge their bets; they might believe that the risk of potential injustice produced by an incorrect winner-take-all statute on the issue of, say, abortion outweighs the certainty of some injustice that will be produced by a checkerboard solution. Indeed, as a society we seem reasonably willing to accept legislative compromise on issues of principle (if not exactly in the checkerboard form) as the price that must be paid to get some legislation on the books. This suggests that we might not object as strongly to

possibility of integrity as a separate value that also plays some role in our condemnation of checkerboard schemes? Have I really proven that our concern for integrity does not exist, or only that our concern for justice is more prominent?

The only way to test whether integrity plays some role, however small, in informing our attitudes toward government decisionmaking is to identify some case or type of case in which government can be said to be acting inconsistently in principle but in which this inconsistency has no corresponding unjust effect on people. We then could examine our reactions to such a case and determine whether some residual offense remains; if so, it might be attributable to a concern for integrity.

The problem, though, is that we can imagine no such test case. Our real difficulty here is not in hypothesizing examples of government decisions that do not affect people in ways that can be considered just or unjust. Although at first glance this task seems difficult enough, such decisions can be imagined with a little effort; indeed, they exist in reality and are made by government every day. Are people affected in any real sense when Congress decides to paint the Capitol building one shade of white instead of another? When the President decides (through some underling) how short to cut the White House lawn? When the Chief Justice of the Supreme Court decides to have the Court's bench rebuilt in cherry rather than in mahogany? True, people may be "affected" in a trivial sense by these decisions; their sense of aesthetics may be more or less offended depending on the choice government makes. But no one can be said to have been treated "justly" or "unjustly" by this kind of decision.[250]

---

checkerboard or checkerboard-like solutions as Dworkin appears to think. But if we are willing to compromise in the hope of a greater justice—if we believe that the ends sometimes justify the means in this way—then we are simply taking a certain kind of consequentialist view of what is just. Dworkin has offered nothing to convince us that something called "integrity" stands in the way of such a view.

250. It might be objected that I am too casually discounting here a conception of justice that includes aesthetic criteria as "relevant" to the treatment of people. It is true that I am implying that a decision whose *effects* are entirely aesthetic cannot implicate "justice" or, for that matter, any substantive moral norm. Some may disagree; but those who do, and who therefore believe that a decision about what shade of white to paint the White House involves a "matter of principle," would not be troubled by the mere fact of inconsistency itself if the White House were painted in two incompatible shades. It would be the unpleasant *consequences* of that inconsistency—the constant eyesore of having the East Wing painted in ivory and the West Wing painted in pearl—that would offend such a person's aesthetic notion of justice. Integrity would have nothing to do with it.

Janice Toran, in the context of procedural reform, has presented an intriguing argument that aesthetic criteria can play a legitimate role in shaping law. *See* Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990). I suppose it is an open question whether aesthetic concerns, in law or elsewhere, properly are viewed as consequentialist, deontological, or something of both, although I find it difficult to articulate a notion of aesthetics that does not ultimately assign them consequentialist rather than inherent value. Beauty, of course, is in the eye of the beholder; aesthetic value would seem to be meaningless if abstracted from its effects on people. Aesthetic qualities, then, must be only consequentially rather than deontologically valuable. As such, any attempt to construct a primarily aesthetic justification of stare decisis would fall under the category of consequential theories. However, although it is possible that, as Toran suggests, hidden aesthetic considerations underlie many theories about

The difficulty is not, then, in identifying a type of government decision that does not implicate notions of justice. The difficulty, rather, is that this vacuous kind of decision cannot be said to involve matters of *principle*. Such decisions are at best decisions on matters of policy;[251] more accurately, they are simply decisions on matters of no consequence. They do not involve any issues of principle precisely *because* they do not entail any morally significant effects on people.

The simple fact is that there is no test case in which government acts inconsistently on matters of principle but does not thereby affect people in a morally significant way. The concept of a "matter of principle" presupposes morally significant effects on real people; it presupposes treatments, not merely decisions. Principle has no meaning if divorced from such treatments.

