Abstract

This dissertation is about the relationship between legal consistency and the rule of law. Chapter 1 begins the dissertation with four prefatory points central to exploring this relationship. Chapter 2 then surveys how different periods of legal thought have conceived of legal consistency. Chapter 3 takes a step back to consider this issue from a broader perspective, investigating the philosophical foundations for this link between consistency and the rule of law. Chapter 4 continues this philosophical examination by looking at divisions on the subject within contemporary analytical legal philosophy. Chapter 5 tackles the empirical side of the debate, exploring how different political science models of judicial decision-making have sought to measure and understand legal consistency.

Chapter 6 marks a break in the dissertation, turning away from survey and synthesis, and moving toward creating a new model and theory of legal consistency. Chapters 6 lays the foundation for this new model by providing an original taxonomy of the different types of legal consistency in an effort to develop a fuller and richer account of legal consistency and its relationship to the rule of law. This chapter argues that legal consistency is not a univocal but rather a protean concept, consisting of various meanings, applications, and uses, with each bearing a distinct relationship to the rule of law. To explore the context-dependency of the concept, Chapter 7 borrows from Wittgenstein’s philosophy of language. Based on this examination, Chapter 7 concludes that the rule of law is not an essential concept, but neither is it an essentially contested concept. Arguing against both extremes, Chapter 7 demonstrates how the rule of law operates like a Wittgensteinian language game. This analogy helps illuminate how, over time, certain legal propositions become foreclosed as implausible due to their being inconsistent in particular ways with settled legal norms. Chapter 8, the final chapter, applies this
theory to the three areas of law discussed throughout the dissertation – abortion, church-state, and affirmative-action law – to demonstrate how participants in legal discourse tend to converge in the long-term. The dissertation identifies this convergence as central to the rule of law.

Readers:

Joel Grossman, Johns Hopkins University, Political Science
Jennifer Culbert, Johns Hopkins University, Political Science
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Ron Walters, Johns Hopkins University, History
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SHOW ME HOW TO GET THERE AND HOW I GOT HERE

This dissertation is about legal consistency and the rule of law. It is an outgrowth of many years of thinking about consistency from a legal, political, and philosophical perspective. Indeed, the roots for this dissertation took form about a decade ago, when I was applying to law school. As I was working on my law school applications, my father, who is a physician but who has always been eager to learn more about law, shared with me that a lawyer friend of his once commented that the hardest legal cases involve conflicting claims. My father asked whether I agreed with this statement and how I planned to approach such cases once I became a lawyer.

I wanted to impress my father, but as a 21 year old with only a basic understanding of the law, I didn’t know how to go about answering his question. Don’t all lawsuits, as adversarial proceedings, involve claims of conflicting rights and interests? I wondered whether there might be different types of legal inconsistencies, with some presenting more difficult problems for lawyers and courts. And perhaps it was this particularly troubling type of inconsistency to which my father’s lawyer friend was alluding. This possibility of different types of legal inconsistencies bewildered me, but I did not realize at the time that it would be an idea that would intrigue and stick with me throughout my legal education and experience in practicing law – eventually leading me to pursue graduate degrees in political science and philosophy.

This conversation with my father occurred shortly after the Supreme Court’s decision in Bush v. Gore, so whenever I thought about his question, my thinking often went back to that controversy. Many liberals at the time accused the Court of issuing a decision inconsistent with fundamental principles of adjudication – principles such as federalism and separation of powers that the five conservatives on the Court generally lauded more than liberals. This betrayal of
such “first principles” prompted many liberal commentators to conclude that in issuing this monumental decision the conservative majority had abandoned the rule of law as we knew it in the United States.¹

All this bickering over the rule of law had an immense impact on me, leading me to wonder whether the Bush v. Gore decision undermined the rule of law either: (1) because it was inconsistent with pre-existing legal norms, (2) because it was inconsistent with the conservatives’ own commitments to federalism and limited judicial power, (3) because the decision had the effect of selecting the next President of the United States, or (4) because it had the effect of selecting George W. Bush – the wrong candidate, in the liberal view – as the next President of the United States. At the time, I had read some material on the case and its relationship to the rule of law, but I knew even then that, without any formal legal training, I would not be able to grasp the matter fully.

While in law school, I encountered more discussion of the relationship between legal consistency and the rule of law, but it was not until I was a practicing lawyer that I finally had first-hand experience with this problem. After graduating from law school, I worked as a litigator at a public-interest law firm in Washington D.C., and when I was assigned my first brief in a case in a federal appellate court, one of the senior attorneys explained to me that there were several Supreme Court precedents that stood in our way. He carefully laid out how our job was,

first, to convince the court that ruling in our favor is right as a matter of public policy, and then, second, to show the court how to reach that result as a matter of law. I remember distinctly that he said: “We have to show the court how to get there.”

I scurried back to my office, and in researching the case law, I discovered that line of Supreme Court cases to which he was referring. To make our argument, I thought, would require making an argument inconsistent with Supreme Court precedents – a task that seems impossible to someone recently indoctrinated in law school with the notion of vertical stare decisis. I ran back to his office and asked for advice on how to structure the argument in light of this inconsistency. I recall how he listened to me explain the situation. He then stroked his beard for what felt like minutes, before finally, in a tone that came across like a beacon of reason, he quoted word for word the following lines from Ralph Waldo Emerson’s famous 1841 essay Self Reliance: “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do.” On another such occasion, when I again came to him for advice on how to reconcile an inconsistency in our argument, he quoted Walt Whitman’s lines from Song of Myself, “Do I contradict myself? Very well, then I contradict myself, I am large, I contain multitudes.”

As a direct result of conversations like these, I became fascinated with the tension between, on the one hand, the proposition that a legal system must tolerate and even embrace inconsistency as a vehicle for legal change, and, on the other hand, the proposition that lawyer’s job is to show judges how to reach a particular result as a matter of law, a view of legal advocacy that suggests that a legal system must be consistent over time. A deep cynic, like a critical legal

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studies scholar, might counter that, in “showing the judge how to get there,” a lawyer is simply coming up with some legal rationalization for the judge’s preferred result. Within any given legal system there are many such rationalizations available, so, the critical legal scholar would claim, lawyers on each side can come up with some rationalization for the result that they are trying to persuade the judge to prefer.

But why, then, do lawyers go through such trouble to come up with the most persuasive path to the judge’s preferred result? Indeed, rarely is a lawyer satisfied with just coming up with any rationalization that the judge could then use to justify her predetermined conclusion. And why do judges insist that the lawyer come up with that consistent path if the judge is going to rule in the lawyer’s favor in any event?

Again, the cynic would say that this is all just a ruse. In the language of the critical legal studies movement, “showing the judge how to get there” is just another way of making the legal system appear more logical and scientific than it really is. What this “scientization” of the law does is that it works to mystify the adjudicative process so as to preserve current power relations. And the most persuasive rationalization – that is, the most consistent path to the desired result – is valued simply because it works the best at accomplishing this task of mystifying and scientizing a legal system. The most consistent path makes the subjects of the law believe that things must be the way that the interests in power prefer, leading to a stupefied state in which the oppressed accept oppression.

The cynic’s interpretation is plausible, and it is one that we will encounter and critique in the following chapters, but for now I simply want to highlight the thrust of the cynic’s argument, and to offer preliminarily what might be considered a phenomenological response to this claim: when participants in legal adjudication, such as lawyers and judges, invoke this consistency
discourse, it at least does not feel that in doing so that they are participating in a mendacious enterprise. Anyone familiar with the practice of law knows that lawyers genuinely worry that they will lose a case, no matter how morally or socially appealing their position, if they do not present a coherent picture of how the law ineluctably leads to that result. Moreover, judges often express that they cannot rule for a side, again no matter how morally or socially appealing the position, unless the lawyer for that side can show the judge how to reach that result as a matter of law – i.e., unless that judge can write an opinion explaining why ruling for that party will make the law more and not less consistent as a whole.

Indeed, as will be discussed in the following chapters, Supreme Court Justices often use oral argument to push lawyers to develop this coherent legal narrative. Justice Breyer is perhaps the Justice who most frequently and explicitly calls this to an advocate’s attention by confessing that he would prefer reaching one result over another for social or moral reasons, but he cannot rule in accordance with that result unless the lawyer can show him how to get there through legal norms. In these instances, consistency as a legal norm appears to exert some constraint on Justice Breyer’s decision-making. Consider, for example, Justice Breyer’s exhortation in *Kentucky Retirement Systems v. EEOC* (2008), an ADEA case: “See, that's why I think the result in this case is just terrible. I think it takes disabled people and cuts their benefits with no benefit. I cannot believe for two minutes that Congress would have intended that result. But the reason I asked you the question was I want you to tell me how to get to that result under this statute.” In other words, Justice Breyer knows, as a moral or political matter, that the right result is not to cut the benefits for disabled people, but to vote for that result, as a legal matter, he must first know that there is a coherent legal narrative leading to that destination. Incidentally, in that case Justice Breyer ended up writing the majority opinion, joined by Chief Justice Roberts, as well as
Justices Souter, Stevens, and Thomas, reversing the lower court opinion and holding that denying benefits did not violate the ADEA. He was not able to get there, despite wanting to reach that destination, because the Solicitor General was not able to show him a sufficiently clear path.

We see further evidence of this phenomenon when judges refer to opinions “that do not write,” a phrase that Justice Stevens is often quoted as using when the act of sitting down and writing an opinion reveals to him that his preferred result does not contain a sufficiently coherent legal narrative, requiring that he switch the grounds for the opinion, or even change his voting disposition altogether. This phrase, “the opinion does not write,” though quite awkward stylistically, reveals a remarkable quality about judicial decision-making: it underscores the difficult position judges find themselves in when they try to reach a particular result that is not supported by the law. Writing such an opinion presents such a difficult task for a judge because consistency is central to the adjudicative enterprise.

So when that senior attorney told me that the law must tolerate and even embrace inconsistency, but that it is nevertheless a lawyer’s duty to show the judge the consistent path to the desired result, I was encountering two profound and yet paradoxical values in our legal system: the need for legal change in the particular and the need for legal consistency in the general.

My Ph.D. dissertation is the culmination of thinking as a lawyer, political scientist, and philosopher about how to reconcile these conflicting mandates. In all three domains of study, there has been precious little scholarship devoted to this topic. In judicial politics, there have been several important studies on whether stare decisis constrains judicial decision-making, with most of these studies finding that the doctrine exerts little to no influence on judges, but there has
been no empirical work on the broader question of whether and which consistency norms constrain judges. Legal philosophers have explored what it means for judges to be bound by stare decisis, and to a lesser extent the relationship between stare decisis and the rule of law, but again, there has been scant theoretical work on how consistency norms relate to these concepts. Legal scholars similarly have examined the legal justifications for stare decisis, but they have written very little about why consistency norms are invoked so frequently and forcefully in legal discourse. In the following pages, we will explore the connections between and among these fields of legal studies in examining the relationship between legal consistency and the rule of law.

This dissertation, then, while about legal consistency and the rule of law, is about much more than legal norms; it is also about judicial politics and the ways we do and should reason about the law and indeed life. It is an interdisciplinary work in judicial politics, weaving together the many threads of philosophy, political science, and legal advocacy that are too often left disconnected. Indeed, we will begin our discussion with an overview of how different periods of legal thought have conceived of consistency. We will then trace the intellectual genealogy of this thinking, in both philosophy and legal theory, before bringing the discussion back to the political, surveying the three primary political science models of judicial decision-making. In the final three chapters, we will move away from exposition and toward the development of a new theory, in the process bringing the discussion back to my focal interest: the Supreme Court and how legal activists, lawyers, and the Justices reason between and among each other about constitutional law.

Throughout this journey, no matter what path we take along the way, our principal and unyielding focus will be on consistency’s role in judicial decision-making and how that role
relates to the rule of law. So each path, however theoretical or untethered from the law it may seem, will bring us right back to actual court decisions. Like Hansel leaving a trail of bread crumbs, I will sprinkle cases throughout our path, to remind us from whence our discussion came and toward what direction it is heading – a pursuit of an understanding of legal consistency and the rule of law.

In my studies of law, political science, and philosophy, I have been lucky enough to work with some truly brilliant minds, many of whom significantly influenced my thinking through the problems presented in this dissertation. I am especially thankful for having taken Constitutional Law II in law school with Chip Lupu, who first sparked my interest in constitutional law and theory, and perhaps just as importantly, taught me that being a scholar means not just being a good thinker but also a good mentor, friend, and teacher. At Hopkins, my adviser, Joel Grossman, taught me more than I could have imagined ever learning about the Supreme Court as a political and social institution. I am forever indebted to Joel for his encyclopedic knowledge of the Supreme Court; many of my Supreme Court anecdotes, which I have come to incorporate into my writing, teaching, and even personal interactions, come directly from Joel. Jennifer Culbert and Steve Teles taught me the invaluable lesson that, to understand the law, one must remember to look outside the courts, a lesson that I must frequently remind myself of so that I do not become too juridico-centric. In the Hopkins philosophy department, Meredith Williams was immensely helpful in guiding me through the nuances of the philosophy of language, particularly Ludwig Wittgenstein’s work, an understanding that proved quite fruitful in thinking about consistency discourse in legal adjudication.

While Supreme Court Justices and the leading commentators on the political and philosophical dimensions of the law have led my thoughts along the way, many non-legal
thinkers have also helped in this pursuit. My father, as mentioned above, first planted the seed for this dissertation in prompting me to think about legal consistency and sustaining with me over the years many conversations on the topic. While my father might have given shape to the contours of this dissertation, my mother – by raising me in a diverse household, where I was surrounded by different and often conflicting racial, religious, and cultural backgrounds – made my interest in consistency an acutely personal one. My four siblings have always been a source of comfort, stimulation, and entertainment, and the similarities among the five of us, in demeanor and sense of humor, despite the sharp differences among us, in professional interests and lifestyles, have provided excellent fodder for my reflection on consistency. So have my friends, who generally have not been academics (indeed, many have not been college graduates), but whose experiences and thoughts have nevertheless always prompted me to consider and reconsider what makes things – such as people, cultures, or laws – different from or similar to one another. In particular, Edwin Grimsley, in 15 years of best friendship, engaged me in such conversations, often times in the least likely of places, spanning Connecticut, New York City, Washington D.C., and Baltimore.

Finally, and most importantly, this dissertation is dedicated to my fiancée, Darina Gancheva. I met Darina in Washington D.C. while she was studying for a semester there as part of her enrollment at New York University in Abu Dhabi. Darina was raised in Bulgaria, and had spent only a few months in the U.S. when we met. Though she knew nothing about the beauty of baseball, and I nothing about the risks of rakia consumption, we instantly knew that our connection transcended space, time, and culture. When I met Darina, I was reminded of Aristophanes’ claim in the Symposium that romantic love exists due to a division of souls. When these divided souls are re-united, Aristophanes wrote, “the pair are lost in an amazement of love
and friendship and intimacy, and one will not be out of the other's sight,” for “these are the people who pass their whole lives together.” One might say that love, and perhaps life in general, is about finding a consistency of souls among all the inconsistency in the mass and welter of our world. I am forever grateful to Darina for giving me my consistency.
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CHAPTER 1
INTRODUCTION: FOUR PREFATORY POINTS

The law is everywhere, and everywhere it is in discord. A woman has a right to abort her fetus; a fetus has a right not to be aborted. A religious organization has a right to receive public dollars on the same basis as a secular organization; a taxpayer has a right not to have her tax dollars used to support the promotion of religion. A white or Asian applicant to a public university has a right not to have her race considered a disadvantage in the admissions decision; a black applicant to a public university has a right as a remedy for past racial discrimination to have her race considered an advantage in the admissions decision. These are all constitutional claims, made before American courts in high-profile cases, and yet they directly contradict one another. For this reason, these subject areas of abortion, church-state, and affirmative-action law, in addition to many others areas of constitutional law, abound with commentary on insoluble doctrinal conflicts. There is no way to give one claim a protected legal status while not negating its opposing claim. Wherever there is law, there is inconsistency.

This feature of American law can be traced back to, and even beyond, Alexis de Tocqueville’s famous observation that in America every dispute ultimately turns into a lawsuit. This statement was surely an exaggeration during de Tocqueville’s time, but it turned out to be amazingly prescient, as the judicialization of politics, particularly under the Warren Court, made many of our most pressing political controversies a federal constitutional matter subject to the

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Supreme Court’s adjudication. In addition, over the course of the 20th century, the realists steadily gained ground in the legal profession and academy, convincing most participants in legal discourse that the law is indeterminate, or at least substantially underdeterminate, thereby making all, or nearly all, legal positions equally palatable as a matter of legal truth. These two trends – the judicialization of politics and the acceptance of the indeterminacy thesis – have worked together to make conflicts like the ones described above a major part of 20th and 21st century legal adjudication.6 Nowadays, warring political movements are often led by a group of legal advocates who advance oppositional constitutional arguments in favor of that cause.

In a sense, this may seem like a banal, even rudimentary, statement about the nature of American constitutional law, not worth the investigation of a dissertation. After all, in a pluralistic society, where multifarious interests are at stake, divergent political players use the legislative process to give their interests legal protection. Moreover, the adjudicative system is designed to settle disputes between adversarial parties, so it is not surprising that litigants request judicial actors to privilege their interests over those with oppositional values. We see this everyday in courts in the U.S. and abroad, with each party in a lawsuit claiming that the law supports only their side of the controversy. Given that the law so obviously involves conflict – indeed its very purpose is to instantiate and settle conflict – how can a dissertation be dedicated to this rather mundane and pervasive phenomenon?

In another sense, however, the relationship between legal consistency and the rule of law is a topic in need of deep and thorough scholarly inquiry. Since the beginning of discussions of the meaning of the rule of law, consistency has played a central role. The British jurist A.V. Dicey is often credited as having coined the expression “the rule of law” and first explicating that

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6 For further discussion of this point, see GORDON SILVERSTEIN, LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINTS, SAVES, AND KILLS POLITICS (2009), particularly Chapter 2, on shifts in modalities.
the rule of law requires that judges apply the law consistently.\footnote{Dicey, Albert Venn. 1885. *The Study of the Law of the Constitution*. London: Macmillan. Specifically, Dicey derived three essential principles of the rule of law: (1) “the absolute supremacy or predominance of regular law as opposed to arbitrary power”; (2) “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts”; and, (3) “the constitution . . . [is] not the source but the consequences of the rights of individuals, as defined and enforced by the Courts.” Id. at 198-99. This second requirement has often been interpreted to mean that judges must apply the law consistently.} But this relationship between consistency and the rule of law actually goes back much further than Dicey. In fact, as will be covered more extensively in Chapters 2 and 3, consistency’s role in legal discourse can be traced, like almost anything in legal philosophy, all the way back to Plato and Aristotle. Before we begin our survey of different periods and areas of legal thought, however, I want to highlight four prefatory points that will come up time and time again in our exploration of the relationship between legal consistency and the rule of law.

**Prefatory Point One: The Different Types of Legal Consistency**

Many legal philosophers and practitioners have extolled the virtues of legal consistency, without being clear about what type of consistency they have in mind. Too often consistency is treated as a univocal concept, as though there is just one way for legal norms to conflict. This is not the case at all, and the multi-dimensionality of legal consistency has deep implications for the rule of law, an issue we will be covering in depth in Chapter 6. For now, though, I just want to identify some different types of legal inconsistency to underscore the concept’s many dimensions. These varied dimensions of legal consistency have heretofore been ignored by commentators, and a principal goal of this dissertation is to create a fuller and richer taxonomy for how we think about legal consistency.

One obvious type of legal inconsistency is a *textual* inconsistency. A textual inconsistency could exist on the face of the law; a prominent example is Lon Fuller’s hypothetical legal system consisting of a law requiring automobile owners to install new license
plates on January first, and another law criminalizing the performance of any labor on that date. A different type of textual inconsistency can arise in how two laws apply to particular facts; a recent example of such a conflict is the inconsistency that many scholars have identified in the debt ceiling debacle, between, on the one hand, the Take Care Clause requirement that the executive faithfully execute laws, and on the other hand, Section 4 of the Fourteenth Amendment, requiring the U.S. to pay off its debts. There is no obvious conflict between these two constitutional provisions based on the content of the text itself, but a textual inconsistency may arise between these two provisions when applied to the debt-ceiling crisis. We might call one textual inconsistency a facial textual inconsistency, because it arises based purely from the semantic content of the norms, and the other an as-applied textual inconsistency, because it arises from how the text of those norms applies to particular facts.

An entirely different category of legal consistency is a decisional inconsistency. This is an inconsistency that arises not necessarily from legal materials themselves, but from the decisions issued by government bodies authorized to create, interpret, or enforce those materials. As we will see, it may be the case that decisional inconsistencies within the judiciary raise more serious problems for the rule of law than do textual inconsistencies, because in our legal culture, dominated as it is by judicial review in practice and legal realism in theory, the law generally means for us what it meant for Holmes – i.e., “what the courts will do in fact,” not the formal content of legal materials.

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Further distinctions can be made regarding these types of legal consistencies, and we will explore these more in Chapter 6. For example, decisional inconsistencies can be broken down further into inter- and intra- institutional forms. An *intra*-institutional decisional inconsistency arises when the same branch of government holds a law to have divergent meanings, such as when the Supreme Court recently held the health-care legislation’s individual mandate to be a penalty and not a tax so as to be justiciable under the Tax Anti-Injunction Act, but to be a tax and not a penalty so as to be constitutional under Congress’s taxing power. By contrast, an *inter*-institutional decisional inconsistency arises when one branch of government interprets the law inconsistently with the meaning held by another branch, such as when the Supreme Court held the mandate to be a tax despite Congress’s specifically proclaiming the mandate to be a penalty and not a tax. Both intra- and inter- institutional decisional inconsistencies bear on the meaning of the rule of law, but, as we will see in Chapter 6, intra-institutional decisional inconsistencies deal much more directly with notions of rationality in legal discourse and the relationship of such notions of rationality to the rule of law.

This dissertation is about all types of legal consistency, but the overriding focus will be on intra-institutional decisional consistency involving constitutional norms, because I am most interested in how notions of legal rationality relate to constitutional law and the rule of law. We will be focusing on *judicial* instead of *legislative* intra-institutional decisional consistency, because in our legal system, as well as in most of the legal systems throughout the world, it is in the judiciary where consistency has the greatest implications for legal rationality and the rule of law. This is because the legislative body, as the creator rather than the interpreter of law, is expected to exhibit some inconsistency in producing legal change, and the judiciary, as the governmental organ of reason, is expected to adhere to logical constraints. Indeed, no one would
accuse the 113th Congress of acting irrationally were it to repeal the ACA, but many would accuse the Supreme Court of acting irrationally if next term the Court granted certiorari on another ACA case and this time found the ACA to be unconstitutional under the Commerce Clause as a penalty on conduct. Throughout this dissertation, I will refer to judicial intra-institutional decisional consistency as “adjudicative consistency.”

Prefatory Point Two: Adjudicative Consistency and *Stare Decisis*

The second prefatory point concerns the relationship between adjudicative consistency and the doctrine of *stare decisis*. *Stare decisis* has two forms – a horizontal and a vertical form. Horizontal *stare decisis* refers to when a court’s own decisions bind its later decisions, and vertical *stare decisis* refers to when a higher court’s decisions bind courts positioned lower within that judicial hierarchy. Both forms of *stare decisis* have a strong overlap with adjudicative consistency, in that the overriding purpose of the doctrine is to promote consistent judicial decision-making so as to produce particular benefits, such as protecting reliance interests formed as a result of past judicial decisions. But in this dissertation I am most interested in consistency within the Supreme Court – i.e., horizontal *stare decisis* – because this type involves a single authority, and therefore, just like an intra-institutional inconsistency, this type of *stare decisis* more squarely deals with matters of legal rationality and its relationship to the rule of law.¹⁰

¹⁰ Just as it is a matter of politics rather than logic when two governmental authorities conflict over the meaning of the law, it is also a matter of politics rather than logic when two judicial bodies conflict over the meaning of the law. We can see this as an intuitive matter in how we respond when the Supreme Court reverses a lower court, as compared to when the Court overrules it prior decisions. Reversing a lower court is principally a matter of judicial politics (i.e., it involves the Court exercising authority over its branch of government), whereas overruling one’s own court is also a matter of logic (i.e., it also speaks to the Court’s ability to articulate a coherent vision of the law). Therefore, when the Court reverses a lower court ruling, we generally do not believe that the Court has threatened the rule of law, but this concern is often present when the Court overrules itself. Indeed, the reason that cases like *Bush v. Gore* and *Citizens United* aroused such vigorous accusations that the Court had undermined the rule of law is not that these decisions reversed the lower court decisions, but rather that many commentators found the decisions inconsistent with the Court’s own precedents.
While there is an overlap between *stare decisis* and adjudicative consistency, there is a key distinction between the two. Whereas *stare decisis* refers only to the doctrine binding courts to prior judicial holdings, adjudicative consistency is a much broader concept, covering a consistency between a multitude of legally significant decisions, such as how courts interpret facts, underlying principles, and interpretive methodologies. So *stare decisis* can be followed in a particular decision while a court still does harm to adjudicative consistency, a distinction of significance for understanding the relationship between legal consistency and the rule of law.

**Prefatory Point Three: Stare Decisis and the Rule of Law**

Because there is nearly universal agreement that consistency is an essential requirement of the rule of law, as will be discussed in greater depth in the following chapter, and because horizontal *stare decisis* is justified to the extent it succeeds in ensuring consistency in a court’s decision-making, horizontal *stare decisis* is closely related to the rule of law. It is quite surprising, then, how little scholarly attention has been paid to this relationship between *stare decisis* and the rule of law. Indeed, Jeremy Waldron mentions in a recent article how after years of teaching classes on the rule of law, he has recently been “struck by how little there is on the significance of *stare decisis* for the rule of law,” and “[a]part from some inconclusive discussion in the later work of F.A. Hayek, it is not addressed in any of the modern rule of law canon.”

Waldron’s article seeks “to fill that gap” by exploring to what extent *stare decisis* is a necessary component of the rule of law. My sense is that the “gap” identified by Waldron is much broader than his article intimates it is: the gap not only consists of the relationship between *stare decisis* and the rule of law, but also the thorny question of whether some types of consistency in judicial

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decision-making are more central to the rule of law and *stare decisis* than are other types of consistency.

This is an important question because if some types of adjudicative consistency are indeed more fundamental to the rule of law than are others, this would suggest that *stare decisis* is not a univocal doctrine as it is commonly represented by courts and commentators. Nor is the rule of a law a singular, essential concept. Rather, both *stare decisis* and the rule of law are legal practices with multiple forms, purposes, and applications. This dissertation examines this difficult and important question.

**Prefatory Point Four: Adjudicative Consistency and the Nature of Law**

Finally, the fourth prefatory point involves the relationship between the meaning of adjudicative consistency and the nature of law. If we disagree with one another about the meaning of law, then we also often will disagree about when two judicial decisions are consistent with one another, and as a result, we often will disagree about when a decision complies with the rule of law. For example, a Dworkinian anti-positivist might contend that *Brown v. Board of Education*\(^\text{12}\) restored rather than undermined adjudicative consistency, because the *Brown* decision was consistent with the underlying moral principles of our legal system despite its arguably being inconsistent with individual decisions like *Plessy v. Ferguson*.\(^\text{13}\) But a positivist might find that the *Brown* decision had the opposite effect due to its inconsistency with valid


\(^{13}\) 163 U.S. 537 (1896). I say "arguably" here because, as will be explained infra, there are multiple ways of interpreting the *Plessy* decision, some of which are entirely consistent with *Brown*. In fact, the *Brown* Court specifically explained that it was not overruling the *Plessy* decision and even suggested that there was no inconsistency between segregation being permissible in railroads but not in places of fundamental importance to personal development, such as public schools.
legal materials, including not only the *Plessy* decision but also arguably the original meaning of the Equal Protection Clause.\(^{14}\)

Importantly, this issue goes beyond such grand debates in legal philosophy between positivism and natural law about whether the law necessarily consists of moral norms in addition to formal legal materials. Indeed, whenever we confront fundamental disagreements about how to interpret the law, even when those disagreements involve relatively mundane matters of legal practice, we will also disagree about when the law is consistent. As will be discussed in subsequent chapters, there are different ways of interpreting the *scope* of judicial decisions. For example, if I adopt the *rules*-approach to precedent and thereby hold a precedent decision to consist of whatever rule was articulated by the deciding court, and you instead adopt the *results*-approach and thereby hold a precedent decision to consist of the facts that triggered the ultimate result reached by the deciding court,\(^{15}\) then we will also often disagree about when a current decision is consistent with that precedent decision.

So, to use the *Plessy/Brown* relationship as an illustration, a rule-approach might interpret the *Plessy* precedent as permitting all state-sanctioned segregation of facilities on the basis of race so long as those facilities are provided to whites and non-whites on a substantially equal basis, but a result-approach might interpret the *Plessy* precedent as permitting only the type of segregated public facilities at issue in the decision – i.e., railroads. Under the former approach,

\(^{14}\) I say “arguably” here, because although most constitutional scholars accept that, given the proliferation of segregated public schools at the time of the adoption of the Equal Protection Clause in 1868, the Clause was not intended to abolish any form of state-sanctioned racial segregation, least of all such segregation occurring in public schools, some originalists vigorously resist this conclusion. This resistance, however, seems due more to political expediency (i.e., originalists wanting to disassociate themselves and their approach to law from segregation) than to a faithful application of originalist principles.

Brown would be inconsistent with Plessy, and would thus undermine the rule of law, but under the latter approach, Brown would be entirely consistent with Plessy, because Brown involved public education, not railroads.

We see strands of both approaches in Plessy and Brown. We often say that Brown overruled Plessy, but the Brown Court of course assiduously disavowed having doing so. Instead, the Court specifically stated that it was upholding Plessy’s “separation but equal” doctrine but declining to apply it in the realm of public education. We thus talk about Brown under the rule-approach, despite the fact that the content of Brown clearly follows the result-approach.

Further confusing matters, more than 50 years before Brown, the Court had arguably extended the doctrine to the realm of public education, in Cumming v. Richmond County Board of Education,\(^{16}\) where the Court upheld a racially segregated school system, though this was not explicitly under the “separate but equal” doctrine but rather for jurisdictional reasons. And the Court did not explicitly repudiate the doctrine’s application to the segregation of transportation until Gayle v. Browder.\(^{17}\) Even there, however, it was in a per curiam decision that simply affirmed the lower court’s repudiation of Plessy on the basis of Brown.

The Plessy/Cummings/Brown/Gayle lineage illustrates the difficulty in identifying when two cases are inconsistent with one another. Did Brown overrule Plessy? Or did Brown overrule Cummings? Was it Gayle that overruled Plessy? There is no way to agree on the consistency issue until we first agree on what constitutes the content and scope of the underlying legal norms. Given the intractability of these grand philosophical debates over the nature of law, as well as more mundane disagreements over how best to interpret the law, any pursuits of agreement on

\(^{16}\) 175 U.S. 528 (1899).
\(^{17}\) 352 U.S. 903 (1956).
adjudicative consistency would seem to run up against the same wall. Therefore, even if we all agree that consistency is an essential requirement of the rule of law, as nearly all legal theorists and practitioners do, we will still often disagree on when the rule of law is satisfied, because we do not have any agreement on the meaning of legal consistency. What seems to promise consensus on the meaning of the rule of law only leads us into a vicious circle.

This dissertation seeks the way out of the circle by searching for a deeper consensus on notions of adjudicative consistency, a consensus that offers the hope of transcending fundamental disagreements over the meaning of law. One of the dissertation’s themes in this regard is that there is no answer to the questions above about which case overruled which case. These are simply trivia questions that have no answers. A skilled participant in constitutional discourse knows that Plessy is no longer valid law, but this is not because of Brown, Gayle, or any other particular case. Rather, it is because Brown, in conjunction with several other cases of that period, as well as the surrounding political and social events, signaled the beginning of a new legal framework. We need to think of legal consistency in clusters and time periods, not individual decisions and data points, to see how it relates to the rule of law.

**Chapter Summary and Dissertation Outline**

In this introductory chapter, I have sought to highlight four points that will be central to our investigation of the relationship between legal consistency and the rule of law. First, there is not just one way in which legal norms can conflict. Indeed, there are many different types of legal inconsistencies, and these different types might carry different implications for the rule of law, with some creating true threats to its existence, and other, more benign, inconsistencies being entirely compatible with how we conceive of the rule of law. Second, there is a strong overlap between adjudicative consistency – a consistency in how courts render decisions – and
the doctrine of *stare decisis*. But they are distinct in significant ways, in that adjudicative consistency refers broadly to a consistency in all dimensions of judicial decisions, and *stare decisis* more narrowly refers only to a consistency between case holdings. Nevertheless, the two are quite similar, and thus our discussion of consistency will shed significant light on how *stare decisis* works. Third, just as adjudicative consistency is central to the rule of law, so too is *stare decisis*, and just as some forms of adjudicative consistency might not threaten the rule of law, so too it may be the case that some departures from prior judicial holdings will not pose such a threat. Finally, debates over adjudicative consistency will often turn on how we interpret the law, a proposition that seems to render impossible any pursuit of an understanding of adjudicative consistency. Our goal will be to resolve – or perhaps more precisely, to *dissolve* – this problem by finding ways to find consensus on consistency and the rule of law, without getting embroiled in the seemingly intractable disagreements over fundamental questions about the nature of law.

At the heart of this investigation is the following question: Is the rule of law in danger? Broadly put, there are two plausible answers to this question, as it relates to our focus on legal consistency. One answer is that this is not a problem in practice at all but only a problem in our academic thinking about the rule of law. Indeed, it may be the case that judicial actors, as reflected in the Supreme Court’s discourse on consistency, have not abandoned the Aristotelian conception of the rule of law. What all this grumbling about the rule of law may be attributable to is that some legal commentators have a stake in portraying legal adjudication as inconsistent.

This is a distinct possibility. There are, after all, significant normative and empirical incentives for such misrepresentations of the judicial process. Normatively, accepting legal inconsistency provides a justification for some of the legal academy’s most cherished departures
from settled legal norms, such as the Court’s repudiation of *Plessy*. Legal change is not possible without creating some legal inconsistency, and legal commentators tend to favor legal change. On the empirical side, some commentators may have an interest in finding inconsistencies within judicial institutions, because such inconsistencies highlight that judicial decision-making is unconstrained, thus confirming the prevailing view of public law in most political science departments, the so-called “attitudinalist model” of judicial decision-making that we will cover in Chapter 5. Indeed, if the attitudinalists are right that consistency norms simply provide *ex post facto* ways of *writing* decisions, as opposed to *ex ante* reasons for *making* decisions, then they would have a strong basis for contending that law is not scientific, and perhaps not even rational, at all. Rather, they would be able to argue, as Segal and Spaeth do, that law is “a low form of rational behavior,” akin to “creative writing, necromancy or finger painting.” But if these commentators are indeed exaggerating the extent to which the American legal system is inconsistent, then it may be the case that the rule of law in the U.S. is alive and well. Under this explanation, the debate over legal consistency is largely due to academic scuffling and political maneuvering. So while our legal culture may be sick, our legal practices may be healthy, at least as a matter of the rule of law.

The other plausible answer is that our courts actually are riddled with inconsistencies and they are simply using the discourse of consistency to conceal how far we have come from the Aristotelian ideal linking reason and law. Under this view, judicial invocations of consistency norms are simply fig leaves for the obliteration of the gap between law and politics. In this case, law is politics, as the attitudinalists claim, and consistency discourse is simply a veil, as the CLS scholars claim, a dressed-up pretension of logical analysis to mystify or conceal the political and power-embedded dimension of legal adjudication.
This dissertation’s goal is to answer, or at least get us closer to answering, these questions. This means putting a foot, or perhaps an entire body, in the battle between the realists and the formalists of the legal world over the meanings of legal consistency, *stare decisis*, and the rule of law. In so doing, we must get involved in the war of which that battle is a mere part – the war between Emersonian and Aristotelian visions of logic, consistency, and truth. Much has already been written about this legal battle, particularly as it applies to different methodologies in legal interpretation, but there has not yet been a definitive exploration of how this clash relates to *stare decisis* and the rule of law. We will engage in this exploration in the following pages.

With this in mind, we can begin our investigation of legal consistency in Chapter 2 by surveying how different periods of legal thought have treated the relationship between legal consistency and the rule of law. We will start on the theoretical end, with a brief overview of the relationships between legal philosophy and consistency, and then move on to survey various legal periods, beginning with the 17th century common law jurists and ending with contemporary commentators. Chapters 3 and 4 will take a step back and examine more closely the philosophical foundations for these views on legal consistency; we will conduct this intellectual genealogy because a prominent theme throughout this dissertation is that thinking on legal consistency is integrally related to broader cultural and intellectual developments in Western thought. Chapter 5 will take on the more empirical side of the debate, examining how different political science models of judicial decision-making have sought to measure and understand legal consistency.

Chapter 6 marks a break in the dissertation, turning away from survey and synthesis, and moving toward creating in Chapters 6, 7, and 8 a new model and theory of legal consistency. These final three chapters will demonstrate that commentators have generally misunderstood
legal consistency by treating it as a univocal concept, when, in fact, there are different types, uses, and scopes of legal consistency. This complicates the theoretical accounts on the subject, discussed in Chapters 2, 3, and 4, as well as the empirical models, surveyed in Chapter 5. My original contribution to the field is to taxonomize these types, uses, and scopes to provide a fuller and richer account of legal consistency and its relationship to the rule of law.

In short, I argue that the rule of law is not an essential concept, but neither is it an essentially contested concept. Rather, it operates like a language game. In making this argument, I will borrow from Wittgenstein’s philosophy of language, which we will cover in some detail in Chapter 7, to argue that, over time, certain legal propositions are foreclosed as implausible due to their being too inconsistent with settled norms. I will use the three areas of law discussed throughout the dissertation – abortion, church-state, and affirmative-action law – to demonstrate how participants in legal discourse tend to converge in the long-term. This convergence is central to the rule of law. So while adjudicative inconsistency continues to exist, adjudicative convergence, rather than complete consistency, is what makes the rule of law possible.

The dissertation concludes with some reflection on what the foregoing teaches us about the relationships among law, politics, logic, and language. The upshot is that law is not politics, but it is not purely a logical exercise either. Language works to constrain the force of both politics and logic. Legal rationality is a special hybrid of both sheer politics and metaphysical logic. Holmes was thus only partly right when he said that “[t]he life of the law has not been logic; it has been experience.” The life of the law is both experience and logic, and this is because it is a language.
CHAPTER 2
CONSISTENCY AND LEGAL THOUGHT: AN OVERVIEW

This chapter will provide an overview of different periods of legal thought and compare how these different legal frameworks have conceived of the role of consistency in guaranteeing the rule of law. As we will see, consistency has played varying roles in the philosophy and practice of law, with some periods seeing it more in logical and other eras conceiving of it in more practical or functional terms. The chapter will begin by introducing the reader to some of the philosophical debates over the relationship between legal consistency and the rule of law. The chapter will then briefly summarize the importance of this issue for contemporary Supreme Court adjudication. We will then arrive at the meat of the chapter. This core part of the chapter will chronologically explore how notions of consistency have developed in different legal periods, beginning with the 17th century common law jurists and moving through the major periods of American legal thought, including the Founding, legal formalism, legal realism, the critical legal studies movement, and contemporary legal conservatism.

Through this short summary I hope to highlight how important this issue of legal consistency has been for both the philosophy and practice of law, and how there has been significant agreement, as well as disagreement, over its content and significance, both between and within these various periods of legal thought. Each period has devised different justifications for adjudicative consistency, and these justifications have closely related to how the period has conceived of the nature of law. Throughout this time, however, there has been a steady progression toward finding a method to make a legal system more consistent. Despite the many differences separating these periods, the one unifying theme is that – whatever the legal
generation and whether we are dealing with the practice or the philosophy of law – consistency is of paramount importance to understanding the nature of law.

**Legal Philosophy and Consistency**

After centuries of debate, legal theorists still disagree sharply about what constitutes the rule of law, with some theorists focusing on the formal elements of the rule of law, such as the consistent and transparent adjudication of legal norms, and others also locating substantive requirements in the concept, such as the guarantee of certain liberal values. This disagreement has prompted some theorists, such as Judith Shklar, to question whether the concept of the rule of law retains any meaning, and others, such as Jeremy Waldron, to conclude that the concept might have some meaning but it is an essentially contested meaning. But despite all of this

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19. Ronald Dworkin is often cited as the leading advocate of the substantive view. See, e.g., Tamanaha, *On the Rule of Law*, supra n. 1, 102-114. This attribution is a bit odd, given the fact that, among his vast scholarly production, Dworkin wrote only one piece of scholarship directly dealing with the rule of law, and that one piece is a relatively obscure article. See Dworkin, Ronald. 1978. “Political Judges and the Rule of Law.” *Proceedings of the British Academy*, 64: 259-262. But the attribution is not entirely misplaced, given that in that article Dworkin did provide a powerful defense of the substantive conception, and moreover, Dworkin’s philosophy of law in general has profound implications for the rule of law, suggesting as it does that the rule of law requires certain liberal guarantees. For an exposition of how Dworkin’s conception of the rule of law requires substantive liberal values, see Dyzenhaus, David. 2007. “The Rule of Law as the Rule of Liberal Principle.” *Ronald Dworkin*. Ed. Arthur Ripstein. Cambridge: Cambridge University Press. 56-81. For an excellent defense of this substantive conception of the rule of law, related to but distinct from Dworkin’s approach, see Allan, Trevor R.S. 2001. *Constitutional Justice: A Liberal Theory of the Rule of Law*. New York: Oxford University Press.