This fact suggests that our concern in evaluating checkerboard statutes is not that they represent inconsistent decisions, but that they entail unjust treatments. We are concerned with the principle, not with the inconsistency. If we assigned moral significance to the fact of inconsistency *qua* inconsistency, we would condemn the President's decision to paint the White House in two incompatible shades of white as morally wrong; but we do not, and would not, do this. Such a decision may be irrational; it may be aesthetically offensive; but it is not morally wrong. We would not condemn such a decision precisely because it does not implicate our concern for justice. It must be this concern for justice, therefore—not any concern for consistency—that underlies our condemnation of checkerboard statutes.[252]

This deceptively simple conclusion is supported by the probability that the intensity of our reactions to hypothetical checkerboard statutes will vary depending upon the substantive principle involved in a given statute. Most people are likely to react quite strongly to checkerboard resolutions of issues like abortion and racial discrimination.[253] But what of a checkerboard approach to the issue of, say, hunting? Assuming some people believe hunting should be permitted and others believe it should not be, how offended are we likely to be if the government decides to compromise by allowing some people, randomly chosen, to acquire hunting licenses while forbidding the rest to hunt? Or by randomly allowing the hunting of some animals but not of others? Or (as government in fact often does, though probably not for reasons

---

the law, to my knowledge no one has yet articulated a primarily aesthetic theory of adjudicative consistency.

251. Dworkin believes that integrity does not require consistency on issues of policy (as opposed to issues of principle). *See* LAW'S EMPIRE, *supra* note 33, at 221–24.

252. This conclusion, I think, is underscored by Dworkin's own suggestion that we would condemn even checkerboard schemes that are not created by any moral actor (statutes created, for example, by a computer programmed with the results of public opinion polls). *See id.* at 182. If so, this suggests that the core of our objection must lie in the treatments such mechanically created statutes would entail, not in any moral defect in the decisionmaking process itself.

253. Again, this fact undermines Dworkin's use of such examples to demonstrate the supposed offensiveness of checkerboard statutes in the abstract. *See supra* Subsection III.C.2.a.

primarily of compromise) by allowing every person to hunt but limiting the number of animals each person can take?[254] Those who feel strongly one way or another about the issue of hunting may take strong offense at such a statute; but most people are not likely to find it as distasteful as a checkerboard approach to abortion or racial discrimination.

What explains this quantitative difference in our assessments of different kinds of checkerboard statute? I believe the answer is simple: The more important we believe a principle to be as a matter of justice, the more strongly we will be offended by a legislative compromise on that issue of principle. Again, this strongly suggests that our real concern lies with justice, not with some separate norm implicated by the fact of inconsistency itself. Inconsistency alone does not offend us; we are troubled only when inconsistency signals injustice.[255]

c. *The Original Position Revisited*

Thus far I have established, I think, that in the real world our offense at checkerboard statutory schemes—the paradigm used by Dworkin to uncover what he believes to be the norm of integrity—is not animated by a concern for something called "integrity" at all; it is animated by, and only by, our sense of justice. I now want briefly to revisit Dworkin's contention that this conclusion does not hold if our evaluation of checkerboard schemes is assessed as if made not in the real world, but from his version of an original position.

Recall my conclusion above that Dworkin's tactic of thrusting us into the original position is an illegitimate one.[256] It is illegitimate because it assumes that we would react to checkerboard statutes from the original position similarly to how we react to examples of such statutes taken from the real world and implicating our real-world beliefs about justice. But we cannot make this assumption, because we cannot know what our intuitions would be in the original position—or even if we would have intuitions at all in such a vacuum. Instead, we are stuck in the real world, and in the real world we are likely to reject checkerboard schemes on grounds of justice and justice alone.

---

254. Query, though, whether this latter statute might be an example of a "false" checkerboard scheme.

255. Of course, we might be troubled by inconsistency even when we personally do not believe that a normative principle is at stake—even, that is, when our own sense of justice is not implicated by the particular issue that is the subject of a legislative compromise. Although we do not care about a given issue (say, hunting), we might reject an inconsistent resolution of that issue because we know it will offend those who *do* care. Such a reaction, though, would be the product of a sense of non-integrity-based justice rather than a sense of integrity. Although we would not believe hunting itself to be either just or unjust, we would believe that the offense suffered by those who do feel strongly on the issue is an unjust result of the inconsistency. We would believe, that is, that inconsistency produces unjust consequences in such a case; it is consequentially unjust. We would not believe inconsistency itself to be an inherent moral evil, which is the result Dworkin attributes to integrity.

256. *See supra* Subsection III.C.2.a.

The problem with Dworkin's analysis, however, is not only that he illegitimately attempts to perform it from an imaginary original position, where the foundation of his analysis—intuition—is at best uncertain and at worst meaningless. The further problem is that, even assuming that an intuitional calculus is possible from the original position, Dworkin's reconstruction of that calculus proceeds on faulty premises.

I have already hinted at how one of Dworkin's premises is faulty.[257] Dworkin assumes that people in the original position would prefer a guarantee of some justice (in the form of a checkerboard statute) to the risk that no justice will be done (if the incorrect winner-take-all alternative is adopted).[258] But in a rational calculus performed from behind a veil of ignorance, each alternative would come out even; each, that is, would promise the same amount of overall justice. To show why this is so, I will do in part what I have been chiding Dworkin for doing: I will postulate how rational people might act in an imaginary original position. (But I will not make any guesses, as Dworkin does, about their intuitions there.[259])

People in the original position will, Dworkin assumes, anticipate that divisions of opinion on issues of principle will arise; they simply will not know what issues will be involved or how opinion will divide.[260] So, in order to determine whether checkerboard statutes are rational means of creating as much justice as possible, they will imagine an issue of principle—call it

257. *See supra* note 231 and accompanying text.

258. *See* LAW'S EMPIRE, *supra* note 33, at 181.

259. I will, however, assume our original position theorists to be risk-neutral rather than risk-averse or risk-prone. I will assume, that is, that they would value a 100% chance at 50¢ exactly the same as a 50% chance at $1.00. This may or may not be true as an empirical matter of human psychology. But people acting in a fully rational way would be risk-neutral, and there is no reason to believe that Dworkin himself assumes non-risk neutrality (i.e., irrationality) in reaching his conclusions about "our" reactions to checkerboard statutes. In assuming risk neutrality, then, I am simply assessing Dworkin's arguments on their own terms.

Still, as the reader considers my analysis over the next few pages, he or she might do well to imagine how it would change if the original position theorists I hypothesize were even slightly risk-averse. If this were the case, as the reader will see, our original position theorists would have reason to prefer the checkerboard method of resolving disputed issues to the winner-take-all method. Does this undermine what will be my conclusion in this subsection, that is, that people in the original position might reject checkerboard statutes out of a sense of non-integrity-based justice?

I think it does not, for two reasons. First, to assume risk aversion in the original position is in essence to cheat at the rules of the game; it is to assume that people in the original position will act irrationally in pursuing justice. Put another way, it is to assume that people will take into account an irrelevant criterion or set of criteria—producing the irrational risk aversion—in deciding what their legislative procedures will be. Any procedure generated by this irrational process must be flawed; it must be unjust. Thus, if risk-averse people prefer checkerboard solutions, it is because of a flawed sense of justice, not a true one. A true (that is, a rational) sense of justice would be risk-neutral and would not prefer the checkerboard solution.

Second, even if we assume that risk-averse (i.e., irrational) decisions nonetheless may be just ones, we will conclude only that risk-averse people in the original position will have some legitimate reason to prefer checkerboard solutions over winner-take-all solutions. But this reason might not be determinative; as I contend below, however, there may be countervailing reasons against checkerboard solutions that even risk-averse people would find convincing. *See infra* text following note 262. As such, even risk-averse people in the original position might reject checkerboard solutions out of a sense of justice.

260. See LAW'S EMPIRE, *supra* note 33, at 180–81.

X—and will imagine a division of opinion on that issue—say a 60%-40% split between two mutually exclusive opinions about *X*. Our theorists then will compare the amount of justice with respect to *X* likely to be achieved by a winner-take-all legislative scheme with the amount likely to be achieved by a checkerboard scheme.

Suppose they assess the amount of justice on a scale from 0 (justice in no instance) to 100 (justice in every instance). (Suppose further that they adopt Dworkin's strictly outcome-based concept of justice.[261]) The correct winner-take-all statute with respect to *X*—call it *J*—will score a perfect 100 on this scale, because it will result in justice in every case. The incorrect winner-take-all statute with respect to *X* (that is, $-J$) will score a 0 on the scale, because it will result in justice in no cases. But, from behind the veil of ignorance, our theorists will not know which winner-take-all statute is likely to prevail in the real world. They will postulate that public opinion will be split 60% to 40% on *X*, but they will not know whether the majority will support *J* or $-J$. Therefore, they will discount the values of *J* and $-J$ by the chances that each will prevail. Because each statute has a 50% chance of being the majority-supported, and thus the prevailing, statute, each of *J* and $-J$ will receive a score of 50. The winner-take-all approach thus will receive a cumulative score of 50 on the scale of justice (because either alternative it offers would receive that score).