21. See Waldron, Jeremy. “Is the Rule of Law an Essentially Contested Concept (in Florida)?” *Law and Philosophy*, 21(2). In using this term “essentially contested concept,” Waldron was harkening back to W.B. Gallie’s influential 1956 paper defining such concepts as "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users." Gallie, Walter Bryce. 1956. “Essentially Contested Concepts.” *Proceedings of the Aristotelian Society*, 56: 167-198. These disputes are endless, Gallie asserted, because they "cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone.” Id. Applying this notion to the 2000 election, Waldron concluded that the rule of law is indeed an essentially contested concept because, as *Bush v. Gore* demonstrated, opposing sides in a dispute can both appeal to the rule of law while not agreeing at all on the proper resolution of the dispute.
contestation on the meaning of the rule of law, there is general agreement that, as Brian Tamanaha writes, “[t]he rule of law, at its core, . . . [means that] law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.”²² That is, almost all theorists, whether they adopt the formal or substantive conception, generally agree that Lon Fuller’s eight desiderata or formal requirements for law are, at a minimum, the necessary elements of the rule of law,²³ a topic that we will analyze in much greater depth in Chapter 4 when we discuss how analytical legal philosophy has conceptualized legal consistency. Because the current debate on the rule of law is largely a debate over the sufficiency of Fuller’s elements, not whether they are necessary for the rule of law,²⁴ Fuller’s desiderata would seem to offer some hope of rescuing the rule of law from essential contestability by placing the locus of the debate on whether any requirements outside of these desiderata are also essential to the rule of law.

But whatever hope Fuller’s desiderata offer in establishing consensus on the rule of law is quickly vanquished by the multifarious ways in which these terms are used in legal theory and discourse. Among these eight desiderata, the requirement of consistency, the focus of our investigation, might be the most protean. Indeed, consistency can have logical and functional meanings, both of which are employed in how theorists, lawyers, and jurists reason about the law. For example, as we will examine more closely in Chapter 4, Hans Kelsen looked to formal

²⁴ For example, even Ronald Dworkin, who as mentioned above is the leading advocate of a substantive conception of the rule of law, contends that the rule of law requires courts to interpret the law with integrity, which for requires a high level of consistency in judicial decision-making. Specifically, Dworkin’s notion of legal consistency requires judges to issue decisions consistently with past judicial decisions as well as with the moral principles underlying the entire legal system. As Dworkin puts it, law as integrity “argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.” Dworkin, Ronald. 1986. Law’s Empire. Cambridge: Harvard University Press.
logic for an understanding of consistency, leading Kelsen to conclude that only inconsistencies between legal obligations (prohibitions or requirements) amount to legal inconsistencies.25 Directly challenging Kelsen’s logical approach, Lon Fuller contended that functionality and not formal logic should guide determinations about legal consistency. So, for Fuller, the question of consistency turns on whether two laws would be so incompatible with one another that they would undermine the functioning of the legal system, not whether their incompatibility would violate some rule of formal logic.26 Logicians have stepped into this debate, and just like the legal theorists, they have disagreed with one another about whether normative consistency in general turns on logic or functionality.27 It seems that both sides of the debate have it right:

25 For example, in *General Theory of Law and State*, Kelsen contented that a legal contradiction is just like a logical contradiction in that both involve supposing that two events obtain even though the two events could not possibly come into existence simultaneously, and Kelsen found such an impossibility to arise when conflicting obligation norms exist within the same legal system. Indeed, he wrote, “[j]ust as it is logically impossible to assert both ‘A is,’ and ‘A is not,’ so it is logically impossible to assert both ‘A ought to be’ and ‘A ought not to be.’” Kelsen, Hans. 1945. *General Theory of Law and State*. 2nd Ed. City: Publisher, 1961. 374. Kelsen affirmed this claim in the second edition of *Pure Theory of Law*, holding specifically that “the Principle of the Exclusion of Contradiction and the Rules of Inference . . . appl[y] to the relation between legal norms,” and that this prohibits the promulgation of conflicting obligation norms. Kelsen, Hans. 1934. *Pure Theory of Law*. 2nd Ed. Berkeley: University of California Press, 1967. 217-218. But shortly after publication of this second edition of *Pure Theory of Law*, Kelsen retreated from this approach to legal contradictions, as part of his broader change from a universalist, neo-Kantian approach to a more particular, skeptical approach. This change in how he viewed legal contradictions is most evident in his 1962 essay, *Derogation*, where Kelsen claimed that legal systems do not need to comply with logical rules and therefore legal obligation norms can be, and in fact often are, inconsistent with one another. Kelsen, Hans. 1962. “Derogation.” *Essays in Jurisprudence in Honor of Roscoe Pound*. Ed. Ralph Newman. Indianapolis: Bobbs and Merrill Co. Inc.

26 In fact, Fuller specifically countered Kelsen’s argument by claiming that if a legal system consisted of conflicting obligation norms, the legal system would fail as a moral matter because it would fail “to build up a system of rules for the governance of . . . conduct,” but in failing in this moral endeavor, the legal system would not “have trespassed against logic.” Fuller, Lon. 1964. *The Morality of Law*. Rev. ed. New Haven: Yale University Press, 1969. 66. Moreover, for Fuller not only is there no logical violation in a system requiring and forbidding the same class of action, but even if there were, logic would still have no significance for how we arrange a legal system, because the ultimate test for a legal system’s consistency is how the system’s norms function in practice and affect actual people, not whether the formal content of those norms violates some rule of logic. In Fuller’s words, determining whether two laws are inconsistent with one another is “not merely or even chiefly technological, for it includes the whole institutional setting of the problem – legal, moral, political, economic, and sociological.” Id. at 70.

27 Compare von Wright, Georg Henrik. 1963. *Norm and Action: A Logical Enquiry*. New York: Routledge and Kegan Paul (holding that a set of obligations “is consistent (the commands compatible) if, and only if, it is logically possible, under any given condition of application, to obey all commands (collectively) which apply on that condition”) with Ross, Alf. 1968. *Directives and Norms*. London: Routledge & K. Paul. 168. (holding that conflicting obligation norms are “not of the nature of a logical contradiction,” because “whether it is possible at the same time to order, or to accept, both directives is a question to be decided by experience”).
consistency has both logical and functional meanings. And to determine which type of meaning is at issue when we talk about the rule of law, we must closely examine how consistency norms are invoked in legal discourse.

This ambiguity is felt distinctly in the practice of law, as evidenced in how the Supreme Court invokes consistency norms in its adjudication of actual cases. Sometimes the Justices refer to consistency as a conceptual or logical requirement, but at other times, the Justices treat this requirement in more functional terms. Just as the multidimensionality of Fuller’s desiderata makes it easier for legal theorists to agree that these requirements are essential to the rule of law, but harder to agree on particular applications, the protean nature of consistency facilitates differently oriented judges to reach consensus on consistency being a requirement of our legal system. Indeed, on a Court where unanimity is rare, Justices of various political stripes have managed to agree that consistency, particularly as guaranteed by the doctrine of stare decisis, is central to the rule of law. When the Justices agree so uniformly, it is clear that we are dealing with a concept deeply embedded in our legal culture. But it is equally clear that we are dealing with an amorphous concept, an idea that we can all rally around without agreeing on much else. Both are the case with the relationship between legal consistency and the rule of law.

**The Supreme Court and Consistency**

Most empirical research on the Supreme Court has found that it is a wildly inconsistent institution, and its inconsistency is evidenced most clearly in the Court’s frequent overrulings of itself. For example, in their book, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992*, political scientists Saul Brenner and Harold Spaeth examined every Supreme Court decision that the Court “formally altered”\(^{28}\) between 1946 (the first year of the Vinson

\(^{28}\) Brenner and Spaeth used the term “formally altered” to include all cases covered by “a statement in the Court’s majority or plurality opinion that the decision overrules one of more of the Supreme Court’s precedents.” Brenner,
Court) and 1992. They counted 154 such cases, and importantly, they found that more and more cases were overruled during this time. Indeed, only 1.4 cases per term were overruled by the Vinson Court, 3.7 by the Warren Court, 3.3 by the Burger Court, and finally, 4.7 by the Rehnquist Court through 1992. Moreover, there was a similar relationship between *overruling decisions* (i.e., cases that overrule precedents) and these Courts, demonstrating that it was not just that more decisions were being *overruled* because there were more available precedents for the later Courts to overrule, but also that more *overruling* decisions were being issued to overrule these precedents. Indeed, whereas the Vinson Court issued only .9 overruling decisions per term, the Warren and Burger Courts each issued 2.7, and the Rehnquist Court issued a whopping 3.3 overruling decisions per term through its 1992 term.

In another important work on *stare decisis*, Spaeth, alongside Jeffrey Segal, argued that the Supreme Court’s inconsistency is not limited to the Vinson-Rehnquist era or to particular Justices. To the contrary, Spaeth and Segal found that dating back to the beginning of the Court, individual Justices have rendered decisions on the basis of preferences rather than precedents. In Chapter 5, we will come back to these empirical studies, in particular the Spaeth and Segal work, but for now, I simply want to flag that most empirical research finds that the Supreme Court is not concerned with consistency.

What is interesting for our purposes in this brief overview is that, despite these rampant inconsistencies in judicial behavior, judicial *rhetoric* about the importance of *stare decisis* and adjudicative consistency remains high, across the ideological spectrum and across subject areas.

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28 Saul and Harold Spaeth. 1995. *Stare Indecisis The Alteration of Precedent on the Supreme Court, 1946-1992*. Cambridge: Cambridge University Press. 19. This includes cases that the Court limits to its facts, but not cases the Court distinguishes as non-binding on the basis of the prior case’s facts. Id. at 21. As we will see in later chapters, this is the crux of any study seeking to measure *stare decisis* efficacy: the meaning of “formal alteration” turns on one’s conception of adjudicative consistency.

Consider, for example, how Justice Scalia has proclaimed that “[c]onsistency is the very foundation of the rule of law.”\(^{30}\) On the opposite end of the spectrum, Justice Thurgood Marshall declared in dissent in an important death penalty case that “fidelity to precedent is fundamental to ‘a society governed by the rule of law.’”\(^{31}\) In the middle of the ideological spectrum, Justice Powell wrote many opinions and academic articles extolling the virtues of legal consistency, claiming in one instance that “[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*.”\(^{32}\) Another centrist, Justice White, asserted in dissenting from an important abortion case upholding *Roe*: “The rule of *stare decisis* is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.”\(^{33}\) Yet another centrist, Justice O’Connor, claimed in her famous *Casey* plurality opinion, upholding the essential holding of *Roe*: “[T]he 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.”\(^{34}\) And the current swing vote, Justice Kennedy, proclaimed: “It is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and


difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”35

This is just a short sample of Supreme Court paeans to the virtues of legal consistency, but even from this list, we can see how it cuts across issues, with Justices using consistency norms to defend and attack the same lines of precedents. For example, both Justices White and O’Connor appealed to the same relationship between stare decisis and the rule of law in their respective statements above, but in invoking this relationship, White urged for the repudiation of Roe in Thornburgh on the basis that the system would be made more consistent by overruling Roe and O’Connor urged for the preservation of Roe in Casey on the ground that the system would become too discordant by overruling it. Likewise, Justice Stevens, in concurring in Thornburgh to uphold Roe, specifically countered White’s stare decisis discussion by claiming that “[t]here is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication.”36

In these cases, both sides were appealing to consistency but were invoking different concepts of consistency to reach opposing outcomes. Justice White was appealing to a textual consistency to argue that overruling Roe is necessary to create a consistent legal system, and Justices O’Connor and Stevens were appealing to an adjudicative consistency. As we will see throughout this chapter, this distinction between a textual consistency and an adjudicative consistency pervades our discourse on the rule of law. This relates to the quality of the consistency at issue, a topic we will come back to when we taxonomize consistency types in Chapter 6.

36 Thornburgh, 476 U. S. at 780-81 (Stevens, J., concurring).
Another important distinction in Supreme Court discourse is between viewing consistency as a logical and a functional requirement. As is the case with legal philosophers, some Justices refer to consistency as a conceptual or logical requirement, but at other times, the Justices treat it in more functional terms, and this protean meaning facilitates consensus on consistency being a requirement of our legal system. This is a problem we will return to throughout the dissertation and seeking to resolve in Chapters 7 and 8, when we look at whether consistency norms are better understood as a language game than a matter of logic or function.

For now, though, I simply want to explore how this logical-functional distinction plays out in practice, which is perhaps best illustrated in a landmark affirmative-action case, *Adarand Constructors, Inc. v. Peña.* In *Adaranad*, the Court, for the first time as a majority, held that the Equal Protection Clause requires the application of strict scrutiny to federal laws that discriminate in favor of racial minorities, just as it requires that this standard of review apply to such laws that discriminate against racial minorities. The conservative majority held that a commitment to consistency requires that the same standard of review applies to all racially discriminatory laws, irrespective of whether racial minorities benefit or suffer from that discrimination. The majority thus interpreted consistency as a logical or formal requirement, commanding that all racial discrimination be treated the same way, regardless of its function or effect. In dissent, however, Justice Stevens challenged this understanding of consistency. According to Justice Stevens, such a formal or logical conception of consistency ignores important common-sensical or functional differences between harmful and benevolent racial discrimination. In his words, “[t]he consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.” Moreover, Stevens continued, the majority’s commitment to logical consistency threatened to turn the Court into a mechanical

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institution, obtuse to practical realities, because “[w]hen a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.”

The *Adarand* opinions neatly illustrate the distinctions between logical or formal conceptions of consistency, and practical or functional conceptions. Both the majority and dissent agreed that the law must be consistent, but they disagreed on what type of consistency the Equal Protection Clause required. This agreement on consistency as a necessary element of the rule of law, but disagreement on the precise nature of this constraint within a legal system, is what permits judges to create inconsistency within a system while at the same time still pledging their fidelity to the virtue of legal consistency. Consistency discourse permits judicial disagreement on legal dispositions while still enabling agreement on legal form. This inconsistent notion and use of consistency as a concept is what makes the topic so important for our understanding of the rule of law. As we will see below, this tension between consistency’s enabling disagreement in outcome but agreement on form underlies our entire culture and system of legal adjudication. Indeed, the ambiguity over legal consistency was present from early judicial invocations of the concept, as is evident in how the 17th century common law judges appealed to it.

**The Common Law and Consistency**

The contemporary Supreme Court’s exaltation of consistency is indebted largely to the British common law system. The common law jurists viewed the law as the reason immanent in nature, and for this reason contended that precedent has the virtue of aiding judges in discovering this omnipresent reason by helping judges see the law as a consistent whole.38 Precedent thus

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had an epistemic rather than a systemic value for these judges in that it helped them *discover* the law, but precedent did not *constitute* the law itself within the common law system.

A prominent exponent of this view of precedent during this time was Sir Matthew Hale, Chief Justice of the King's Bench under Charles I. Hale is famous not only for many of his judicial opinions but also for his personal writings, including his *The History of the Common Law of England*. In that work, Hale wrote that precedents “have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is.” This was one of the most forceful declarations of the importance of precedent to the English legal system. Hale’s work profoundly influenced Sir William Blackstone's *Commentaries on the Laws of England*, which of course would in turn greatly influence the Founders in developing the American legal system. We can see Hale’s influence on Blackstone particularly in Blackstone’s writing on precedent. Indeed, looking to Hale, Blackstone contended that judges should consult precedent because it provides the “best and most authoritative” evidence of what the law is.

Precedent was such a powerful aid in discovering the law for these common law jurists because, as Neil Duxbury puts it, they believed that law was reason and “reason implied consistency.” That is, because they believed that law is the reason underlying nature, and because they contended that reason requires consistency, they concluded that the law governing a particular controversy is whatever norm is most consistent with the principles governing the entire legal system as a whole. As Gerald Postema explains the relationship between consistency and this period of legal thought, “[i]n 17th century common law parlance, for a . . . judgment to be ‘against reason’ . . . was for it to be inconsistent with the law as a whole, to fail to fit

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coherently into the common law.” For example, Postema points out, Hale argued that the law’s rationality depended on judges “keep[ing] a constancy of the law itself.”

Nevertheless, although these judges saw following precedent as helpful in ensuring adjudicative consistency, and adjudicative consistency as essential to the law’s rationality, they did not see *stare decisis* as required by the common law. In fact, a strict and pervasive rule of *stare decisis* did not develop in England until well into the 18th century. As evidence of how underdeveloped *stare decisis* was in the 17th century, consider how in a 1673 case Hale announced that he would follow precedent because “it was his rule, *stare decisis*” with how Vaughan, the Chief Justice on that court, admonished in another case that same year that a judge “in his own conscience ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wronged before.” Whereas Hale claimed that he would follow precedent because it “was his rule” to do so, Vaughan contended that this was a matter for a judge’s individual conscience, and Vaughan’s conscience dictated not following precedent.

Not only did these common law jurists disagree on whether *stare decisis* was a requirement of the law, but they also lacked a developed understanding of how *stare decisis* could be applied to guarantee adjudicative consistency. Indeed, the central component of *stare decisis* application – the distinction between the *ratio decidendi* and *obiter dicta* – was not fully articulated in the common law until the 19th century. *Ratio decidendi* literally means “the reason for the decision,” and in our contemporary legal parlance, the *ratio decidendi* refers to the

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44 Neil Duxbury, 35.
45 Hanslap v. Carter (1673)1 Vent. 243.
essential and therefore binding holding of a prior case. *Obiter dicta*, by contrast, refer to “sayings by the way” – meaning all of the non-essential and therefore non-binding material in a prior decision. Because the 17th century common law jurists lacked a sophisticated understanding of this distinction, they could not fully operationalize *stare decisis* to guarantee adjudicative consistency.

To be sure, some of the 17th common law jurists did allude to a distinction between following the important as opposed to the less significant points in a prior decision. For example, in that Vaughan decision quoted above, the one in which he rejected Hale’s strict doctrine of *stare decisis*, Vaughan explained that when judges issue statements not strictly necessary to the judgment of the case, those statements lack a legal quality: “An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broach’d is no judicial opinion, no more than a *gratis dictum*.”\(^{47}\) This statement shows that 17th century common law *stare decisis* doctrine had some concept of precedential relevance, with more relevant statements in a prior decision having more significance in creating a consistent legal system, but the doctrine still did not have a method of distinguishing and justifying which prior judicial statements would constrain later courts.

This common law conception of adjudicative consistency animated the U.S. Founders in developing the American legal system and culture, and as we will see below, although the Founders, like the common law jurists, did not establish a strict doctrine of *stare decisis* or fully develop a method of applying it to achieve adjudicative consistency, they pushed forward on both fronts. But the biggest distinction between how the Founders and the common law jurists conceptualized consistency rested not in how they treated *stare decisis*. Rather, it was in how they thought of consistency’s *virtue* within a legal system. The Founders, in justifying their

\(^{47}\) Bole v. Horton (1673) Vaugh. 360, 382.
views that law commands consistency, relied less on appeals to natural reason and more on appeals to republican theory and practice.

**The Founders and Consistency**

Many of the Founders linked legal consistency not to common law reason, “that brooding omnipresence in the sky” that Oliver Wendell Holmes would later dub it, but to more pragmatic concerns – namely, in creating a functional republican democracy. For example, James Madison wrote in an 1831 letter: “It is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known; which would not be the case if any judge, disregarding the decisions of his predecessors should vary the rule of law according to his individual interpretation of it.”

Likewise, Justice Story, in his influential *Commentaries on the Constitution*, expounded at length on the need for “the principles of the [judicial] decision . . . as precedents and authority, to bind future cases of the same nature,” so as to impose “just checks upon judicial authority.”

Even Thomas Jefferson, whose revolutionary

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49 It is worth quoting from Justice Story’s Commentaries at length:

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was recognized, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

spirit inclined him towards uprooting tradition, urged subsequent generations to follow the Founders’ constitutional traditions, because the people become accustomed to those traditions. Therefore, Jefferson concluded, although the people should not treat the Founders with “sanctimonious reverence,” the people nonetheless should follow the Founders’ interpretations of the Constitution because “we accommodate ourselves to them.” So even if subsequent generations were to adopt a new constitution to reflect their own ethos, as Jefferson thought appropriate, these new framers should consider the original framework to ensure some minimal level of consistency or continuity within the system.

This link between republican democracy and adjudicative consistency was also evident in the most famous *stare decisis* pronouncement from the Founders, in *Federalist 78*, where Alexander Hamilton, in defending judicial review, explained that “[t]o avoid an arbitrary discretion in the courts, it is indispensible that [federal courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” Hamilton was arguing here that judicial review is justifiable only to the extent that judges are bound by consistency norms. Again, legal consistency is important because it serves a republican democracy by at the same time justifying and constraining judicial power.

50 Indeed, in a letter to James Madison, Jefferson famously proposed that justice requires creating a new constitution every 19 years: “Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.”


52 *Id.*  It should be noted that some have treated Jefferson as a critic of constitutional *stare decisis*. For example, Justice Douglas, in his attack on constitutional *stare decisis*, quotes Jefferson’s language warning those who treat the dead with too much reverence, and then claims that “Jefferson’s words are a *fortiori germane* to the fashioning of constitutional law” Douglas, William.  1949.  “*Stare decisis.*”  *Columbia Law Review*, 49.  735, 754-55.  Oddly, though, Douglas omits the language in which Jefferson explains that he is “certainly not an advocate for frequent and untried changes in law and constitutions” and “think[s] moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them and find practical means of correcting their ill effects.”  Jefferson Letters, at 1401.

Notably, Hamilton was responding in *Federalist 78* to arguments leveled by the Anti-Federalists against the power granted in the Constitution to the federal judiciary. Brutus was especially hostile in this regard, writing that under the Constitution the federal judiciary would be able to use its power “to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people.”\(^{54}\) According to Brutus, this process would occur so gradually and without public reaction because the judiciary’s “decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one . . . so that a series of determinations will probably take place before even the people will be informed of them.”\(^{55}\) Brutus thus saw precedent as a tool for justifying change and hence a threat to creating a consistent legal system.

Not all Anti-Federalists, however, were so hostile toward the federal judiciary’s use of precedent. In fact, some Anti-Federalists saw precedent in much the way that Hamilton did, as a way to limit, rather than to expand, judicial authority. For example, whereas Brutus worried about the creation of precedents as an insidious tool to limit democratic accountability, the Federal Farmer worried that the new republic’s dearth of precedents would permit too much judicial discretion. Indeed, the Federal Farmer wrote, “we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.”\(^{56}\) So whereas Brutus saw precedent as a tool of oppression, the Federalist Framer, like Hamilton, saw it as a tool to ensure adjudicative consistency, a requirement of democratic governance.


\(^{56}\) Id.
Chief Justice Marshall provided one of the most significant Founding contributions to *stare decisis* doctrine in *Cohens v. Virginia*, where Marshall rejected the argument that *Marbury v. Madison* required the Court to hold that Congress lacks the power to expand not only the Court’s original jurisdiction (as was the case in *Marbury*) but also the Court’s appellate jurisdiction (the facts at issue in *Cohens*). In so holding Marshall explained why the *ratio decidendi* but not the *obiter dictum* from Marbury must control the controversy at bar. In Marshall’s words, “It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.” Although Marshall’s reasoning seemed to provide the foundation for a firm *stare decisis* doctrine – with the *ratio decidendi* of a precedent absolutely binding later decisions and *obiter dicta* simply demanding respect according to their persuasiveness – it would be many years before the Court fully articulated an established the doctrine of *stare decisis*. But this is not to say *stare decisis* was not present at all in early American law. To the contrary, throughout the 19th century many U.S. and state Supreme Court decisions, including constitutional ones, were made under the doctrine – though, again, these decisions, even in applying *stare decisis*, did not fully develop the meaning or applicability of the doctrine.

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57 19 U.S. 264 (1821).
59 See, e.g., *Wright v. Sill*, 67 U.S. (Black) 544, 1862 WL 6738, *1 (1862) (“Whatever differences of opinion may have existed in this Court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhausted in the earlier cases.”); *University of North Carolina v. Fox*, 1 Mur. 58 N.C. 1805 (justifying interpretation of the State Constitution under “the ancient and wise maxim *stare decisis*”). See also *DeTocqueville*, 277 (claiming that American courts showed more reverence for precedent than French courts, resulting in enhanced judicial humility and carefulness).
Stare decisis also exerted some force on political decisions outside of the courts. For example, Henry Tucker, a noted early 19th century Democratic-Republican politician and constitutional commentator, indicated that precedent could settle some constitutional questions, even those with which he disagreed, such as the Court’s decision in *McCulloch v. Maryland* to uphold the creation of the national bank.\(^{60}\) James Madison held an even stronger commitment to consistency arising from the chartering of the bank. Whereas Tucker argued that the Supreme Court’s *McCulloch* opinion required Democratic-Republicans to accept the constitutionality of the bank, Madison found that, even before the *McCulloch* opinion, a commitment to consistency required that Congress re-charter the bank. Indeed, although in 1791 as a congressman Madison voted against the creation of the national bank on the ground that it would exceed Congress’s authority under Article I,\(^{61}\) in 1816, after the original 20-year charter for the bank had expired, Congress voted to renew the charter, and Madison, now President, signed the bill into law.

Madison’s *volte facce* led many members of his party to accuse him of inconsistency, and he denied such accusations by claiming that it was actually his commitment to consistency that motivated this reversal. As Madison put it in his memorandum on *McCulloch*, his decision to re-charter the bank was not a “change of opinion” on the bank’s constitutionality, but “instead [an instance] of precedents superseding opinion.”\(^{62}\) In fact, it seems that even after the *McCulloch*

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\(^{60}\) Henry St. George Tucker was one of the more prominent Democratic-Republican commentators on constitutional law in the early days of the Republic. He was elected as a Democratic-Republican to the U.S. House of Representatives and served for two terms, from 1815 to 1819, before joining the Court of Appeals of Virginia, and later the University of Virginia Law faculty, where he taught and wrote about constitutional law. Tucker thought that *McCulloch* settled the question of whether the Bank of the United States was constitutional, even though he was a committed Democratic-Republican. Bauer, 197-208.


\(^{62}\) In Madison’s “Detached Memoranda,” he wrote that Chief Justice Marshall had misunderstood Madison’s signing the bill into law as a change of opinion, when in fact it was an instance of Madison valuing consistency with the past over his own personal opinion of the bank’s constitutionality: “[R]easoning of Supreme Ct—founded on erroneous views &—1. as to the ratification of Const: by people if meant people collectively & not by States. 2. imputing concurrence of those formerly opposed to change of opinion, in- stead of precedents superseding opinion.” Madison,
opinion Madison continued to believe that the bank exceeded Congress’s Article I powers, since he continued to make such arguments against the constitutionality of similar national projects, as evidenced in his argument for vetoing the Bill for Internal Improvements.63

We see in Madison’s dilemma the multidimensionality of legal consistency that we will come back to in Chapter 6 when we seek to taxonomize legal consistency. To preserve an institutional consistency (i.e., the consistency in Congress’s governance of the economy), Madison had to create an individual inconsistency (i.e., a departure from previous decisions Madison had made as a public official). Madison’s dilemma also highlights another distinction in types of inconsistency. He changed his view of the bank to maintain an institutional consistency with the first charter, but he did not believe that this change required a modification of the constitutional principle used to justify that charter. That is, it is conceivable that he could have deemed it necessary to alter his understanding of Article I, Section 8 to justify his decision to re-charter the bank. Indeed, this change is at the heart of our theory and practice of living constitutionalism, which holds that many minor and individual changes in how we understand a provision’s applicability require a wholesale revamping of our understanding of that provision’s general meaning. For example, almost all judges and scholars who adhere to living constitutionalism today believe that the Commerce Clause now means that Congress has plenary authority over the national economy, due to McCulloch and the many decisions expanding the Clause thereafter. Had Madison taken this approach to understanding the McCulloch decision, he also would have had to accept all other such exercises of congressional power. But he did not

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do this, as illustrated in his vetoing the Bill for Internal Improvements on constitutional grounds. He thus saw his obligation to institutional consistency as requiring a factual but not a principled consistency. As a result, he permitted the bank as a single exception to the principle that the Constitution does not permit such national exercises of power, and he did this because he felt institutionally obligated to maintain a factual consistency (i.e., the existence of the national bank) but not institutionally obligated to further a principled consistency (i.e., the constitutional principle of plenary Article Section 8 congressional authority announced in *McCulloch*). But notice that Madison was not entirely inconsistent as a matter of principle; to the contrary, Madison believed that on principles he should be individually consistent. He simply did not think that he needed to be institutionally consistent as a matter of principle. So in maintaining his own principled consistency, he created a principled inconsistency in the constitutional system.

Madison’s dilemma represents a peculiarly American conflict that many later American politicians would face: the conflict between a constitutional precedent, as established by the U.S. Supreme Court, and the politician’s understanding of the constitutional text. Madison resolved this by ensuring a factual but not a principled consistency – deferring to the Court on facts, so as to preserve the bank, but not on principle, so as to preserve his constitutional objections to other such exercises of national power. Many later presidents would privilege their understanding of the constitutional text over both the facts and principles announced by the Court. One of the most notable early-Republic examples, of course, was Andrew Jackson’s decision to go against the Madisonian tradition and veto, on constitutional grounds, the bill to re-charter the bank. Lincoln would take this argument even further, contending that not only did he not have to accept the Supreme Court’s understanding of the Constitution as a matter of principle or facts,
but that he was not even bound by particular Supreme Court judgments. This battle between an actor’s understanding of the original meaning of a constitutional provision, and the Supreme Court’s understanding of the principle governing that provision, has become a staple in our pursuit of legal consistency.

We will turn back to this conflict in later chapters, but for now, I simply want to underscore that the Founders, much like the common law jurists, had more of a Burkean than a purely technical approach to *stare decisis*. That is, just as Edmund Burke was arguing in England in the late 18th century that traditions embody a culture’s rationality and therefore should not be easily dismissed, the Founders contended that political actors and judges alike must maintain institutional consistency as part of a general nod to the wisdom of tradition. It was not until the 19th century that a stricter, more juridico-centric, and more technical, view of *stare decisis* emerged as part of a new science-based approach to law – what came to be known as “legal formalism.”

**Legal Formalism and Consistency**

Whereas the 17th century common law jurists generally saw precedent as evidence of rather than constitutive of the law, and the Founding generation generally saw precedent as valuable in limiting judicial discretion and thereby securing a republican scheme of governance, the formalists generally viewed precedent as making law more scientific – specifically, more logical. Indeed, the judges and scholars of this period are often represented as having viewed the law through a logical prism; it is often said that they saw a legal system as a closed set of
necessary and sufficient conditions. As we will see throughout this dissertation, this claim is often overstated; in fact, the formalists did not initiate a seismic shift in jurisprudence. Logic, with consistency as its essential requirement, has always had – and continues to have – a significant place in legal adjudication. But it is true that the formalists did represent a transition in legal thinking, moving to a more scientific, logic-driven approach to law.

A good example of such a formalist approach is Wesley Hohfeld's influential 1913 work, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning*, on the relationships among eight legal concepts that Hohfeld identified as basic to a legal system: (1) right, (2) no-right, (3) privilege, (4) duty, (5) power, (6) disability, (7) immunity, and (8) liability. Hohfeld separated these concepts into two categories: jural opposites and jural correlatives. Jural opposites cannot co-exist for the same class of action at the same time; a jural opposite is a negation of a corresponding legal concept. By contrast, jural correlatives consist of a pair of legal concepts that must co-exist for the same class of action at the same time; a jural correlative refers to a legal concept's corresponding status that must inhere in Party B so that it can exist for Party A.

Hohfeld used examples from property law to illustrate how these conceptions play out in practice, but to make his framework more germane to our analysis, consider how it would apply to abortion law. According to this framework, if a woman has the *right* to choose to get an abortion, then it is not the case that she has *no-right* to choose to get an abortion. *Right* and *no-right* are thus *jural opposites*. Likewise, if a woman has a *right* to choose to get an abortion, then

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the state has a *duty* not to restrict that right. Her *right* and the state's *duty* are thus jural correlatives. Hohfeld accordingly framed his eight concepts with the following table:

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<th>JURAL OPPOSITES</th>
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<th>(2)</th>
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<th>(4)</th>
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<tbody>
<tr>
<td>Right</td>
<td>Privilege Power</td>
<td>Immunity</td>
<td></td>
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</tr>
<tr>
<td>No-right Duty</td>
<td>Disability Liability</td>
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<table>
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<tr>
<th>JURAL CORRELATIVES</th>
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<tbody>
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<tr>
<td>Duty</td>
<td>No-right Liability</td>
<td>Disability</td>
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Note here how the law of non-contradiction underlies Hohfeld's framework. He presupposed that in the concept of the law is the requirement that a legal status and its negation cannot co-exist. So a person cannot have a right and not have a right, or a privilege and a duty, to perform the same class of action. Without this consistency requirement, Hohfeld would not be able to succeed in his project of using these eight legal statuses to demonstrate “the fundamental unity and harmony in the law.”\(^{66}\) As we will see later in the dissertation, this unity is by no means uniformly accepted as essential to law or even the rule of law. Indeed, many later theorists have questioned whether such a consistency must be part of a legal system. In fact, some of these theorists, somewhat paradoxically, found a basis for this skepticism in Hohfeld's framework itself. Many realists, especially Karl Llewellyn, saw Hohfeld as a proto-realist because he did not argue that the particular legal content occupying these statuses is objectively and universally present in a legal system; rather, Hohfeld acknowledged that this content is constructed within a society and relative to other norms within the system. This was significant for the realists because, as we will see below, their central concern was with how formalists represented conservative legal propositions as logically compelled, necessary, and universal – as

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\(^{66}\) Hohfeld, supra, at 64.
opposed to practically induced by conservative judges, contingent, and particular to a time and place.

Nevertheless, even Llewellyn acknowledged that had Hohfeld lived another 20 years (Hohfeld died in 1918 when he was only 39), they “would have been at war” with each other due to Hohfeld's formalistic approach to law. Indeed, though a sympathizer with progressive political values, Hohfeld was at odds with the realists as a jurisprudential matter, which is particularly evident in how Hohfeld viewed the role of consistency in the law. That is what I want to highlight for our purposes here: how Hohfeld's approach was emblematic of the formalist period in its use of consistency reasoning to examine the logical relationship between legal concepts. For this reason, Hohfeld saw his work as aligned with that of the leading formalist of this period, Christopher Columbus Langdell, the first Dean of the Harvard Law School, in its overarching and rational ordering of a legal system. By examining Langdell's work, we can see more clearly how the formalists held consistency as an essential element of the law.

During his tenure as Dean from 1870 to 1895, Langdell transformed Harvard Law School, and legal education in general, by adopting the case method – i.e., the teaching method by which students learn a particular area of law by reading the leading judicial opinions in that field and then deriving the governing rules and principles from those opinions. Langdell believed that an understanding of an entire area of the law could be learned this way, because, as Langdell wrote in the introduction to one of his contracts casebooks, “the number of fundamental

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legal doctrines is much less than is commonly supposed.”69 So “[i]f these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.”70 This effort to taxonomize the law, in the process reducing a plurality of legal principles to a unity, was part of Langdell’s contention that “law is a science.”

Fundamental to this contention was the possibility that particular legal propositions could be derived from judicial opinions with consistency and certainty. Indeed, Langdell wrote, “[l]aw, considered as a science, consists of certain principles or doctrines,”71 and to be “a true lawyer”72 is “[t]o have such a mastery of these [principles and doctrines] as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs.”73 But, Langdell admonished in an 1887 Harvard Celebration speech, if it were not possible for lawyers to derive these principles or doctrines from judicial opinions, then it would be the case that the law is “not a science … [but rather] a species of handicraft,”74 better suited for apprenticeship than formal academic education. Thus, for Langdell, the very idea of formal legal education necessitated the possibility of deriving legal propositions from judicial opinions with consistency and certainty. In effect, then, adjudicative consistency, as guaranteed through the doctrine of stare decisis, was at the heart of Langdell’s notion of law.

We can see this in Langdell’s famous *Summary of the Law of Contracts*, where Langdell explicitly acknowledged that the consideration doctrine in contract law is unnecessary in terms of furthering the fundamental principles of contract law, and moreover, that the doctrine often

70 Id.
71 Id.
72 Id.
73 Id.
produces “hardship and injustice.” Nevertheless, despite the fact that he found the doctrine unnecessary and often times unjust, Landgell contended that courts must still adhere to the consideration doctrine, because “whatever may have been the merits of the question originally, it was long since conclusively settled.”

Such a situation presented a significant problem for formalists, because if a decision was originally wrong as a matter of law, then adhering to it would create a legal system inconsistent with legal correctness. But if a court were to overrule the wrong decision to effectuate the right one, then the court would be creating an adjudicative inconsistency, thereby acknowledging that judicial authorities err in interpreting the law, thus raising the possibility that the law is not completely determinate. Either way, the unity of the law would be compromised.

As Thomas Grey frames this dilemma, for the formalists “stare decisis meant that whenever there was a clash between ‘principle’ and ‘authority,’ formality was lost,” and that therefore, to preserve this formality, many of these jurists, including Langdell, engaged in “frantic efforts . . . to reconcile apparently inconsistent cases.” That is, the only way out of this conundrum was for formalists to show that the result that is right as a matter of legal principle is also consistent with precedent. As evidence of such a “frantic effort,” Grey points to how, to evade the proposition that the “mailbox rule” was a binding part of contract law, in one of his casebooks Langdell “manage[d] to reduce all judicial affirmations of the mailbox rule, but one, to dicta, and then condemn[ed] the sole survivor of the massacre on the ground that it had rested on the authority of a slain predecessor.”

76 Id. at 61.
78 Id.
79 Id. at n. 35. For Langdell’s distinguishing of these cases, see Langdell, Christopher Columbus. 1880. Summary of the Law of Contracts. 2nd Ed. Boston: Little Brown and Company. 16-18.
But while it is clear that Langdell believed that judges must engage in this frantic pursuit of consistency, it is not exactly clear why Langdell believed this, because Langdell never explicitly justified the doctrine of *stare decisis*. Brian Tamanaha has recently argued that the formalists and the realists were really not that different in how they conceived of the law, and according to Tamanaha, this is evident in how they justified *stare decisis*. Indeed, Tamanaha writes, the formalists did not see adjudicative consistency as compelled by some ethereal force, as a commandment of logic, but rather “in public policy terms.” This is part of Tamanaha’s project to weaken the oft-exaggerated distinctions between formalism and realism – a project that, as we will see in the following chapters, resonates strongly with some of the themes we will be developing here. But it must be conceded that, though Tamanaha is certainly right that jurists during the formalist era gave divergent justifications for *stare decisis*, some of which did not rest on purely logical values, it was rare for any jurist at this time to connect *stare decisis* explicitly to public policy. Rather, they often gave reasons that related to formalist concerns – i.e., concerns relating to the legal system’s conceptual integrity, not to how the legal system affected actual individuals.

Consider, for example, how Judge Cooley wrote that *stare decisis* is necessary to ensure “uniform rules for the administration of justice”\(^80\) so that even if a later court has “doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured on.”\(^81\) Although Cooley clearly considered how *stare decisis* affected actual citizens by admonishing that there are grave consequences to overruling precedents and that these grave consequences relate to ensuring equality, his emphasis was still thoroughly


\(^{81}\) Id.
formalistic in its focus on how *stare decisis* maintains “uniform rules.” Likewise, in 1916, the Dean of the University of Virginia Law School, W.M. Lile, claimed in a speech before the Alabama Bar Association that we must have a *stare decisis* doctrine, because the command of legal consistency is grounded in "the very nature of our institutions."⁸² Lile’s speech focused principally on how this command is derived from our concept of the law; he largely ignored the practical consequences of such consistency, though he did acknowledge how adjudicative consistency facilitates societal reliance on judicial decisions.⁸³ Similarly, one of the most authoritative state Supreme Court *stare decisis* opinions at the time emphasized how *stare decisis* is commanded by “the nature of our legal system,”⁸⁴ for *stare decisis* is “the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy."⁸⁵ All of these justifications for *stare decisis* rest on conceptions of the nature of law, not on how the doctrine would affect actual individuals. As these statements vividly illustrate, legal discourse at the time was fixated on how consistency was part of the very concept of a legal system.

Perhaps the most influential and illustrative judicial statement of formalist *stare decisis* doctrine appeared in *Menge v. The Madrid*, a 1889 case in which a Louisiana district court explained that “[a]n adherence to [precedent] is necessary to preserve the certainty, stability, and symmetry of our jurisprudence.”⁸⁶ Of these three considerations, only “stability” directly relates to practical or functional interests, in that it could arguably refer to how stable decisions facilitate the public’s reliance on those decisions. But note that the court referred to the stability of the court’s *jurisprudence*, rather than to the stability of society, thus suggesting that the court was

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⁸³ See, e.g., id. at 101-02.
⁸⁴ Bates v. Relyea, 23 Wend. 336, __.
⁸⁵ Id.
⁸⁶ 40 F. 677, 679 (1889).
focusing more on preserving the integrity of the legal system as such than on helping citizens to organize their lives around judicial decisions. It is therefore not surprising that very few discussions of *stare decisis* during this time explicitly drew this connection between preserving the stability of law and promoting societal reliance on the law. Rather, most late 19th and early 20th century jurists seemed satisfied with the notion that *stare decisis* is justified because it makes the law consistent and thereby more certain and symmetrical – or in other words, more akin to mathematics and logic.

This language from the *Menge* opinion was pervasive in late 19th and early 20th century discussions of *stare decisis*, appearing in many judicial opinions, academic articles, and legal dictionaries. In fact, in his influential 1912 handbook on *stare decisis*, Henry Campbell Black, the founder of Black’s Law Dictionary, cited the *Menge* opinion for the proposition that *stare decisis* is designed to promote judicial certainty, stability, and symmetry. The influence of the *Menge* decision on *stare decisis* doctrine lasted well into the 20th century, as evidenced in the 1938 version of Congress’s *Analysis and Interpretation of the Constitution Annotations of Cases Decided by the Supreme Court of the United States*, now known as *The Constitution Annotated*, designed to provide the most authoritative interpretations of the Constitution at that time. It is

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87 See, e.g., American Mortgage Co. of Scotland v. Hopper, 64 F1d. 553, __ (9th Cir. 1894) (“An adherence to the doctrine of *stare decisis*, in a proper case for its application, is undoubtedly necessary to preserve certainty and uniformity in the stability and symmetry of our jurisprudence.”).


91 In 1924, the Senate ordered publication of the first *The Constitution Annotated*, and in 1936 Congress mandated that the Bill Digest Section of the Legislative Reference Service (now the Congressional Research Service) publish 3,000 copies (2,200 for the House and 800 for the Senate) of a revised edition of the *Constitution Annotated*, detailing what the Constitution meant at that time according to its most authoritative interpretations. Legislative Reference Service, Library of Congress. 1938. *Analysis and Interpretation of the Constitution Annotations of Cases Decided by the Supreme Court of the United States*. Washington: United States Government Printing Office. 5.
quite telling for our present investigation into the formalist understanding of adjudicative consistency that, under the chapter entitled “Principles of Interpretation,” the Menge decision was cited as the primary authority for the definition of *stare decisis* and the justifications for the doctrine. Indeed, the 1938 version of *The Constitution Annotated* defined *stare decisis* as follows: “The general maxim is, that a point of law once settled by a decision from a precedent not afterward to be departed from – a precedent for the guidance of courts in substantially similar cases, adherence to which is necessary to preserve the certainty, stability, and symmetry of our jurisprudence.” This was one of the few non-Supreme Court cases cited in that version of *The Constitution Annotated*, providing further evidence of how the Menge decision, despite being only a district court opinion, was considered the authoritative proclamation during the formalist period on the meaning of *stare decisis*, as a doctrine designed to achieve the consistency, symmetry, and certainty of mathematics.

Integral to this desire to make the law more consistent, symmetrical, and certain through *stare decisis* was a need to develop an iron-clad distinction between the *ratio decidendi* and *dicta*. Indeed, if the formalists were to create a legal system that guaranteed consistency and that was governed by logical principles rather than individual discretion, they would need to find a way to distinguish between which statements in a previous judicial opinion were so important that they must be consistent with future opinions, and which statements were not of such magnitude so that inconsistencies with these statements in future opinions would not jeopardize the consistency of the system overall. Langdell failed to provide such an account, though, as mentioned above, it was clear from his writings that he thought that *dicta* are not binding, such as the mailbox rule, and that the *ratio decidendi*, such as the rule established by the consideration

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92 Id. at 69.
doctrine, must be followed. Likewise, while many courts cited the virtues of *stare decisis*, they failed to develop an account of how *stare decisis* could achieve these virtues in practice.

A central question for formalists, then, became how to distinguish between the *ratio decidendi* and *dicta*. The clearest and most forceful answer to this question came just as formalism was dying, and the answer came not from the American but the British legal academy — from Arthur Goodhart. Although Goodhart was born in, educated, and practiced law in the U.S., he spent his academic career in England, first at Cambridge and then later at Oxford. Goodhart wrote several important articles on *stare decisis* and a formalist bent pervaded his approach, in both the justifications and applications of *stare decisis*. In terms of justifications, he defended *stare decisis* in much the same way that the American formalists did — as contributing to legal certainty and consistency. As he wrote in a 1934 article, “the most important reason for following precedent is that it gives us certainty in the law.”

His most important *stare decisis* contributions, however, were not in his theorizing about the justifications for *stare decisis* but rather in its applications.

His first contribution to the applications question appeared in his 1928 Cambridge Law Journal article, *Three Cases on Possession*, where Goodhart argued that judges often create adjudicative inconsistencies by providing their own reasons for why a previous court decided a case a certain way. Therefore, Goodhart argued, the only way to guarantee adjudicative consistency was for a judge to limit herself to the precise reasons considered by the previous court. So, to use an American example, if a judge at time x decided to rule that a government display of the Ten Commandments violated the Establishment Clause because the government had a religious purpose in erecting the display, a judge at time x + 1 could not interpret that decision as turning on some other feature of the case, such as that the display was not featured

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among secular symbols. Therefore, if a case at time $x + 1$ involved a Ten Commandments display that was in fact featured among secular symbols, and the court found that that, just like the earlier display, the government erected this one for a religious purpose, then the judge would be compelled by *stare decisis* to rule it unconstitutional, even if these factual distinctions might be persuasive to the judge in ruling a different way. This approach was widely attacked, principally because it treated judicial opinions as though they clearly exposed all of the reasons for deciding a case a certain way. Judges often of course do not outline all of their reasons for ruling a certain way, and this is particularly true at the Supreme Court level, where the Justices frequently seek to dispose of controversial cases on narrow and sometimes even opaque grounds to avoid confining themselves on related matters in later decisions.

Goodhart ultimately found this criticism persuasive, leading him, two years later, in 1930, to adopt a modified approach, what has come to be known as the “rules-approach,” mentioned in Chapter 1. In his 1930 Yale Law Journal article, *Determining the Ratio Decidendi of a Case*, Goodhart changed his approach to focus on the facts, not the reasons, provided in the precedent case. According to this new approach, judges find the *ratio decidendi* by looking to the prior court’s description of the facts that yielded the outcome in question. Two important distinctions are relevant to Goodhart’s formulation. One, it was the prior court’s *own* description of the facts – not the facts as they really were or the facts as a later court would perceive them. Two, under Goodhart’s formulation, the holding consists only of the materially relevant facts – not all of the facts mentioned by the prior court. The later court must look only to those facts that the prior court signaled as being materially relevant to the outcome. As Goodhart put it, “[w]hen a judge says, ‘In this case as the facts are so and so I reach conclusion X,’ this is not a *dictum*, even though the judge has been incorrect in his statement of the facts.”

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mischaracterization of the facts does not bear on the relevance of those facts to the holding. Conversely, an accurate characterization of materially irrelevant facts does not bear on the relevance of those facts to the holding. Indeed, Goodhart admonished, “if the judge says, ‘If the facts in this case were so and so then I would reach conclusion X,’ this is a dictum, even though the facts are as given.”

So, to use the Establishment Clause example above, if a prior decision involved the government’s display of the Ten Commandments in a public park, and the prior decision held it to be unconstitutional because it endorsed religion as the only display in the park, a later court could not rule that another Ten Commandments display was permissible on the ground that it is smaller than the previous one (materially irrelevant fact) or that the prior court had erred in finding that the prior Ten Commandments display was in fact the only display in the park (materially relevant but erroneous fact).

Just like Goodhart’s first model, his refined model also came under attack, as a new approach to law emerged, legal realism, which rejected such efforts to make the law reflect the symmetry and consistency of mathematics and logic. A principal target of this attack was the formalists’ stare decisis project – in particular, their mathematic justifications for legal consistency and their pursuit of a logical method for distinguishing the ratio decidendi from dicta. Indeed, writing in 1927, Yale law professor and realist Walter Wheeler Cook ridiculed the formalists for seeking to preserve “the logical symmetry of the law.”95 Similarly, a review of an influential casebook by Joseph Henry Beale, one of the leading formalists of the period, characterized formalists such as Beale as adhering to such a strong “demand for logical

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consistency”⁹⁶ that these formalists “evaluate[d] precedents upon the basis of symmetry rather than justice.”⁹⁷

The realists not only objected to these mathematic justifications for *stare decisis*, but also the methods that formalists, such as Goodhart, proposed to achieve these justifications. As one realist characterized Goodhart’s work, there was not “the faintest shadows of signs that indicate that Mr. Goodhart is even remotely conscious of [his] theories as a realistic description of legal concepts and of what is taking place in our courtrooms.”⁹⁸ The realists’ effort to move the study of law away from conceptual theory, and toward more empirical observations of what was actually going on inside judicial chambers, had a profound effect on how legal practitioners and theorists began to think about *stare decisis*, in both its justifications and applications.

**Legal Realism and Consistency**

The legal realist movement had both philosophical and political goals.⁹⁹ Philosophically, the movement sought to attack a system of legal thought, what the realists called “conceptualism” and what I have referred to above as “formalism,” that they saw as resting on overly rigid and formal concepts. The realists saw this system becoming increasingly antiquated in the early 20th century, in the face of rising social sciences, such as economics, sociology, and political science. By following the lead of these social sciences so as to take a more empirical and less conceptual approach to the law, the realists sought to reveal how the law actually operates in practice, thereby moving the study of law to focus more candidly on how judges

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⁹⁷ Id.
actually make decisions, rather than on the formal content of the doctrines supposedly governing those decisions.

The movement’s political goals were related to this philosophical agenda. The leaders of the movement were uniformly progressive, and the thinking at the time was that formalism enabled judges to issue politically conservative decisions by hiding behind legal doctrines. The realists sought to expose these judges as political conservatives who used legal rhetoric as a tool to conceal their policy preferences and thereby justify their conservative decisions. This attack on formalism took on two related but distinct battles. First, the realists advanced a normative argument, taking on traditional legal reasoning itself, assailing it as a guise for conservative judicial decision-making. The focus of this attack on legal reasoning was *stare decisis* and the legal consistency it sought to achieve. The realists contended that even if there were some necessary conceptual relationship between legal consistency and our conception of the rule of law, that didn’t mean that we *should* make our legal system more consistent, for legal consistency impedes social progress.

Second, the realists made the empirical claim that in practice judges use legal doctrine – such as those doctrines governing civil procedure, contract law, and constitutional law – to smuggle their political values into adjudication behind the veil of doctrinal neutrality. In fact, the realists would likely take issue with the use of the word “governing” in the previous sentence, because for the realists, legal norms do not govern by themselves, but are instead *used* by judges as *governing tools*. Central to this argument was the realists’ claim that legal doctrine is insufficiently determinate, and judges as decision-makers are insufficiently constrained, to prevent a judge’s personal values from overwhelming doctrine in the adjudication of actual cases.
Therefore, the realists argued, even if legal consistency is desirable because the rule of law really is more important than social progress, perhaps because of its tendency to promote stability and order, this would still be simply a conceptual or idealistic argument for legal consistency, bearing little effect on how judges do and should decide actual cases. In the realists’ view, judges in practice are fundamentally incapable of privileging consistent decision-making over their political and legal preferences, so there is no reason to place such a high premium on legal consistency. Based on this empirical argument, the realists bolstered their normative agenda – to accept, and indeed to embrace, that we don’t live under the rule of law but the rule of politics.

We can see both strands of these arguments in the thinker most responsible for the development of legal realism, Justice Oliver Wendell Holmes. Holmes sought to drive out the formalistic conceptions that he believed had clouded legal thinking, and following the lead of his intellectual idol, Emerson, the principal victim in Holmes’s attack was the notion that the law must be consistent. Indeed, Holmes argued in various works that consistency could not be an essential ingredient to the rule of law, because he saw the law as an ineluctable clash between opposing forces – between logic and experience, concept and practice, theory and policy. He thus famously described his judicial philosophy in the first page of The Common Law in these terms: “The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” For Holmes, while judicial opinions might be conveyed through neat syllogisms, the decision-making process is not nearly as tidy, having been formed by years of practical experience.

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Some commentators have interpreted passages like this one to mean that Holmes believed that logic has no place in the law, but it is more accurate to say that Holmes contended that logic has some place, but it belongs to a second-class order of legal rationality, always behind common sense. Holmes believed that at some points within a legal system it is inevitable that formal logic will clash with common sense, and when such a clash arises, common sense will always prevail. As a result, consistency norms, while playing some role in guiding how judges decide cases, will always play a secondary role to policy in this process. As he put in his 1891 Harvard Law Review article on agency, “the whole outline of the law is the resultant of a conflict at every point between logic and good sense — the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.” In other words, it may be that a judge will often try to make her decisions logically consistent, but at one point, when that effort undercuts the judge’s common sense too much, the judge will always make the decision that the judge believes to be the best policy, even if that means violating logical consistency in the process.

Several years later, in The Path of the Law, another famous article of his in the Harvard Law Review, Holmes announced what would become the centerpiece of his legal philosophy: the notion that the law is simply a prediction of how courts will decide cases. As he boldly put it, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Because Holmes’s understanding of the law came down to predicting how judges will make decisions, the human mind became a central preoccupation of his legal philosophy. Holmes thus traced the clash between formal logic and common sense he had identified in his earlier work to dueling impulses in human nature: our pursuit of certainty and

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consistency, on the one hand, and our desire to take action according to our will, on the other. According to Holmes, “the logical method and form flatter that longing for certainty and for repose which is in every human mind.”\textsuperscript{104} But this longing will eventually be trumped by the competing desire to take new and often times inconsistent actions, because “certainty generally is illusion, and repose is not the destiny of man.”\textsuperscript{105} Therefore, he concluded in that article, precedents have little to no practical effect on judicial decision-making, nor should they, because “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”\textsuperscript{106}

Never before had a legal commentator used his understanding of metaphysics and psychology to attack so thoroughly a judicial doctrine, let alone one as preciously held as 	extit{stare decisis}. Indeed, this assault on 	extit{stare decisis}, and the legal consistency that 	extit{stare decisis} sought to achieve, was groundbreaking, for Holmes was challenging a legal practice that, as discussed above, was firmly embedded in the American legal tradition. In fact, one could say that Holmes was challenging an entire system of Western legal thought beginning with Plato. As will be covered more extensively in Chapter 3, consistency had been thought to be essential to rational thinking, and legal consistency had been thought to be essential to the rule of law. Holmes was thus attacking nothing less than these related pillars of law and rationality – a challenge that engendered the legal realist movement in the 1920s.

A leading thinker in this movement was Karl Llewellyn, who argued that not only would it be unwise to defer to the past in the name of consistency, as Holmes had contended, but also that 	extit{stare decisis} fails to generate such consistency in practice. Llewellyn took aim at efforts, such as Goodhart’s, to reduce 	extit{stare decisis} to a simple formula. As Llewellyn wrote in \textit{The

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\textsuperscript{104} Id. at ___.
\textsuperscript{105} Id. at ___.
\textsuperscript{106} Id. at ___.

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Common Law Tradition: Deciding Appeals, such efforts are like searching for “a Never-Never Single Answer,” because there are at least 64 different ways, Llewellyn asserted, that lawyers and judges can treat precedent.107

Llewellyn’s most influential attack on stare decisis appeared in his earlier, and most famous work, Bramble Bush, which he designed for first-year law students – particularly, to disabuse them of any illusions about the certainty and consistency in the law that formalists like Langdell had insisted could be gleaned from studying case law. In the Bramble Bush, Llewellyn claimed, contra the formalists, that stare decisis does not create consistency because for each decision holding x, a judge could always find a decision holding not x. As he put it, legal precedent is “Janus-faced.”108 According to Llewellyn, there is “not one doctrine, nor one line of doctrine, but two, and two which, applied at the same time to the same precedent, are contradictory of each other.”109 Therefore, even if a judge were so mentally disciplined that she could subordinate her will to her fidelity to consistency, she would still not be able to preserve adjudicative consistency through stare decisis.

The empirical and normative strands of the realist attack on legal consistency are also evident in much of the work of another leading realist, Jerome Frank, particularly in his influential book, Courts on Trial. In Chapter 19, entitled “Precedents and Stability,” Frank explained how stare decisis promotes injustice by commanding judges to follow earlier decisions that have since been found to promote injustice. Later in that work, Frank conceded that, despite valuing consistency over justice, stare decisis is nevertheless important to a legal system, because, to the extent it succeeds in promoting consistent judicial decision-making, it enables

citizens to rely on the law. But, Frank admonished, consistency is not a virtue of law in itself. Taking a jab at the formalists’ logic-driven justifications for *stare decisis*, such as those mentioned above, Frank explained that some misguided jurists had defended *stare decisis* on the ground that it ensures consistency, and “without it, the ‘beauty and symmetry’ of the legal system would be destroyed.” \(^{110}\) According to Frank, however, this is not a sound justification for *stare decisis*, because “[t]he preservation of the aesthetic proportions of a legal system seem [to Frank] a ridiculous excuse for working injustice.” In other words, the beauty of a consistent system is not worth the social injustice that such consistent decision-making entails.

On the empirical side of his argument, Frank argued further that, even if it were important to a legal system for courts to render consistent decisions, the doctrine of *stare decisis* would not be able to ensure such consistency. Frank made this argument much as Llewellyn had argued but in slightly different terms, introducing the concepts of “rule skepticism” and “fact skepticism” and thereby advancing a new terminology that would become very important for analyzing legal decisions. Rule skepticism is based on the notion that courts can and do interpret legal norms in multiple ways, and fact skepticism is based on the related notion that courts can and do interpret facts in multiple ways. Because the same legal rule can be interpreted differently, cases can be distinguished by interpreting norms so as not to apply to the particular case at bar. And because similar\(^ {111}\) facts can be interpreted differently, cases can be distinguished by classifying facts in different categories so that the facts at issue in the case at bar are not subject to those norms. Therefore, because Frank saw norms and facts as almost completely indeterminate, Frank concluded that cases could always be distinguished from one another so as never to be legally inconsistent.

\(^{110}\) Id. at 271.

\(^{111}\) I use “similar” instead of “the same” here because facts, unlike rules, necessarily have some distinguishing traits in different cases.
This was a startling discovery, with serious repercussions for the rule of law. After Holmes had argued that consistency is not an essential part of the law because common sense is a judge’s ultimate governing faculty, and Llewellyn had taken this argument further to say that the law is full of inconsistency because *stare decisis* has varied applications and each precedent has its counterpart tugging the court in the opposing direction, Frank exploded the entire consistency enterprise. For Frank, there is no such thing as adjudicative consistency, because all legal judgments are subject to interpretation, making it impossible to say that one decision is ever truly inconsistent with another. In other words, there is no Holmesian battle between consistency and common sense in the law. There is only common sense. All appeals to adjudicative consistency are simply fig leaves for unbridled judicial discretion. This radical claim birthed the critical legal studies movement, which is the latest movement in the assault on legal consistency.

**The Critical Legal Studies Movement and Consistency**

The Critical Legal Studies (CLS) movement, while in many ways resembling realism, took the realist arguments further by insisting that *all* laws within a legal system are *completely* indeterminate. This is the movement’s indeterminacy thesis. Because CLS scholars saw the law as completely indeterminate, they contended that any claim to treat the law as having any determinacy is simply a means of dressing up the politics of law in logical discourse – a process they often referred to as “the mystification of the law.” The CLS movement’s attack on the relationship between law and reason is apparent in the movement’s attack on consistency and *stare decisis*.

According to CLS scholars, not only does precedent fail in securing legal consistency, but it in fact “serves to disguise enormous discretion,”¹¹² and thus “provide[s] a falsely

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legitimizing justification for a decision that is ultimately social and political.\textsuperscript{113} Indeed, one of the CLS movement’s central claims is that liberal constitutionalism cannot eradicate its internal contradictions.\textsuperscript{114} In fact, some CLS scholars such as Duncan Kennedy have argued not only that contradiction is permissible in legal adjudication, because law is political rather than logical, but also that contradiction is essential to the adjudication of law, because the law itself is based on opposing forces, such as the pull and tug between communitarianism and liberalism. For this reason, Kennedy concludes that in a liberal polity the rule of law is an unachievable ideal, since many conceptions of the rule of law presuppose the non-existence of such contradictions. For Kennedy, the rule of law is not the touchstone of legality, as Aristotle had held, but merely an ideological tool, used to legitimate and justify governmental coercive power.\textsuperscript{115} Roberto Mangabeira Unger, another leading writer in the CLS movement, has likewise embraced contradictions in urging for scholars and judges to promote what Unger calls “deviationist doctrine” — i.e., the transferring of legal arguments accepted in one area of the law to another area in which conflicting norms currently prevail.

As Brian Tamanaha writes in his important work on the intellectual foundations of the rule of law, the effects of the legal realist and critical legal studies movements have been profound, nearly dismantling the entirety of Aristotle’s legal philosophy — in particular, Aristotle’s linking of “man with passion and law with reason.”\textsuperscript{116} The legal conservative movement began in the 1980s largely as a response to legal realism and the critical legal studies movement in an effort to restore this Aristotelian conception of the rule of law.

\textsuperscript{113} Id.
Legal Conservatism and Consistency

The legal conservative movement is a diverse movement, incorporating various libertarian and Republican agendas, such as the judicial enforcement of property rights as well as the dismantling or weakening of affirmative action, abortion rights, church-state separationism, and criminal procedural safeguards. The movement also has a broader, and more philosophical, agenda, and that is to restore a more traditional conception of adjudication – namely, that Aristotelian linking of man with passion and law with reason mentioned above. This agenda transcends the political movement's particular goals, and for this reason, it has attracted even some political liberals who hold such traditional views of the judiciary's role in American governance.

One of the most important works with regard to this philosophical agenda is Herbert Wechsler's 1959 Harvard Law article, *Toward Neutral Principles of Constitutional Law*, arguing that the Supreme Court incorrectly decided *Brown v. Board of Education*. According to Wechsler, racial segregation of public education does not offend the Equal Protection Clause so long as it applies to all races equally. Brown was thus an illegitimae decision for Wechsler because, to reach the conclusion that equally applicable racial segregation can violate the Equal Protection Clause, the decision was based on naked emotional attachments rather than neutral legal principles. For Wechsler, a neutral principle consists of two elements: content generality and equal applicability. Wechsler thus defined a principled decision as one resting on “reasons quite transcending the immediate result that is achieved,” and applying to all parties equally, whether “a labor union or a taxpayer, a Negro or a segregationist, a corporation or a
Communist.” As Judge Posner has explained, all that Wechsler “seems to have meant by ‘neutrality’ was consistency.”

A critical element of the Wechsler article is its emphasis on the role of reason in the law, which downgrades the place of emotional considerations in judicial decision-making. We can see reverberations of this issue in public discourse on the judiciary's role in our constitutional democracy. A good example arose when Chief Justice John Robert declared in his Confirmation Hearings that his ideal of judging is to act like an umpire: “The role of the umpire and a judge is critical. They make sure everyone plays by the rules.” Although many scholars attacked Roberts for expressing what they believed to be an embarrassingly naive conviction in legal formalism, the statement can more charitably be interpreted as expressing how important judicial impartiality is because of the relationship between consistency and the rule of law.

A similar dispute between legal liberals and conservatives arose in 2009 after President Obama announced that his ideal replacement for Justice Souter would decide cases on the basis of empathy. In Obama’s words, “the quality of empathy, of understanding and identifying with people’s hopes and struggles, [i]s an essential ingredient for arriving at just decisions and outcomes.” Likewise, before he was President, while still Senator Obama, he expounded on his view that empathy is important to judging: he explained that although the law will determine

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120 For example, Dean Erwin Chemerinsky criticized Roberts’s judge-umpire analogy on the ground that judges, unlike umpires, exercise significant discretion in their decision-making, and therefore “[a]lthough both [judges and umpires] make decisions, it is hard to think of a less apt analogy.” Chemerinsky, Erwin. 2006. *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*. Boston University Law Review, 86. 1069.


“95 percent of the [Court’s] cases,” in those remaining five percent of cases, which are often the Court’s most important, a Justice must rule “on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”

To the surprise of many liberals, Obama’s seemingly benign – and indeed rather banal – statements about empathetic judging incited excoriating responses from legal conservatives, many of whom accused Obama of seeking to undermine the rule of law by introducing inconsistency into our legal system and thereby destroying the link between law and passionless reason. For example, Professor Steven Calabresi argued that if Obama were to prevail in using empathy as the touchstone for a nominee’s credentials, that would “replace justice with empathy,” effectively destroying “the very idea of liberty and the rule of law.” In an opinion piece in the Washington Times, Wendy Long of the Judicial Confirmation Network argued that Obama’s nomination of empathetic judges would “make lawlessness an explicit standard for Supreme Court Justices,” and thus would make it difficult for these judges "to uphold the federal judicial oath to dispense justice impartially." A libertarian blog likewise warned of the “tyranny of empathy,” because if judges used empathy to decide cases, there would be “no consistency in our government's actions,” and such inconsistency would mean “the end of the rule of law.”

Diarmuid F. O'Scannlain, a Ninth Circuit judge, wrote that the rule of law requires the extirpation of empathy from judicial decision-making, and applauded Justice Sotomayor for deciding “to embrace the traditional conception [of judging] and to reject

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[President Obama’s] revisionist one” by proclaiming in her Confirmation Hearings that “judges can't rely on what's in their heart” and that judges “don't apply feelings to fact.”

Liberals were so surprised by these responses because empathy is a natural part of human reasoning, and liberals expect judges to reason like normal human beings. Indeed, Mark Graber argued that Obama’s preference for empathic judicial decision-making should not be controversial, since all judges consult empathy to some extent, “particularly if empathy is understood as an ability to see things from the perspective of the various litigants.” Likewise, Dahlia Lithwick sardonically questioned in her Slate column, “When did the simple act of recognizing that you are not the only one in the room become confused with lawlessness, activism, and social engineering?“

When this disagreement over empathetic judging arose, I sought to locate the intellectual source of the dispute, tracing the philosophical lineage of legal conservatism’s hostility toward empathy all the way back to ancient Stoicism. In an article in *Law and Philosophy*, I argued that contemporary legal conservatism shares much in common with ancient Stoicism in that “[b]oth philosophies teach that judges should refrain from assenting to a legal judgment unless the proposition underlying the judgment is certain; that judges should ignore goods external to the practice of judging and instead strictly apply the law to the facts; and that feeling some emotions, such as empathy, will result from or induce deficient judgments about the law.” Thus, “the real issue underlying the debate over empathy is not whether empathy is good or bad or whether empathy is conservative or liberal, but rather whether judging is of such a nature that certainty,

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consistency, and control are desirable and possible.” Legal conservatives tend to value a particular type of consistency – a more formalistic than a functionalist type – that requires the extirpation, or at least minimization, of the use of empathy in judicial decision-making.

As we will see, this intellectual genealogy is a project that will be relevant to our investigation later on in this dissertation when we explore how philosophical dispositions relate to how we conceive of different types of consistency within a legal system. For now, though, I want to flag three issues about this relationship between empathy and consistency, since these issues will prove significant for that later discussion.

One, legal conservatives do not reject all emotions. They tend to oppose only those emotions that they think will interfere with consistency. This means that exuberance for originalism, zealotry for consistency, and anger toward opposing viewpoints are permissible emotional expressions exhibited by legal conservatives. Justice Scalia of course comes first to mind on this point, particularly his excoriating dissents, which often bubble with anger and frustration but suppress empathy for the individual litigants.

Two, consistency for legal conservatives need not include adjudicative consistency. Indeed, a central division within legal conservatism is between pure originalism (which requires overruling all precedents that are inconsistent with the original meaning of the Constitution) and faint-hearted originalism (which requires overruling only those precedents that are both inconsistent with the original meaning of the Constitution and that are not so deeply entrenched in our constitutional culture that overruling them would create a more harmful inconsistency in our legal system than preserving them would).
The former group trumps originalism over precedent and therefore sees a very weak relationship between *stare decisis* and legal consistency.\textsuperscript{130} This group of pure originalists includes judges like Justice Thomas and scholars like Randy Barnett who explicitly pledge no fidelity to precedent in constitutional cases. For example, in *Elk Grove Unified School District v. Newdow*,\textsuperscript{131} Justice Thomas urged the Court to disincorporate the Establishment Clause, thereby threatening to undo all of the precedents applying the Establishment Clause to the states, dating all the way back to *Everson v. Board of Education*.\textsuperscript{132}

The latter group includes faint-hearted originalists like Justice Scalia\textsuperscript{133} and neo-formalists like Larry Solum who, despite generally adhering to originalism, believe that precedents play an equally or perhaps even more important role than text in adjudication; this group therefore sees a very strong relationship between *stare decisis* and legal consistency. In contrast to the purists, it is highly unlikely that a faint-hearted originalist like Justice Scalia would ever take such an extreme action as the one proposed by Justice Thomas. Indeed, as conservative as Justice Scalia is on Establishment Clause issues, he has never intimated that he favors disincorporating the Establishment Clause, despite the strong evidence that the Clause was originally meant to be a federalist guarantee and not an individual right, thereby defying incorporation to apply to the states through the 14th Amendment. In fact, Scalia has accepted the entire incorporation enterprise as part of substantive due process, even though he strongly

\textsuperscript{130} Note that this position assumes that *stare decisis* was not contemplated by the Framers as part of the Article III power granted to the federal judiciary. Some commentators have argued that some form of *stare decisis* is actually required by the Constitution, and therefore there is no tension between precedent and original meaning. See McGinnis, John O. and Michael B. Rappaport. 2009 “Reconciling Originalism and Precedent.” Northwestern University Law Review, 103. 803; Mitchell, Jonathan F. 2011. “*Stare decisis* and Constitutional Text.” Michigan Law Review, 110. 1.

\textsuperscript{131} 542 U.S. 1 (2004).

\textsuperscript{132} 330 U.S. 1 (1947).

contends that this was not part of the original meaning of the 14th Amendment. Scalia has explicitly made a similar argument in favor of judicial review, conceding in one of his landmark articles on originalism that “almost every originalist would adulterate [originalism] with the doctrine of *stare decisis* – so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong [as an original matter].”

The division between these two approaches to legal conservatism comes down to a distinction in types of inconsistency, an issue that we have alluded to throughout this chapter and that will be covered more extensively in Chapter 6. Recall how Madison felt impelled to maintain an institutional consistency on facts but an individual consistency on principles. Likewise, the pure originalist conceives of consistency in *individualistic* terms; she sees her fidelity to consistency as part of her duty to interpret the constitutional text consistently, which, for an originalist, requires reading it according to its original meaning. The faint-hearted originalist, by contrast, conceives of consistency in more *institutional* terms; she sees her fidelity to consistency as part of her duty to interpret the constitutional text in a continuing discourse within the Supreme Court as an institution.

*Stare decisis* is a feature of institutional consistency but it has no role in individual consistency. Some commentators have referred to a judge’s individual consistency over time as “personal *stare decisis*” but, as we will see, this is not an apt way of framing such consistency, as *stare decisis* really refers to the opposite phenomenon – i.e., *stare decisis* will often call for individual *inconsistency* over time when a precedent calls for a judge to change from her previous opinion on a matter. We will come back to this individual-institutional consistency

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distinction when we cover the different ways of measuring *stare decisis* efficacy, in Chapter 5, and when we discuss the different types of legal consistency, in Chapter 6.

Finally, the third issue concerns the relationship between the legal conservative movement and conceptualizing the law as a consistent system of rules. Scalia is again the leading example of this on the Supreme Court, in both his judicial opinions and his academic writings. In his judicial work, one of Scalia’s most well-known invocations of this idea appears in *Morrison v. Olson*, where, in dissent, Scalia argued that the power exercised by the independent counsel under the Ethics in Government Act intruded on the executive prerogative, in violation of the separation of powers. Scalia began his dissent by proclaiming that “[i]t is the proud boast of our democracy that we have ‘a government of laws, and not of men.’” Scalia then traced the history of this claim to the Massachusetts Constitution of 1780 and explored its meaning. According to Scalia, this dictum has become a mere platitude, leading many to forget that its profundity lies in the insight that “[a] government of laws means a government of rules.” Therefore, Justice Scalia concluded, because the majority’s decision to permit the independent counsel to intrude on executive power was “ungoverned by rule,” it was “hence ungoverned by law” – meaning nothing less than that the majority’s decision threatened the rule of law.

Similarly, in *Hein v. Freedom From Religion Foundation*,135 a more recent but less well-known instance in which Scalia has invoked this link between rule consistency and the rule of law, Justice Scalia attacked his conservative colleagues for authoring a plurality opinion that, in Scalia’s view, unreasonably distinguished some of the Court’s Article III standing precedents involving Establishment Clause suits. According to Scalia, the rule of law permitted the Court to rule in the *Hein* case in only two ways: (1) to follow the precedents and find standing for the plaintiffs, or (2) to overrule the precedents and not find standing for the plaintiffs. Either path

would preserve the rule of law for Scalia because each path would be consistent with pre-existing legal norms – the first with the Court’s precedents and the second with (Justice Scalia’s understanding of) the original meaning of Article III. But the *Hein* Court’s plurality’s decision, in preserving the Article III precedents in form while not finding standing in this particular case, “cannot possibly be (in any sane world)” a grounds for a judicial decision, because, as Scalia warned, “[i]f this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides.” In other words, the rule of law compels judicial actors to decide cases logically and therefore as consistent rules.

One particularly influential academic article on this subject is Scalia's *Assorted Canards of Contemporary Legal Analysis*, where Scalia assailed the legal academy’s frequent citation of Emerson’s quote “a foolish consistency is the hobgoblin of little minds,” the very line that, as mentioned in the Preface, I heard in practicing law and ultimately drew me to this dissertation subject. In attacking Emerson, Scalia looked to Aristotle for support, citing him for the proposition that “[c]onsistency is the very foundation of the rule of law” and that "the mother of consistency" is logic.136 In that article, Scalia explained how his fidelity to consistency means that he must have a greater fidelity to precedent than to originalism – meaning that his understanding of the rule of law requires that he be a faint-hearted originalist who interprets precedents as rules. This of course is the rules-approach to precedent that we mentioned in Chapter 1, a view of precedent championed by leading writers on precedent, such as Larry Alexander, Emily Sherwin, and Fred Schauer, and a view that we will come back to when we discuss how precedential scope relates to how we conceptualize adjudicative consistency and its relationship to the rule of law. In another influential article on legal rules and consistency,

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provocatively entitled *The Rule of Law as a Law of Rules*, Scalia more directly took on this issue concerning the relationship between the rules-approach and the rule of law. He again invoked Aristotle as the basis for his contention that the rule of law requires that judges issue decisions based on a consistent set of rules, as opposed to a loosely organized set of open-ended legal principles or standards. To do otherwise, Scalia contended, is to abandon the judicial duty in preserving the rule of law.

As is evident in Scalia’s writings, ancient Greek philosophy, in particular Aristotle, has had a profound influence on how we think about the relationship between legal consistency and the rule of law. The next step in our journey will be to explore this intellectual genealogy, starting with Plato and Aristotle, so that we can better understand how this thinking has come to animate our legal ethos.

**Chapter Summary**

Each of these various periods of legal thought devised different justifications for adjudicative consistency, and these justifications closely related to how the particular period conceived of the nature of law. Indeed, the common law jurists viewed consistency as part of a transcendent legal rationality, the Founders as part of republican governance, the formalists as part of logic, and the realists as part of political power. Despite these many differences separating these periods, there has been a steady progression toward finding a method, or at least a more enriched understanding, of how to make a legal system more consistent, starting with the common-law distinction between essential and non-essential judicial statements, moving through Goodhart’s formulation, and now to the current debate over whether the realists are right that both Goodhart’s results-approach and the rules-approach are insufficient in guaranteeing adjudicative consistency because there are too many ways to interpret precedents.
The result of this progression is that we now occupy a legal culture that has in many ways abandoned its commitment to legal consistency and the rule of law, as evidenced in how legal realism dominates the legal academy and in how many liberal commentators favor empathy-based judging. But our legal theorists, practitioners, and judges still pledge their fidelity, at least in rhetoric, to the concept of adjudicative consistency, as is evident in how we conceive of a legal advocate’s job “to show the court how to get there” and how the Supreme Court talks about [*stare decisis*](https://en.wikipedia.org/wiki/Stare_deisis) and consistency. That is the crux of this dissertation: to understand how we are occupying these two spaces at once, simultaneously believing and disbelieving in, following and yet shunning, consistency and the rule of law.

In the following pages, we will seek to explore these spaces so that we can better understand why so many judges, lawyers, and law professors have embraced Emerson’s idea that some forms of consistency are “foolish,” and why Scalia and so many other members of the American legal community have found this acceptance of inconsistency to constitute a threat to the rule of law. More importantly, in locating the sources and ascertaining the content of this disagreement, I want to determine whether there are any spaces and opportunities for agreement on this issue. That is, I want to understand why – given that so many lawyers, judges, and legal academics accept inconsistency as a natural byproduct of a legal system – do so many of us still insist that consistency is essential to the rule of law, and do lawyers and judges still see a lawyer’s job as one of showing the judge how to get to a particular result.

A general answer seems to be that, even when consistency was extolled as essential to legal adjudication, as in the formalist era, some inconsistency was tolerated as necessary to a functioning legal system. And conversely, even now when consistency is rejected as a foolish and archaic relic from legal formalism, it is still thought that some types of consistency are
necessary for a legal system to guarantee the rule of law. Indeed, it seems that, throughout the
different periods of legal thought, both consistency and inconsistency have been considered as
essential to a legal system. Our goal in the following pages will be to reach a more particular
answer that will enable us to sort through these different types of consistencies and
inconsistencies to get a better sense of what it means to live under the rule of law.
CHAPTER 3

THE CONSISTENCY CANON:
PHILOSOPHICAL AND HISTORICAL ANTECEDENTS

While legal philosophy might not all be a mere footnote to Plato, as Whitehead famously said of philosophy in general, it is not an overstatement to say that Plato, along with Aristotle, provided the most important early chapters in the book of legal philosophy. Plato and Aristotle therefore deserve attention in the third chapter of any exposition of a subject like the one under investigation here, the relationship between legal consistency and the rule of law. Although an entire dissertation could be dedicated to their contributions to legal philosophy, we will look only briefly at their general contributions to our conceptions of the rule of law. We will look particularly at how they made these contributions through their writings on rationality – namely, through developing what are now known as “the three laws of thought”: the law of identity (each thing must be identical with itself), the law of non-contradiction (it is not the case that a thing and its negation are both true), and the law of excluded middle (every proposition must be either true or false, but no proposition can be both true or false or neither true nor false). These laws are known as the three laws of thought because they have come to form the basis for rationality.

Below, we will examine how various philosophers have employed these laws – particularly the law of non-contradiction – to argue that consistency is an essential element of rationality and by extension, a rational legal system. We will take snapshots of various philosophical periods to illustrate just how significant consistency has been for philosophy throughout time and to document how thinking about consistency, including its place within legal systems, has developed. We will begin with Plato and Aristotle, exploring how they conceived of the law of non-contradiction and the relationship between consistency and law. In our discussion of Aristotle, we will briefly cover his development of formal logic, as this will be
of importance to us later when we look at attempts to formalize consistency’s role in legal systems. We will then move on to see how ancient Greek thinking on the law of non-contradiction influenced the development of ethical and legal philosophy in the Middle Ages, particularly in how Aquinas conceived of consistency as an essential element of a natural legal system. Next, we will see how consistency animated thought during the Enlightenment. Here, we will see how two polar philosophical opposites – the utilitarian Jeremy Bentham and the deontologist Immanuel Kant – came to see consistency’s role in legal systems in surprisingly similar ways, a point that has been entirely ignored in commentary on these two monumental philosophers. Finally, we will see how Bentham’s and Kant’s thinking on legal consistency anticipated the development of deontic logic in the 20th century. In this section, we will cover the formal elements of deontic logic briefly and explore how G.H. von Wright, one of the founders of deontic logic, thought about consistency within normative systems. Our discussion of deontic logic will lay the foundation for an examination in the following chapter of how various analytical legal philosophers have disagreed over whether legal consistency should be understood more in logical or functional terms.

Ancient Beginnings: Plato and Aristotle on the Law of Non-Contradiction

Plato arguably provided in the Republic the first full formulation of the law of non-contradiction. The reference appears in Book IV of the Republic, where Socrates and Glaucon discuss how the three parts of the soul relate to the three classes of the citizenry. In that discussion, Socrates proclaims that if each part of the soul has a different attribute, then each part must form a distinct entity, because “[t]he same thing will not be willing to do or undergo opposites in the same part of itself, in relation to the same thing, at the same time.”137 In other words, the same thing cannot have and not have a particular attribute. Although there had been

137 Republic, 436b.
previous accounts of the law of non-contradiction, this formulation in the *Republic* was the most complete at the time, and one could say that it got the consistency conversation in Western thought rolling.