Now our theorists will look at the checkerboard alternatives to the winner-take-all approach. The checkerboard alternative that favors justice—call it *C*—will receive a score of 60 on the justice scale; it will reach a just result in 60 cases out of 100. Conversely, the checkerboard alternative that favors injustice—call it C_I—will receive a score of 40 on the justice scale; it will achieve a just result in 40 cases out of 100. But our theorists, again, will not know which of *C* or C_I will prevail; and again they will discount each by its probability of prevailing (50%). The result will be a 50% chance for a score of 60 and a 50% chance for a score of 40. Cumulatively, the checkerboard approach, like the winner-take-all approach, therefore will receive a score of 50 on the justice scale.

Our theorists in the original position, then, will have no inherent reason of justice to choose a checkerboard approach over a winner-take-all approach; they will have no reason to hedge their bets, to suppose (as Dworkin does) that "the checkerboard strategy will prevent instances of injustice that would otherwise occur."[262] But, like people in the real world, they might have *independent* reasons of justice to prefer the winner-take-all alternative. They might believe, for instance, that the democratic institutions of decisionmaking they are designing (or assuming) for use in the real world are more likely, in

261. *See supra* note 168 and accompanying text.
262. LAW'S EMPIRE, *supra* note 33, at 181.

the end, to produce the *just* winner-take-all result than to produce the *unjust* one. They might believe that proportions of difference in public opinion on matters of principle can be changed through dialogue and rational deliberation, and that the political systems under which they will operate in the real world will promote those processes. They might, in short, believe that complete justice is achievable, or nearly so. If so—if they are optimists—they might reject the checkerboard approach as defeatist. (Indeed, they might believe that such an approach, by reducing incentives in the real world to strive for complete justice, is simply a means of throwing out the baby with the bathwater.)

So the validity of Dworkin's assumption that our sense of justice would not prevent us from choosing checkerboard solutions from the original position is seriously in doubt. Rational people in the original position might well reject checkerboard schemes out of a sense of justice; and, if that is the case, "integrity" loses its force as an explanatory norm.

But there is yet further reason to challenge Dworkin's assumptions about justice in the original position. Dworkin's analysis assumes that justice must be defined to turn on outcomes and only on outcomes. It assumes that justice is served whenever the outcome dictated by "the best theories of justice"[263] is reached, *regardless of whether the best theories of justice actually are applied in reaching that outcome.*[264] It assumes a definition of justice that is wholly indifferent to reasons for treatment—one that makes no distinction between, on the one hand, a correct outcome achieved by application of all the relevant criteria and, on the other hand, a correct outcome achieved by random chance, or misconceived evil intent, or fortuitous stupidity. It assumes, that is, a definition of justice critically different from the one assumed in this Article,[265] which is concerned not merely with outcomes but also with the reasons for them.

Dworkin's reconstruction of the original position assessment of checkerboard statutes displays, and relies upon, his outcome-based concept of justice. Dworkin assumes that checkerboard statutes always will (and would be seen by people in the original position to) "prevent instances of injustice that would otherwise occur" if the incorrect winner-take-all alternative were adopted.[266] He assumes, that is, that those people who are treated under a checkerboard statute according to that principle which is correct among the two (or more) inconsistent principles embodied by the statute are therefore being treated "justly." Based on this assumption, he concludes that a checkerboard statute results in more instances of just treatment than the incorrect winner-

263. *Id.* at 180.
264. *See supra* note 168.
265. *See supra* Section I.C; *see also supra* note 168.
266. LAW'S EMPIRE, *supra* note 33, at 181.

take-all alternative, which would result in no instances of just treatment. The number of just treatments is equated with the number of correct outcomes.

Because Dworkin's concept of justice is entirely teleological, however, he ignores the fact that even those "correct" outcomes produced by a checkerboard regime will have been achieved for incorrect reasons. We can turn again to our abortion example for an illustration of this fact. A checkerboard abortion statute that allows abortions to women born in odd-numbered years but not in even-numbered years does more than achieve the morally incorrect outcome for half the women it affects; it also applies an irrelevant criterion (the differentiating criterion) to *every* woman affected by the statute. Such a statute requires that *every* woman be treated according to the irrelevant criterion of whether the year of her birth ends in an even or an odd digit. Thus even those women who experience the morally correct treatment (whether it is allowance or prohibition of abortion) are being subjected to treatment for a morally incorrect *reason.*