Plato also laid the foundation for discussions of how the law of non-contradiction relates to the rule of law. In his final dialogue, the *Laws*, Plato’s protagonist, the Athenian Stranger, contended that a human of perfect intelligence “would have no need of laws to rule over him, and therefore a state governed by such a person would have no need for what the 20th century legal philosopher H.L.A. Hart would later dub secondary rules – i.e., rules constraining law-making power. But although an ideal state would not need such rules, in the real world of politics these secondary rules are necessary, for “there is no [perfect] mind anywhere . . . and therefore we must choose law and order, which are second best.” In other words, although in the Platonic world of the ideal forms the philosopher king is the best option, in a state governed by non-ideal rulers the rule of law – i.e., a legal system governed by consistent rules – is the best option.

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138 The first such account is often attributed to Parmenides, who proclaimed in his only known work, his poem *On Nature*, that: "Never will this prevail, that what is not is." [http://www.stanford.edu/~jsabol/sophia/parmenides.html](http://www.stanford.edu/~jsabol/sophia/parmenides.html). Of that poem, we have only fragmented sections; the above quote comes from The Way of Truth section. Notably, in Plato’s dialogue *Sophist*, Plato has the Visitor from Elea (playing a role similar to Socrates in Plato’s other dialogues) quote this line from Parmenides in proclaiming that Parmenides “testified to us [about the need to avoid inconsistency] from start to finish.” *Sophist*, 257a. In *Theaetetus*, a dialogue that was supposed to have occurred one day before the *Sophist* dialogue, Plato credited Protagoras as providing a similar formulation. Many are familiar with Plato’s quoting Protagoras’s famous dictum on moral relativism in that dialogue – “Man is the measure of all things” – but the full Protagoras quote deals with how humanity, in evaluating the world, is bound by the law of non-contradiction. The full quote is: “Man is the measure of all things: of things which are, that they are, and of things which are not, that they are not.” *Theaetetus*, 152a.


140 Id.

141 Indeed, whereas in the *Republic* Socrates argued that the just state must be ruled by a philosopher king unconstrained by popularly enacted laws, in the *Laws* the Athenian Stranger referred to rulers not as philosopher kings, but more modestly as “servants or ministers of the law,” and this is because “upon such service or ministry depends the well- or ill-being of the state.” Id. at 89. The Athenian Stranger argued that the state’s well-being depends on the rulers being servants, because a state in which the rulers are above the law is “on the highway to ruin,” whereas “the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer.” Id.
Aristotle carried this discussion of the rule of law further and for this reason he (and not Plato) is often said to have provided the most significant foundation for A.V. Dicey’s development of our modern conception of the rule of law. Whereas Plato held in the *Laws* that the rule of law is the second best option after the state governed by a philosopher king, Aristotle more pragmatically held that the rule of law is the best scenario, because the ideal ruler is just that – an ideal – and as such bears no practical significance on the formation of the just state. A significant feature of the rule of law for Aristotle is legal stability; he thus emphasized in the *Politics* how constitutional systems must explicitly prohibit excessive change. Furthermore, Aristotle contended, because passions induce rulers to engage in such excessive change and people are ineluctably driven by their passions, rulers unconstrained by rules will change laws too capriciously and thereby upset this precious stability. So the law must control rulers, not the other way around, and therefore Aristotle defined “[t]he law [a]s reason unaffected by desire.” Notably, this emphasis on passionless consistency resonates with other areas of Aristotle’s philosophy. In the *Nicomachean Ethics*, for example, Aristotle contended that an ethical life – that is, a happy or flourishing life – consists in consistently engaging in rational action that accords with human virtue or excellence.

Aristotle’s most extensive discussion of the law of non-contradiction appears in his *Metaphysics*, where Aristotle argued that this law of thought is the first of the first principles of

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142 As Aristotle famously put it, because “the law has no power to command obedience except that of habit, which can only be given by time,” we must conclude that “the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by making the change as he will lose by the habit of disobedience.” Aristotle, *Politics* (B. Jowett trans.), in *The Complete Works of Aristotle* 2. 1984. Ed. Jonathan Barnes. Therefore, a constitutional system that permits “a readiness to change from old to new laws enfeebles the power of the law.” Id.

rationality – i.e., “the most indisputable of all principles.” Therefore, he concluded, anyone who challenges the law of non-contradiction “is from the start no better than a vegetable,” and for this reason “it is absurd” to engage in debate with such a person. Aristotle presented in the *Metaphysics* three related but conceptually distinct versions of how things must be consistent. The first formulation to appear in the *Metaphysics* is the following: “It is impossible for the same thing to belong and not to belong at the same time to the same thing and in the same respect.”

There are two important features of this formulation, features that we will review briefly here because they will come up later when we seek to taxonomize legal consistency norms in chapter six.

One significant feature of this formulation is that by the “same thing,” Aristotle was referring to the *actual* composition or content of the thing, not simply the way that we might refer to it in our language. For example, the terms “king” and “queen” could both belong and not belong to the category of games, because both terms could refer to pieces in a chess game as well as to figures in a monarchy. These terms, then, would seem to violate the law of non-contradiction, but they do not actually violate this law of thought when we are using the terms to refer to different entities. Indeed, there is nothing contradictory about saying that the Queen of England is not a game piece but that the white queen on the chessboard is. Aristotle’s point here was that whereas the actual thing cannot belong and not belong to a particular category, our linguistic conventions could make terms appear to have such a characteristic.

Moreover, Aristotle referred to how things *currently* belong, not to how they might potentially belong. Aristotle made this point to counter Heraclitus’s claim that inconsistency is

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145 Id. at 52.
146 Id.
unavoidably part of our experiences because things naturally change over time, and as a result, a thing that belongs to a particular category now might not belong to that category in the future. For example, in the future, we might play chess without a king or queen, so that these terms would no longer refer to pieces of a game, or perhaps more likely, in the future England might abolish its monarchy, so that the Queen of England will no longer belong to a category consisting of figures in a monarchy.

To see how this applies to legal discourse, consider the following legal example. One of the judicial tests for enforcing the Establishment Clause is the controversial test announced in *Lemon v. Kurtzman*, providing that the government may not pass a law that either: (1) lacks a secular purpose, (2) has the primary effect of advancing or impairing religion, or (3) excessively entangles religion and government. The *Lemon* test is of course so controversial because many conservatives, most notably Justices Scalia and Thomas, believe that the test requires too much separation between religion and government. Legal conservatives object especially to the second and third prongs of the test – two prongs that, according to conservatives, give a judge too much discretion to invalidate any type of government program that, in that particular judge’s view, improperly promotes religion.

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149 We should note here that there are other Establishment Clause tests. While many of the most ardent church-state separationists on the Court often adhere to the *Lemon* test, the more moderate Justices have urged for the “endorsement test,” which holds that the Establishment Clause prohibits public endorsements of religion that “send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). The most conservative Justices on church-state issues have expressed support for the “coercion test,” which holds that the Establishment Clause prohibits a government action only if it has the effect of coercing participation in a religious exercise. Note that the liberal Justices have at times appropriated this test for government-speech cases. In fact, the principal case explaining the “coercion test” is *Lee v. Weisman*, 505 U.S. 577 (1992), where the liberal Justices, with Justices Kennedy’s support and writing the majority opinion, applied a weak version of the test to hold that a public school violated the Establishment Clause by sanctioning a rabbi’s benediction at a graduate ceremony, whereas the conservatives, led by Justice Scalia in dissent, applied a stronger version of the test to hold that the benediction was permissible because it did not coerce anyone’s participation in the religious activity.
Now, to drive Aristotle’s point home, let’s compare two Supreme Court opinions and see whether they involved the same thing so as to create an inconsistency under Aristotle’s first formulation of the law of non-contradiction. One opinion is *Committee for Public Education & Religious Liberty v. Nyquist,*\(^{150}\) where, two years after announcing the *Lemon* test, the Court applied the test to invalidate a New York State program that, through various measures, directly funded religious organizations. The other opinion is *Zelman v. Simmons-Harris,*\(^ {151}\) where, almost 30 years after *Nyquist,* the Court, with a narrow 5-4 conservative majority, upheld the constitutionality of a Cleveland voucher program under which the government indirectly funded religious organizations through the private and independent decisions of the voucher beneficiaries. The liberals dissented in *Zelman* on the ground that it was inconsistent with *Nyquist,* as well as many of the Court’s other precedents in this area of the law, because, just like the funding program at issue in *Nyquist,* the Cleveland voucher program resulted in substantial funding of pervasively sectarian institutions and therefore had the primary effect of advancing religion, in violation of the *Lemon* test. That this effect arose indirectly, through the private and independent choices of voucher beneficiaries, was irrelevant to the dissenting Justices.

But the conservative majority did not accept the *Lemon* test’s applicability to the case. In fact, the majority opinion, written by Chief Justice Rehnquist, did not even cite *Lemon.* Therefore, according to the majority, even if the dissenting Justices were right that *Zelman* was the type of case belonging to the category of programs having the primary effect of advancing religion, this case did not necessarily belong to the category of programs violating the Establishment Clause, because the *Lemon* test did not apply to programs that have the primary effect of advancing religion through the *indirect* funding of religion.

\(^{150}\) 413 U.S. 756 (1973).
\(^{151}\) 536 U.S. 639 (2002).
This highlights two of the above-discussed features of Aristotle’s first formulation. The Nyquist and Zelman decisions were not necessarily inconsistent, as a matter of logic, because they did not involve the same thing. To be sure, in applying the linguistic convention of the Lemon test, we might place the programs at issue in Nyquist and Zelman in the same constitutional category – i.e., as funding programs that have the primary effect of advancing religion, in violation of the second prong of the Lemon test. But if we reject that interpretation of the Lemon test, then the programs may be logically placed in different categories, with Nyquist involving direct funding of religion, and therefore being constitutionally impermissible under the Lemon test due to its advancement of religion, and Zelman involving indirect funding of religion, and therefore being outside of the Lemon test’s applicability and hence being constitutionally permissible, regardless of its advancement of religion. It is our language that makes us see these cases as being similar, thereby inducing us to see treating them differently as logically inconsistent, but it is not necessarily illogical to treat them differently.

Moreover, even if we were to agree that both cases involved the same type of program under the Lemon test, and therefore actually constituted “the same thing” under Aristotle’s formulation, it still would not necessarily be illogical to treat them differently at different times. As mentioned above, Aristotle added the temporal condition, limiting true contradictions to instances in which the same thing is treated differently at the same time, to account for changes over time in natural and social phenomena. We can see that vividly in the Establishment Clause context. Although the Supreme Court has not yet formally overruled the Lemon test, it has strongly hinted at doing so, and if we were to treat the Lemon test as no longer applicable, then there would be nothing illogical about upholding in a future case a direct-funding program like the one at issue in Nyquist, on the basis that the two cases should be decided differently because
different constitutional standards apply to the two cases. Indeed, it would not be logically inconsistent to hold that a program nearly identical to the one at issue in *Nyquist* is now permissible, because the *Lemon* test no longer applies to any government funding programs. There is not necessarily a logical violation when the same thing is treated differently at different times.

These two features in Aristotle’s first formulation raise all sorts of problems for applying the law of non-contradiction to law, and as we will see throughout this dissertation, these are problems that have plagued legal discourse on consistency. Since legal cases always rest on facts and no pair of fact patterns are truly identical, how can we ever say two cases are the same in law? And since a legal system is constantly changing, particularly a common law system, which evolves according to judicial decisions, how can we ever say that two decisions have been entered at the same time, so as to be subject to logical limitations on consistency? We will address these fundamental questions in due course, but for now, I simply want to flag these issues about case identity and time, for they will come up throughout our analysis of legal consistency.

Turning back to Aristotle’s three formulations on consistency, let’s examine the second formulation, which does not raise these same identity and temporal issues but raises different problems for applying the law of non-contradiction to legal norms. The second version, appearing shortly after the first in the *Metaphysics*, proclaims that “[i]t is impossible to hold (suppose) the same thing to be and not to be.”¹⁵² This formulation has sometimes been interpreted to mean that, as a descriptive matter of human psychology, people do not in fact believe in x and not x.

¹⁵² *Metaphysics* IV 3 1005b24.
If we were to apply this interpretation to Supreme Court decision-making, this would mean, to use the example above, that Supreme Court Justices do not believe that the Establishment Clause does and does not prohibit the government from passing laws that have the primary effect of advancing religion. The problem with this interpretation is that it does not fit well with our experiences. To the contrary, people often tend to hold inconsistent beliefs. We see this in the Supreme Court’s overruling itself, with even the same Justices saying that they no longer believe the law to require what they had believed it to require in a previous opinion. In fact, this type of internal judicial inconsistency is essential to the doctrine of *stare decisis*, as demonstrated in the previous chapter, where we highlighted how *stare decisis* has led to some monumental individual reversals of opinion. The problem in Aristotle’s formulation here, according to this interpretation, is that it does not account for how people’s beliefs change over time, due to various forces. In law, judicial views can change internally, due to one’s independent re-evaluation of the law, or externally, due to changes in legal norms themselves. But whatever the source of the change, we see many instances in which judges say one thing at point t and then contradict that assertion at point t +1.

Moreover, even if this formulation did include a temporal limitation, so that it asserted that people do not believe in x and not x at the same time, it would still seem to fail as a descriptive matter. We can again see this illustrated in Supreme Court decision-making. A Supreme Court Justice might believe that the original meaning of the Establishment Clause would permit many laws that have the primary effect of advancing religion, but that same Justice might also believe that the *Lemon* test prohibits all such laws and the *Lemon* test is required to be applied to Establishment Clause claims under *stare decisis*. So that Justice might believe at the
same time that the Establishment Clause does and does not prohibit laws that have the primary effect of advancing religion.

A good Aristotelian would of course counter that these positions are not necessarily contradictory, because one belief is that the Establishment Clause, as a matter of original meaning, does not contain this prohibition, and the other belief is that *stare decisis*, as part of the legal system as a whole, does contain the prohibition. But even here there is a potential for an actual contradiction, because if one believes that a Justice’s duty is to follow the Court’s prior decisions, as well as to enforce the original meaning of various constitutional provisions, then it may very well be that a Justice will find that she has a duty to invalidate and uphold a law that has the primary effect of advancing religion. In such instances, we often accuse the Justice of not actually believing one of the propositions that led to the inconsistency. Indeed, when Justice Scalia does not follow his originalist methodology, many claim that this reveals how Scalia does not actually believe that he has a duty to enforce the Constitution’s original meaning. But it may very well be that someone like Scalia *does* believe in both of these commands at the same time. As a descriptive matter, it is at least possible to hold firm to both a belief in originalism and *stare decisis*, even when the two conflict with one another in particular applications.

Perhaps the better interpretation, then, of Aristotle’s second formulation is that although people do in fact hold inconsistent beliefs, it is irrational for them to do so. This normative interpretation seems to hold more promise than the descriptive account, because although experiences lead us to acknowledge that people do in fact hold inconsistent beliefs, we tend to rule out such instances as examples of human irrationality. When we encounter inconsistent beliefs, we point them out to the person as evidence that they have not thought about the subject with sufficient rigor to have developed firm conclusions. So under this interpretation, we might
point out to Justice Scalia that although he might truly believe in originalism, despite his inconsistent applications of it, his inconsistencies reveal instances of his irrationality. To the extent that he wants to act rationally as a Supreme Court Justice, which may be an essential element of his duty to uphold the rule of law, he must extirpate those inconsistencies from his jurisprudence. But this does not challenge whether he does in fact believe in both originalism and *stare decisis*. It merely accuses him of acting irrationally, and therefore against the rule of law, when he displays an inconsistent commitment to these principles.

Finally, Aristotle’s third formulation is that “opposite assertions cannot be true at the same time.”\textsuperscript{153} This formulation does not suggest whether it applies either psychologically (i.e., to people’s beliefs about things) or ontologically (i.e., to things as they are in the world). Some philosophers have treated this formulation as a variant of the first, because it similarly contains a temporal limitation, but others have found it to modify the second formulation, announcing that it is either psychologically impossible or normatively irrational for people to assert the same statement as both truth and false. Given these distinctions among all of the formulations, and the multiple ways of interpreting each one, philosophers have sharply disagreed on which formulation Aristotle held, and we will see later in the dissertation that these variations have different implications for applying the law of non-contradiction to legal discourse.

But none of these formulations gets at what exactly *constitutes* a contradiction. Aristotle addressed this more formalistic question in his *De Interpretatione*, one of the first works to explore the relationship between logic and language. In that work, Aristotle identified four types of propositions or assertions: universal affirmatives (“every S is P” or “A” statements), universal negatives (“no S is P” or “E” statements), particular affirmatives (“some S is P” or “I” statements), and particular negatives (“some S is not P” or “O” statements).

\textsuperscript{153} *Metaphysics* IV 6 1011b13–20.
We see such types throughout legal discourse. For example, in church-state law, we have A statements (e.g., “every law whose primary effect is to advance religion is a violation of the Establishment Clause”),\(^\text{154}\) E statements (e.g., “no law that is neutral and generally applicable is a violation of the Free Exercise Clause”),\(^\text{155}\) I statements (e.g., “some law that has a religious purpose is a violation of the Establishment Clause”),\(^\text{156}\) and O statements (e.g., “some law that has a religious purpose is not a violation of the Establishment Clause”).\(^\text{157}\)

These four categories of assertions correspond with four ways in which these assertions can relate: contradictories, contraries, subcontraries, and subalterns. Two propositions are contradictory with one another if and only if they cannot both be true and they cannot both be false. Two propositions are contraries with one another if and only if they cannot both be true but they can both be false. Two propositions are subcontraries if and only if they cannot both be false but they can both be true. Finally, a proposition is a subaltern of another if and only if it must be true if its superaltern is true, and the superaltern must be false if its subaltern is false. A and O, as well as E and I, propositions are contradictories. A and E propositions are contraries. I and O propositions are subcontraries. A and I, as well as E and O, are subalterns of each other, because if A is true, then I must be true, and if E is true, then O must be true.

So, for example, if we had two court decisions, with one holding that every law whose primary effect is to advance religion is a violation of the Establishment Clause (A statement) and another one holding that some law whose primary effect is to advance religion is not a violation of the Establishment Clause (O statement), those holdings would be contradictory, because they both cannot be true and they both cannot be false. By contrast, if we had two court holdings, one


holding that every law whose primary effect is to advance religion is a violation of the Establishment Clause (A statement) and another one holding that no law whose primary effect is to advance religion is a violation of the Establishment Clause (E statement), those holdings would be contrary, because they both cannot be true but they both can be false (e.g., it could be the case that some, but not all, laws whose primary effect is to advance religion violate the Establishment Clause).

As we will see, many legal scholars and logicians have sought to apply this square of opposition to legal and moral norms, eventually giving rise in the 18th century, through Jeremy Bentham’s work, to a distinctly legal method for analyzing the logical relationship between norms. Before we cover Bentham’s contributions, however, we will take a closer look at the influence of Aristotle’s work on thinking about the relationship between consistency and natural law in the Middle Ages.

**The Middle Ages: The Aristotelian Tradition and Natural Law**

Many of Aristotle’s most significant works would have likely been lost, never to be found by the Western world, if it were not for Al-Farabi, whose 9th century translations of Aristotle’s works earned him the title in the Arabic world of “The Second Teacher,” with Aristotle being the first. It was not until Avicenna, however, in the 11th century, that an Arab thinker developed his own approach to implementing Aristotle’s work. Avicenna purportedly read the Metaphysics over 40 times, only to be entirely bewildered before finding clarification in Al-Farabi’s commentary on the work. But Avicenna would ultimately go beyond Al-Farabi’s translations, becoming the leading thinker during that period to interpret Aristotle to advance his own understanding of metaphysics. In so doing, Avicenna emphasized the significance of the law of non-contradiction with even greater force than did Aristotle. Indeed, whereas Aristotle
accused those who rejected the law of non-contradiction of being “vegetables,” Avicenna made this argument more violently, writing that “[a]nyone who denies the law of non-contradiction should be beaten and burned until he admits that to be beaten is not the same as not to be beaten, and to be burned is not the same as not to be burned.”\textsuperscript{158} Avicenna thus played a significant role in making logic its own subject in philosophy, so that it became a distinct branch rather than merely an intellectual tool in philosophical inquiry.\textsuperscript{159} Avicenna’s commentaries on Aristotle had a particularly strong impact on Thomas Aquinas, who, writing in the 13th century, two hundred years after Avicenna, was next in the line of great thinkers to place consistency at the center of their philosophy. Aquinas will be especially important for the investigation in this dissertation because he would come to be the leading exponent of natural law and was one of the first theorists to explore how a natural legal system requires consistency among legal norms.

Aquinas derived much of his metaphysics from Arab thinkers, particularly Avicenna. For example, in his \textit{Commentary on the Sentences}, Aquinas argued that time is eternal and in making this argument, Aquinas cited Avicenna extensively.\textsuperscript{160} In that work, Aquinas aligned himself squarely within the Aristotelian tradition, arguing that contradictions do not exist, because “what is being and not-being, neither is being nor not-being.” Aquinas developed this argument further in his magnum opus, \textit{Summa Theologica}, where Aquinas drew from Avicenna to make his famous argument about God’s omnipotence. In that work, Aquinas defined God’s omnipotence to exclude a power over contradictions: “Nothing which implies contradiction falls under the omnipotence of God.” This claim has aroused debate among philosophers, because omnipotence seems to include a power over everything. Aquinas reasoned, however, that because each agent is limited to things like itself, God, as an existent

\textsuperscript{158} Avicenna. \textit{Metaphysics}. I; commenting on Aristotle, Topics I.11.105a4.
\textsuperscript{159} Sabra. “Avicenna on the Subject of Logic.” 1980. 752–753.
\textsuperscript{160} See II, d.1 q.1 a.5
being, has no authority over the non-existent, and therefore, because contradictions do not exist, God has no power over contradictions.

This view of contradictions runs through Aquinas’s legal philosophy as well. In the legal world, Aquinas is of course most famous for distinguishing between natural law (the law that inheres in nature irrespective of human action) and positive law (the law that is law by virtue of its being validly promulgated by the sovereign). Aquinas articulated the most well known endorsement of natural law, but he is often simplified as believing that the only type of law is natural law. But this is not precisely what Aquinas held. To the contrary, he explicitly recognized that there are two types of law – positive and natural law – and he acknowledged that human institutions play a significant role in the creation of law. The key distinction for Aquinas is that he contended that a governmental act is not law merely because it comes from a governmental body. It still must satisfy certain conditions, external to any human institution, to qualify as a law. This is what makes Aquinas a proponent of natural law.

Aquinas’s focus on legal consistency is part of his natural law theory. According to Aquinas, for a human institution to enact law, it must satisfy certain conditions of rationality. This means that the sovereign’s enactments must be general, clear, stable, and practicable. We see a deep analogy here between God, as lawmaker for nature, and the sovereign, as lawmaker for subjects. Just as God is bound by the possible, with contradictions being outside of God’s power because contradictions are non-existent, so too the sovereign is constrained by the possibility of the citizenry’s ability to comply with those edicts, which means that contradictory laws are not in fact laws. Indeed, if the government seeks to create a law that

161 Summa Theologiae, I-II q. 96 a. 1.
162 q. 95 a.3.
163 q. 97 a. 2.
164 q. 95 a. 3.
is either unduly particular, vague, inconsistent, or impracticable, to the extent that subjects
cannot predictably conform themselves to the government’s command, then, in Aquinas’s view,
the government has failed to make law.

This constraint on lawmaking stems from Aquinas’s contention that law consists of a
rational discourse of the possible between the sovereign and its subjects. As Aquinas put it, law
consists of “the universal practical propositions conceived in the reason of the ruler(s) and
communicated to the reason of the ruled so that the latter will treat those propositions, at least
presumptively, as reasons for action – reasons as decisive for each of them as if each had
conceived and adopted them by personal judgment and choice.” In other words, for a
governmental body to create valid laws, it must engage in the lawmaking process with its
subjects as partners in the enterprise of public reason. Consistency, therefore, as an essential
element of rationality, is necessary for the government and its subjects to engage in this
enterprise. The law for Aquinas is thus the rational ordering of society – rational in both the
logical sense (i.e., legal norms must comply with the laws of thought) and in the practical sense
(i.e., legal norms must provide reasonable bases for human action).

This rational ordering of society places a special role on judges in a polity. Indeed,
Aquinas argued that, whatever enactments the sovereign promulgates, the judges, as the arbiters
of law, are bound not to whatever semantic content inheres in those promulgated enactments but
rather to the nature of law. A judge’s duty is thus to assemble those enactments into a rational
ordering – to make them rational so that they constitute the law. Aquinas thereby distinguished
between the rule of law (i.e., the rational order of all the enactments within a legal system) and
the rule of men (i.e., the enactments in themselves, without any rational ordering).\textsuperscript{165} The rule of
law always supersedes the rule of men. Contradictions may be part of the rule of men, but they

\textsuperscript{165} See II-II q. 67 a. 2; q. 64 a. 6 ad 3.
cannot form the rule of law. The rule of law consists of a perfectly consistent legal system. Judges must harmonize dissonant edicts to assemble a coherent legal order. Judges, essentially, must use consistency norms to preserve the rule of law.

Unfortunately, however, Aquinas did not clarify what type of consistency is required in a legal system. As we briefly alluded to in the previous chapter, legal systems can contain many different types of inconsistencies – so far we have identified factual inconsistencies, methodological inconsistencies, personal inconsistencies, and institutional inconsistencies. As we will see in the next section, later thinkers began to explore what types of inconsistencies are required in a legal system, and these inquiries appeared in works that squarely opposed Aquinas’s natural law approach. Indeed, the section below will explore how Jeremy Bentham, whose moral utilitarianism and legal positivism are often contrasted against Aquinas’s views on ethics and natural law, and Immanuel Kant, whose deontology created a distinctly rationalistic approach to ethics and law, approached the relationship between consistency and law. We will see how both Bentham and Kant, while coming from sharply different perspectives, agreed with Aquinas on the importance of consistency in legal systems, and even more strikingly, came to very similar conclusions with each other about what type of consistency a legal system must guarantee.

**The Enlightenment: Bentham and Kant – Similar Consistencies for Different Legal Philosophies**

* Bentham’s Utilitarian Approach to Legal Consistency

Jeremy Bentham is most famous for his *An Introduction to the Principles of Morals and Legislation*, which announces social utility as the basis for his moral philosophy. For Bentham, an action is moral to the extent that it has social utility, and a thing has utility to the extent that it produces the greatest amount of pleasure and the minimum amount of pain. “Nature has,” as
Bentham famously put it, “placed mankind under the governance of two sovereign masters, pain and pleasure.” Bentham’s reduction of morality to a pain-pleasure calculus birthed utilitarianism, a moral philosophy that stands in sharp contrast to the Aristotelian or aretaic view of morality, which centers the morality of an action on the virtue displayed by the agent, and the Kantian view, which, as we will discuss later in this section, bases the morality of an action on the rational autonomy displayed by the agent.

Bentham’s legal philosophy follows from his utilitarian moral philosophy. A law for Bentham is valid to the extent that it complies with norms established by the relevant lawmaking body, so although this body should, in Bentham’s view, make good laws – i.e., laws that maximize pleasure over pain – it need not do so to succeed in making law. In contrast to Aquinas, Bentham argued in An Introduction to the Principles of Morals and Legislation that there is no standard, outside of the human-made norms governing a particular society, for evaluating whether a particular law is valid. Every law positively promulgated by the sovereign is a valid law and nothing not positively promulgated by the sovereign is a valid law. In other words, a law exists if and only if the sovereign is its source. Whether it is a good or bad law is not relevant to whether it is in fact a valid law. This is of course Bentham’s positivism, what has come to be known now as “vulgar positivism,” due to its rather simple account of the source of law. This vulgar version would be refined substantially by later thinkers who identify with the positivist tradition, as we will see in the following chapter on contemporary analytical philosophy.

Bentham’s positivism, however, was not quite as “vulgar” as some have suggested. In fact, Bentham did provide more sophisticated commentary on his legal positivism in his Of Laws in General, a work that some have even alleged lowered the status of utility within Bentham’s
legal philosophy. Despite its significance, this work has been largely ignored, because for more than 150 years it remained unpublished, as it lay among 172 boxes of manuscripts that Bentham left to University College, London upon his death in 1832. Bentham’s literary executor, Sir John Bowring, had overlooked the manuscript, and it was not discovered until the 1930s. HLA Hart was responsible for resuscitating the work and eventually publishing an edited version in 1945. Hart found this work of Bentham’s exceptionally important, even going so far as to claim that, had it been published in Bentham’s lifetime, it would have been Bentham, rather than his student, John Austin, who would have become known as the founder of analytical legal philosophy.166

One of the most important features of *Of Laws in General* is Bentham’s effort to create a new terminology capturing the linguistic resources available to a legislative body in making law. Bentham begins by defining law as follows: “A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon whose conduct is in question.” Therefore, Bentham concludes, “[t]here are two things essential to every law: an act of some sort or other, being the object of a wish or volition on the part of the legislator; and a wish or volition of which such act is the object.” Here, we see Bentham’s positivism: the sovereign is the only source of the law. There is no basis for pointing to anything outside of the sovereign’s commands for understanding what the law is.

But we also see in this definition a refinement of Bentham’s positivism. The law is not simply what the sovereign says, as he had more vulgarly described his positivism in his earlier works. Rather, the law is what the sovereign wills through a series of commands for its subjects to act. The law is about the state issuing imperatives that express a desire for the subject to perform some action in accord with those imperatives.

Bentham’s focus on imperatives marked a move away from the Aristotelian square, discussed above, and would eventually give birth to new branch of logic, what has come to be known as deontic logic, the study of the logical relationship between norms. Bentham anticipated this new approach to logic by identifying three distinct types of norms: command, prohibit, and permit norms. Bentham sought to taxonomize these norms for the purpose of creating a distinctly legal logic that would facilitate the categorization and codification of a legal system. By using the term “command,” Bentham referred to an affirmative mandate to perform some action. By using the term “prohibit,” Bentham referred to a negative mandate not to perform some action. And by using the term “permit,” Bentham meant that there was neither such an affirmative nor a negative mandate – the action was simply allowed but neither required nor forbidden. This represented the first attempt to capture the logical relationship among legal norms. By advancing such a logical system, Bentham sought to develop a new grammar for expressing, analyzing, and evaluating legal norms.

Just like Aristotle did in the traditional square of opposition, Bentham applied the law of non-contradiction to his scheme to make four deductions. First, he argued that if a norm is commanded, the law of non-contradiction requires that the norm be neither “not prohibited nor left uncommanded.” To use a church-state example, if the Free Exercise Clause commands the government to exempt religious believers from a generally applicable law that substantially
burdens their beliefs, as the Court held in Sherbert v. Verner, then it is the case that the
government is not prohibited or uncommanded to enact such exemptions. This means that if
there were to arise a new legal norm prohibiting the government from exempting religious
believers in these circumstances, then there would be a contradiction within the legal system.

Likewise, Bentham continued, if a norm is prohibited, the law of non-contradiction
requires that the norm is “not commanded nor permitted (that is left unprohibited).” So, turning
back to our church-state example, we can deduce from Bentham’s scheme that if the
Establishment Clause prohibits the government from passing laws that have the primary effect of
advancing religion, as the Lemon test holds, it is then the case that the government is not
commanded or permitted to pass such laws.

Bentham’s third deduction is that if a norm is uncommanded, it is then, necessarily,
“either prohibited or permitted.” Again, if the Establishment Clause leaves the government
uncommanded as to whether to enact voucher programs that fund religion indirectly through the
independent decisions of private beneficiaries, as the Court held in Zelman, then doing so may be
either prohibited or permitted. But it may not be both prohibited and permitted, for “if it be in
the one case it is not in the other.” The state must choose between prohibiting and permitting
such voucher programs.

Finally, if a norm is permitted, it is then, necessarily, “not prohibited . . . but it may be
either commanded or left uncommanded.” So if the Establishment Clause permits the
government to enact voucher programs that fund religion indirectly through the independent
decisions of private beneficiaries, then doing so may be either commanded or left uncommanded,
but, again, it may not be both commanded and uncommanded, because “if it be in the one case, it
is not in the other, as before.”

Bentham’s logical system marked a striking departure from the Aristotelian logic, discussed above. Recall that Aristotle’s square of opposition rested on propositions that are either universal or particular, affirmative or negative. But Aristotle’s scheme was unable to capture the logic of legal systems. For example, if we know that it is the case that some law whose primary effect is to advance religion is not a violation of the Establishment Clause, we do not know if the government is permitted or required to pass such a law, a distinction of vital importance for a subject wishing to understand and comply with the law. By basing a logical system on the status of the legal command, Bentham made it possible to capture the precise relationship between different legal norms. Under Bentham’s scheme, for example, we know that if the Establishment Clause prohibits laws with such a purpose, the government is neither permitted nor required to enact such laws.

Bentham’s scheme in *Of Laws in General* complicates our understanding of his legal philosophy. As mentioned above, Bentham’s legal philosophy is often represented as being a vulgar form of positivism, with the law consisting simply of whatever norms have been positively promulgated by the sovereign. But in *Of Laws in General* we have a more complicated account of positivism. In Bentham’s view here, laws also must be logically consistent in order to count as laws. Indeed, Bentham specifically argues that consistency is an essential requirement of law. So if the sovereign enacts contradictory laws, it has failed to make law. A legal system cannot, for example, both require and prohibit that the government pass laws whose primary purpose is to advance religion. Such a system would be invalid.

Importantly, however, Bentham’s basis for this modification is not Aquinas’s notion that a natural precondition inhering in the concept of law is the requirement of consistency. Rather, Bentham’s justification for consistency is still utilitarian. Bentham argued that the purpose of
the law is to control populations so as to maximize aggregate pleasure and therefore contradictory laws fail to produce law because they cannot clearly signal to subjects how to conform their conduct to the sovereign’s will. But this does not mean that all legal inconsistencies must be extirpated from a legal system. Indeed, Bentham does not seem to object to a legal system containing some of the inconsistencies covered in Chapter 2, such as factual inconsistencies, institutional inconsistencies, and interpersonal inconsistencies. What Bentham finds threatening to a legal system are laws that contradict one another in the ways mentioned above – i.e., legal norms whose imperatives contradict one another as a matter of legal logic. As we will see in the next section, Immanuel Kant, writing during the same period as Bentham, advanced a similar vision of legal consistency, while endorsing a very different ethical and legal philosophy.

*Kant’s Deontological Approach to Legal Consistency*

“Consistency,” Kant wrote in his *Critique of Practical Reason*, “is the highest obligation of a philosopher, and yet the most rarely found.” Kant found this value particularly wanting in his own intellectual milieus. Indeed, for Kant, “[t]he ancient Greek schools give us more examples of [consistency] than we find in our syncretistic age, in which a certain shallow and dishonest system of compromise of contradictory principles is devised.” Bentham’s utilitarianism was precisely the type of “shallow,” “dishonest” and “contradictory” philosophy Kant found as typifying his “syncretistic age,” because, as mentioned above, Bentham’s utilitarianism defined morality as the mixing of disparate values and acts into one pleasure-calculus, so that, as Bentham famously put it, “[i]f the game of push-pin furnish[es] more pleasure [than music and poetry], it is more [morally] valuable than either.”
Kant rejected this calculus, and set out to demonstrate how some acts are simply better than others, and not just for a particular person or time period, but for everyone and all times. Some things simply are objectively and categorically true. And becomes some things are objectively and categorically true, anything inconsistent with that truth is objectively and categorically false. Push-pin, for example, is objectively and categorically inferior to music and poetry, under Kant’s framework, because push-pin values simple pleasure, whereas music and poetry value human creativity and understanding.

With this goal of establishing objective and categorical truths, Kant made consistency the centerpiece of his philosophy. Kant explored his understanding of consistency most fully in his Critique of Pure Reason, where he applied the law of non-contradiction to derive the Categorical Imperative, the universal and objective obligation to treat others as ends in themselves rather than as means or instruments to the effectuation of our own particular ends. Kant also made the law of non-contradiction the foundation for his legal philosophy, but to the surprise of many, Kant did not center his legal philosophy around the Categorical Imperative. Indeed, Kant did not hold that the law must or should directly coincide with moral norms, despite his holding that moral norms are universal and objective. Rather, Kant saw the law as exerting an independent normative force, distinct from morality but still overlapping with it in many ways. Given Kant’s belief that “justice [must] reign even if all the rogues in the world perish because of it,”

Kant’s willingness to trump law, as a local social institution, over Law, as a guarantor of universal morality, has puzzled many theorists. As Stuart Brown writes, “all Kant needs to do in order to complete his program in philosophy of law is to show how the Categorical Imperative may be used to test the moral status of the rules in a body of positive law.”

showing how the Categorical Imperative may be applied to test the rules of positive law, Kant introduces a number of difference principles which . . . have no discernible relationship to the Categorical Imperative and no clear application to positive law."\(^{170}\) Brown thus concludes that Kant “has no philosophy of law.”\(^{171}\) In other words, because Kant rejects both positivism and natural law, Brown concludes that Kant does not have a coherent legal philosophy.

But Kant certainly does have a coherent philosophy of law, and it is one that rests on a middle-ground between Aquinas’s natural law approach and Bentham’s positivism. To be sure, this is a thin ground, comparable to walking a tight rope between two continents. There is nevertheless sufficiently strong ground on this tight rope for Kant to stand. And as we will see, when it comes to consistency, Kant is like a tectonic plate binding together the philosophical continents of natural law and positivism. For us to develop a complete view of legal consistency, we must understand how consistency might be required in a legal system for reasons outside of both natural law and positivism. Kant provides an outlet to that view.

Kant’s most significant contribution to legal philosophy appeared in his Doctrine of Right [“DR”]. published separately in 1797 before the book’s second part, the Doctrine of Virtue [“DV”], was published. Whereas the DR focuses on how law, and in particular courts, can and should promote freedom and morality, the DV focuses on how individuals can and should pursue their own moral development. In investigating the relationship between courts and morality, the DR begins by exploring the logical modalities of a categorical imperative of reason. A “categorical imperative,” according to Kant, involves “commands” and “prohibitions.” The term “obligation” refers to these two types of modalities, and the term “duty” refers to the category of action subject to these modalities. This leaves a questionable role for permission norms. For

\(^{170}\) Id.
\(^{171}\) Id.
this reason, immediately following his discussion of how a categorical imperative involves a command or prohibition, Kant writes that “[t]he question can be raised whether there . . . must be permissive laws . . . in addition to laws that command and prohibit.”172 Kant acknowledges that there is such a thing as a permitted action: “[a]n action that is neither commanded nor prohibited is merely permitted, since there is no law limiting one’s freedom (one’s authorization) with regard to it, and so too no duty.”173 But although permitted actions exist, Kant questions whether there could be laws permitting actions, since laws, for Kant, are based on necessity.

Notably, Kant had pursued this question concerning the legal status of permissions more explicitly in 1795, two years before the DR was published, in his essay, Toward Perpetual Peace [“TPP”]. In a lengthy footnote in that essay, Kant wrote that “[w]hether, in addition to commands . . . and prohibitions . . . there could also be permissive laws . . . of pure reason has hitherto been doubted, and not without grounds.”174 Kant then surveyed these grounds, beginning with the premise that “laws as such involve a ground of objective practical necessity.”175 Permission laws, therefore, are not really laws because “permissions involve a ground of the practical contingency of certain actions.”176 As a result, given Kant’s conception of law as grounded in necessity and the permission modality as grounded in contingency, Kant

172 Id.  
173 Grounding for the Metaphysics of Morals. 6:223.  
174 It is unclear whether in mentioning here how the status of permission laws had previously been doubted, Kant was referring to his own or to someone else’s work. To my knowledge, besides expressing such doubt here in TPP, the only other place in which Kant questioned this proposition is the DR, as explained supra. So perhaps Kant was referring in TPP to how he had expressed such doubt about permission laws in his preliminary work on the DR, though that work was not to be published until two years later. We should also note that in his Lectures on Ethics, consisting of student notes from Kant’s Ethics class at Königsberg between 1775 and 1781, Kant indicated that permission norms are actually laws, contra his later assertions in TPP and the DR. Indeed, according to student notes, Kant specifically held that “[l]eges can be praeceptivae, or prohibitavae, or permissivae.” Immanuel Kant, Lectures on Ethics 36 (1963). Thus, in addition to a legal system of prescriptions and one of prohibitions, “a system of jus permissi is also conceivable.” Id. Evidently, in the 15 or so years between the time Kant gave these lectures and then wrote TPP and DR, Kant changed his views on permission laws from holding that they can validly constitute a legal system to holding that they are not in fact laws.  
175 TPP, 8:348n.  
176 Id.
finds that, to constitute law, “a permissive law would involve necessitation to an action such that one cannot be necessitated to do it.”¹⁷⁷

But this presents a problem for Kant, because “if the object of the law had the same meaning in both kinds of relation, this would be a contradiction.”¹⁷⁸ For example, if a law specifically permitted lying, then according to Kant that law would involve saying that it is necessary that lying be allowed (otherwise, lying would simply be prohibited), but it is not necessary for anyone actually to participate in that act (otherwise, lying would simply be required). This conflict between the necessity of the law concerning the action, but the non-necessity of the action subject to that law, creates a contradiction for Kant. Therefore, Kant concludes, permission laws are not in fact laws.

In this discussion, Kant of course had in mind what Hart would later call “primary rules” – i.e., rules governing private conduct. But we can illustrate Kant’s point on permission norms by applying it to the focus of our investigation, “secondary rules” – i.e., rules governing the creation of primary rules. Such secondary rules, in the American legal order, include the constitutional rules announced by the Supreme Court. To illustrate Kant’s point and its relevance to our investigation, consider the relationship among some of the church-state norms we have discussed throughout this chapter.

Recall how the Court applied the Lemon test in Nyquist in 1973 to rule that the Establishment Clause forbids the direct funding of religious organizations because this has the primary effect of advancing religion, in violation of the second prong of the Lemon test. But in 2002, in the Zelman case, the Court, in a controversial 5-4 opinion, held that the Establishment Clause permits the indirect funding of religious organizations through voucher programs, and the

¹⁷⁷ Id.
¹⁷⁸ Id.
majority ignored the *Lemon* test in reaching this conclusion. This incited the liberals on the Court to accuse the majority of creating an inconsistency in the Court’s jurisprudence, because what had been prohibited in *Nyquist*, the funding of religious organizations, was now permitted in *Zelman*.

This clash between *Nyquist* and *Zelman* came to the surface in *Locke v. Davey*, a case that arose under a Washington State program that awarded college scholarships to students who satisfied various academic and financial conditions. One student, Joshua Davey, satisfied these conditions but Washington State denied him a scholarship on the grounds that the Washington State Constitution forbids government funding of theological education and Davey sought to use the funding to train for the ministry at Northwest College, a religious school. Washington had to justify its denial of the funding under its own state constitution, instead of under the Establishment Clause, because although under the *Nyquist* decision Washington’s funding of Davey’s religious education would have been unconstitutional, under *Zelman* it was clearly constitutional. But because *Zelman* only permitted rather than required Washington to fund Davey’s religious education, Davey had to turn to the First Amendment’s Free Exercise Clause for this mandate – relying in particular on the Court’s ruling in *Employment Division v. Smith* that the Free Exercise Clause forbids the government to burden religious exercise with laws that discriminate on the basis of religion.

Given that Chief Justice Rehnquist had dissented in *Nyquist*, but had been in the majority in both *Smith* and *Zelman*, one would think that it would be clear that in *Locke v. Davey* Rehnquist would vote consistently with his own decisions, in Joshua Davey’s favor. But to the surprise of many, Rehnquist wrote the majority opinion denying Davey’s claim, drawing support

\[\footnotesize{\textsuperscript{179}} 540 U.S. 712 (2004).\]
\[\footnotesize{\textsuperscript{180}} 494 U.S. 872 (1990).\]
from two of the Court’s other four conservatives, leaving only Justices Scalia and Thomas to dissent. Rehnquist’s opinion reasoned that the Free Exercise Clause must *permit* Washington to refuse to fund Davey’s religious education, because when the Free Exercise Clause and Establishment Clause create a conflict of obligations, “‘there is room for play in the joints’ between them”\[^{181}\] – meaning, that there must be “some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”\[^{182}\]

This resonates strongly with Kant’s view of permission norms as not actually being laws. The *Zelman* permission norm, allowing but not requiring states to enact voucher programs that indirectly fund religious organizations, gave states room to choose either to protect religious exercise beyond the Free Exercise requirements, so as to include religious organizations in the programs, or to pursue a strict disestablishmentarian regime beyond the Establishment Clause prohibitions, so as to exclude religious organizations from such programs. For Kant, then, the *Zelman* ruling did not create law in the same way as a prohibition or requirement ruling would because *Zelman* did not *bind* states to any course of actions. As we will discuss in later chapters, this distinct logical status, between conflicts of obligations, on the one hand, and conflicts with permission norms, on the other, seems to have been the driving force behind Rehnquist’s invocation of the “play in the joints” principle to reject Davey’s claim, and this distinction will help reveal how consistency norms operate to guarantee the rule of law.

Turning back to Kant, we should note that while Kant denied that permission norms constitute law, he did not deny that, as an empirical matter, permission norms exist in legal systems. To the contrary, the *TPP* footnote Kant specifically acknowledged that in “civil


\[^{182}\] Id. at 718.
(statutory) law use is often made of the concept”\textsuperscript{183} of permission norms. But Kant argues that in these situations a permission norm is “not included in that law as a limiting condition (as it should be) but is thrown in among exceptions to it.”\textsuperscript{184} What Kant seems to have in mind here are instances when a permission norm is added to a law for the purpose of effectuating the law’s \emph{purpose} rather than its \emph{form}.

When Kant was writing, he of course did not have the terminology of rules available to us now, but he seems to have been referring to what Fred Schauer would later dub “internally defeasible” rules – i.e., rules that are subject to an exception based on a justification that is \textit{internal} to the rule. For example, if we had a law forbidding lying, and a case arose in which a person lied to an axe murderer who came to the door looking for the location of his next victim, a court might draw an exception to the prohibition in that situation on the ground that the purpose of the law is to maximize happiness and therefore lying is permissible when it is necessary to protect a person from serious bodily injury. The permission norm would thus arise from the court’s interpretation of the rule’s purpose. Schauer argues that in such an instance the permission norm annihilates the rule because “a rule that is inapplicable in every case of internal failure is in an important way not a rule at all.”\textsuperscript{185}

Applied to Kant, this means that if a rule does not forbid or require conduct whenever its perceived purpose is inapplicable, it does not actually operate as a rule. This seems to be why Kant concludes that permission norms are not actually laws. So although Kant recognizes that such exceptions do often arise within legal systems, he believes that for a legal system to live up to its moral requirement of creating universally and objectively applicable obligations, it must

\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Schauer, Frederick. 1991. \textit{Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life}. 117.
seek to frame these exceptions as part of the rule itself, instead of permitting these exceptions to arise \textit{ad hoc} through the course of application of law to particular facts. In the example above, then, a legal system with integrity would not permit an exception to cover the axe-murderer situation. Rather, the lying-prohibition in such a system would already have an exception built into it, so that it would say something like: “Unless telling a lie is necessary to protect a person from serious bodily harm, no one may tell a lie.”\footnote{Note, however, that Kant might insist that no such exception be made, even if built into the law itself, for Kant arguably held in \textit{On a Supposed Right to Tell Lies from Benevolent Motives} (1797) that the Categorical Imperative requires that one affirmatively disclose the location of the murderer’s ostensible victim. I say “arguably,” however, because some scholars have interpreted this work only to forbid affirmative lies, not to require affirmative disclosures.}

Even though functionally this universal \textit{ex ante} rule might have the same effect as a general prohibition to which exceptions are later added to the prohibition an \textit{ad hoc} basis, the universal \textit{ex ante} rule is still superior for Kant to such \textit{ad hoc} exceptions, because general rules apply consistently, whereas \textit{ad hoc} permissions do not. Thus, “the possibility of such a formula (similar to a mathematical formula) is the sole genuine touchstone of legislation that remains consistent, without which the so-called \textit{ius certum} will always remain a pious wish.”\footnote{TPP, 8:348n.} That is, until we can develop such a formula, whereby the law consists \textit{ex ante} entirely of consistent and comprehensive prohibitions and requirements, “we shall have merely \textit{general} laws (which hold on the \textit{whole}); but we shall have no universal laws (which hold \textit{generally}), as the concept of a law nevertheless seems to require.”\footnote{Id. (emphasis in original).} In other words, until we can develop an entirely consistent system of legal rules, we will not have law.

Kant seems to be saying here that in the concept of the law is the property of consistency, just as in the concept of bachelor is the property of being an unmarried man. Thus, if a system of norms lacks that consistency, that system will not consist entirely of laws. Such a system will...
also consist of permission norms based on what Kant calls “practical contingency.” If we put this in our contemporary Hartian framework, distinguishing between primary and secondary rules, we can see how primary permission norms will open up the way for people to act in a way that they find appropriate in particular circumstances, and secondary permission norms will open up the way for governmental entities to make policy decisions appropriate for their particular polity. Permission norms open up an agent’s path to action; legal norms bind agents to action. So, for example, a primary law must require or forbid an agent to lie: we must lie or not lie, regardless of when it would be advantageous to us. But a primary public policy leaves it up to us, permitting us to lie when we choose to do so. Likewise, a secondary law requires or forbids the government to fund religious entities on an equal basis as their secular counterparts. But a secondary public policy leaves that decision up to each governmental entity. We can thus represent Kant’s scheme with the following diagram, with the opposing poles representing legal extremes between which the law may not oscillate, and the middle representing the space for policy to occupy:

![Diagram showing Requirement, Permission, and Prohibition]

This is a scheme that we will come back to later in the dissertation, with special attention in the final chapter, when we develop our own account of how the rule of law operates as a language game, but for now, I want to stick with developing Kant’s approach. I want to

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189 Id.
highlight in particular here the deep coherence in Kant’s thought – with profound resonances in Kant’s metaphysics, ethics, and jurisprudence. Just as in his ethics Kant distinguished between hypothetical and categorical imperatives, with hypothetical imperatives applying conditionally based on utilitarian reasoning and categorical imperatives applying universally based on deontological reasoning, in his legal philosophy Kant likewise distinguished between public policy and law, with public policy turning on the particular circumstances at issue, and law applying to all individuals in all circumstances with equal force. Just as pure ethics has no place for hypothetical imperatives, a pure legal system has no place for permission norms. A system consisting not only of legal (i.e., prohibition and requirement) norms, but also permission norms, is a mixed system of both law and policy.

Kant reiterates this point, though not as stridently as he had in *TPP*, in the *DR*, when he discusses conflicts of rules. Kant begins that discussion with the premise that “duty and obligation are concepts that express the practical necessity of certain actions.”\(^{190}\) So “if it is a duty to act in accordance with one rule, to act in accordance with the opposite rule is not a duty but even contrary to duty.”\(^{191}\) Here, it is important to understand what Kant meant by “the opposite rule.” As discussed above, Kant saw only forbidden and required actions as constituting duties; permitted actions do not give rise to duties. Thus, when discussing conflicts of duties, Kant was referring to a case when the same act is both forbidden and required.

For example, if a court were to find a duty not to lie in the legal system, then according to Kant it would be a contradiction if a court were later to find that there is a duty to lie, for such “a collision of duties and obligations is inconceivable.”\(^{192}\) But a court could later permit lying in certain situations – though as explained above, such an exception to a general prohibition would

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\(^{190}\) MM 6:224 (emphasis in original).
\(^{191}\) Id.
\(^{192}\) Id.
make the legal system a mixed system of law and policy, which, in Kant’s view, would be inferior to a pure legal system that consisted entirely of \textit{ex ante} universal requirements and prohibitions. Applied to church-state law, the \textit{Zelman} exception to the pre-existing prohibition on funding religious organizations added a policy judgment to our constitutional system, by excepting a type of funding from a general prohibition on government support of religion. In such a situation, in which permissions conflict with requirements or prohibitions, but requirements and prohibitions do not conflict, there is \textit{not a legal} inconsistency. Thus, it would satisfy Kant’s requirement of legal consistency – though, again, it would not be a pure legal system, because of the addition of permission norms. A legal inconsistency for Kant consists of a conflict of mandatory norms – i.e., an inconsistency of obligations.

Importantly, however, this is not to say that we cannot have conflicting \textit{reasons} or \textit{grounds} for obligation norms. To the contrary, Kant acknowledged that we might have a reason for the requirement to lie that would conflict with a reason for the prohibition not to lie; for example, a reason for the requirement to lie might be not to hurt another person, and this would indeed conflict with the categorical imperative never to lie. Likewise, we might have reasons for the requirement to fund religion as well as for the prohibition not to fund religion; a reason for the requirement to fund religion might be that the Free Exercise Clause requires the government to treat religion and non-religion equally and this would conflict with the wall of separation that the Court has found to inhere in the Establishment Clause.

But these conflicting reasons must never produce conflicting rules, Kant argued, because the stronger reason must always produce the rule. So it is “not that the stronger obligation takes precedence . . . but that the stronger \textit{ground of obligation} prevails.”\textsuperscript{193} That is, the law does not consist of weighing obligations and trumping the stronger obligation over the weaker one.

\textsuperscript{193} Id. (emphasis in original).
Rather, the law consists of weighing reasons for obligations and trumping the obligation with the stronger reasons over the obligation with the weaker reasons. For example, when confronted with an axe-murderer looking for the location of his next victim, there might be grounds not to lie as well as grounds to lie, but since the grounds not to lie stem from Kant’s Categorical Imperative whereas the grounds to lie come from utilitarian concerns, Kant would say that although there are conflicting grounds for conflicting obligations, there is nonetheless only one obligation – i.e., not to lie. Thus, even though there are conflicting grounds, there are not in fact conflicting obligations. We see this in Chief Justice Rehnquist’s decision to uphold Washington’s exclusion of Joshua Davey. Rehnquist clearly found strong constitutional reasons for both excluding and including Joshua Davey, based on the Court’s church-state jurisprudence, but he could not find that these conflicting reasons could generate conflicting obligations in the law. That the *Lemon* prohibition on funding religion was so firmly embedded in the Court’s jurisprudence made it the stronger reason. This therefore made the *Lemon* obligation the stronger obligation – i.e., the law.

Likewise, different *people* can assign different grounds for the same law. Whereas as you might believe that there is an obligation not to lie because of the Categorical Imperative, I might believe that such an obligation exists for utilitarian reasons, such as that not lying maximizes human pleasure. Likewise, in *Locke v. Davey*, the liberals in the majority opinion likely believed that Washington was permitted to exclude Joshua Davey because they still disagreed with *Zelman* and found that this exclusion was actually required by the Establishment Clause under *Lemon*, whereas Rehnquist and the other conservatives on the majority believed that this was permitted by the Free Exercise Clause but not required by the Establishment Clause.
The liberals and conservatives believed in the same ruling – that Washington’s exclusion was permitted – but for different reasons.

Kant referred to these subjective grounds as “maxims.” The consistency of a legal system does not require that each individual have the same maxim for the same law. Rather, we can all hold maxims inconsistent with one another. This is a feature of the inter-personal inconsistency we referred to in the previous chapter. What we cannot have, however, are laws that are inconsistent in themselves. So for each person, whatever her particular maxim for the law, the content of the law must be the same – which, again, for Kant means that prohibitions and requirements must not conflict. So while after *Locke v. Davey*, the liberals and conservatives still disagreed on whether the Establishment Clause required or permitted Washington State’s exclusion of Davey – i.e., they still disagreed on whether *Zelman* was decided correctly – what mattered for the integrity of the legal system is that they agreed that the Constitution did not require what it had previously prohibited. The legal system was still consistent in this manner. As we will see later in the dissertation, this ability to agree on rules, while disagreeing on the grounds for rules, is a significant part of how consistency norms operate to guarantee the rule of law.

Before we leave Kant, I want to highlight how both he and Bentham, while adhering to very different moral and legal philosophies, reached very similar positions about legal inconsistencies. For both thinkers, a legal system may contain many different types of inconsistencies, such as inconsistencies between individuals, institutions, and facts, but certain types of inconsistencies between legal norms may not exist. And this analysis turns on the *logical* status of the norm, not the effect that the inconsistency has in application. Indeed, for both Kant and Bentham we can derive legal norms from their logical relationships. For example,
we can infer whether x is prohibited by the fact that a court decision had already required x. This is a surprising resonance between the two thinkers, because, as mentioned above, Bentham’s legal and moral philosophy was thoroughly consequence-oriented, whereas Kant’s was deontological and formal.

As we will see in the section below, logicians would later draw from Bentham’s and Kant’s insights to create deontic logic, a logic dealing with the relationship between norms. Deontic logic is, as Risto Hilpinen defines it, “an area of logic which investigates normative concepts, systems of norms, and normative reasoning.” These “[n]ormative concepts include the concepts of obligation (ought), permission (may), prohibition (may not), and related notions, such as the concept of right.” As early as the 14th century, philosophers had thought of these concepts as direct analogues to the alethic modalities in modal logic: the alethic modalities necessity, possibility, and impossibility correspond with the deontic concepts of obligation, permission, and prohibition. But it was not until the 20th century that deontic logic appeared as a distinct area of logic.

**Deontic Logic and Formalizing a Logic of Legal Norms**

In 1926, the Austrian philosopher Ernst Mally wrote *The Basic Laws of Ought: Elements of the Logic of Willing*, based on the classical propositional calculus provided in Whitehead and Russell's *Principia Mathematica*. Although Mally contributed to the formulation of a logic of norms, his system suffered from many deficiencies, the most notable of which was that, as Karl Menger pointed out in a 1939 article, the formula “p ↔ !p” (i.e., “p is the case if and only if p ought to be the case”) was a theorem in Mally’s system. A significant problem with this theorem is that it does not fit with how we generally conceive of the notion of “ought,” since we often say

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195 Id.
196 Id.
that people ought to do things that are not in fact the case, and conversely, many things are the
case even though they ought not to be. Another significant problem is that this theorem treats
“p” and “!p” as equivalent statements, thus rendering Mally’s “!” sign superfluous.

G.H. von Wright, in his famous 1951 article, *Deontic Logic*, corrected these defects in
Mally’s system. In that article, von Wright developed what has come to be known as “classic
deontic logic.” In this system, “permission” (denoted by the von Wright’s deontic operator “P”)
is taken as the primitive operator, meaning that we can derive “obligation” and “prohibition”
from P. So in this system, if proposition p is obligated, we can represent it as “¬P¬p” (i.e., “it is
not the case that not p is permitted”) and if proposition p is prohibited, we can represent it as
“¬Pp” (i.e., “it is not the case that p is permitted”). Von Wright’s system was later modified
slightly to become what is now often called “standard deontic logic,” the principal version of
deontic logic used today. A significant change was to add that deontic logic has a rule of
inference holding that every logically true proposition is obligatory and that every logical
contradiction is forbidden. New logical operators were also added to the basic permission
operator, so now, instead of just using the operator P, there are four operators to represent the
four deontic statuses: (1) “OB” for “it is obligatory that,” (2) “PE” for “it is permissible that,” (3)
“IM” for “it is impermissible that,” and (4) “OM” for “it is omissible that.”

These statuses correspond precisely to the Aristotelian relationships among A, E, I, and O
propositions. Obligatory and omissible norms, as well as impermissible and permissible norms,
are contradictories. Obligatory and impermissible norms are contraries. Permissible and
omissible norms are subcontraries. Permissible and omissible norms are subalterns of obligatory
and impermissible norms, respectively.
With this basic framework covered, we can now move on to what is most important about deontic logic for our purposes – namely, how, from this framework we can derive the same conclusion about contradictions between norms that Bentham and Kant found. Put in formal deontic logic terms, from the five deontic definitions above, we can derive the following theorem: \( \neg(\text{OB}p \& \text{OB}\neg p) \).\(^{197}\) This theorem holds that it is not the case that it is both obligatory that \( p \) state of affairs exist and obligatory that \( p \) state of affairs not exist. In other words, the same act cannot be both forbidden and required. Recall that this is precisely the type of contradiction that Kant found so “inconceivable.”\(^{198}\)

Again, this theorem, just as Kant held in his legal philosophy, holds that it is a logical contradiction for a system to forbid and require the same course of action. That is, if we have a Supreme Court ruling holding that the Establishment Clause forbids the government’s funding of religious activities, as the Court in Nyquist held, we cannot then have a Supreme Court ruling holding that the Free Exercise Clause requires such funding, as Joshua Davey urged the Court to rule in Locke v. Davey. Importantly, since this theorem of deontic logic is derived from the definitions of the deontic operators provided above, if we reject this theorem, we must reject the entire scheme of deontic logic. The entire deontic scheme rests on this principle that within a given system obligations cannot conflict with one other.

As we will see later in the dissertation, however, there have been challenges to how this theorem applies to normative systems. This issue, of how to apply deontic logic to normative systems, was at the heart of von Wright’s influential 1963 book, Norm and Action. In that work, in defining the meaning of deontic consistency, von Wright identified how obligation and permission norms are logically distinct in forming a consistent system. According to von

\(^{197}\) Id.

\(^{198}\) Id.
Wright, a set of obligations “is consistent (the commands compatible) if, and only if, if it is logically possible, under any given condition of application, to obey all commands (collectively) which apply on that condition.”\textsuperscript{199} By contrast, a set of permission norms “is ipso facto consistent,”\textsuperscript{200} because “[p]ermissions never contradict each other.”\textsuperscript{201} Therefore, a system containing both commands and permissions “is consistent (the norms compatible) if, and only if, it is logically possible, under any given conditions of application, to obey \textit{all} the commands collectively and avail oneself of \textit{each one} of the permissions individually which apply on that condition.”\textsuperscript{202}

We can illustrate this again in the church-state context. In \textit{Zelman}, discussed above, the Court held that the Establishment Clause permits the government to enact voucher programs that indirectly fund religious organizations through the private and independent decisions of voucher beneficiaries. This is a permission norm, so it would be consistent with another permission norm expressing quite different content, such as the following holding from \textit{Locke v. Davey}: The Free Exercise Clause permits the government to exclude religious organizations from voucher programs that indirectly fund those organizations through the private and independent decisions of voucher beneficiaries. These two permission norms are consistent with one another, even though \textit{Zelman} explicitly justified the \textit{inclusion} of religious organizations in such voucher programs and \textit{Locke} explicitly justified their \textit{exclusion}. Inclusion and exclusion are nonetheless consistent in this scenario because the two cases together permit, but do not require, both the existence and non-existence of inclusionary and exclusionary voucher programs. Under these two rulings, then, a state has the option whether to institute either type of voucher programs, and

\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 144 (emphasis in original).
as a result, it is not impossible for both the *Zelman* and *Locke* norms to exist in our constitutional order.

But the *Zelman* permission norm would *not* be consistent with the *Locke* norm if we kept all of the *Zelman* permission norm’s content except changed it to be an *obligation* norm, such as the following: The Establishment Clause *obligates* the government to include religious organizations in generally available funding programs that indirectly fund such organizations through the independent and private decisions of funding beneficiaries. This would be inconsistent with the *Locke* permission norm provided above in some but not all circumstances: It would be consistent with the *Locke* permission norm when the state chose to enact such an inclusive voucher program (because in such a case the state would not “avail itself,” in von Wright’s language, of the *Locke* permission norm), but it would be inconsistent when the state chose to exclude religious organizations from such a voucher program (because in such a case the *Locke* permission norm would allow the government to pursue such an exclusion, whereas the *Zelman* obligation norm would not).

The sharpest inconsistency between norms arises when two obligation norms conflict. This is what Joshua Davey was urging for in claiming that the Free Exercise Clause required Washington State to fund his religious education. He was arguing that the Free Exercise Clause required what the Establishment Clause had prohibited under cases like *Nyquist*. There is no possible scenario in which these two norms do not conflict. Again, this is precisely why Kant held this type of normative conflict to be at the heart of legal inconsistency: such conflicts *bind* the actor to conflicting actions. And this seems to be why even the majority of the Court’s conservatives, while favoring the *Zelman* permission norm, could not go so far as to find that the
Free Exercise Clause now requires what the Establishment Clause had prohibited. A legal system can never permit such an inconsistency between two obligation norms.

But von Wright pointed out that not all overlapping obligation norms within a system conflict so as to create such a logical inconsistency. In particular, there are two types of overlapping obligation norms that appear to create a logical inconsistency in the way that conflicting obligations do, but in fact do not rise to the level of a logical inconsistency. One type of such a conflict consists of norms with competing goals so that the norms do not make sense together but do not actually conflict. The second type consists of norms that, though actually conflicting, are issued by competing authorities, so as not to create logical inconsistencies.

Von Wright called the first type a “Sisyphus-order,” because it creates norms that undermine one another, thereby creating a purposeless scheme, as was the case with the Myth of Sisyphus. Indeed, although Zeus seemed to contradict himself by commanding Sisyphus to roll the boulder up the hill while also commanding the boulder to roll down the hill each time before Sisyphus could reach the top, these commands were not actually contradictory, as a logical matter, because these commands operated at different times. The dueling commands rendered Sisyphus’s compliance inefficacious, but the commands were nonetheless logically consistent, because it was possible to comply with the dueling commands. Sisyphus could simply roll the boulder up the hill, and then, once the boulder rolled back down, retrieve it to roll it up again, ad infinitum.

Von Wright’s example of a Sisyphus-order is the following: “Open the window whenever it is closed, and close it whenever it is open.”203 For the temporal reasons discussed above, when we reviewed Aristotle’s work on the law of non-contradictions, this command does not present a logical inconsistency: The subject can close the window after it has been opened, and then open

203 Id. at 147.
it after it has been closed. Were there not this temporal element – i.e., if the order instead commanded the subject to open and keep shut the same window at the same time – then there would be a logical inconsistency. But with the temporal element, it not a logical inconsistency, though it “may be cruel.”204 Nevertheless, “it is not nonsensical in the same sense in which to issue inconsistent orders such as ‘Open the window, but leave it closed’ is nonsensical.”205 So if I were to posit that someone open and leave closed the same window, I would “rightly be accused of contradicting [myself] logically”206 because in this instance the “[t]he two commands annihilate one another,”207 but such an accusation could not be mounted against me if I posited a Sisyphus-order, such as the command to open and then close a window.

We can highlight this distinction with our church-state example. The Constitution would provide such a Sisyphus-order if it required the government to include religious organizations in generally available funding programs but then to exclude such organizations from receiving funding. In such an instance, the Constitution would be an absurd document in terms of efficiently and wisely commanding governmental resources. But it would not be a logically inconsistent document, for, although it would consist of two mandatory norms that would seem to contradict one another, these norms would not actually contradict one another because they would be occurring at different times. Indeed, it would be possible for the government to create voucher programs that explicitly made religious organizations eligible for funding but then to deny the funding to all such organizations that applied for funding. As von Wright would have put it, such competing constitutional commands would not make the Constitution nonsensical in

204 Id.
205 Id.
206 Id. at 148.
207 Id.
the way it would be if it commanded that at the same time the government must both include and exclude religious organizations from funding programs.

Von Wright invoked a spatial metaphor to distinguish these two types of conflicts; a conflict of obligations is truly nonsensical because it is as if the two commands “cannot exist together ‘in logical space,’”²⁰⁸ but a Sisyphus-order is not nonsensical in this way because there is logical space for the commands to co-exist, though it might be a kind of incoherent or purposeless space. To sharpen this spatial metaphor, consider M.C. Escher’s works using tessellation – i.e., the covering of a surface or plane with interlocking shapes. In *Day and Night*,²⁰⁹ one of his most famous uses of this method, he tessellated black and white birds, with the black birds forming the background of night if the viewer focuses on the white birds, and the white birds conversely forming the background of daylight if the viewer focuses on the black bids.

²⁰⁸ Id.
Escher’s *Day and Night* depicts these black and white birds similarly to how conflicts of obligations appear to von Wright: Just as an order to open a window and keep the same window shut leaves no logical space for the two commands to be obeyed, Escher’s tessellated birds require that either the black or white birds form the background and thereby leave no logical space for both the black and white birds to be birds at the same time. Likewise, there would be no logical space for the First Amendment to require the government to include and exclude religious organizations at the same time, for there would be absolutely no way for the government to comply with both commands.

By contrast, compare another famous work of Escher’s, *Ascending and Descending*, which depicts two lines of identically dressed men walking on a never-ending loop of stairs, with one line seeming to ascend while the other line seeming to descend. These stairs, based on the Penrose staircase, present a visual paradox, in that it makes the viewer think that eventually the line of ascending people will reach a higher level of stairs, and that the line of descending people will reach a lower level, but this never happens because the lines of people keep passing one another in the same loop of stairs.

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211 The penrose staircase (created by Lionel Penrose and his son Roger Penrose and published in an article in the *British Journal of Psychology*) is a two-dimensional depiction of a square staircase that seems to descend in a clockwise direction and ascend in a counter-clockwise direction. But the stairs form a continuous loop, thus rendering the clockwise descension and counter-clockwise ascension impossible. A friend sent Escher a photocopy of the article, which inspired Escher to design his *Ascending and Descending*. See Ernst, Bruno. 1992. *The Eye Beguiled: Optical Illusions*. 70-78.
Escher’s *Ascending and Descending* is like von Wright’s Sisyphus-order, because the two lines of people, while co-existing in a way that is sensical (after all, the people are just walking up and down stairs), create an endless cycle that is incoherent, just as the order to open a window when shut and then shut it when open is sensical (after all, the subject is just opening and then closing the window), but nevertheless creates an endless cycle of opening and shutting widows that is purposeless or incoherent. Again, there would be logical space for the government to exclude religious organizations after having previously created a program that included them, so such a Sisyphus-order applied to our church-state hypothetical would make the Constitution incoherent in a way but not logically inconsistent.

A second type of conflict of obligation norm that von Wright identifies as not involving a logical inconsistency is a conflict that arises from dueling norm-givers. As mentioned above, von Wright held that the paradigmatic type of logical inconsistency of norms is when there is a conflict of obligations, such as in the following command: “Open the window, but leave it
closed.” But von Wright contended that there is not a logical inconsistency when one authority commands a person to open the window, and an entirely different authority commands the same person to close it. For von Wright, “[t]his is no logical contradiction; but it can truly be called a ‘conflict.’”

Von Wright called such a conflict “a conflict of wills.”

At first glance, it is puzzling why this conflict of wills does not pose a logical contradiction, because just as when there is a single normative authority, the conflict of wills renders it impossible for the subject to comply with the conflicting commands: In both cases, the subject cannot both open the window and leave it closed. The difference for von Wright between these two situations is that when a single normative authority issues conflicting commands, that authority is acting irrationally, whereas when two normative authorities conflict one another, each authority may be acting rationally. So when a single normative authority issues conflicting commands, it is an actual logical contradiction, but there is only a conflict of wills and not a logical contradiction when two normative authorities conflict one another.

For example, as stated above, if the First Amendment required both the inclusion and exclusion of religious organizations in funding programs, that would be a logical contradiction for von Wright because the Constitution would itself be rendered irrational. If, however, the U.S. Constitution required all of the states to include religious organizations in funding programs, as Joshua Davey alleged to be the case in _Locke v. Davey_, but the Washington State Constitution prohibited such inclusion, as Washington State alleged to be the case in _Locke v. Davey_, there would not be a logical contradiction between the U.S. and Washington Constitutions, even though it would be impossible for Washington State to comply with both norms. If both Davey’s and Washington’s allegations were right, the conflict would simply be a

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212 Id.
213 Id.
conflict of wills between the U.S. and Washington Constitutions. As we will see later in the dissertation, a coherent legal system needs a way of arbitrating between such conflicts of wills, and one such way that the American system reconciles this conflict vertically between different legal orders is through the Supremacy Clause, trumping federal over state law.

Turning back to von Wright’s example, even though it is not possible for the subject of two conflicting normative authorities to comply with the conflicting command to open the window and keep it closed, it is possible for two different normative authorities to have a rational will in issuing their respective commands, and because each authority’s will can be rational in this situation, there is no logical contradiction. But it is impossible for a single normative authority to have a rational will in issuing conflicting commands, and for this reason, this situation does create a logical contradiction. As a result, von Wright concluded that “[t]he only possibility which [he] can see of showing that norms which are prescriptions can contradict one another is to relate the notion of a prescription to some idea about the unity and coherence of a will.”214 In other words, we must assume the rationality of the sovereign’s will to find that a normative conflict can present a logical contradiction. Von Wright found this distinction between logical contradictions and conflicts of wills vital to securing a logic of norms. Indeed, he emphasized how he wanted to make his “readers see the serious nature of this problem,”215 for “if no two norms can logically contradict one another, then there can be no logic of norms either.”216 This is because “[t]here is no logic, we might say, in a field in which everything is possible.”217 Securing a unity of sovereign wills, then, is the only way, for von Wright, that we

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214 Id. at 151.
215 Id.
216 Id.
217 Id.
can secure a logic of norms and thereby ensure that not everything is possible within a normative system.

Von Wright therefore held that a necessary element of a normative system is that it must have a highest normative authority that displays a coherence of a will by not providing logically inconsistent norms. Indeed, because he found that “[c]ontradiction between prescriptions can be said to reflect an inconsistency (irrationality) in the will of a norm-authority,”\textsuperscript{218} von Wright concluded his influential book \textit{Norm and Action} by declaring that “[w]ithin a corpus a conflict between prescriptions is excluded as being contrary to the nature of a rational will.”\textsuperscript{219} For von Wright only a system so “logically immune to conflict”\textsuperscript{220} can have the “the coherence of a corpus.”\textsuperscript{221} So if there are several authorities within a system, for those authorities to form a rational system, the highest authority must display a logically consistent will, and the various “sub-authorities cannot contradict the [the logically consistent] will of the sovereign, but only ‘transmit’ it.”\textsuperscript{222} As we will see in the following chapter, the issue of when the sovereign will is sufficiently united to be subject to consistency requirements would become a subject of significant interest for 20th century legal philosophers, an issue of paramount concern for our inquiry into how consistency relates to the rule of law.

\textbf{Chapter Summary}

This chapter began in Ancient Greece, exploring how Plato and Aristotle conceived of the law of non-contradiction and the relationship between consistency and law. We then saw how their works influenced the development of ethical and legal philosophy in the Middle Ages, particularly how Aquinas conceived of consistency as an essential element of the natural law.

\textsuperscript{218} Id.
\textsuperscript{219} Id. at 206.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
Our discussion then moved on to the Enlightenment to highlight how Bentham’s positivism and Kant’s deontological jurisprudence incorporated elements of the view that consistency is essential to law. We saw how both Kant and Bentham focused on a particular type of consistency – a consistency between the modalities of legal norms. Kant emphasized in particular how a legal system must not create conflicting duties. According to Kant, if the law requires an act, it may never prohibit that act, and vice versa, but permission norms may conflict with these obligation norms, without jeopardizing the consistency of a legal system, because permission norms do not constitute law for Kant.

The chapter thus showed how within the natural, positivist, and deontological approaches to understanding the nature of law, there are various but similar bases for finding consistency to be an essential element of the law. Natural, positivist, and deontological legal systems all seem to require consistency, though the justifications for consistency vary according to the philosophical tradition.

Finally, we demonstrated how deontic logic gives a formal structure to our understanding of legal consistency, showing how Kant’s conflict of obligations is at the heart of the meaning of inconsistency within a normative system. Permission norms, von Wright teaches us, have a different logical status within a normative order than do obligation norms. Permission-obligation conflicts need not involve absolute inconsistencies, whereas obligation conflicts necessarily do. We hinted throughout the chapter at how this distinction between permission and obligation norms might underlie judicial decision-making, a topic we will turn to in later chapters. Before we make that empirical turn, however, we have one more chapter on the theory of consistency. The following chapter will explore how contemporary analytical philosophy has conceived of
legal consistency, so that we can develop a clearer picture of whether consistency is part of the rule of law, or part of the very meaning of law itself.
CHAPTER 4
THE CONSISTENCY CANON:
CONTEMPORARY ANALYTICAL PHILOSOPHY

In the previous chapter, we saw how many leading philosophers have opined on what consistency means to the rule of law and the law in general. We learned in particular that there has been a startling level of agreement among different philosophical traditions on whether consistency is an essential element of law and what type of consistency is required within a legal system. In philosophy, logic has been the touchstone for this inquiry, with the law of non-contradiction providing the basis for determining what types of inconsistencies judges must extirpate from a legal system.

In this chapter, we will focus on how conceptions of consistency have changed with the emergence of analytical legal philosophy – the study of the concepts inherent to a legal system – as an independent branch of philosophical study. Before the advent of analytical jurisprudence, legal theory had been thought of as a part of moral and political philosophy, as is illustrated vividly in the previous chapter in how thinkers like Aristotle and Aquinas thought about law. But analytical jurisprudence ushered in a new way of thinking about law as a distinct concept from these branches of philosophy. And with this new approach, the analytical jurisprudences came to think of legal consistency in a distinct way from the philosophers covered in the previous chapter. For one, logic has come to play a decreasingly important role in how we think about legal consistency. In analytical jurisprudence, there is now much less of an effort to study the logical relationship demanded by legal consistency. In addition, sharper disagreements have arisen over whether consistency is indeed an essential element of law. This disagreement is most starkly evident in the division between the two pillars of analytical legal philosophy, positivism
and natural law, a division we will explore in this chapter by profiling the leading thinkers within these divergent traditions of legal theory.

We will begin with positivism, contrasting how Hans Kelsen, H.L.A. Hart, and Neil MacCormick have seen consistency’s role within a legal system and in guaranteeing the rule of law. There are, to be sure, other important positivists, and it is a particular shame to leave out Joseph Raz, who did write about consistency and the rule law, but we will focus on these three specifically – Kelsen, Hart, and MacCormick – because they have particularly rich, distinct, and influential theories of consistency’s role in adjudication. Through their works we will see how positivists often disagree on whether consistency is essential to the law and if so, what type of consistency this requires. But positivists often agree that there is a difference between consistency’s relationship to law and its relationship to the rule of law. That is, positivists generally argue that even if consistency is not necessary for law to exist, it may be necessary for the rule of law. But positivists are quick to point out that this does not mean that consistency will guarantee a good rule of law. Rather, consistency norms may create a good or a bad rule of law, depending on how these norms are used in particular contexts.

In the natural law tradition, however, this distinction between the nature of law and the rule of law is much less sharp. As we will see, two important legal philosophers, Lon Fuller and Ronald Dworkin, have drawn from the natural law tradition to argue that consistency is essential to both law and the rule of law. Again, there are other important natural law thinkers besides Fuller and Dworkin, such as John Finnis, but we will not review Finnis’s work in detail here because his writings on consistency are in many ways a modern version of Aquinas’s, which we covered in the previous chapter. Fuller and Dworkin offer theories that diverge more sharply from Aquinas. But, like Aquinas and Finnis, Fuller and Dworkin argue that the meanings of law
and the rule of law overlap substantially, with many of the same requirements for law applying for the rule of law to exist within a given system. In the natural law tradition, the rule of law, just like law, has a necessary moral component, and as a result, the consistency required by the rule of law is highly tethered to one’s moral conception of the law. Logical reasoning, therefore, has less to do than moral reasoning with determining when a judge must reconcile an inconsistency within a natural law system.

As we did in the last chapter, we will often turn to our church-state example to illustrate various theories of consistency, but in this chapter, we will add another line of precedents, the Plessy line dealing with racial segregation. These two examples – religious funding and racial segregation – will prove fruitful in later chapters when we explore what types of deviations from precedents may be tolerated for the rule of law to exist within a legal system. Through our examination of positivism and the natural law, we will touch on many of the themes we have covered so far, such as the relationship between stare decisis and different types of consistency, as well as the relationship between legal consistency and different conceptions of law and the rule of law. This will put us one step closer toward developing our own taxonomy of legal consistency and our own account of how consistent adjudication relates to the rule of law.

**Positivism and Consistency**

As we discussed in the previous chapter, Jeremy Bentham is in many ways the founder of positivism, and H.L.A. Hart has gone so far as to claim that had Bentham’s *Of Laws in General* been published during his lifetime, Bentham would have come to be known as the founder of analytical jurisprudence as well. But this work was not published during Bentham’s lifetime, and as things turned out, it was his student, John Austin, who would be given this status as the founder of analytical legal philosophy. Austin is most famous for his “command theory” of
positivism, which holds that law is defined by the command of the sovereign, backed up by a penalty for non-compliance with that command. By this, Austin meant that law is defined not by its moral content but by its authoritative source and authoritative infliction of punishment, whether physical or monetary. Therefore, in Austin’s view, if the sovereign issues a command that violates moral norms, that moral quality has no bearing on whether the command actually constitutes law. Austin, as Bentham had before him, contended that we could have moral and immoral laws, but this has no significance for whether we are dealing with law. Austin took Bentham further, however, by highlighting the importance of the sovereign to the concept of the law, thereby differentiating other types of commands, such as commands by an employer to an employee or a parent to a child, from the nature of law.

But while Austin advanced a positivist theory of law and in the process founded analytical jurisprudence, Austin never explored how his legal philosophy relates to legal consistency or the rule of law. As Roger Cotterrell writes, “Austin's theory is not a theory of the Rule of Law: of government subject to law.”²²³ Rather, “[t] is a theory of the ‘rule of men’: of government using law as an instrument of power.”²²⁴ It was not until Hans Kelsen that positivist legal theory really developed a notion of how consistency relates to law and the rule of law.

_Hans Kelsen: Consistency as “Presuppositions of Legal Cognitions”_

Like the American legal formalists we covered in chapter two, Hans Kelsen sought to present an understanding of law that was conceptually distinct from other intellectual disciplines, such as political science and moral philosophy. Indeed, Kelsen contended that law did not consist simply of a judge deciding cases according to her political preferences, as the legal realists were arguing during Kelsen’s lifetime. Nor did it consist simply of a judge deciding cases

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²²⁴ Id.
according to whatever she thought was morally right in a given instance, as the natural law tradition held. Rather, Kelsen asserted, law has its own basis, apart from politics and morality, for determining when a judicial decision is valid or not. On its surface, this is just a re-iteration of Bentham’s positivism that we covered in the previous chapter, but Kelsen’s positivism is distinct in many ways from Bentham’s, particularly in how it conceives of the relationship between consistency and law.