If, then, one assumes (as I have in this Article) a definition of justice that turns on reasons for treatment as well as results of treatment, one discovers that a checkerboard statute produces exactly the same number of instances of injustice that is produced by the incorrect winner-take-all alternative. By definition, *everyone* affected by a checkerboard statute is being treated unjustly. Of course, the total *amount* of injustice may be less under a checkerboard regime than under an incorrect winner-take-all statute, because we may believe that it is less unjust for someone to experience the correct result for the wrong reasons than it is for someone to experience the incorrect result for the wrong reasons. But the point remains: Under a concept of justice where reasons matter, checkerboard schemes produce as many *instances* of injustice as incorrect winner-take-all schemes do.

Adoption of a reason-based definition of justice therefore tilts the *ex ante* original position calculus against the checkerboard approach. We can demonstrate the truth of this conclusion by referring back to the methodology we hypothesized for our original position theorists above.[267] Having adopted a reason-based concept of justice, our theorists will recognize that checkerboard statutes will produce instances of injustice in every case to which they apply. They therefore will assign to both C and C_I scores of 0 on the justice scale, giving the checkerboard approach a cumulative score of 0. The winner-take-all approach still will receive a cumulative score of 50, making it the clear choice in a risk-benefit analysis.[268] From the original position, then,

267. *See supra* notes 259–62 and accompanying text.

268. This analysis, of course, assumes that the number of instances of injustice (rather than the total amount of injustice) is the appropriate standard for comparing the two alternative approaches. As I have noted, it may be thought that instances of incorrect (or unjust) outcomes coupled with irrelevant reasons for outcomes are more unjust than instances of *correct* (or just) outcomes coupled with irrelevant reasons for outcomes. *See supra* Section I.C. If one adopts this view (as indeed I do), each instance of injustice produced by an incorrect winner-take-all statutory alternative, which couples an unjust outcome with unjust

people who adopt a reason-based definition of justice will be motivated by justice to reject checkerboard statutes.

So, even if we accept Dworkin's construction of a Rawlsian original position from which to test our reactions to checkerboard statutes, a reason-based conception of justice explains our rejection of such statutes as well as—maybe better than—a mysterious independent value called "integrity" does. If, as Dworkin thinks, our reactions to checkerboard statutes are not adequately accounted for by justice as he defines it, the answer may not be the invisible, hulking presence of the hidden planet Integrity. The answer may simply be a better definition of justice.

3. *The Failure of Integrity as a Substantive Norm in Adjudication*

We have seen that Dworkin's concept of a distinct substantive norm called "integrity" is mistaken, and his use of the checkerboard statute as a divining rod for that norm is misguided. We noted first that integrity fits poorly with the facts of judicial decisionmaking.[269] Unlike legislatures, courts often must make a choice between a consistent result and a just one. Integrity purports to demand consistency instead of justice at least some of the time, and we might reasonably believe that this is simply too high a price to pay for consistency.

The notion of integrity thus is much more infirm in the judicial than in the legislative context. But integrity is not merely weak when applied to adjudication; it is nonexistent. Recall that our difficulty with Dworkin's checkerboard statutes stems not from our sense of integrity, but from our sense of justice. A checkerboard statute necessarily offends justice because it treats people according to irrelevant criteria.[270] Justice, not integrity, explains our rejection of checkerboard statutes, and thus only justice (and not integrity) can explain our concern for inconsistent court decisions.

---

reasons for that outcome, may be thought to represent a greater amount of injustice than each instance of just outcomes coupled with unjust reasons that is produced by a checkerboard alternative.

Dworkin, however, assumes that measuring instances rather than total amounts of justice is the correct standard for gauging justice. *See* LAW'S EMPIRE, *supra* note 33, at 180–81. Indeed he must, because his outcome-based definition of justice does not allow for the possibility that treatments involving the same outcome may involve different degrees of justice. (This, I think, is a powerful reason to reject definitions of justice that are entirely outcome-based.)

Theorists in the original position who believe that instances of treatment should be weighted differently with respect to justice depending upon the reasons for such treatments still may prefer a checkerboard approach to a winner-take-all approach if they compare the alternatives based on total amount of justice produced rather than number of instances of justice produced. Whether this will be the case, however, will depend on exactly how much less just they believe an incorrect result coupled with irrelevant reasons to be than a correct result coupled with irrelevant reasons. The answer to that question is likely to depend on both the nature of the results and the nature of the reasons—factors that will change with each different principle and each different checkerboard approach to that principle. As such, it is hard to believe that this kind of calculus could be performed in the vacuum of the original position.