A predominant feature of Kelsen’s positivism is the focus on how legal adjudicators cognize legal norms. In Reine Rechtslehre, the first edition of his magnum opus, Pure Theory of Law, Kelsen called his approach “a ‘pure’ theory of law because it aims at cognition focused on the law alone.”225 That is, a pure theory of law focuses only on the cognitions relevant to determining what the law means. As we will see below, early in his career Kelsen held that that this pure theory of law requires that judges presuppose the non-existence of logical inconsistencies within a legal system, but Kelsen later retreated from this approach, experiencing a transition that embodies much of the ambivalence and ambiguity surrounding legal theory’s pursuit of consistency. We can see in Kelsen the inconsistent notions of consistency that are at the heart of this dissertation.

Let’s begin with the early Kelsen’s position on consistency. In 1945, eleven years after the first edition of Pure Theory of Law, Kelsen published General Theory of Law and State, where Kelsen first directly tackled the role that the law of non-contradiction plays in forming these purely legal cognitions. Kelsen began his discussion of this issue by finding that a legal contradiction is just like a logical contradiction in that both involve supposing that two events obtain even though the two events could not possibly come into existence simultaneously.

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Indeed, he wrote, “[j]ust as it is logically impossible to assert both ‘A is,’ and ‘A is not,’ so it is logically impossible to assert both ‘A ought to be’ and ‘A ought not to be.’”\textsuperscript{226} By framing a legal contradiction as a logical contradiction consisting of conflicting “ought” statements, Kelsen seemed to express, as Kant had before him, that only conflicts of obligations create a logical, and thus a legal, contradiction. That is, Kelsen did not seem to think that a logical or legal contradiction would arise from a conflict between a mandatory norm and a permissive norm, or from a conflict between two permissive norms. For the early Kelsen, only conflicts of mandatory norms create conflicts.

In addition to endorsing the view that legal contradictions are simply logical contradictions consisting of conflicts between obligations, Kelsen also contended that a judge’s duty is to interpret the law so as to ensure this logical consistency. As he put it, “[i]t is one of the main tasks of the jurist to give a consistent presentation of the material with which he deals.”\textsuperscript{227} Accordingly, “[t]he specific function of juristic interpretation is to eliminate these contradictions by showing that they are merely sham contradictions.”\textsuperscript{228} By a “sham contradiction,” Kelsen meant a case in which there is an appearance of a contradiction but there is not what Kelsen called a “logical contradiction.” As discussed above, Kelsen seemed to believe that only conflicting “ought” statements constitute a logical contradiction. For this reason, he contended that an actual “logical contradiction is always a relation between the meaning of judgments or statements, never a relation between facts.”\textsuperscript{229} In contrast to a true logical contradiction, a conflict of facts “means the psychological fact of an individual’s being under the influence of

\textsuperscript{227} Kelsen, \textit{General Theory of Law and State}, supra 4, at 375.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
two ideas which push him in opposite directions; it does not mean the simultaneous validity of
two norms which contradict one another.”

To illustrate how this distinction between “a logical contradiction” and “a sham
contradiction” cashes out in a legal system, Kelsen offered the example of a man who believes
himself obligated under positive law to perform military service, as well as obligated under
moral law to refuse to perform such service. Although this scenario consists of conflicting
“ought” statements, and it therefore would be a logical contradiction for Kelsen if both
statements validly existed within a single legal system, this scenario does not present an actual
logical contradiction for Kelsen because one norm exists under positive law and another under
moral law. As a result, this is not a logical contradiction but rather a mere description of two
conflicting psychological facts – the person’s feeling of a duty to follow the legal norm requiring
military service and his conflicting feeling of a duty to follow his moral norm forbidding military
service. These two norms can co-exist for Kelsen because, according to his pure theory of law,
law and morality occupy distinct spheres, each providing its own grounds of normativity. Unless
there is another law within that legal system exempting conscientious objectors from such
service, there is no contradiction as a legal matter in compelling the individual to enter the
military. Kelsen contended that this process of distinguishing moral from legal norms, and
thereby revealing each legal norm as part of a consistent system, is how judges “transform[
[legal material] into a legal system.” Legal materials, therefore, do not by themselves
constitute a system. Rather, legal materials form a system only through the process of
adjudication – i.e., through judges interpreting and applying the materials in such a way that they
are entirely consistent with one another.

230 Id.
231 Id.
But what if some legal materials were to present an actual conflict with one another? Would the material not, then, form an actual legal system? Kelsen’s answer to such a predicament lies in his theory that a legal system consists of norms that are *a priori* deducible from the system’s basic norm, what he called the Grundnorm. Kelsen believed that methods of reconciling contradictions can be directly derived from the Grundnorm. For example, Kelsen explained, if the legislature passed a law providing x, and then the legislature subsequently passed a law providing not x but without explicitly repealing the former law, the judge would resolve this inconsistency by holding that the later-enacted norm prevails under the principle of *lex posterior derogat priori* – i.e., the principle that “the more recent law abrogates any inconsistent earlier law.” Kelsen argued that this interpretive principle is common to so many legal systems because it is presupposed in our thinking about the law and it therefore can be deduced from the Grundnorm.232 Similarly, if two laws conflicted with one another but they operated on different levels in a legal hierarchy (e.g., one norm is a constitutional provision and the other is a statute), Kelsen’s judge would resolve this conflict by adhering to the basic interpretive principle that the higher norm prevails.233 And if there were a conflict on the same horizontal and vertical level (i.e., a conflict between norms enacted at the same time and operating on the same hierarchical order), Kelsen’s judge would resolve this inconsistency by construing the norm in such a way that would avoid the contradiction, or if such a construction was not plausible, the judge might hold that the conflicting norms are both invalid.234

All of these are common examples of inconsistencies that arise in the law, and according to Kelsen, judges derive these methods of resolving such inconsistencies from the Grundnorm. These methods are derivable from the Grundnorm, Kelsen explained, “[f]or the principle of non-

232 Id. at 402.
233 Id. at 403.
234 Id. at 404.
contradiction must be posited in the idea of law, since without it the notion of legality would be destroyed."235 According to Kelsen, this “presupposition [of non-contradiction] . . . is contained in the basic norm,” 236 and it thereby “allows legal cognition to supply a meaningful interpretation of the legal material.”237 That is, even if there were no specific positive law requiring judges to avoid logical inconsistencies within the law, judges would still need to impose the law of non-contradiction on the system because of the Grundnorm. So if, for example, the U.S. Constitution did not contain the Supremacy Clause making the U.S. Constitution the supreme law of the land, it would still be clear that when faced with an inconsistency between the U.S. Constitution and an ordinary statute, a judge must hold that the Constitution, as the higher law, prevails, because that interpretive principle is presupposed in our legal cognitions. We indeed see this sort of presupposition at work in much of Chief Justice Marshall’s reasoning in Marbury, holding that the Constitution simply must be the supreme law of the land and the Supreme Court simply must be the final arbiter of its meaning. As Kelsen proclaimed, these applications of the law of non-contradiction to a legal system “are not rules of positive law, not established norms, but presuppositions of legal cognitions.”238 And “[t]his means that they are part of the sense of the basic norm, which thus guarantees the unity of the norms of positive law as the unity of a system which, if it is not necessarily just, is at least meaningful.”239

Thus, the answer to the question posed above about how Kelsen would view a legal system consisting of contradictory legal materials is that he would contend that if there were indeed such contradictions, the legal system would not in fact be a system, for the Grundnorm

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235 Id. at 406.
236 Id.
237 Id.
238 Id. at 407.
239 Id.
presupposes the non-existence of all contradictions. In essence, to have a legal system we must have a Grundnorm, and to have a Grundnorm, we must not have contradictions. So there is no way a legal system can contain contradictions.

Many commentators have noted the Kantian influence here: Just as Kant saw our perceptions of the world as being filtered through our “forms of intuition” of space and time, which for Kant invariably include the law of non-contradiction, Kelsen viewed a judge’s analysis of the law as being filtered through “the cognitions of law,” which likewise require imposing norms about consistency on interpretations of the content of the law. But it is important to note an important distinction between Kant’s transcendentalism and Kelsen’s notion of pure cognitions of law. Kant’s transcendental argument sought to establish that some categories and modes of perception are necessary to human cognition because these categories and modes are presuppositions of thought. Indeed, we saw in the previous chapter how Kant rejected the possibility of legal norms ever requiring what they prohibit. Although Kelsen likewise saw his Grundnorm as essential to legal cognitions because the Grundnorm is presupposed in our thinking of the law as having a normative force on human conduct, Kelsen, in contrast to Kant, did not see the presupposition of the Grundnorm as necessary to human cognition in general. Kelsen did not go this far because he clearly acknowledged that some people might reject the normativity of law. Only if one accepts the normativity of law – i.e., only if one accepts that we ought to behave as the law claims we ought to – does the Grundnorm become presupposed by our thinking about the law. So if, and only if, we accept this feature of the law, then we must also presuppose that the law cannot contradict itself. This is distinct from how Kant saw non-contradictions in the law, as inhering in the very concept of rationality itself.
Kelsen re-iterated this argument, but made it more forcefully, in his second and substantially extended edition of his magnum opus, *Pure Theory of Law*. Indeed, he wrote, “The Pure Theory describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposed.”

For this reason, his pure theory of law “thereby characterizes this interpretation as possible, not necessary, and presents the objective validity of positive law only as conditional—namely conditioned by the presupposed basic norm.”

Kelsen also restated in the second edition of *Pure Theory of Law* why the law of non-contradiction is a legal cognition – i.e., why it is presupposed by viewing the law as a normative system. Kelsen emphasized his claim that “the Principle of the Exclusion of Contradiction and the Rules of Inference . . . appl[y] to the relation between legal norms,” but he then went beyond the first edition to delve into the following question: “How can logical principles, especially the Principle of the Exclusion of Contradiction and the Rules of Inference be applied to the relation between legal norms, if, according to traditional views these principles are applicable only to assertions that can be true or false.” That is, in formal logic, as we discussed in the previous chapter, we can derive inferences from the law of non-contradiction based on knowing whether certain propositions are true or false. For example, in Aristotle’s logic, if we know that it is true that every law that has the primary effect of advancing religion is a violation of the Establishment Clause (an A statement), we can infer from the law of non-contradiction that it is false that there is some law that has this effect and is not a violation of the Establishment Clause (an O statement). Kelsen inquired how we can apply the law of non-contradiction.

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241 Id. at 218.
242 Id. at 74.
243 Id.
contradiction to legal propositions, which, in Kelsen’s view, are neither true nor false. Indeed, this is a critical question for Kelsen in the second edition because his positivism rejects the idea that we can say whether it is true or false that the Establishment Clause actually prohibits laws that have the primary effect of advancing religion.

Kelsen’s answer is that “[l]ogical principles are applicable, indirectly, to legal norms to the extent that they are applicable to the rules of law which describe the legal norms and which can be true or false.”244 In other words, while legal norms themselves are neither true nor false, descriptive statements about those norms are true or false. So whereas it is not true or false that the Establishment Clause prohibits laws that have the primary effect of advancing religion, it is true that the Lemon test, which effectuates the Establishment Clause through adjudication, provides this prohibition. Therefore, Kelsen reasoned, if two descriptive statements about two legal norms logically conflict with one another, then not only are the two descriptive statements contradictory but so too are the norms themselves: The “[t]wo legal norms are contradictory and can therefore not both be valid at the same time.”245 Thus, while logic alone cannot determine whether it is actually true that the U.S. Constitution permits the inclusion of religious organizations in funding programs, logic can tell us that if it is true that the governing Establishment Clause precedents prohibit this inclusion, and if it is true that the governing Free Exercise Clause precedents require this inclusion, then it is also true that one of those lines of precedents is not valid, for these are conflicting constitutional obligations.

Just as he had argued in General Theory of Law and State, Kelsen reasoned in the second edition of Pure Theory of Law that the law of non-contradiction is derivable from the Grundnorm, because “the cognition of law, like any cognition, seeks to understand its subject as

244 Id.
245 Id.
a meaningful whole and to describe it in noncontradictory statements." As Uta Bindreiter characterizes Kelsen’s arguments on the relationship between interpretive principles and the Grundnorm, “[i]n his view, principles of interpretation are in the main ‘presuppositions’ of legal cognition and must, therefore, be part of the sense of the basic norm.” To illustrate precisely how judges derive these presuppositions of legal cognitions from the Grundnorm so as to reconcile legal conflicts, Kelsen re-used many of the examples he had used in General Theory of Law and State, such as how judges use the law of non-contradiction to reconcile conflicts between earlier and later conflicting laws, as well as conflicts existing in the same law.

Shortly after publication of this second edition of Pure Theory of Law, however, Kelsen retreated from this approach to legal contradictions – a move of great significance to us because it represents the difficulty of reconciling positivism with the notion that consistency somewhere inheres in the concept of the law. Many scholars have observed that this retreat was part of Kelsen’s broader change from a universalist, neo-Kantian approach to the law to a more particular, skeptical approach. This change in how he viewed legal contradictions is most evident in his 1962 essay, Derogation, featured in an anthology of jurisprudence essays dedicated to Roscoe Pound.

Whereas the early Kelsen of General Theory of Law and State and Pure Theory of Law vigorously contended that a conflict of norms can never actually exist, the later Kelsen in Derogation conceded that “[t]here is no doubt that such conflicts between norms exist.” By

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246 Id. at 206.
this, he meant that there is not, as he had argued in Pure Theory of Law, a “presupposition of legal cognitions”\textsuperscript{250} requiring judges to reconcile conflicts of norms. As a result, many legal systems can, and indeed do, contain conflicts that cannot be, and in practice are not, reconciled through reference to some basic norm. And because conflict-reconciling interpretive methods, such as \textit{lex posterior derogat priori}, are not derivable from the Grundnorm, they are not necessary elements of legal cognition. To the contrary, they are simply interpretive methods that may, but need not, become part of positive law.

Here, in arguing that these are simply interpretive methods that need not be part of a legal system, Kelsen drew from the distinction between logical and legal principles, with logical principles necessarily applying but legal principles arising if and only if the sovereign has validly promulgated them. As Kelsen put it, “since derogation is not a logical principle but the function of a positive legal norm, it does not necessarily apply, but can apply only if it is positively stipulated.”\textsuperscript{251} Therefore, even if the legislative body did not specifically promulgate such methods of reconciling conflicts of norms, these interpretive methods could still become part of positive law because of “the fact that the legislator omits formulating expressly much which he silently presupposes and assumes to be self-understood,”\textsuperscript{252} and these methods are “so often applied by the law-applying organs as principles of interpretation, that their existence is taken for granted by the legislator.”\textsuperscript{253}

This skeptical later Kelsen thus completely contradicted the Kantian earlier-Kelsen by holding that certain methods of reconciling norm conflicts are not part of “presupposition of legal cognitions,” but are simply methods of organizing and interpreting positive law.

\textsuperscript{250} Kelsen, General Theory of Law and State, supra, at 407.
\textsuperscript{251} Kelsen, “Derogation,” supra, at 354.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
Sometimes the legislative body explicitly promulgates these methods; for example, a legislative body might specifically state in enacting a law that the law supersedes all previously enacted laws that conflict with it. Other times the legislative body might implicitly endorse certain methods of reconciling conflicting laws by not passing laws to prohibit judges from interpreting the law in this way; for example, Congress has arguably endorsed the canons of statutory construction by not prohibiting courts from using them to ascertain statutory meaning. But whether these conflict-reconciling methods enter the law explicitly through legislation or implicitly through legislative deference to judicial interpretive prerogatives, these ways of rendering the law consistent are part of a legal system, Kelsen concludes in Derogation, only as a result of being part of positive law, not due to their logical relationship to the Grundnorm.

Moreover, whereas in General Theory of Law and State and Pure Theory of Law Kelsen claimed that a conflict of norms cannot exist within a legal system on the ground that such a conflict is similar to a logical contradiction, in Derogation Kelsen rejected this analogy between law and logic. As explained above, in Pure Theory of Law, Kelsen argued that while norms are not themselves true or false, descriptive statements about norms are true or false, and therefore the law of non-contradiction and other principles of logic can apply to norms through their application to these descriptive statements. But in his essay Derogation Kelsen rejected this argument on the ground that whereas logical propositions are true or false, norms are not. Instead, norms are simply valid or invalid. And they are rendered valid or invalid through governmental action, unlike a logical proposition, whose truth exists at the outset. So descriptive statements about conflicting legal norms can both be true.

To use our church-state example, it might be true, as a matter of describing the law, both that the Establishment Clause requires the exclusion of religious organizations from general
funding programs under *Lemon*, and that the Free Exercise Clause requires the inclusion of such organizations under Smith. Whereas a conflicting logical proposition reveals that one of the propositions is and has always been false, for a logical contradiction means that “one of the two assertions is untrue from the very beginning,”254 this is not the case in the law, since a law’s validity is based on positive governmental action and we therefore cannot say that a legal norm has been false from the outset. Indeed, if positive governmental action had made it so that the two Religion Clauses conflicted in this way, we could not use the law of non-contradiction to deduce that one of the Clauses, or one of these lines of Supreme Court precedents, is invalid. Therefore, “a conflict between norms is not a logical contradiction and cannot even be compared to a logical contradiction.”255

Kelsen argued further that if we must compare legal conflicts to some phenomenon in the natural sciences, the comparison would have to be with physical rather than logical forces, since the pulling of the judge in opposing directions is more akin to “two forces exerting their power on the same point from opposite direction,”256 rather than akin to two conflicting propositions revealing a falsehood. Indeed, the *Lemon* and Smith lines of precedents certainly seem to tug a judge in opposite directions when the government creates a generally available funding program, but this tug would not make the conflict *illogical*, because it would not be *inconceivable* that these norms could and would co-exist in the same legal order. Indeed, it is perfectly conceivable for a constitutional system to value both religious liberty and religious disestablishmentarianism, to the extent that they can create conflicts in particular contexts.

Although Kelsen distanced himself in *Derogation* from the formalistic notion that the law of contradiction is contained within the very notion of a legal system, Kelsen still devoted

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254 Id.
255 Id.
256 Id.
significant attention in that essay to analyzing the formal content of legal inconsistencies. Kelsen identified three formal distinctions relating to legal inconsistencies: bilateralism v. unilateralism, necessity v. possibility, and totality v. partiality. A conflict is bilateral if obeying either one of the norms possibly or necessarily involves violating the other, but it is unilateral if such a violation arises only by obeying one of the norms. A conflict is necessary if it must arise, but possible if the conflict arises only because of the existence of some other condition. Finally, a “conflict is a total one if one norm prescribes a certain behavior which the other one forbids (prescribes the omission of the behavior),”\textsuperscript{257} while it “is a partial one if the content of one norm is only partially different from the content of the other one.”\textsuperscript{258} Thus, even while rejecting his earlier stance that the Grundnorm requires the eradication of legal contradictions and that such legal contradictions consist of conflicts between obligations, Kelsen harkened back in \textit{Derogation} to his earlier position that conflicts between obligations are total conflicts, conceptually distinct from conflicts between non-obligations, which Kelsen called only partial conflicts. Just as Kant and the deontic logicians had found conflicts of obligations to be at the essence of normative inconsistency, Kelsen continued to adhere to this position in \textit{Derogation}, even while conceding that the basic norm does not require the extirpation of legal inconsistencies.

Kelsen offered several examples to illustrate these different types of conflicts, but for our purposes, we will use racial de-segregation, a conflict we will be covering in later chapters. There would be a unilateral conflict if there were one norm providing that within a given state black children must attend schools that are at least 70\% non-black and another norm providing that in each school white children must be between 70\% and 80\% of the student population.

\footnote{\textsuperscript{257} Id. at 349.}
\footnote{\textsuperscript{258} Id.}
This is only a unilateral, possible, and partial conflict. It is a *unilateral* inconsistency because, if in following the first norm a school district were created consisting of 100 children, 85 white and 15 black, the second would be violated, because whites would exceed their limit, but there is no way in which following the second norm could violate the first. It is a *possible* inconsistency because the violation of the second norm is not necessary; for example, following the first norm would not violate the second norm if the school district included only 75 whites and 25 blacks. Finally, it is a *partial* instead of a total inconsistency because it would not involve a conflict of obligations; no agent would be required to do what she is also forbidden to do.

We can move this conflict to the opposite end of the spectrum – i.e., we can make the conflict bilateral, necessary, and total – if we change the norms slightly. For example, there would be such a conflict if there were one norm providing that schools must be segregated according to race, and another norm providing that schools must be integrated according to race. Here, each norm would necessarily violate the other, and it would do so in a complete way, requiring school districts to do precisely what they are forbidden to do.

We can move the conflict to the middle of the spectrum if we changed the norms to provide that schools must be segregated according to race, and that a segregated school is unequal in resources, it must be integrated. This is a bilateral conflict because each norm can violate the other. An unequally resourced, integrated school would violate the first norm (by not segregating the races) but not the second norm, and an unequally resourced, segregated school would violate the second norm but not the first. Thus, although this is a bilateral conflict, in that satisfying each of the norms can violated the other, it is not a necessary conflict because such a conflict need not arise. Indeed, if all the schools in the district were segregated and equally resourced, following the first norm would never violate the second norm and the second norm’s
requirement of integration would never be triggered so as to violate the first norm. This would still be a total inconsistency, however, because it would involve conflicting obligations: If segregated schools were unequally resourced, they would need to be integrated under the second norm, thereby creating a total conflict with the first norm’s requirement that all schools must be segregated.

Kelsen thus offers a spectrum of legal consistency, turning on the direction, likelihood, and scope of the inconsistency. The weakest inconsistencies are unilateral, possible, and partial. The strongest inconsistencies are bilateral, necessary, and total. Moderate inconsistencies incorporate both elements. We can represent Kelsen’s scheme with the following table:

<table>
<thead>
<tr>
<th>Strength of Inconsistency</th>
<th>Direction</th>
<th>Likelihood</th>
<th>Scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weak</td>
<td>Unilateral</td>
<td>Possible</td>
<td>Partial</td>
</tr>
<tr>
<td>Strong</td>
<td>Bilateral</td>
<td>Necessary</td>
<td>Total</td>
</tr>
</tbody>
</table>

As helpful as this taxonomy is to understanding legal conflicts, Kelsen never fully explored how it might relate to his legal philosophy. One gets the distinct impression that the early Kelsen would find that the strongest conflict cannot exist in a legal system, for our legal cognitions must presuppose the non-existence of such conflicts, whereas weaker ones can without threatening the entire system because our legal cognitions do not rule out the existence of these inconsistencies. But the later Kelsen did not make this claim. Indeed, Kelsen’s categorization of the three types of inconsistencies seemed merely descriptive, holding no normative power for when judges should reconcile inconsistencies.

Kelsen’s transition on consistency seems to be a direct result of his general change from viewing the law from a neo-Kantian perspective, whereby cognitions about the law require
judges to form some presuppositions about what it means to have a legal system, to a more skeptical perspective, whereby the law means whatever is contained in the positive legal materials. ²⁵⁹ As we see from our discussion of Kelsen above, he provided a much more thorough account than did the American formalists about why a legal system must be consistent, but he was not able to do so without raising the specter of Kant’s metaphysics. Once he rejected his Kantian approach, he could not find any basis in law for rejecting inconsistencies. Indeed, Kelsen could not provide an account, under his more skeptical approach to positivism, for why a necessary inconsistency would present a more significant problem for the rule of law than a possible one, or a bilateral inconsistency as opposed to a unilateral one, or a total inconsistency as opposed to a partial one. The strength of the inconsistency does not seem to matter if one takes the later Kelsen’s approach to understanding the nature of law. So long as a legal system is silent on the matter of consistency, it should tolerate stronger inconsistencies to the same extent as weaker inconsistencies.

This makes it particularly strange why Kelsen had any interest in taxonomizing the different types of consistencies. If each legal system will deal with these matters differently, taxonomizing the different types of consistency is tantamount to a doctor describing the symptoms of ailments that each body will deal with differently. There must be some unifying theme to how legal systems deal with consistency to make this taxonomy project have any real significance. This raises the following question: For the many positivist theorists who reject that a legal system must be cognized through particular presuppositions about consistency, what reason is there to hold that judges must interpret and apply the law in consistent ways? This is

by no means an easy question to answer, and the leading positivist and legal thinker of the 20th century, H.L.A. Hart, could not find any such reason.

_H.L.A. Hart: Consistency as Unnecessary to Law_

H.L.A. Hart’s groundbreaking 1961 book, _The Concept of Law_, refined many features of Kelsen’s Pure Theory of Law. As explained above, Kelsen’s Pure Theory of Law held that if we believe law to be a normative system, then we must also presuppose the validity of the Grundnorm. Hart continued Kelsen’s positivist account of law but more pragmatically conceived of law as a positively promulgated system of rules, and insisted that such a system does not require any such presuppositions about its normativity. According to Hart, a legal system consists of two types of positively promulgated rules, primary and secondary rules. A primary rule governs conduct; an example of such a primary rule is a law prohibiting murder. A secondary rule, by contrast, authorizes the creation, amendment, and elimination of primary rules. These can be private rules (e.g., the laws governing the creation of contracts) as well as public rules (e.g., the constitutional rules governing Congress’s law-making process). This distinction between primary and secondary rules is one of Hart’s most significant contributions to analytical legal philosophy, and it is one that we have encountered earlier in this dissertation.

Another monumental Hartian contribution is the notion of “a rule of recognition.” According to Hart, every legal system must have such a rule determining what is a valid law within that system. Thus, Hart writes, “to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.”

A law becomes the rule of recognition not because of its formal content but rather because it has become conventional for officials to treat it this way. For example, based on the formal content of the U.S. legal system, it might seem that our rule of recognition is the U.S. Constitution, and

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indeed it has been used since Marbury v. Madison as our principal basis for determining whether a given law is actually a valid law. But the Constitution itself is not necessarily our rule of recognition, for there might be a deeper rule governing whether we accept as valid a given interpretation of the Constitution. 261

Whatever the precise content of our ultimate rule of recognition, however, the important point for our purposes is that Hart’s notion of a rule of recognition is similar to, yet distinct from, Kelsen’s Grundnorm. Hart acknowledged that his rule of recognition “resembles in some ways Kelsen’s conception of a basic norm,” 262 but Hart decided to use a different terminology from Kelsen, because, as Hart explained, the rule of recognition is different from the basic norm in four important ways. The most important difference for Hart seemed to have been that whereas Kelsen’s basic norm was presupposed as a matter of legal cognition, Hart’s rule of recognition was not presupposed but rather accepted simply as a matter of fact. As Hart put it, “the point stressed in [his] book [was] that the question what the criteria of legal validity in any legal system are is a question of fact.” 263 For Hart, the rule of recognition is not presupposed in our cognitions about law’s normativity; rather, it simply exists as a result of some positive legal act. A judge’s duty is therefore not to search for the Grundnorm in her presuppositions about law but instead to search the legal system for the precise criteria that the system has in fact promulgated for determining what is a validly enacted law.

This distinction between Kelsen and Hart has deep implications for their views on legal inconsistency. As we discussed above, Kelsen’s notion of a Grundnorm led him to find that the


263 Id. at 293.
law of non-contradiction must be presupposed in how we think about law and therefore must be part of every legal system. But Hart’s notion of a rule of recognition dissolved such Kelsenian presuppositions as mere relics from natural law mysticism. For Hart, the law of non-contradiction does not necessarily inhere in a legal system. Rather, the law of non-contradiction may enter a legal system only through some positive legal act promulgating it as a rule. For example, as explained above, if the U.S. Supreme Court ruled that the Establishment Clause required the exclusion of religious organizations from generally available funding programs, but then the Court later held that the Free Exercise Clause required that the government never discriminate on the basis of religion, there would be a conflict between these two rulings in the event that the state created a funding program that did not include religious organizations. Kelsen would say that a judge must use the Grundnorm to reconcile this contradiction, perhaps by upholding the later ruling on the basis of lex posterior derogat priori theory of stare decisis. And indeed, we do see courts reasoning in precisely this way. For example, part of our stare decisis doctrine is to hold that an earlier ruling can be implicitly overruled by later rulings that undermine the earlier ruling’s “doctrinal underpinnings.” But Hart would hold that this contradiction need not be resolved unless such a mandate was already part of the legal system. Indeed, in Hart’s essay, Kelsen’s Doctrine of the Unity of Law, where he directly challenged Kelsen’s view of legal consistency, Hart contented that “though it would certainly be deplorable on every practical score if laws of a single legal system conflicted and the system provided no way of resolving such conflict, it is still far from obvious that even this is a logical

264 See supra __.
impossibility.”265 Hart’s point is that we could have a system without stare decisis, or we could have a stare decisis system that did not provide for how later rulings modified earlier precedents.

For Hart, then, a judge would not need to reconcile such a legal conflict as a legal matter, and its existence within a legal system would not necessarily present a logical problem either. This conflict would simply present for the judge what Hart termed a “penumbral case” – that is, a case in which the law does not clearly dictate a particular result. According to Hart’s positivism, courts look outside a rule’s language only in penumbral cases. When the law “runs out” in this way, a judge may, and indeed must, use her discretion to resolve the case. So when two rules conflict, it is not the case that the law requires the reconciliation of the rules. Rather, the law does not govern this scenario. The judge is, effectively, in a lawless zone. David Dyzenhaus thus writes that “[i]t is not . . . too much of an exaggeration to say that for Hart and for many other legal positivists the moment of discretionary judgment in a penumbral case is a kind of mini state of emergency or exception.”266 In this sense, Hart came closer to the realists and Carl Schmitt than many have acknowledged, in that Hart also saw the vast possibility of discretion and exceptions pervading the law.

Let’s turn back to our church-state example to illustrate how Hart thought about this issue. Say we are judges faced with the Locke v. Davey conflict: (1) we have the pre-Zelman Establishment Clause precedents that seemed to require the exclusion of Joshua Davey from the scholarship program, (2) we have the Zelman precedent that clearly permitted Davey’s inclusion, and (3) we have the Free Exercise Clause precedents that seemed to require Davey’s inclusion because excluding him would constitute a discriminatory burden on his religious exercise. The

early Kelsen would say that there must be something in this legal system providing direction as to how we should reconcile these conflicting precedents. Hart, by contrast, would say that the law simply does not provide an answer, because we have different precedents that have combined, in this fact scenario, to point the Court in opposing directions, and the Justices must therefore use their unbounded discretion to make the decision. The law simply does not command the judge in this instance. This authorization of the use of unconstrained judicial discretion in hard cases has come to be known as Hart’s “discretion thesis,” a point that will have greater significance later in this chapter when we discuss Ronald Dworkin’s view of legal inconsistency.

In addition to challenging Kelsen’s solution to dealing with legal consistencies, Hart also questioned Kelsen’s conception of what constitutes a legal inconsistency. Recall that the earlier Kelsen held the Kantian position that a legal inconsistency arises if and only if there is a conflict between obligations – i.e., a situation when the same act is both obligated and prohibited. Under this account, permissive rules cannot create legal conflicts. For example, the Zelman decision would not create a true legal inconsistency for the early Kelsen, because it did not require states to implement voucher programs that included religious organizations; it simply permitted such programs. Even the later Kelsen suggested that the Zelman decision did not create the same type of consistency as would the one that Joshua Davey urged the Court to adopt, because the Zelman decision created a partial and not a total inconsistency with prior Establishment Clause case law. Such a partial inconsistency seemed to create for Kelsen less of a problem in his philosophy of law than would a total inconsistency, but as we discussed above, Kelsen did not pursue this point, likely due to a concern of raising the specter of his earlier, more Kantian approach to law.
Hart was heavily critical of the early Kelsen’s view of legal consistency, and he was not satisfied with the later Kelsen’s mediated retreat from this position. Hart argued that Kelsen’s modeling of legal consistency around a notion of conflicting obligations is both under- and over-inclusive in capturing how inconsistencies arise in adjudication. Hart argued that it is under-inclusive because, by holding that permissive rules cannot create conflicts, it overlooks the many scenarios in which laws create logically impossible events. Hart insisted that Kelsen’s mistake was to neglect that when a legal agent avails itself of a permissive rule, the permissive rule is then effectively made to have “the same form as the obedience statement for a rule requiring the same action.”

Recall from the previous chapter how von Wright had made this point about conflicts between permission and obligation norms – they conflict based not on concepts but rather on factual scenarios. So in the example above, if the Establishment Clause permitted but did require the inclusion of religious organizations in generally available funding programs, as the Court held in *Zelman*, but the Free Exercise Clause required such inclusion, as Joshua Davey urged the Court to hold in *Locke v. Davey*, then there still would be a legal inconsistency between the two rulings in the instance that a particular state availed itself of the option under the *Zelman* rule not to include religious organizations. For Hart, when the agent avails itself of the permission norm, the conflict between the permission and obligation norm has the same logical status as a situation involving conflicting obligations. In either case, it would be impossible to satisfy both rules. The only difference is that, as a matter of formal logic, conflicting obligations always create inconsistencies, whereas permission-obligation conflicts do not. But in practice, when an agent

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avails itself of a permission norm, the inconsistency is *functionally* the same. The difference between Kelsen’s total and partial inconsistencies thus turns on facts, not logic.

Likewise, Hart found that Kelsen’s conception is *over-inclusive* because, according to Hart, conflicting obligations need not be posed as logical inconsistencies in all circumstances. Indeed, he found it “worth noting that logicians of repute in constructing systems of deontic logic have allowed for the possibility of conflicting obligations,”268 a position Hart endorsed on the ground that “a logical calculus which is out to catch the logical properties of actual human codes of behavior should not rule such possibilities of conflict in advance by taking it as an axiom that ‘one ought to do A’ entails that it is not the case that one ought not to do A.”269 We will discuss some of these “logicians of repute” in subsequent chapters, focusing in particular on how, in an influential essay, *Imperatives and Logic*, 270 Alf Ross, the Danish legal philosopher and leading exponent of Scandinavian Legal Realism, challenged deontic logic’s application to law.

Before we leave Hart, I want to re-iterate how his positivism differs from Bentham’s and Kelsen’s positivism on the issue of legal consistency, as this will be of importance later in the dissertation when we seek to develop a broader view of legal consistency within the positivist tradition. Whereas both Bentham and the early Kelsen held consistency to be an essential element of the law, so that judges must eliminate certain types of inconsistencies even if the positive legal materials do not explicitly warrant this judicial process, Hart held a more strictly positivist position on legal consistency, arguing that a legal system must be consistent if and only if the positive law requires it to be so. To be sure, Hart conceded that it might be difficult for a judge to enforce the positive law if it contains conflicting norms. But Hart maintained that there need not be anything in the positive law commanding how the judge must reconcile this...

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268 Id. at __.
269 Id. at 188.
270 Ross, Alf. 1941. *Imperatives and Logic*. Theoria, 7. 53.
inconsistency. In the event there is not a relevant positive norm in that system, the judge must use her discretion to reach the best result. An inconsistency thus does not bring the judge up to some sort of meta-legal posture, looking down on the legal system as a whole from an Archimedean point above. An inconsistency rather brings a judge down to the messy world of politics and discretion, where she is free from law to make a decision based on her own preferences. Again, Hart, even though challenging the realist attack on the formality of law, ended up coming to very similar conclusions as the realists on the subject of how judges deal with legal inconsistencies.

In addition, Hart agreed with the realists in seeing legal consistency in more functional and less logical terms, sharply diverging here from how influential positivist thinkers like Bentham and Kelsen thought about consistency in logical terms. Indeed, Hart urged legal theorists and jurists to examine legal consistency with a greater attention to how they function in practice, so that in some circumstances permissive norms can create logical inconsistencies, and conflicting obligations need not create logical inconsistencies.

The driving distinction between Hart and Kelsen on legal consistency is the distinction between Kelsens’s Grundnorm and Hart’s rule of recognition. In contrast to Kelsen’s basic norm, which presupposes logical consistency as a matter of legal cognition, Hart’s rule of recognition does not make any such presuppositions. Rather, the rule of recognition is a matter of fact, turning on the conventions public officials use in determining what is a valid legal act. So whether the rule of recognition requires the extirpation of inconsistencies is a question of how public officials act in practice. The distinction between primary and secondary rules also might be of significance here. Although Hart never questioned how this distinction might relate to his writings on consistency, it seems that the rule of recognition would treat consistency differently
for primary as opposed to secondary rules. Indeed, we might want primary rules to be consistent for the purpose of promoting societal reliance on the law, but consistency might be even more important for secondary rules for the purpose of securing the rule of law, since these rules go to the basis of our social order.

This might seem to go against the norm in American law holding that non-constitutional precedents are subject to a stricter form of *stare decisis* than are constitutional ones. This distinction of course goes back to Justice Brandeis’s famous 1932 dissent in *Burnet v. Coronado Oil & Gas Co.*, where Brandeis said that historically it has been the practice for the Court to grant greater deference to non-constitutional precedents, because people arrange their private affairs around these decisions. The historical accuracy of Brandeis’s statement has recently come under question, with some scholars claiming that this was a bit of realist revisionism, as part of Brandeis’s broader effort to overrule some of the Court’s conservative precedents. Whatever its accuracy, however, Brandeis’s assertion has come to establish the “common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case.”

But while *stare decisis* might apply less forcefully to constitutional precedents, that does not mean that this is true for norms about adjudicative consistency, for, as we discussed in chapter one, there are important distinctions between *stare decisis* and adjudicative consistency. This will prove important when we develop a theory in later chapters of how *stare decisis* and adjudicative consistency operate in constitutional decision-making. We will see in the following

271 285 U.S. 393 (1932).
273 *Casey*, 505 U.S. at 854 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 -411 (1932) (Brandeis, J., dissenting)).
chapter on the politics of adjudicative consistency that many efforts to measure the force of precedents in judicial decision-making have worked under misguided efforts to reduce *stare decisis* to a single phenomenon – that is, to *essentialize* the doctrine. Once we open up ourselves to the multifarious ways in which precedents guide judicial decision-making, and the ways in which judges seek some level of adjudicative consistency while still not following all precedents in their entirety, we will see that a legal system might be much more consistent in reality than it appears on its face. The rule of law might guarantee deep consistencies, working beneath a façade of extreme superficial inconsistencies. For now, though, before we develop our own theory of legal consistency and the rule of law, let us return to the topic at hand, how legal positivism conceives of the subject. Our next and final thinker on this topic is Sir Donald Neil MacCormick, the great Scottish legal philosopher and politician.

*Neil MacCormick: Consistency as Essential to the Judiciary’s Institutional Role in the Rule of Law*

In his important work, *Legal Reasoning and Legal Theory*, Neil MacCormick explored the relationship between positivism and adjudicative consistency. MacCormick began that work by clarifying that his goal was not to prescribe how judges *ought* to reason about the law in theory, or to describe in exhaustive detail how judges *do* reason about the law in practice. Rather, his goal was to walk a fine-line between the formalists and realists, between the normative and descriptive – that is, to provide “an account of certain features of legal argumentation which are actually instantiated within the law reports, and explain the reasons why [he] think[s] they ought to be fundamental features of legal argumentation given its function.”

the institutional status of courts – that is, on how legal norms not only describe the judiciary’s functions but also justify the existence of the institution.

Because MacCormick sought to describe and justify how courts act given their institutional status within a particular legal system, he did not seek to derive necessary truths about law in the way that the formalists and the early Kelsen did. Indeed, in the introduction to *Legal Reasoning and Legal Theory*, MacCormick warned that he “do[es] not pretend to be demonstrating necessary truths about legal reasoning everywhere.”\(^{275}\) For this reason, in *Legal Reasoning and Legal Theory* he often limited his analysis to particular legal systems – namely, the English, Scottish, and American systems. Nevertheless, at times his focus was much broader, “attempt[ing] . . . to bring out what seem . . . to be more invariant elements in legal argumentation”\(^{276}\) and thus “aiming to give suggestive hypotheses worthy of testing for their explanatory value in relation to other legal systems.”\(^{277}\) MacCormick thus sought to broaden his account beyond particular judicial systems on the ground that all courts, to the extent that they are similar as institutions whose primary function is to guarantee the rule of law, must apply legal norms in similar ways.

One of the central, and most controversial, features of MacCormick’s institutionalist account was his empirical claim that courts often justify their decisions with deductive reasoning, and his normative claim that courts should do this to legitimate their status as institutions whose primary function is to guarantee the rule of law. According to MacCormick, lawyers argue cases and judges justify their decisions by employing syllogisms based on a legal version of *modus ponens*, wherein the major premise is a legal norm, the minor premise is the alleged set of facts occurring in this case, and the conclusion is the deductive application of the major premise to the

\(^{275}\) Id. at 8.
\(^{276}\) Id. at 12.
\(^{277}\) Id. at 8.
minor premise. MacCormick acknowledged that often times legal reasoning is more complicated and messy than this, but at least in some cases the reasoning is this straightforward. And even when a case seems more complicated, it is not necessarily because the case does not rest on deductive justifications, but rather because there are multiple such justifications within the argument.