269. *See supra* Subsection III.C.1.

270. *See supra* Subsection III.C.2.b.

This conclusion, of course, begs the question: Does some deontological notion of non-integrity-based justice demand adherence to precedent in the same way that it might demand rejection of checkerboard statutes, even to the extent of following unjust decisions? Just as we are forbidden to enact checkerboard statutes by the fact that they treat people differently according to irrelevant criteria, might we be required to avoid adjudicative inconsistency by the fact that inconsistent case law treats people differently according to irrelevant criteria?

To reach such a conclusion, one must assume that different courts deciding different cases are in fact agents of a single entity—"the law" or something like it—and that, in deciding different cases differently, that entity is in fact "treating" the parties to each case according to a single irrelevant differentiating criterion or set of irrelevant differentiating criteria. But courts do not operate that way. If the court in Case *X* mistakenly (or even intentionally) decides that case according to an irrelevant criterion, it does not thereby "treat" the parties to Case *Y*, a distinct case before a different court, according to the same irrelevant criterion. The court in Case *X* is not intentionally distinguishing between Plaintiff *X* and Plaintiff *Y*; the court in Case *X* does not even know that Plaintiff *Y* exists, and indeed may assume that future courts will decide similar cases consistently with its own decision. The separate decisions in Cases *X* and *Y*, in other words, are just that: separate decisions. Unlike checkerboard statutes, which necessarily treat everyone in their purview according to some irrelevant criterion, inconsistent case law necessarily treats only one person—Plaintiff *X*, the first party subject to an unjust court decision[271]— according to an irrelevant criterion (or according to an erroneous assessment of relevant criteria).[272]

Because the plaintiff in Case *Y* is not in any way being treated in accordance with the irrelevant criterion applied in deciding Case *X*, the decision of Case *X* cannot itself provide any reason to decide Case *Y* the same way. The unjust result of Case *X* remains, regardless of how Case *Y* is decided. Indeed, deciding Case *Y* similarly would merely result in two unjust decisions rather than one. Moreover, even if we can somehow imagine that the plaintiffs in Cases *X* and *Y* are being treated according to the same irrelevant differentiating criterion, this injustice cannot be remedied by deciding Case *Y* consistently with Case *X*. A court cannot remove the stain of injustice by reaching the same incorrect result in Case *Y* that the prior court reached in Case *X*; changing the result of Case *Y* cannot remove the fact that the parties

271. Of course, the defendant in Case *X* also has been treated unjustly in our hypothetical.

272. Only if the subsequent court deciding Case *Y* treats the decision in Case *X* as a substantive reason to decide Case *Y* in a certain way are the parties to Case *Y* in some way "treated" according to the irrelevant criterion relied upon by the court in Case *X*. Here, of course, we revisit territory covered in our critique of consistency as equality. *See supra* Section II.C.

to both Case *X* and Case *Y* have been treated, on this strained theory, in accordance with a morally incorrect *reason*.

There is, then, no independent reason of justice, stemming solely from the fact that a similarly situated plaintiff in Case *X* was allowed to proceed with her claim, that mandates a similar result in Case *Y*. Integrity fails both as a substantive norm in itself and as a signal of some deontological principle of justice that requires adjudicative consistency. It thus joins its cousin equality as a chimerical explanation of stare decisis.

CONCLUSION: FOOLISH CONSISTENCY

The deontological justifications of stare decisis fail at the task that has been set for them; the norms that have been offered as their grounds do not exist. Is the notion of adjudicative consistency therefore an irredeemably foolish one? It need not be.

A number of sensible-sounding reasons can be articulated, and have been, why courts should strive to be consistent from case to case. The protection of reliance interests, the need for certainty and predictability in the law, the goal of judicial efficiency, the promotion of confidence in something called "the rule of law," the imposition of constraints on judicial lawmaking—the list is a familiar one to any lawyer.[273] But these sorts of reason are purely

273. On stare decisis as a response to the possibility that parties may justifiably have acted in reliance on previous court decisions, see WASSERSTROM, *supra* note 5, at 66–69; Alexander, *supra* note 5, at 13–14; Maltz, *supra* note 5, at 368–69; Moore, *supra* note 26, at 201 n.5. On stare decisis as a means of assisting the planning of private conduct by promoting certainty and predictability in the law, see WASSERSTROM, *supra* note 5, at 60–66; Benditt, *supra* note 26, at 91; Maltz, *supra* note 5, at 368–69; Moore, *supra* note 26, at 201 n.5; Schauer, *supra* note 5, at 597–98; Wesley-Smith, *supra* note 26, at 84. On the notion that adjudication would be hopelessly inefficient if judges were allowed (or required) to reassess settled rules of law in deciding each new case, see CARDOZO, *supra* note 29, at 149–50; WASSERSTROM, *supra* note 5, at 72–74; Maltz, *supra* note 5, at 370–71; Moore, *supra* note 26, at 201 n.5; Schauer, *supra* note 5, at 599; on the related argument, grounded in social choice theory, that stare decisis serves to prevent the phenomenon of "cycling," or the inability to achieve aggregate outcomes combining the majority-preferred resolutions of multiple issues, see Stearns, *supra* note 135, at 1329–50. On the rather nebulous idea that adjudicative inconsistency undercuts the valuable public perception of a "rule of law" that is relatively stable and nonarbitrary, see, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) (stating that overruling a prior decision "is usually perceived (and perceived correctly) as . . . a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. . . . [Frequent discarding of precedent would result in] [t]he country's loss of confidence in the judiciary . . . ."); Alexander, *supra* note 5, at 14–16; Maltz, *supra* note 5, at 371–72; Postema, *supra* note 27, at 24–26; Pound, *supra* note 5, at 942–43; Schauer, *supra* note 5, at 600–02. On the argument, based in the concept of the separation of powers or, sometimes, in jurisprudential theories about the nature of law, that adherence to precedent provides a means of constraining the lawmaking discretion of courts, see *Casey*, 505 U.S. at 865 (declining to overrule *Roe v. Wade* in part because doing so "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law"); WASSERSTROM, *supra* note 5, at 75–79; Greenawalt, *supra* note 108, at 1171–73; Powell, *supra* note 5, at 286–87.

An innovative and, as far as I can tell, unique consequentialist justification of stare decisis has been offered by Martin Shapiro, who draws on communications theory to defend stare decisis as a "redundancy" that functions to overcome communication problems inherent in a diverse legal system and thereby ensure that lawyers and judges accurately receive information about how prior courts have decided legal issues. Shapiro asserts: "*Stare decisis* viewed as redundancy is a fully rational, probably indispensable, method of

consequentialist ones; they are strategic reasons to decide a later case in the same way as a previous one, but they are not reasons for following precedent *qua* precedent. Indeed, as Max Radin argued in 1933, perhaps they are not really considerations of "stare decisis" at all, properly understood:

> If a court follows a previous decision, because a revered master has uttered it, because it is the right decision, because it is logical, because it is just, because it accords with the weight of authority, because it has been generally accepted and acted on, because it secures a beneficial result to the community, that is not an application of *stare decisis.* To make the act such an application, *the previous decision must be followed because it is a previous decision and for no other reason . . . .*[274]

It is Radin's pure, deontological sense of stare decisis, or something close to it—the command to follow a previous decision "because it is a previous decision and for no other reason"—that has been the concern (the target, really) of this Article. Many others have assailed the popular consequentialist justifications of stare decisis,[275] but its deontological defenses have gone largely unnoticed by critics, as if either their validity were too self-evident or their effects too harmless to suffer analysis. Deontological theories of stare decisis can be more dangerous than their consequentialist counterparts, though, for the simple reason that they disdain compromise; they demand homage to empty notions of equality or integrity at the expense of what is important in adjudication.

What is important in adjudication is reaching the right result—the *just* result, all things considered. If part of the "just result" is protection of reasonable expectations or establishment of a stable rule or preservation of judicial resources, so be it; consistency may serve the ends of justice. But our courts finally must rid themselves of the habit of thinking that adjudicative consistency holds some inherent value tugging them away from what is just. They must, that is, adopt the approach of the Supreme Court in *Planned Parenthood v. Casey*[276]—an unabashedly "prudential and pragmatic"[277]

---

solving the problem of syntactic noise in a system with very high message loads—which any system that proceeds case by case inevitably is." Martin Shapiro, *Toward a Theory of* Stare Decisis, 1 J. LEGAL STUD. 125, 133 (1972).