In arguing that courts are institutions whose legitimacy rests on the use of deductive justifications, MacCormick challenged the later Kelsen’s repudiation of the notion that the law of contradiction applies to rules of law. As we discussed above, Kelsen in his later work recanted this notion on the ground that norms are not subject to true-false valuations. MacCormick’s most direct challenge of the later Kelsen’s argument on this point appeared in his 2005 book *Rhetoric and the Rule of Law*. In Chapter 4, entitled “Defending Deductivism,” MacCormick defended the account he had provided in his earlier work, and in doing so, MacCormick challenged the later Kelsen’s argument that there could not be any logic of norms. According to MacCormick, “the Institutional Theory of Law gives a solid ground for rejecting the Kelsenian objection [against linking norms and logic.]”\(^{278}\) MacCormick explained that, contra the later Kelsen’s objections, legal norms can be analyzed with MacCormick’s “logic of justification,”\(^{279}\) but this is so only if it is seen as a logic that “has recourse to statements which make assertions about (what one understand to be) the content of the norm, rather than producing the very norm itself and working from that.”\(^ {280}\) In other words, there can be a logic of norms, but not one that produces legal norms; rather, the logic must be employed only to describe the veracity of the legal statement at issue.


\(^{279}\) Id.

\(^{280}\) Id.
This is quite similar to the early Kelsen argument, discussed above, that the law of contradiction can apply to law because, while it cannot apply to norms themselves, it can apply to statements about those norms. But a significant point of departure between the early Kelsen and MacCormick is that the early Kelsen believed that logic can determine, by itself, whether it is true or false that a given legal norm is valid, but MacCormick more modestly held that logic can determine only whether, based on how we ordinarily reason about the law within a particular legal system, a legal norm is valid.

So, to use the example we used above, the early Kelsen held that logic itself can tell us that if it is true that the Establishment Clause requires the exclusion of religious organizations from generally available funding programs, and if it is true that the Free Exercise Clause requires their inclusion, then it must also be true that at least one of those constitutional norms is not valid. This use of the law of non-contradiction produces a new norm by invalidating at least one of the norms that had previously been valid in the system. MacCormick, however, would hold that the law of non-contradiction can never produce such a norm by itself. To the contrary, the law of non-contradiction can invalidate one of these norms if and only if there was already some other norm in that system holding that we must reason about legal norms in such a way that they do not conflict. Logic thus clears the clouds of thought for Kelsen, but logic only allows some sunlight to pour through the clouds for MacCormick. That is, logic does not have quite the clarifying force for MacCormick as it did for the early Kelsen, but MacCormick does preserve the potential for applying the law of non-contradiction to legal inconsistencies.

Before we explore precisely how MacCormick argued that the law of non-contradiction applies to legal inconsistencies, however, it will be helpful to examine how MacCormick analyzed how courts use deductive reasoning in justifying their legal conclusions. MacCormick
used various English and Scottish cases to illustrate this phenomenon, but we can illustrate it with one of the American example discussed above, that of racial segregation. A reasonable interpretation of the Plessy Court’s reasoning is that it announced the following major premise: For any law requiring racially segregated facilities, if the law guarantees that the non-white facilities are substantially equal to the white facilities, then that law complies with the Equal Protection Clause. And the Plessy Court announced the following minor premise: A law requiring racially segregated trains with similar accommodations for the non-white and white cars is a law that guarantees that the non-white facilities are substantially equal to the white facilities. Applying the major premise to the minor premise, the Court concluded that, because the Louisiana law required that the white and non-white cars have similar accommodations, that law complied with the Equal Protection Clause.

While this syllogism is logical in a technical sense, what bothers many of us about it is that it is illogical in a common sense, because it contravenes one of the central moral principles of the American legal system – that no citizen may be relegated to a second-class status on the basis of race or color. For this reason, it does not make sense, as a legal matter, for a legal system to provide, on the one hand, that laws must be color-blind, and on the other, to permit laws that require that facilities be provided separately on the basis of race or color. MacCormick readily recognized that such a technically logical argument might not be logical as a matter of common sense. In fact, MacCormick emphasized this distinction between formal and common-sense logic, explaining that we say an argument is logical in a technical sense only “if it complies with the requirements of logic, that is to say, if its conclusion follows necessarily from its

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281 This principle has of course been violated throughout American legal history, but it is nonetheless a principle that has animated legal decisions long before Brown, and indeed, even before Plessy. See Kull, Andrew. 1992. The Color-Blind Constitution. Cambridge: Harvard University Press.
premises, but that it is logical in a common sense only if it makes sense to us in practice. Applying this distinction to law, MacCormick found that technical logic requires that the legal argument be framed as a valid deduction, but common-sense logic requires that the conclusion be consistent “with the general policies and principles of the law.”

These different senses of what is logical provide the framework for MacCormick’s account of how judges and lawyers formulate the major and minor premises that are necessary to get the legal syllogism off the ground in the first place. MacCormick acknowledged that his explanation of the role of deductive reasoning in the law disguises what makes legal rulings so complicated and contestable. Judges often disagree on the precise content of the major premise (i.e., the legal norm applicable to a given case); MacCormick called these “interpretation” disputes. And even when judges agree on the governing norm, they still might disagree on the legal conclusion to derive from it because they disagree on the minor premise (i.e., the relevant facts subject to that norm’s applicability); MacCormick called these “classification” disputes. MacCormick argued that when there is either an interpretation or a classification dispute, judges face “rival possible rulings.” To choose between or among these rival rulings, judges must then turn to what MacCormick called “second-order justifications.”

For MacCormick, second-order justifications involve three forms of reasoning: (1) consequentialist reasoning based on which of the rival possible rulings best fits with our common sense about the world, (2) coherence reasoning based on which of the rival possible rulings best fits, as a matter of common-sense logic, with the principles or policies underlying that particular legal system, and (3) consistency reasoning based on which of the rival possible rulings best fits, as a matter of technical logic, with current norms in that system. MacCormick contended that

282 Id. at 38.
283 Id. at 39.
there is a hierarchy among these justifications. Although judges may justify a decision on coherence or consequentialist instead of consistency grounds, consistency must prevail if ruling on consequentialist or coherence grounds would create a logical inconsistency. As he sternly put it, a ruling “may not be adopted if it is contradictory of some valid and binding rule of the system.”

Again, while MacCormick used several English examples to illustrate how courts invoke these second-order justifications, we can see this in the American segregation cases. In Brown v. Board of Education, the Court considered whether racially segregated public schools with similar accommodations are substantially equal so as to comply with the Equal Protection Clause. This involved determining whether the Plessy decision required the Brown Court to uphold racial segregation of public education. As explained above, the Plessy Court held as its major premise that for all racially segregated facilities, if the non-white facilities are substantially equal to the white facilities, then those racially segregated facilities comply with the Equal Protection Clause. And its minor premise was that racially segregated trains with similar accommodations for the non-white and white cars are racially segregated facilities whose non-white facilities are substantially equal to the white facilities. The Brown Court challenged the applicability of the minor premise to racially segregated schools that provided substantially similar accommodations for white and non-white students. The Brown Court thus made what MacCormick called a “classification” argument. That is, the Court classified public schools as not being like trains on the ground that, due to the special role education plays in a person’s moral and intellectual development, racially segregated public schools, unlike racially segregated

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285 Id. at 106.
trains, could never be substantially equal to one another even if they provided the exact same accommodations for whites and non-whites. As the Brown Court put it, “in the field of public education, the doctrine of ‘separate but equal’ has no place,”²⁸⁸ because “[s]eparate educational facilities are inherently unequal.”²⁸⁹

The Court based this classification on all of three of MacCormick’s “second-order justifications.” The Court’s consequentialist reasoning perhaps appeared most prominently in the opinion. Indeed, in what has become the most controversial step in its reasoning, the Court drew from psychological studies to conclude that, while in theory school segregation does not necessarily create inequality, in the real world it does, because separating non-white students “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁹⁰ In addition to its consequentialist reasoning, the Court engaged in coherence reasoning, looking to the principles underlying its previous rulings on segregation to determine whether upholding racial segregation in schools would cohere with those principles. Based on these cases, the Court found that there was a principle prohibiting the state from interfering on the basis of color or race with a person’s right to develop “his ability to study, to engage in discussions and exchange views with other students,”²⁹¹ thereby making racially segregated education quite different from racially segregated trains. Finally, the Court applied consistency reasoning, taking great pains to clarify that its ruling was logically consistent with Plessy. As the Brown Court explicitly declared, it was not rejecting the Plessy decision’s major

²⁸⁸ Brown, 347 U.S. at 495.
²⁸⁹ Id.
²⁹⁰ Id. at 494.
²⁹¹ Id. at 493 (quoting McLaurin v. Oklahoma State Regent).
premise, but rather classifying public education as not being covered by that premise, because “in the field of public education, the doctrine of ‘separate but equal’ has no place.”

For this reason, although Brown is often said to have overruled Plessy, it is more accurate to say that the Court overruled Plessy two years later, in Gayle v. Browder, where, in a per curiam opinion, the Court affirmed a decision by the United States District Court for the Middle District of Alabama holding as unconstitutional Alabama’s laws requiring segregation of motor buses. The District Court relied on Brown as having undermined the Plessy Court’s major premise, so that it was no longer true as a matter of law that racially segregated facilities whose non-white facilities are substantially equal to the white facilities comply with the Equal Protection Clause. In effect, it did not matter for the district court whether buses were like trains, in sharp contrast to how it did matter for the Brown Court that trains were not like public schools.

As the district court conceded in Gayle, however, the Supreme Court in Brown had not explicitly overruled Plessy but rather affirmed a principle – namely, the color-blindness principle – that rendered the Plessy Court’s major premise incoherent. Thus, the district court announced in Gayle: “We cannot in good conscience perform our duty as judges by blindly following the precedent of Plessy,” because according to the district court’s reading of Brown, the Plessy major premise “has been impliedly, though not explicitly, overruled.” Putting this reasoning in terms of MacCormick’s framework, we can see that the district court prioritized

292 Id. at 495.
293 352 U.S. 903 (1956)
295 There is of course a lot of controversy over what this color-blindness principle means, with liberals claiming it requires more substantive equality measures, such as affirmative action and school desegregation, and conservatives contending that it requires more procedural guarantees, such as the end of race as a means to achieving government policies. Again, for more discussion of this principle, see Kull, Andrew. 1992. The Color-Blind Constitution. Cambridge: Harvard University Press.
296 Id. at 717.
297 Id.
coherence reasoning over consistency reasoning by privileging a general color-blindness principle over particular Supreme Court precedents, namely Plessy and its progeny.

This privileging of principle over precedent, or coherence over consistency to put it in MacCormick’s language, incited a vigorous dissent from one of the other district court judges, Judge Seybourn H. Lynne, who in dramatic fashion announced that he was writing his first dissent ever out of a duty to adhere to precedent. In Lynne’s words, the majority’s reasoning represented how “[a] comparatively new principle of pernicious implications has found its way into our jurisprudence,”298 a principle under which “[l]ower courts may feel free to disregard the precise precedent of a Supreme Court opinion if they perceive a 'pronounced new doctrinal trend' in its later decisions.”299 Again, applying MacCormick’s framework, we can see that Judge Lynne disagreed with the majority because Lynne believed that the majority prioritized coherence over consistency, when the court was obligated, in Lynne’s view, to prioritize these judicial values in the just the opposite way.

The Supreme Court, by affirming the district court’s holding with only a per curiam opinion, suggested that it agreed with the majority’s reasoning that Brown had implicitly overruled Plessy’s major premise. In fact, the Court explicated this a few years later, in Bailey v. Patterson,300 where, in invalidating Mississippi’s segregation of all types of transportation facilities, the Court cited the Gayle decision for the following proposition of law: “We have settled beyond question that no State may require racial segregation of interstate transportation facilities. . . . This question is no longer open; it is foreclosed as a litigable issue.”301 The Bailey decision thus clarified once and for all that Plessy’s major premise had indeed been overruled:

298 Id. at 718.
299 Id. at 718-719.
300 369 U.S. 31 (1962).
301 Id. at 33.
No forms of racially segregated facilities comply with the Equal Protection Clause, even if those facilities are substantially equal to one another.

Whether *Plessy’s* major premise was overruled in Brown, or Gayle, or even Bailey, is unclear, and one of the themes of this dissertation is that there simply is no answer to this question. As we will see in the following chapter, efforts to measure the efficacy of *stare decisis* assume that there is a single phenomenon to study, as though with each case citing a precedent we can say whether it followed or overruled that precedent. But the Brown lineage shows how problematic this assumption is. We can say that Brown, Gayle, Bailey, or even some later case overruled Plessy. Perhaps the best way to think about this scenario is that they *all* overruled Plessy, *together*, but that *none* of them did, *in isolation*. That is, Plessy was followed until it was clear to participants in legal discourse that its underpinnings had been so thoroughly uprooted that it no longer made sense to call it a governing rule under *stare decisis*. It is like in language, how we continue to follow rules of grammar until over time gradual changes in language render adherence to the old rule nonsensical. Just as how through popular usage we come to accept that “data” can be used as a singular as well as a plural noun, so too we come to accept that Plessy is overruled, not through the content of Brown itself but through a variety of judicial opinions, both within and without the Supreme Court, as well as through extra-judicial actions. *Stare decisis* is not such a thing that can allow us to pinpoint when it is working and when it is not. Again, this is a topic we will come back to in subsequent chapters, when we discuss the political science literature on *stare decisis* and how thinking of law as a language game can complicate and enrich that research.

This is not to say, however, that we can never say when a precedent is being followed. To the contrary, Judge Lynne seems to have been absolutely right in claiming that the majority
decision was inconsistent with Plessy: As the Gayle majority acknowledged, the Brown decision did not explicitly overrule Plessy, so Plessy was still binding precedent, but the Gayle majority nevertheless found that it was required to ignore Plessy, on the ground that its major premise no longer cohered with prevailing legal norms. There was an inconsistency here in that the majority interpreted Plessy to require upholding the Alabama law, and the court recognized Plessy as binding precedent, but the court nevertheless invalidated the Alabama law.

What Judge Lynne failed to acknowledge, though, was that his dissent was not necessarily consistent with Supreme Court precedent either. Recall that Plessy involved privately owned trains, Brown involved public schools, and Gayle involved public buses. Judge Lynne did not need to reach his conclusion that Alabama’s segregation of buses was constitutional, because Lynne could have classified publicly operated buses as being more like public schools than like privately operated trains, thus finding that public buses fall within the ambit of Brown’s rather than Plessy’s minor premise. To be sure, there is some basis for Lynne’s finding that, based on the Brown Court’s principle for distinguishing racially segregated schools from racially segregated trains, buses are more like trains than like schools. Indeed, as the Brown Court explained, racial segregation of public schools is likely to produce a substantial sense of inferiority in non-white students because education is so central to one’s moral and educational development, and separate schools convey the message that non-white students are unfit for experiencing that development alongside white children. By contrast, racial segregation on buses and trains is unlikely to produce the same sense of inferiority in non-white passengers, because taking a bus or train usually involves only a short period of interaction with other passengers, and this brief and impersonal experience is not nearly as significant to one’s sense of self-worth as is K-12 education. But there is also some basis for resisting Lynne’s finding.
Racially segregated public buses and education arguably violate a citizen’s sense of dignity and equality more than do racially segregated private trains, because taking the bus and attending school are often part of one’s daily experiences whereas riding the railroad is not. Moreover, racially segregated public buses and schools, as government spaces, carry the government’s support of racial segregation more than do segregated private trains, even when that segregation of trains is required by law. Therefore, because there were principles supporting Gayle being both more and less like Brown than Plessy, there was no logical or legal principle governing whether the Gayle case was more like Brown or Plessy, and as a result, there was no way of saying that ruling in the majority or the dissent would be more consistent with binding U.S. Supreme Court precedents. This is simply the point that the realists made, discussed in chapter two, that there are always multifarious ways of interpreting precedents, so *stare decisis* never places a meaningful constraint on judicial discretion.

But the realists overlooked the fact that there could be an actual inconsistency between Plessy and one of these other decisions. For example, let’s say that the *Plessy* majority opinion were written more broadly so that it did not turn on the particular mode of transportation at issue (i.e., trains), but rather on the more general proposition that, for *all forms of transportation*, the facilities are equal for purposes of the Equal Protection Clause if their accommodations are similar. So in this scenario Plessy’s minor premise would be something like the following: A law requiring racially segregated transportation facilities with similar accommodations for the non-white and white facilities is a law that guarantees that the non-white facilities are substantially equal to the white facilities. Since a bus is clearly a transportation facility, if the Plessy minor premise were framed this broadly, then for the Gayle Court to be consistent with Plessy, the Court would have needed to uphold as constitutional Alabama’s segregation of public
buses. And if the Gayle Court wanted to invalidate Alabama’s segregation of public buses, it would then have had two options: It could oppose the Plessy major premise concerning the “separate but equal” doctrine, or the minor premise that racially segregated facilities with similar accommodations are substantially equal to one another. But either way, it would have to render a decision inconsistent with Plessy. So there are instances when a later court must come to terms with creating a legal inconsistency, a point that will be of significance to us when developing a theory of how consistency norms, and by extension the doctrine of stare decisis, can constrain judicial discretion.

The Plessy-Brown-Gayle lineage illustrates the strengths and weaknesses of MacCormick’s view of adjudicative consistency. MacCormick provides a persuasive and forceful argument for why courts must render consistent decisions. Courts, as institutions designed to secure the rule of law, must act rationally, and this requires that they base their decisions on deductive justifications that are consistent with one another. He also explains how three considerations (consequential, coherence, and consistency considerations) must play into how, to act rationally, courts must form their deductive justifications. As mentioned above, MacCormick believed there to be a hierarchy in how judges apply these considerations. Judges may choose a particular ruling on consequentialist grounds even if it does not completely cohere with other legal principles; MacCormick found that only some but not complete coherence is required. Conversely, a judge may trump coherence over consequentialist reasoning by choosing a ruling on the ground that it coheres with other legal principles even though it will produce bad consequences. But unlike these other second-order justifications, consistency is an absolute requirement. A ruling categorically “may not be adopted if it is contradictory of some valid and
binding rule of the system.” 302 MacCormick found consistency to be an absolute requirement because “legal reasoning is a form of thought,” 303 and as such, “it must be logical, i.e., must conform to the laws of logic, on pain of being irrational and self-contradictory.” 304 The law of non-contradiction, in other words, is absolute in legal reasoning. It is the only second-order justification that cannot be trumped. And this “demand of consistency [applies to] . . . to statute law and case law alike.” 305 Indeed, MacCormick’s commandment “‘[t]hough shat not controvert established and binding rules of law is a commandment which applies to both [precedents and statutes], and which imposes genuine and important limits to judicial freedom of action.” 306

Importantly, however, this does not mean that courts may never overrule themselves. Although this requirement of consistency means that lower courts must never contravene the precedents of higher courts, since these precedents are binding law, this is not the case for courts following their own precedents, because such decisions are “only presumptively binding . . . so that observance of [such] precedent rulings lacks the cast-iron obligatory quality presented by valid statutes.” 307 This is the familiar point that vertical stare decisis is absolutely binding, but horizontal stare decisis is only presumptively binding. MacCormick’s answer for when this presumption of bindingness may be defeated in horizontal stare decisis goes back to his second-order justifications for interpreting the major and minor premises of a legal syllogism. The judge must consider “the reason of justice, of not departing from like decisions in like cases without very good reason, and the reasons of policy and principle supporting the precedents, coupled

302 MacCormick, Legal Reasoning and Legal Theory, supra __ at 106.
303 Id. at 41.
304 Id.
305 Id. at 227.
306 Id.
307 Id.
with the public-convenience argument for certainty in law, which account for the standing of precedent as a source of law’ in the system.”

Thus, MacCormick held that courts must always render logically consistent decisions, and this injunction means that lower courts may not ever render decisions that are logically inconsistent with higher court precedents, but this requirement does not prohibit courts from overruling themselves, for there is no inconsistency in a court’s overruling itself when consequentialist and coherence considerations militate toward doing so. For example, as discussed above, although the district court in Gayle violated this requirement because, as it acknowledged, the Brown decision did not explicitly overrule Plessy, the Supreme Court in affirming the district court, did not act inconsistently because according to MacCormick’s account the consistency requirement never applies to a court’s own decisions. But as we will see in later chapters, there might be reason to push MacCormick on this point, because in some instances there might be something like a logical inconsistency in a court’s overruling itself. Horizontal stare decisis might contain some absolute bindingness.

A deficiency in MacCormick’s account is that, unlike Kelsen, he never explains how legal rulings are to be consistent with one another. To be sure, MacCormick is clear that his notion of consistency refers to logical consistency, as he defines consistency “as being satisfied by non-contradiction.” Thus, “[a] set of propositions is mutually consistent if each can without contradiction be asserted in conjunction with every other and with their conjunction.” It seems from this statement that all of the steps in a court’s deductive justification must be consistent with one another and consistent with all the other steps of deductive justifications that are part of binding precedents. But MacCormick is quite vague on what it means for a legal

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308 Id.
309 Id. at 190.
310 Id.
proposition to be made “without contradiction” of another. That is, does MacCormick view inconsistency, as Kant and the early Kelsen did, as involving only conflicts of obligations? Or does MacCormick view inconsistency as the later Kelsen did, as being grouped into various categories, based on Kelsen’s total/partial, necessary/possible, bilateral/unilateral distinctions?

Given MacCormick’s neglect of this issue, it is interesting to question whether MacCormick might view some violations of horizontal **stare decisis** as creating such sharp inconsistencies so as to violate his commandment against legal inconsistency. For example, as mentioned above in our discussion of Kelsen, total, necessary, bilateral conflicts seem intuitively to be the sharpest type of conflict, so perhaps MacCormick would find that although the consistency requirement permits courts to overrule themselves if it creates weaker conflicts, he would find it impermissible to overrule themselves if it were to create such a sharp conflict, as such a conflict bears the strongest resemblance to a logical contradiction and therefore to the rule of law. Unfortunately, however, MacCormick did not address any of these issues, but it is an issue we will come back to later.

MacCormick was also unclear on precisely **what** in a precedent must be consistent, though in both *Legal Reasoning and Legal Theory* and *Rhetoric and the Rule of Law* MacCormick did dedicate some space to this difficult issue. We discussed this issue in some length in chapter two, when we examined the different ways that precedents have been conceptualized during different periods in legal thought – namely, the distinction between the rules- and results- approaches to interpreting the scope of precedent decisions. This question about the scope of precedent decisions is one we will have to grapple with in coming up with a theory of adjudicative consistency, so it is worth dilating on MacCormick’s writing on the subject in greater depth here.
In *Legal Reasoning and Legal Theory*, MacCormick defined the “[t]he ratio decidendi [a]s the ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties’ argument in a case, being a point on which a ruling was necessary to his justification (or one of his alternative justifications) of the decision in the case.” 311 Almost thirty years later, in *Rhetoric and the Rule of Law*, MacCormick slightly amended this definition, changing it from using the definite article “the” to the indefinite article “a” as the first and fifth words of the definition; MacCormick made this change to emphasize that there is not a single ratio decidendi of a case.312 Indeed, as mentioned above, a case might rest on several deductive justifications, and each of these may be part of the ratio decidendi as a necessary justification for resolving the case.

MacCormick also put his foot in the perennial debate between the results- and rules-approaches to precedent. As we discussed in chapter two, under the results-approach, a precedent is a rule consisting of the prior case’s material facts that the deciding court later determined to have been necessary for the prior court to have reached its result; Arthur Goodhart’s 1930 *Yale Law Review* article, *Determining the Ratio Decidendi of a Case*,313 is the leading account of this approach. By contrast, under the rules-approach, a precedent is a rule consisting of whatever rule or doctrine that the prior court announced as necessary to reach its result. So whereas the results-approach considers the *facts* triggering the prior court’s result, the rules-approach considers the *rule* announced by that court.

MacCormick adopted a two-track approach, whereby the rules-approach applies when “a ruling is expressly stated,”314 but in the event that the prior court did not expressly state a

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311 Id. at 215.
particular justification for its decision, then the deciding court must employ Goodhart’s method and derive the material facts from the prior court’s description of the facts and reasoning based on those facts. MacCormick acknowledged that these methods do not reduce the holding of a particular case to a single determinate proposition. Indeed, MacCormick readily accepted Julius Stone’s influential criticism of the Goodhart results-approach on the ground that a prior court’s description of the facts and reasoning based on those facts do not limit later courts in any way from re-categorizing the material facts so as to produce new holdings. We saw evidence of this in the segregation cases, with Brown re-categorizing Plessy as involving trains and not public schools, Gayle re-categorizing Brown as involving both public trains and buses, finally leading the Court to declare explicitly in Bailey v. Patterson\footnote{315 369 U.S. 31 (1962).} that racial segregation of any sort was no longer permissible. Each case involved the judicial reformulation of the material facts, illustrating how the Goodhart method cannot adequately constrain judicial decision-making so as to ensure adjudicative consistency.

MacCormick acknowledged this possibility, conceding that courts can, and often times do, distinguish precedents by either interpreting the major premise of the precedent case so that it simply does not apply to the current case or classifying the relevant facts of the present case so that the case does not fall within the ambit of the major premise of the precedent case. Nevertheless, although MacCormick found that these methods enable courts to evade many precedents, he insisted in Legal Reasoning and Legal Theory that precedents do place some constraint on judicial decision-making because “such devices for reconciliation fail”\footnote{316 MacCormick, Legal Reasoning and Legal Theory, supra __, at 106.} when the court in the precedent case stated its ruling or reasoning so clearly that a later court simply could not in good faith deny the precedent case’s applicability. Indeed, MacCormick declared “judges
are often capable of giving clear and crisp rulings, either explicit or unambiguously implicit in their justifications.317 And in these instances “the requirement of consistency would require rejection of an otherwise attractive ruling on the ground of its irresoluble conflict with (contradiction of) established valid rules.”318 He maintained this point in Rhetoric and the Rule of Law, declaring that “[f]aithfulness to the Rule of Law calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another.”319 Such a frivolous variation would arise, and hence a violation of MacCormick’s rule-of-law consistency requirement, if a court were to issue a decision logically inconsistent with a necessary justification for a decision clearly declared or implied by a prior court. As we will see below, natural law theorists have likewise seen such a derogation from consistency to constitute a violation of the rule of law, as MacCormick held, but they have gone further to argue that these derogations amount to an abandonment of the law itself.

Natural Law and Consistency

We explained in the previous chapter how Aquinas, writing in the Aristotelian tradition, developed the first complete articulation of what is required of a natural legal system. Aquinas argued that as part of human rationality it is essential that, for a governmental body to create valid laws, it must engage in the lawmaking process with its subjects as partners in the enterprise of public reason. Aquinas contended that because consistency is an essential element of rationality, as Aristotle had so strenuously held, consistency among legal norms is necessary for the government and its subjects to engage in this enterprise. We also saw how Aquinas declared that the law must be rational in both the logical sense (i.e., legal norms must comply with the laws of thought) and in the practical sense (i.e., legal norms must provide reasonable bases for

317 Id.
318 Id.
319 MacCormick, Rhetoric and the Rule of Law, supra __, at 142.
human action). Some of the 20th century’s most important legal philosophers, such as John Finnis and John Rawls, were deeply indebted to Aquinas in developing their theories of law and the rule of law, but below we will focus on Lon Fuller and Ronald Dworkin, because they devoted significant attention to the matter of legal consistency, in a way that diverges sharply and importantly from the positivists discussed above.

**Lon Fuller: Consistency as Part of the “Inner Morality of Law”**

Fuller attacked Hart’s positivistic notion that there is only a minimal relationship between law and morality, as well as the realist’s view that the law is indeterminate and subject to significant judicial discretion. Against both of these positions, Fuller contended that the law objectively contains a deep morality. Fuller developed this argument most fully in is his famous work, *The Morality of Law*, where, to establish how morality is an essential element of the law, Fuller hypothesized a scenario involving a king, Rex, who, in seeking to rule his kingdom, found that he could not rule effectively without satisfying eight procedural requirements. While Kelsen took Kant as his lead in conceptualizing the relationship between law and consistency, Lon Fuller looked to Aquinas for guidance. As mentioned in the previous chapter, Aquinas identified various formal and procedural features of what is necessary for law to exist. Fuller synthesized these elements into what are now known as his eight desiderata of the law, which we briefly discussed in chapter two. Specifically, to be effective, a legal system must consist of laws that are: (1) general; (2) publicly promulgated; (3) prospective in effect; (4) comprehensible; (5) consistent, (6) capable of being obeyed, (7) stable, and (8) administered and adjudicated in accordance with its text. Fuller termed these eight requirements the “inner morality of law,” because he found them to be *internal* in that they inhere in the very basis of law (i.e., without them, law couldn’t exist) and to be *moral* in that they further the law’s moral value (i.e., they

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promote social order and individual autonomy). Just like Aquinas, Fuller argued that these desiderata are necessary to a legal system because they enable a rational decision-making process between the rulers and ruled.

Fuller was heavily criticized for this claim, most notably by Hart, who, in a review of *The Morality of Law*, argued that these requirements did not further the law’s morality but simply its efficacy. Indeed, Hart claimed, legal systems we almost universally believe to be immoral, such as the system promulgated under the Nazi regime, satisfy these eight requirements. So while these requirements might form the inner nature of law, in that they might be essential for law to function effectively, they do not necessarily represent the *moral* nature of law. As Raz famously argued about the rule of law, it is like a sharp knife, whose sharpness makes it just as apt for saving life through surgery as taking life through murder.

But whether Hart is right about whether these are truly moral or simply pragmatic features of the law, the important point for our purposes here is that Fuller held them to be *internal* to the law, and one of these requirements – the fifth requirement provided above – held that legal norms must not contradict one another. Fuller thus endorsed a position that would end up being quite close to MacCormick’s view of legal inconsistency. Indeed, just as MacCormick held that courts must issue consistent rulings to perform their function as institutions with a distinctive role in securing the rule of law, Fuller similarly held that courts must issue consistent rulings to make the law further its moral purpose of promoting social stability and individual autonomy. The only difference on this issue between the two thinkers is that Fuller saw this requirement as a distinctly moral one, and MacCormick saw it more plainly as an amoral institutional element of the rule of law.
A significant divergence between MacCormick and Fuller is evident, however, in how they conceived of legal inconsistency. MacCormick viewed legal inconsistencies as tracking logical inconsistencies; indeed, as explained above, MacCormick found consistency to be an absolute requirement in a legal system, because “legal reasoning is a form of thought,” 321 and as such, “it must be logical, i.e., must conform to the laws of logic, on pain of being irrational and self-contradictory.” Fuller, by contrast, approached legal inconsistency from a much more functional perspective. Although Fuller agreed with MacCormick that a legal system must be free from contradictions, Fuller contended that determining whether a legal contradiction exists is not as straightforward as finding a logical contradiction. As Fuller put it, “there can be difficulty knowing when a contradiction exists, or how in abstract terms one should define a contradictions,” 323 and this is because, for Fuller, a logical contradiction is different from a legal contradiction. Fuller viewed logical contradictions in the way that the thinkers covered in the previous chapter, such as Aristotle, Bentham, Kant, and von Wright, did – that is, as referring to when a proposition “violates the law of identity by which A cannot be non-A.” 324 But logic, Fuller contended, “if it has any value at all, has none whatever in dealing with contradictory laws.” 325 In contrast to these thinkers, Fuller held that logic cannot determine when laws contradict each other. For Fuller, the only type of inconsistency that has any relevance to the law is an inconsistency that undermines the law’s moral purpose of promoting social stability and individual autonomy – i.e., any inconsistency that makes it difficult for subjects to ascertain the law’s meaning so that they can act in accordance with its imperative and thereby avoid penalty.

321 MacCormick, supra __, at 41.
322 Id.
323 Id. at 65.
324 Id.
325 Id.
Thus, Fuller’s theory of the inner morality of law, rather than logic, is the guide for determining when there is a *legal* inconsistency.

To illustrate his point of how logic has little relevance to finding inconsistencies, Fuller hypothesized the existence of a legal system consisting of a law that required automobile owners to install new license plates on January first, and another law that criminalized the performance of any labor on that date. Fuller acknowledged that in this law “there seems to be a violation of law of identity,”[^326] since, as many of the theorists discussed in the previous chapter held, “an act cannot be both forbidden and commanded at the same time.”[^327] But, Fuller countered, there is not an actual logical contradiction here because there is not “any violation of logic in making a man do something and then punishing him for it.”[^328]

Although it is not clear whether Fuller was even familiar with deontic logic, his argument here suggests an agreement with Hart’s rejection of Kelsen’s claim that a logic of norms must rule out the possibility of treating conflicts of obligations as logically consistent. Indeed, Fuller argued, when there is a conflict of mandatory legal norms, there is only the appearance of a contradiction in form, not the actual existence of a contradiction in practice. Here, Fuller was emphasizing the possibility in practice of a judge complying with both norms by punishing a subject for installing a new license plate on January first. In this instance, the subject would have complied with the requirement to install a license plate on that date and the judge would have complied with the law prohibiting the subject from working on that day. Hence, Fuller concluded, even though there is a contradiction in logical form, there is not necessarily one in function.

[^326]: Id. at 66.
[^327]: Id.
[^328]: Id.
To illustrate this, let’s turn back to the Supreme Court’s interpretation of the Equal Protection Clause in *Gayle* to prohibit state-sanctioned racial segregation of motor buses. If after that decision a governmental body were to adopt a law requiring segregation of all motor buses, a bus passenger’s recourse would be to get a court to invalidate the law on the basis that the government had an obligation not to pass such laws. But if after *Gayle* there were a backlash to integration, giving rise to a Supreme Court ruling that the Constitution imposes an absolute obligation on the government to require racial segregation in all forms of public transportation, then there would be conflicting absolute obligations, creating what Kelsen called “a total conflict” within the legal system.

Fuller would argue that there would not be a logical inconsistency here because it would be factually possible for a state to ignore the pro-segregation ruling and instead follow the *Gayle* ruling by refusing to punish bus companies that did not segregate passengers. Such a course of action, however, would likely lead to a subsequent lawsuit and another injunction, this one based on the more-recent ruling, requiring the state to segregate passengers. In response to this, Fuller might contest that just as in his hypothetical involving the man forced to pay a penalty for complying with the legal requirement to install a new license plate on January first, our segregation hypothetical would not involve a logical inconsistency, because the state would have complied with the *Gayle* ruling (by initially not punishing integrated buses) as well as the later, pro-segregation ruling (by acting pursuant to the Supreme Court’s injunction to punish the integrated buses). But this argument is also to no avail, because by complying with the later ruling, the state would then violate the anti-segregation ruling. The state would thus be caught in an endless sequence of self-cancellation, in which complying with the pro-segregation requirement would necessarily entail the violation of the anti-segregation requirement, and then
complying with the anti-segregation requirement would necessarily entail violating the pro-
segregation requirement, and so on. This is the very essence of a logical contradiction in legal
norms: It is impossible to comply with one without violating the other. Fuller did not seem to
grasp how although this sort of logical contradiction does not generally apply to private law,
because it is often based on penalties, it often does apply to public law, because it is often based
on absolute obligations.

Although Fuller did not see how such a conflict of mandatory legal norms could create a
logical inconsistency, he did see how it would be a violation of common sense, because “[a] man
who is habitually punished for doing what he was ordered to do can hardly be expected to
respond appropriately to orders given him in the future.”329 Fuller seemed to see conflicts of
obligations in much the way that von Wright saw Sisyphus orders – i.e., as laws that do not
contradict each other as a matter of logic, but that undermine the purpose of the system. For
Fuller, then, if the law were to punish a man for performing an act the law also prohibited him to
perform, the legal system would fail in its attempt “to build up a system of rules for the
governance of his conduct.”330 Nevertheless, Fuller contended, in failing in this moral endeavor,
the legal system would not “have trespassed against logic.”331 In other words, the vice in such a
law for Fuller is not that it formally violates the law of contradiction, but that its effect is to
undermine the moral purpose of the legal system as a whole. Fuller’s analysis of consistency is
thus thoroughly functional rather than formal, as it rests on the consequence of the conflict rather
than on its logical form. Because of Fuller’s emphasis on results over form, Fuller explicitly
rejected Kelsen’s notion that a judge’s central task is to avoid logical inconsistencies; as Fuller
put it, “Kelsen’s highly formal analysis of the problem of contradictory norms does not . . . offer

329 Id.
330 Id.
331 Id.
any aid at all to the legislator seeking to avoid contradictions or the judge seeking to resolve them.”

Because Fuller conceived of legal inconsistency from a functional rather than a logical perspective, Fuller agreed with the suggestion, posited by other legal thinkers, “that instead of speaking of ‘contradictions’ in legal and moral argument we ought to speak of ‘incompatibilities.’” According to Fuller, this term expresses that the problem is not one relating to formal logic’s law of non-contradiction, but rather to our everyday experience of seeking to harmonize “things that do not go together or do not go together well.” Fuller also found the common law term “repugnant” to be “especially apt” in referring to legal inconsistencies, “because what we call contradictory laws are laws that fight each other, though without necessarily killing one another off as contradictory statements are assumed to do in logic.” He also liked the use of the “the word ‘inconvenient’ in its original sense,” because “[t]he inconvenient law was one that did not fit or jibe with other laws.” But whether we use the word “contradictory,” “incompatible,” “repugnant,” or “inconvenient” to refer to such instances when the law is inconsistent, Fuller emphasized that determining when there is an inconsistency will require the use of judicial discretion. In particular, it will require that a judge “take into account a host of considerations extrinsic to the language of the rules themselves.” Indeed, such an analysis is “not merely or even chiefly technological, for it includes the whole institutional setting of the problem – legal, moral, political, economic, and sociological.”

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332 Id. n. 24.
333 Id. at 69.
334 Id.
335 Id.
336 Id.
337 Id.
338 Id.
339 Id. at 70.
340 Id.
Fuller’s approach to identifying legal consistencies is thus quite similar to Hart’s, discussed above, in that both thinkers, while coming from very different theories of the nature of law, argued that conflicting laws create penumbral cases. The difference, however, is that whereas Hart believes that a penumbral case creates a lawless zone, in which a judge has absolute discretion, Fuller believes that the moral principles underlying the legal process still must animate this process. Fuller suggested that one way that this could be done is by treating a conflict as opening up the space for private rather than judicial discretion. Indeed, Fuller speculated that one way of dealing with such a conflict is to give citizens the discretion to commit the act (in compliance with the requirement) or not to commit the act (in compliance with the prohibition). According to Fuller, this “solution would recognize that the basic problem presented by the statute is that it gives a confused direction to the citizen so that he ought to be allowed to resolve that confusion in either way without injuring himself.”\footnote{Id. at 67.} Fuller chose this pragmatic solution, instead of having judges use technical legal reasoning to sort through the problem, because, again, the problem for Fuller is not the formal existence of a contradiction in a legal system, but the effect that the contradiction has on the people expected to act within that system. As we will see below, Ronald Dworkin held a similarly functional conception of consistency in advancing his theory of the integrity of law.

**Ronald Dworkin: Consistency as Part of the “Integrity of Law”**

Like Fuller, Dworkin attacked Hart’s argument that there is only a minimal relationship between law and morality, but unlike Fuller, Dworkin did not identify particular procedural requirements for the law to serve its moral purpose. Rather, Dworkin more holistically found that substantive moral principles undergird the entire legal system. Dworkin developed this view most fully in his 1986 book, *Law’s Empire*, where Dworkin clarified that he sees judicial
decision-making as a form of “constructive interpretation.” By this, he meant that “legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice as an unfolding narrative.”342 These interpretive judgments are constructive, because, when considering how to rule in a given case, a judge does not merely discover what the law requires. Rather, the judge, in looking both backwards and forwards, constructs a theory of what the law requires in that case.

There are two discrete parts to this constructive interpretation. The backwards-looking part requires a judge to consider whether a proposed interpretation of the law fits with previous governmental actions, and the forward-looking part requires a judge to consider whether a proposed interpretation of the law justifies the law as whole to make it the best it can be. For Dworkin, there is a right interpretation to every case, what has been dubbed his “right answer thesis,” and that right interpretation is the one that both fits and justifies the legal system in this way.

In assessing how judges do and should go about this constructive interpretation, Dworkin considered three approaches, each having special implications for the role of consistency within a legal system. The first approach is “conventionalism,” which is the view “that collective force should be trained against individuals only when some past political decision has licensed this explicitly in such a way that competent lawyers and judges will all agree about what that decision was, no matter how much they disagree about morality and politics.”343 According to Dworkin, a conventionalist judge values consistency only in a narrow sense; this judge is concerned with ensuring that the precise holding of a decision “fit[s] well enough with rules established by others or likely to be established in the future that the total set of rules will work

343 Id. at 114.
The second approach is “pragmatism,” which, in stark contrast to conventionalism, “denies that past political decisions in themselves provide any justification for either using or withholding the state’s coercive power.” As a result, a pragmatist “find the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one.”

Dworkin’s notion of conventionalism closely resembles what we called in chapter two “legal formalism,” with its narrow and logical approach to consistency. And his understanding of legal pragmatism is similar to what we called in chapter two “legal realism,” with its rejection of the claim that consistency has any inherent value to a legal system.