274. Max Radin, *Case Law and Stare Decisis: Concerning* Präjudizienrecht in Amerika, 33 COLUM. L. REV. 199, 200 (1933) (emphasis added).

275. *See, e.g.*, WASSERSTROM, *supra* note 5, at 66–69, 72–73, 75–79 (questioning degree to which goals of protecting reliance interests, promoting efficiency, and restraining judges' discretion are served by system of stare decisis); Laurence Goldstein, *Some Problems About Precedent*, 43 CAMBRIDGE L.J. 88, 102–07 (1984) (critiquing extent to which stare decisis is made necessary by, inter alia, concerns about ex post facto liability, separation of powers, and predictability); Maltz, *supra* note 5, at 368–69, 370–71 (questioning validity of certainty, reliance, and efficiency as justifications for stare decisis).

276. 505 U.S. 833 (1992).

277. *Id.* at 854.

philosophy of stare decisis, a skeptical willingness to immerse that doctrine in the exacting crucible of justice. Recall that some among the *Casey* plurality found the rule of *Roe v. Wade*[278]—a rule constitutionalizing a woman's right to an abortion—to be "offensive to [their] most basic principles of morality."[279] But in refusing to jettison *Roe*'s "central rule,"[280] the plurality did not, in the name of consistency, reach a result they believed to be unjust. Instead, they weighed their moral and constitutional "reservations"[281] about *Roe* against the injustice they believed would result if *Roe* were overturned. They put stare decisis to the test of justice, and, in that case, they held it to have passed the test.

The Court's approach in *Casey* contrasts sharply with its approach in *James B. Beam Distilling Co. v. Georgia*,[282] decided only a year earlier.[283] In *Beam*, the Court rejected a case-by-case, prudential approach to retroactive application of judicial decisions, mandating instead a bright-line rule requiring retroactivity in constitutional cases. The *Beam* Court's reasoning was primarily deontological, resting on the notion that adjudicative consistency, because it reflects "the principle that litigants in similar situations should be treated the same,"[284] is a good in itself. In brushing aside consequentialist concerns of predictability and substantive fairness in the name of equality, the decision in *Beam* cast in bold relief the disquieting tendency of deontological theories to scorn practical, balanced approaches as unprincipled heresy.

The point of this Article has been that the view of adjudicative consistency exemplified by *Beam* is an indefensible one. Courts grasp at thin air when they search for reasons why stare decisis must be an intrinsic good. Worse, they disserve justice; they bind themselves and the future to the missteps and wrong turns of an imperfect past.

This is not to say that the bitter pill of bad precedent should never be swallowed. Sometimes the general injustice flowing from inconsistency will outweigh the particular injustice of a result that would, standing alone, be indefensible. In commercial law, for instance—where lawyers structure transactions and pen opinion letters on the promise of steady doctrine—frequent rejection of precedent would engender chaos. In areas of the law with high visibility—free speech, equal protection, and abortion cases come to mind—slapdash application of supposedly immutable constitutional provisions would undermine public confidence in the courts. In statutory interpretation,

278. 410 U.S. 113 (1973).
279. 505 U.S. at 850.
280. *Id.* at 855.
281. *Id.* at 853.
282. 501 U.S. 529 (1991).
283. *See supra* notes 76–91 and accompanying text.
284. 501 U.S. at 537.

fragmented case law would frustrate the very purpose of having a statute in the first place.

Some of the traditional consequentialist justifications of stare decisis, that is, may have validity in any given case. The point is that stare decisis is, and must be seen to be, a tool to achieve these ends, not an end in itself. A court deciding a case should examine the pragmatic reasons for following precedent. (Has one of the parties relied to her detriment on the rule of the old case? Would public confidence in the judiciary and the rule of law be threatened significantly by overruling or ignoring precedent? Are there institutional reasons to adhere to the prior case? Would it be inefficient to reopen the issue?) The court then should weigh any of those considerations that apply against all the other considerations relevant to the case. Sometimes the result will be adherence to precedent; sometimes it will not be. But if the court does its job right, *justice will be done.*

I have not tried here systematically to defend this sort of pragmatic vision of stare decisis; my aim has been critique, not theory. But in challenging the idea of a "pure" consistency, I hope I have suggested that only a consequentialist approach to precedent—one animated by justice and tempered by common sense and Holmes's muse, experience—can claim a legitimate place in adjudication. Any other notion of adjudicative consistency—any belief in consistency for its own sake—is a foolish consistency indeed.