Against both of these approaches, Dworkin proposed “law as integrity,” a sort of middle-ground approach that “denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism.” Dworkin thus rejected legal formalism as being too retrospective in its attempts to decide cases in perfect accordance with previous governmental actions, as well as legal realism for its bold proclamations that judges decide cases simply on the basis of how to further their preferred policies. So although Dworkin’s view of law as integrity agrees with legal formalism in “accept[ing] law and legal rights wholeheartedly,” it takes a less procedural approach to rights by “suppos[ing] that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way,” as formalism...
supposes, but also “by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.”\textsuperscript{350} As a result, law as integrity “argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the \textit{principles of personal and political morality} the explicit decisions presuppose by way of justification.”\textsuperscript{351} Just as an individual furthers her moral character by displaying integrity of principle throughout her lifetime, so too does the law. The judiciary enhances the moral character of a political community by displaying integrity of principle in its adjudication of cases.

Although Dworkin agrees with formalism that consistency is an essential feature of a legal system, he interprets this consistency in a much less logical manner than did the formalists, thus furthering the realist project of breaking the link between logic and law. Indeed, Dworkin’s law of integrity views legal inconsistency in terms of how the conflict \textit{functions} in promoting the community’s integrity. Because Dworkin is concerned with integrity and not logic, he contends that a legal system need not require a complete consistency with past legal norms, what Dworkin calls “vertical consistency,” but rather a complete consistency with current legal norms, what Dworkin calls “horizontal consistency.” And this consistency does not just apply to legal rules, but all legal norms, such as the principles underlying those rules. As Dworkin puts it, “law as integrity . . . commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces.”\textsuperscript{352} Thomas Grey thus explains Dworkin’s philosophy in these terms: “The judiciary and its surrounding corps of lawyers and commentators serve not as philosopher-kings, but as interpreters of the community’s traditions

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\textsuperscript{350} Id. at 96.
\textsuperscript{351} Id. (emphasis added).
\textsuperscript{352} Id. at 227.
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and ideals, and thus as critics of its practices that are not congruent with a coherent scheme of value for governing its common life.”

In other words, judges “are experts in integrity, in making society more consistently what it already is.” Consistency lies at the foundation of Dworkin’s theory of law, but it is a particular form of consistency, less rule- and logic-based than the formalist accounts.

Dworkin’s notion of consistency is perhaps most evident in his now-famous discussion of *Riggs v. Palmer*, a 19th century New York probate case involving a young man who, worried that his grandfather would change his will so that the young man would no longer inherit the bulk of the estate, killed his grandfather so that he could gain his inheritance under the current will. The question before the New York Court of Appeals was whether the murderer of a testator could inherit under that will. The court ruled that although the text of the New York inheritance statutes permitted the grandson to inherit under the will, since the statutes did not say anything about wrongfully benefitting from murdering the testator, the principles underlying the entire legal system prohibited the grandson from obtaining his inheritance. Indeed, the court explained, these principles provide: “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”

According to the court, the statutory rule had to give way to these legal principles. The court’s reasoning illustrates Dworkin’s notion that adjudication involves harmonizing legal rules and principles in an effort to create a unified, consistent legal system.

We can also see this in our own example, that of racial segregation. At the time of Brown, vertical consistency would seem to require the Court to uphold racial segregation of

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355 115 N.Y. 506 (1889).
356 Id. at 511.f
public education as permissible under the Equal Protection Clause, given the Plessy precedent. But horizontal consistency was not as clear on this point. Upholding the segregation at issue in Brown would fit with some legal norms, such as the Plessy precedent and its progeny, but not with some broader legal principles, such as the color-blindness principle that the Court had invoked in decisions like Buchanan v. Warley\textsuperscript{357} and Shelley v. Kraemer.\textsuperscript{358}

In chapter two, we discussed how some realists like Llewellyn found instances of conflicting precedents as evidence of how \textit{stare decisis} fails to secure consistency within a legal system, and the CLS scholars later expanded on this critique by arguing that such contradictions lie at the very core of a liberal legal system, thus revealing the rule of law as a sham and liberalism as an incoherent ideology. In \textit{Law’s Empire}, Dworkin gave several nods to these critics, at one point proclaiming that their “general skeptical ambitions, understood in the mode of internal skepticism, are important.\textsuperscript{359} This skepticism is important for Dworkin because it highlights the flaws in thinking of the law too formalistically. Indeed, Dworkin agreed with the critics that conflicts do often arise within a legal system, and this happens, Dworkin wrote, because “there will be inevitable controversy, even among contemporaries, over the exact dimensions of the practice they all interpret, and still more controversy about the best justification of that practice.”\textsuperscript{360}

But, contra the critics, Dworkin saw these conflicts not as evidence of \textit{contradicting} legal norms, but rather as \textit{competing} legal principles. Judges may, and indeed often do, disagree about the right resolution of a case, thus creating competing principles in the law, but ultimately, for

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\item[357] 245 U.S. 60 (1917).
\item[358] 334 U.S. 1 (1948).
\item[359] Dworkin, \textit{Law’s Empire}, supra __, at 275
\item[360] Id. at 67.
\end{enumerate}
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Dworkin every case presents only one right answer, and this right answer is whatever resolution of the case best fits with and justifies the legal system as a whole.

Dworkin applied his “right answer” thesis specifically to the Brown case, contending that the Court was right in finding that racially segregated education violates the Equal Protection Clause. This is because, though Plessy and its progeny militated against this result, there were other cases like Buchanan and Shelley upholding the color-blindness principle, and moreover, this color-blindness principle justified our legal system as a whole much better than did the “separate but equal” doctrine endorsed in Plessy.\textsuperscript{361} The Brown result thus best fit with and justified the entire legal system, and accordingly, Dworkin’s ideal judge, Hercules, would find that “if Plessy is really precedent against integration, it must be overruled now.”\textsuperscript{362} That is, Dworkin’s ideal judge would not engage in the type of case-distinguishing engaged in by the Brown Court, whereby Plessy was upheld as good law on the ground that it applied to trains and not schools. Hercules would not do this because to permit the non-segregation principle to prevail in education but not in other areas of the law would create what Dworkin called a “checkerboard” legal system, a situation in which the same principle inconsistently applies in one context but not in others. For Dworkin, such inconsistent laws “are the most dramatic violations of the ideal integrity,”\textsuperscript{363} because they make the law incoherent by arbitrarily applying a principle in one area but not in others. This is quite similar to Kant’s claim, covered in the previous chapter, holding that in a pure legal system there are not exceptions (i.e., permission norms) attached to generally applicable prohibitions and requirements (i.e., obligation norms).

\textsuperscript{361} Dworkin’s argument is slightly more nuanced than this, resting on whether a judge considering this case would opt for a “suspect classifications,” “banned categories,” or “banned sources” approach to dealing with governmental discrimination on the basis of race. For his discussion of how Hercules would decide Brown, see id. at 381-392.
\textsuperscript{362} Id. at 389.
\textsuperscript{363} Id. at 202.
But just as Kant acknowledged that in practice legal systems do have such exceptions, Dworkin also conceded that checkerboard laws are common in our legal system because they often arise from political compromise. For example, Dworkin questioned, if the people of Alabama disagreed about the morality and legality of segregation, as they surely did at the time Gayle was decided and still do, the legislature might be inclined to “forbid racial discrimination on buses but permit it in restaurants.” But as tempting as this might be for the sake of political compromise, the legislature would not be acting with integrity if it gave into this temptation, because such inconsistent application of integration principles would create a checkerboard of norms, thus undermining the integrity of the law. So if the legislature passed such checkerboard laws, the judiciary’s duty would be to make the stronger principle – for Dworkin, the pro-integration principle – prevail throughout the legal system, rendering all pro-segregation principles in that system invalid.

But what if the conflict facing the Brown Court were more acute so that there were conflicting obligations, the type of inconsistency that some of the thinkers in the previous chapter held to be at the heart of the meaning of legal inconsistency. For example, say, if Plessy, instead of permitting segregation, had held that the state must segregate public accommodations on the basis of race. As Dworkin acknowledges, while this was not a popular position at the time of Brown, it was still a plausible competing principle of law at this time, given that the “[p]eople who supported racial segregation did not try to justify it by appealing just to the fact of their preferences, as people might support a decision for a sports stadium rather than an opera house.” Rather, proponents of segregation argued that it was a matter of individual right, and therefore a matter of obligation on the part of the state, because the

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364 As discussed above, Gayle involved Alabama’s segregation of public buses.
365 Id. at 178.
366 Id. at 387.
proponents “thought segregation was God’s will, or that everyone had a right to live with his own people, or something of that sort.” So if, at the time Brown was decided, this competing principle had already been enshrined in the law – i.e., if Plessy had announced that segregation is not only constitutionally permissible but also mandatory – it would create a different type of conflict than the one that the Court confronted in Brown. If we were to hold that the heart of legal consistency is that the law can never require and prohibit the same class of action, then that would seem to require upholding the racial segregation at issue in Brown, because invalidating such racial segregation would create a conflict of obligations in which the Constitution would be logically inconsistent in both requiring and forbidding state-sanctioned racial segregation. But this distinction would not be relevant to Hercules’s reconciliation of legal inconsistencies, because in Dworkin’s system, all precedents must be overruled to the extent that they conflict with extant legal principles. It is of no moment for Dworkin whether the conflict can be distinguished on factual grounds, or whether the conflict violates deontic logic. Logic is not the guide for Dworkin. It is principle.

In fact, Dworkin’s writings evince a deep awareness of the constant possibility of conflicting obligations arising from competing legal principles, and he specifically argues that such conflicts do not present especially difficult problems for judges. For example, in his 1993 work, Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, Dworkin acknowledges that many pro-life proponents have favored interpreting the Due Process Clause to guarantee the life of fetuses in addition to born persons, so that “states not only may forbid abortion but in some circumstances must do so.”

This is precisely what liberals worried about in Webster v. Reproductive Health

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367 Id.
where the Court permitted restrictions on abortion that seemed to have been prohibited under the standard announced in *Roe v. Wade.* This of course was a blow to the pro-choice movement, but the concern at the time was that the blow could have been much greater, as there was a push by the pro-life movement for the Court to hold that not only are such restrictions permitted, but that they are also required because the fetus has a constitutional right to life. Indeed, the Missouri statute at issue in *Webster* announced in its preamble that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and wellbeing.” But Chief Justice Rehnquist’s plurality opinion stopped short of constitutionalizing these statements, asserting instead that they simply represented Missouri’s view of when life begins, having no substantive value concerning the constitutional obligation of states to regulate abortions.

As we discussed in the previous chapter, when we discussed how conflicts of obligations relate to the Court’s opinion in *Locke v. Davey,* Rehnquist could have opted for the most conservative position before the Court, but he stopped short of doing so. As in Davey, there is little in the way of judicial politics to explain his decision-making. Had Rehnquist sided with Joshua Davey in Locke, he would not have changed the disposition of the case, as there would still be six votes against Davey, and his opinion would not seem to differ substantially from what the majority of the Court would have held, a point we will discuss in greater depth in subsequent chapters. Likewise, in *Webster,* had he taken the more extreme position and held that Missouri’s restrictions were constitutional because the state had an obligation to regulate abortion, as the state had asserted, it would not have changed the outcome, for he had already lost Justice O’Connor vote, because she had already refused to sign on to any of Rehnquist’s statements.

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supporting modifying *Roe* to uphold the state’s interest in pre-viable fetal life. It is true that had Rehnquist taken this more extreme position, he might have lost Kennedy’s vote as well. But it likely would have gained Justice Scalia’s vote. Thus, taking the more extreme position would most likely have had no effect on the outcome, keeping Rehnquist’s opinion a plurality opinion for three Justices, with a 5-4 vote upholding the Missouri statute. Therefore, as is the case in Locke, judicial strategy and judicial attitudes provide poor explanations for Rehnquist’s decision-making in Webster. The better explanation seems to be that Rehnquist rejected Missouri’s extreme conservative position not for strategic or attitudinal reasons but for *rule-of-law reasons*. He saw a significant difference, as a matter of the rule of law, between (1) moving abortion law from the Roe prohibition to the Webster permission of such restrictions, and (2) moving abortion law from the Roe prohibition on abortion restrictions to all the way on the other side of the constitutional spectrum, creating a constitutional *requirement* of the state to restrict abortion.

We will turn back to this relationship between judicial politics and theories of logical consistency in the following chapter, but in concluding this chapter, I want to highlight how Dworkin would not find a difference between the conflict of obligations that *could* have been at issue in Webster, and the conflict between Roe and a permission norm that was ultimately part of the case. These two scenarios are not legally distinct for Dworkin because logic does not control Hercules’s consistency inquiry. Principle does. Because Dworkin believed that the claim that “a fetus is a constitutional person is easy to dismiss because it is so dramatically contradicted by American history and practice,”371 he concluded that, if such a clash of obligations actually arose in a case, where a pro-choice group alleged that there is an absolute right to be free from abortion restrictions and the state countered that it had a constitutional obligation to regulate abortion due

371 Id. at 111.
to a conflicting right to fetal life, the pro-choice principle would have to prevail. And even had there been such a pro-life interpretation existing before Roe, that ruling would have to be overruled in Roe. This would not create any adjudicative inconsistency for Dworkin because only the pro-choice principle truly fits and justifies our system. As we saw in the segregation and abortion examples, Dworkin would accept introducing a logical inconsistency into a legal system if doing so would make the system cohere in such a way that would promote the law’s integrity. Thus, put in MacCormick’s framework, Dworkin would find that consequentialist and consistency concerns may be trumped, but coherence cannot, for it is the one thing that is essential to making the law a unified and principled system – i.e., to making a system of legal norms constitute the law.

**Chapter Summary**

This chapter stands in sharp contrast with the previous one, where we saw that many philosophers have held that consistency is an essential element of the law and have looked to logic as governing this analysis, with the law of non-contradiction providing the basis for when an inconsistency between two legal norms must be eradicated from a system. With the advent of analytical legal philosophy, thinking on this subject changed dramatically. Some positivists abandoned the idea that a legal system must be logically consistent. We saw how although the early Kelsen held logical consistency as essential to a legal system, as part of his Kantian notion that legal cognition must presuppose the non-existence of contradictions, the later Kelsen repudiated this idea on the ground that a positive legal system need not require any presuppositions about consistency. Hart took this argument further, holding that the concept of law contains no elements of consistency, so while consistency may be a requirement of the rule of law, it has nothing to do with the nature of law. MacCormick complicated this idea by
holding that courts, as institutions tasked with guaranteeing the rule of law, must operate according to certain notions of rationality, the top of which is the requirement of logical consistency. For MacCormick, although law can exist as a system of inconsistent norms, courts, if they are to play their institutional role in guaranteeing the rule of law, must reconcile these discordant norms into a logically harmonious order.

We distinguished these positivists from natural law thinkers, who have argued that the nature of law and the rule of law overlap substantially, with many of the same requirements for law applying for the rule of law to exist within a given system. We see this most vividly in Fuller’s desiderata, holding that eight requirements, including consistency, are necessary for law to exist. Many commentators have noted that these are simply the elements for the rule of law, not for the concept of law itself, but it seems that for Fuller, as well as for many others within the natural law tradition, these are highly overlapping, if not identical, inquiries.

But while consistency is essential to a natural legal system, logical consistency is not. Natural law theorists hold consistency to be of greater importance to the law than do positivists, but it is not the logical consistency that the philosophers in the previous chapter held, and that some positivists, such as the early Kelsen and MacCormick, have found in the concept inherent in the law. For theorists like Fuller and Dworkin, the law requires a more functional consistency, one that makes the legal system satisfy the moral purpose of the legal system. Whereas Fuller saw this moral purpose in Aquinas’s terms, as relating to the rational autonomy of the governed, Dworkin viewed this moral purpose as turning on the principles underlying a particular system, as making the system work to fulfill its moral promise. In natural law, then, one’s theory of the moral purpose of law provides the content for the type of consistency we are expecting from a particular legal system. That is, in natural law, consistency is often conceptualized in highly
system-specific ways. For example, if we expect our system to provide for substantive equality, then we will interpret conflicting legal principles in light of this purpose, and this consistency inquiry might differ substantially from a system whose purpose is to create procedural fairness. This makes consistency norms turn on the type of natural law we are dealing with – Fuller’s consistency will differ from Dworkin’s because of how their natural law theories differ. This will pose a significant problem for trying to come up with some consensus on how we can think about legal consistency within a particular system, given the seemingly intractable debates between positivists and natural law theorists, and indeed within each tradition itself.

Now that we have covered the theoretical problems underlying thinking about legal consistency, we are ready to move on to the practical implications this has for the study of law, particularly for the doctrine of *stare decisis*. The next chapter will examine empirical studies of *stare decisis* and explore how these disagreements over what constitutes consistency have plagued these pursuits.
CHAPTER 5
CONSISTENCY AND THREE MODELS OF JUDICIAL DECISION-MAKING

Frank Easterbook observed in 1988 that, after so many years of developing the doctrine of *stare decisis* in American law, we still don’t have a theory of precedent. That may have been true 25 years ago, but now, it seems that *too many* theories of precedent exist. Indeed, there has recently been an abundance of *stare decisis* theories, particularly within the legal academy. These theories have often come in spurts. For example, there was a spate of scholarship on precedent following the Casey decision’s controversial application of *stare decisis* to affirm Roe’s “essential holding,” a term that confused, and still confuses, many legal scholars, leading to many law review articles on the subject. Another surge arose after Chief Justice Roberts’s confirmation hearings, which devoted a significant amount of attention to the role of precedent, in particular the newly coined term “super precedent,” in Supreme Court decision-making. Senator Arlen Specter asked Roberts whether Roe was a “super precedent,” or perhaps even a “super-duper precedent,” which aroused laughter at first, but then serious inquiry later within the legal academy about whether the *type* of precedent should be considered in understanding and applying *stare decisis* doctrine, a topic we will be discussing below in examining Michael Gerhardt’s important work.

Much of this legal scholarship on *stare decisis* has been normative, defending or criticizing the doctrine based on various theories of the nature of law and constitutional interpretation, but some of the legal work has been descriptive, seeking to capture how *stare decisis* works in practice. Some of these descriptive studies have been qualitative, examining how judges and lawyers tend to cite precedents in legal reasoning, but more recently, with the advance of the law-and-economics movement, some of these studies have been quantitative,
measuring the frequency of judicial citations and case overrulings. These studies have been quite mixed in finding whether *stare decisis* works to ensure adjudicative consistency, giving new meaning to Easterbrook’s dictum that no theory of precedent exists. Maybe too many theories exist, but no single one tells us very much about how *stare decisis* works.

The political science literature is similarly diverse. There has been a similar surge of political science research on *stare decisis*, most of which has been quantitative, but these quantitative studies have measured *stare decisis* in different ways, yielding discrepant results about the doctrine’s efficacy in guaranteeing adjudicative consistency. The studies within the attitudinal school have tended to find that precedents do not constrain judicial decision-making at all, whereas the strategic model holds that precedents often times do exert some constraint, but it is not the type of stricture that lawyers imagine *stare decisis* to impose on judges. Rather, *stare decisis* works as a negotiating tactic, emerging from how argumentation works within the judiciary to facilitate each judge’s strategic pursuit of her personal policy goals.

We thus have quite distinct models of how *stare decisis* works, employing different ways of thinking about precedents and their role in creating a consistent legal system. But all of these approaches have something in common: they raise the same questions we have been covering throughout this dissertation – how different concepts of precedential scope and consistency weigh on one’s understanding of *stare decisis*. We will see in this chapter how these questions have plagued many otherwise sophisticated studies of *stare decisis*. These studies will help us understand how important a theory of precedential scope and consistency is to understanding *stare decisis*, and our examination of these studies will prove fruitful in finally developing our own account in the final two chapters.
Below, we will begin with the legal model, paying particular attention to Michael Gerhardt’s theory of how some types of precedents create path dependency within a legal system. We will then move on to the political science studies, dividing our time between the attitudinalist and strategic models. Our discussion of the attitudinalist model will focus on Spaeth and Segal’s immensely influential *Majority Rule or Minority Will*. We will focus here on the study’s design and findings, covering some of the flaws that other scholars have found in their analysis, but also proposing some of our own criticisms. Finally, we will move on to the strategic model, examining in particular Knight and Epstein’s work on how precedents are used strategically through the course of Supreme Court litigation. All of these accounts will help us develop a broader understanding of *stare decisis* as we attempt to connect the dots and build our own account of legal consistency and the rule of law in Chapters 6 and 7.

**The Legal Model and Consistency**

Political scientists often use the term “legal model” to describe the conventional view of law – i.e., the view held by many legal practitioners and scholars that the law places some constraint on how lawyers make arguments and judges decide cases. There is, to be sure, significant divergence within the legal model, as discussed in chapter two, with more formalist thinkers seeing legal norms as placing a robust constraint on the legal process and more realist types viewing legal decision-making as involving a significant interplay between discretion and constraint. But even realists tend to accept that legal decision-making is not completely untethered to the semantic content contained in the norms themselves. Thus, although legal realism birthed the study of law and courts in political science departments, legal realists within the legal academy often differ from political scientists, in that most legal realists see some gap between law and politics, whereas many political scientists see no space between the two. So
even though realists overwhelmingly dominate the legal academy, there are still substantial differences between how legal academics and political scientists tend to view legal decision-making, and this difference is evident in their views of *stare decisis* and adjudicative consistency. As we will see in the following section below, political scientists, particularly those adhering to the attitudinalist model, believe that *stare decisis* rarely constrains judges, because the language in judicial opinions does not accurately capture judicial motivations. Legal academics, by contrast, contend that this language provides at least some insight into judicial reasoning.

This division between legal academics and political scientists has led to “a chasm,” in Michael Gerhardt’s words, between how the two disciplines study *stare decisis*. A chief part of this chasm is methodological. Legal academics tend not to be interested in measuring the efficacy of *stare decisis* quantitatively through an exhausting coding of case outcomes, whereas political scientists tend not to be interested in doing so qualitatively through close readings of judicial opinions. As is often said in jest about this division, legal scholars can’t do math, and judicial politics scholars can’t read. It is indeed true that many in the legal world are suspicious of efforts to use statistics to root out the ultimate motivations of judicial behavior. This hostility is no doubt partly due to mathematic anxiety and disciplinary jealousy within the legal academy. Indeed, many legal scholars and practitioners do not welcome political scientists using statistical models to peer into the law and reveal its most embarrassing feature, its lawlessness, a process that is tantamount to having a psychologist use psycho-analytic methods to reveal a family’s deepest and most humiliating secret.

But this hostility also stems from a more legitimate concern – that numbers are simply incapable of capturing the complexity of legal reasoning, particularly the nuances of *stare
decisis. As D.C. Circuit Chief Judge Edwards writes, while “careful statistical analysis, cautiously interpreted, may conceivably shed some light on judicial decision making . . . serious scholars seeking to analyze the work of the courts cannot simply ignore the internal experiences of judges as irrelevant or disingenuously expressed.” This is why, Michael Gerhardt writes, “many if not most legal scholars ignore the dominant social science models [of stare decisis.]” Legal scholars believe that, due to the complexity of legal reasoning, “judging cannot be quantified.” and the legal academy therefore dismisses “empirical analysis [of stare decisis as] untrustworthy.” As a result, the leading legal studies on stare decisis have been largely theoretical, focusing on the conceivable ways that courts and lawyers can rather than do interpret precedents, and using selected cases to illustrate how this process sometimes works in practice.372

That is not to say that no legal studies have used quantitative methods to measure the efficacy of stare decisis empirically. There have been some such studies, but they have been largely ineffective in documenting anything other than the fact that courts frequently cite precedents. Indeed, several legal scholars have inferred the force of stare decisis from the average number of precedent citations in Supreme Court decisions and the relative infrequency of formal overrulings of Supreme Court precedents.373 But all this shows is that it is a common practice in Supreme Court opinions to justify legal conclusions by reference to prior decisions and that opinions rarely acknowledge their direct inconsistency with prior decisions so as to require overruling them.

More sophisticated empirical studies within the legal academy have focused not just on the number of case citations or the frequency of overrulings, but on the factors contributing to this process. For example, in 1954 John Merryman conducted one of the earliest quantitative studies on *stare decisis*, examining case citations in California Supreme Court opinions decided in 1950. His study found that there was a strong correlation between the recency of a precedent and the frequency of its citations in later cases, with about one-half of the cases cited in 1950 having been decided between 1940 and 1950. Merryman expanded this study in 1977 and found the same effect. Richard Posner and William Landes added to Merryman’s findings by studying the citation of precedents in the U.S. Supreme Court and U.S. Courts of Appeals. Posner and Landes similarly found that precedents are decreasingly cited with the passage of time. Posner and Landes explained this in economic terms – a precedent “depreciates” over time as social conditions change and thereby deplete the precedent of its informational value. Even in pointing to the social factors influencing precedential depreciation, however, the Posner and Landes study also found that various legal factors contribute to this depreciation rate. One, the forum matters; Supreme Court precedents depreciate more slowly than do Court of Appeals precedents. Two, legal subject area matters; common law cases depreciate more slowly than do civil rights and economic regulation cases. Three, the breadth of a precedent matters; broader precedents depreciate more slowly than do narrow precedents, because “[a] general precedent is less likely to be rendered obsolete by a change in the social or legal environment in which the precedent is applied.” This is a point that we will come back to in discussing how the language in a precedent relates to how it is later treated under *stare decisis*.

These studies confirm that precedent is a significant part of legal reasoning, and that several factors, both social and legal, matter in how precedents are used. But they do not show
that *stare decisis* actually *constrains* judicial decision-making. They show only how precedents are *used* in judicial opinion-writing. As a result, these studies tell us very little about whether *stare decisis* succeeds in ensuring adjudicative consistency.

To get at this issue, several legal scholars have tried to measure *stare decisis* efficacy by looking not simply at the frequency of a precedent’s citations but at how a precedent relates to the direction of case outcomes. After the Chevron decision, many legal scholars examined how Chevron worked in vertical *stare decisis*, looking to see whether, in accord with this landmark decision, lower courts began to defer to administrative agencies with greater frequency. These studies yielded mixed results, with some suggesting that Chevron led to greater deference,374 as would be expected, but others finding that Chevron had little to no impact on judicial deference.375 Thomas Merrill conducted a horizontal *stare decisis* study on this issue, finding that the Court had not succeeded in binding itself: Whereas pre-*Chevron* the Supreme Court deferred to agencies 75 percent of the time, post-Chevron the Court actually became less deferential, acceding to agencies only 70 percent of time, and even more strikingly, for the cases in which the Court conducted the *Chevron* two-step procedure, it deferred only 59 percent of the time.376 Again, however, these Chevron studies do not demonstrate how *stare decisis* did or did not constrain judicial decision-making. They show only that Chevron did not lead to a monumental change in how administrative cases were decided. To determine whether *stare decisis* was a factor, we would have to know how individual judges would have approached these cases differently were it not for Chevron. As we will see in the section below, this is what the leading political science studies on *stare decisis* have sought to measure, but we will find that they, too, just like the legal studies above, have largely failed to measure the efficacy of *stare decisis*.

375 Cross and Tiller (1998).
These Chevron studies underscore a seemingly intractable problem with quantitative studies on *stare decisis*. For such studies to work, we have to say that x precedent at time t led a judge to decide y case at time t+1 in a way that accords with x precedent and that is not in accord with how that judge would have decided y case without the existence of x precedent. This requires knowing two important things about that judge and about those two cases. One, we have to know how that judge would have decided x precedent. And two, we have to know what it means to decide y case in accord with x precedent – i.e., we have to have some criterion of consistency. Both of these problems have plagued quantitative studies on *stare decisis*, and although there have been some ingenious efforts to get around both of these problems, as we will discuss in the following section, these efforts are appearing increasingly Sisyphean; with each failure, the problem seems more and more insurmountable. My hope is that our analysis of the theories of consistency covered in chapters three and four will ultimately help us out of this rabbit hole.

Given these problems in quantitative studies on *stare decisis*, many legal scholars have accepted, some tacitly and others more explicitly, that the best way to study *stare decisis* is qualitatively, engaging in a deep and individualized assessment of how precedents are used in particular cases, showing in these isolated circumstances how particular judges have voted in a way that is different than we would have expected them to vote were it not for a particular precedent. By limiting the analysis to certain judges and certain case examples, we can have greater confidence that we can agree on how the judge would have decided precedent x at time t and what it means to decide case y at time t+1 consistently with the precedent x decided at time t.
For this reason, in the qualitative *stare decisis* literature one of the most examined cases is *Dickerson v. United States.*\(^{377}\) In that case, the Court, per Chief Justice Rehnquist in a 7-2 opinion, upheld the *Miranda* rule as constitutionally required on the basis of *stare decisis* and accordingly invalidated a congressional enactment that directly contravened *Miranda.* This ruling came as a huge surprise to the legal world because the conservatives seemed to have had five votes at that point for finally overruling Miranda, given that Rehnquist had long expressed his disagreement with *Miranda* in many previous opinions,\(^{378}\) that O’Connor and Kennedy had often sided with Rehnquist in this battle,\(^{379}\) and that Scalia and Thomas clearly disagreed with Miranda (as expressed in their dissent in Dickerson). Everything was in order for Rehnquist, as the Chief Justice, to author a 5-4 opinion overruling Miranda, once and for all, finally putting the finishing touches on the goal he had long ago developed as President Nixon’s Assistant Attorney General.

So why, then, did the Court rule 7-2, upholding Miranda, and even more puzzlingly, why did Rehnquist write the opinion? Legal scholars and political scientists often explain this puzzling result in different ways. Many legal scholars provide distinctly legal reasons, pointing in particular to the force of *stare decisis,* which, after all, is the animating principle expressed in the opinion itself. Indeed, writing for the Court, Rehnquist expressed doubts about Miranda’s correctness as an original matter, but then went on to declare that, even if Miranda was an

\(^{377}\) 530 U.S. 428 (2000).

\(^{378}\) In fact, Rehnquist had expressed this interest even as Assistant Attorney General. Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda’s Critics—and Then Its Supporters, in THE REHNQUIST LEGACY* 109 (Craig Bradley ed., 2006). And once appointed to the Court, Rehnquist had 57 opportunities before Dickerson to uphold or narrow Miranda, and in each of these opportunities he chose to narrow Miranda. Daniel Katz, *Institutional Rules, Strategic Behavior and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on Dickerson v. United States,* 22 Law & Pol. 303, 333, n. 140 (2006). Similarly, pre-Dickerson, O’Connor had on 25 occasions joined or concurred with Rehnquist in narrowing Miranda, and Kennedy had done so in 10 of his first 14 opportunities. Id. at 332 n. 34.

\(^{379}\) Indeed, pre-Dickerson, O’Connor had on 25 occasions joined or concurred with Rehnquist in narrowing Miranda, and Kennedy had done so in 10 of his first 14 opportunities. Id. at 332 n. 34.
erroneous interpretation of the Fifth Amendment, the Court was impelled, and perhaps even compelled, by *stare decisis* to uphold that precedent. In Rehnquist’s words, “[w]hether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.” As we will see below, many political scientists disregard this language as having no bearing on what actually motivated Rehnquist’s reasoning. But legal scholars, including most realists in the academy, believe that such language provides at least some insight into why Rehnquist voted the way he did.

Dickerson provides a particularly good example for studying *stare decisis* because in this case we know with an exceedingly high level of confidence the two things necessary for measuring *stare decisis*. We know that Chief Justice Rehnquist, as well as Justices O’Connor and Kennedy, strongly objected to Miranda, as displayed in the various cases interpreting Miranda, leading up to Dickerson. We also know that the status of the Miranda precedent was at issue in Dickerson – there was consensus on the Court that it could not rule for the government in Dickerson without confronting the status of the Miranda precedent, and this confrontation with Miranda was specifically framed by Congress in its passage of a statute declaring that Miranda did not apply to the admissibility of evidence in federal criminal prosecutions. Rarely do we have this kind of information for measuring *stare decisis*, but in Dickerson we know both that five Justices on the Court doubted or flat-out denied Miranda’s correctness and that the Dickerson facts involved a direct challenge to the correctness of Miranda. Nevertheless, even with this information, political scientists adhering to the attitudinalist and strategic models have questioned whether we can say for sure that the Court affirmed Miranda because of *stare decisis*.

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Another popular *stare decisis* example in the qualitative *stare decisis* literature is Planned Parenthood v. Casey, where the plurality, consisting of Justices O’Connor, Kennedy, and Souter, specifically rested its decision on *stare decisis* grounds rather than the constitutional merits of Roe v. Wade. Indeed, while conceding that Roe v. Wade may have been decided erroneously, the plurality nevertheless contended that *stare decisis* required that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” Legal scholars have pointed to Casey as another example of *stare decisis* working, because Casey clearly involved the legitimacy of the Roe rule (Pennsylvania had passed its statute, restricting access to abortion, as a vehicle for challenging the legitimacy of Roe) and the three Justices in the plurality were appointed by Republican Presidents for the specific purpose of overruling the Roe decision. Thus, just as in Dickerson we seem to have the two pieces of information necessary to demonstrate the efficacy of *stare decisis*: We know that Casey was in the same class of case as Roe so that upholding Pennsylvania’s statute in Casey would seem to require overruling Roe, and we have reason to suspect, based on the political context surrounding their appointments, that the Justices in the plurality did not believe that Roe was decided correctly.

But we should be quick to note that both of these points are debatable, as the Pennsylvania statute in Casey did not involve as much of a direct confrontation with Roe as did the federal law at issue in Dickerson did with Miranda. And the fact that the Justices in the plurality were appointed for the purpose of overruling Roe of course does not establish that they actually believed that Roe was erroneous. Indeed, Souter was a “stealth candidate,” who had never shown his hand when it came to abortion, and O’Connor and Kennedy in their past decisions on the issue had both proved to be moderates on the constitutionality of restrictions on abortion. Many political scientists, as well as quite a few legal academics, have therefore
questioned, just like they have of Dickerson, whether *stare decisis* really constrained the plurality in the Casey opinion. These scholars have emphasized that the plurality’s paean to *stare decisis* has no relevance for studying *stare decisis*, because judicial language does not count as *stare decisis* data.

Even if we accept the legal model’s use of the Dickerson and Casey cases as demonstrating the efficacy of *stare decisis*, there still is the glaring problem – they are only two cases. Most cases involving citations of precedent do not offer us this information. Indeed, most often when the Supreme Court cites a precedent to support a legal proposition, it is not clear whether the citing Justices agree with that precedent on the merits and whether those Justices believe that voting differently would have required overruling that precedent. This is precisely why Dickerson and Casey are discussed in the legal *stare decisis* literature so much – they are rare exceptions in giving us at least some confidence in knowing the critical information that we want in studying *stare decisis*. But as rare exceptions they provide poor guides for understanding judicial decision-making in the aggregate. Even if one accepts that *stare decisis* need not be measured quantitatively with a large sample size to demonstrate its efficacy, a focus on isolated examples of *stare decisis* is still not sufficient to make a persuasive qualitative argument for the doctrine exerting force on judicial decision-making.

Michael Gerhardt has sought to address this problem by thinking of *stare decisis* in terms of path dependence, thereby bridging the “chasm” he has identified between political science and legal studies on *stare decisis*. The legal model, Gerhardt argues, has expected too little from *stare decisis* studies. Indeed, the legal academy’s qualitative studies, focusing on isolated examples of how precedent operates in legal reasoning, cannot account for how *stare decisis* works in the aggregate, and the legal academy’s quantitative studies, simply counting citations
and overrulings, do not measure *stare decisis* as a decision-making constraint. But the political science model, Gerhardt contends, has asked for too much, requiring that studies statistically measure a particular phenomenon – how precedents induce judges to vote to affirm what they believe to be an erroneous decision. Gerhardt argues that a fuller and more accurate understanding of *stare decisis* is to conceive of precedent-based decision-making as a form of path dependence.

Gerhardt argues that path dependence consists of the following five properties: permanence, sequentialism, consistency, compulsion, and predictability. That is, for *stare decisis* to create a robust path dependence in judicial decision-making, precedents must be *permanent* in that they are never overruled. The *sequence* of decisions must matter in that “the order in which the Court decides cases makes a difference to their outcomes.” Precedents must be *consistent* with each other so “that a current decision fits logically or coherently into a sequence of cases.” Precedent decision-making must be *compulsory* so that precedents “forc[e] Justices to reach, or to forego, some choices or decisions and favor others they might personally prefer not to make.” And finally, precedents must make judicial decision-making more *predictable* in that the precedents “make forecasting future or subsequent ones easier.”

Gerhardt concedes that often times in constitutional adjudication these factors are not present. For this reason, Gerhardt argues that a *strong* path dependence is not achieved through *stare decisis*. But Gerhardt contends that this does not mean that political scientists are right that *stare decisis* is altogether ineffective. The problem with this interpretation, Gerhardt argues, is that political scientists demand too much of path dependence in law. In Gerhardt’s words, “[s]ocial scientists expect that if particular decisions of the Court are really ‘law’ then they must impose relatively robust path dependency on the doctrine of constitutional law,” and “[t]he
absence of such path dependency then leads these social scientists to conclude that precedents do not matter (or at least only matter to the extent they can be manipulated by the Justices to facilitate their desired strategic objectives).” Here, Gerhardt is referring specifically to the attitudinalist and strategic model studies that we will be discussing later in this chapter.

A curious phenomenon emerges from Gerhardt’s diagnosis. Many of these political scientists, in challenging the force of law, ask too much of stare decisis, treating it as though to have an independent normative force on judicial decision-making it must carry the omnipotence of a biblical commandment. And legal scholars, in defending the power of law, ask too little of it, treating legal citations and judicial reasoning as though they establish a knock-down defense of the doctrine’s prowess. Gerhardt claims that neither account is right. To show that law has some independence force from politics, we simply need to find that legal adjudication consists of a limited path dependence, which means that some precedents exhibit some of the properties of path dependence discussed above, leading to a significant consistency constraint on judicial decision-making. But this does not show that law is entirely distinct from politics, because other precedents exhibit none of these properties and therefore fail to create any path dependence in legal adjudication. Precedents thus do not create absolute commandments but they are not simply empty vessels to be filled by judicial discretion. Rather, in legal adjudication there is something in between these two extremes. Gerhardt claims that in between the extremes of pure law and pure politics is the middle-ground, what he calls the “golden rule,” a general push to guarantee some consistency within a legal system because “the justices recognize the need to give the same level of respect to the precedents of others as they expect their preferred precedents to deserve.” So the Justices attempt to follow at least some of the Court’s precedents, not because they feel compelled by law and not because doing so is simply the most strategic
way to maximize their power, but also because it is a feature of judging to give the respect for
the opinions of one’s colleagues and predecessors that one would expect of one’s own opinions.

Thus, if at Point A, there are three precedents available, and each precedent is consistent
with a different assortment of precedents, the Court’s choice of precedent will determine which
precedents or paths or available to it at Point A. For example, if Path 1 is consistent with itself
and Path 2, Path 2 is consistent with all three paths, and Path 3 is consistent with itself and Path
2, the options available to the Court at Point A will differ from those available at Point B
depending on that path it chose. So if it chose Path 1, it could then rely only on Path 1 and 2 at
Point B, and so on. Gerhardt thus imagines some types of precedents as creating the following
model:

![Diagram of precedential paths]

What makes Gerhardt’s agenda distinct from other works that have thought of *stare
decisis* as a form of path dependency is that he wants us to look at *particular precedential paths*
and examine whether we are dealing with the type of path in which this golden rule could
overcome the lure of individual judicial attitudes and strategizing so that *stare decisis* can do its
job to create adjudicative consistency. This golden rule is particularly forceful, Gerhardt argues,
in areas of law that rest on what Gerhardt calls “super precedents” – i.e., precedents that are qualitatively different from ordinary precedents so as to create a stronger path dependence in legal adjudication.

One type of super precedent consists of judicial decisions that are “so deeply embedded in our law and culture that they have become practically immune to overturning.” As an example of such a super precedent, Gerhard points to the precedents establishing judicial review, namely Marbury v. Madison and Martin v. Hunter’s Lessee. These precedents, he contends, are now beyond re-consideration and have established a deep path dependence in the law for the judiciary’s authority over constitutional interpretation and inter-branch oversight. Another type of super precedent is a case resting on “foundational doctrines”; he includes in this category the cases creating the framework for incorporating most of the Bill of Rights. The weakest and more controversial type of super precedent for Gerhardt consists of “foundational decisions,” which are precedents that have become well settled by the legal community as an interpretive matter and well accepted by society as a political matter, but do not rest on broader doctrinal underpinnings. A good example here is of course Brown v. Board of Education. As mentioned above, almost all members of the legal community, including conservative originalists, have come to accept Brown as doctrinally right even though it is arguably inconsistent with precedents and the original meaning of the 14th Amendment, and Americans now overwhelmingly accept school integration as a political matter, though residential patterns indicate that many do not welcome it in their own personal lives. What makes Brown a super precedent is that precious few mainstream legal scholars and private citizens question its correctness. But it is not part of a “foundational doctrine” that supports the entire framework of constitutional adjudication so as to be a clear super precedent for Gerhardt, though one could argue that it is eligible for this
treatment because it is integral to the broader doctrine of color-blindness that underlies our entire legal system.

Gerhardt’s focus on particular types of precedential lines and his notion of limited path dependence are immensely important contributions to the field, striking a persuasive middle-ground position between the quantitative political science model and the qualitative legal model for the study of *stare decisis*. There are some shortcomings in Gerhardt’s analysis, however, shortcomings that we will discuss quickly here because we will try to shore up these weaknesses later in the following chapter to come up with a more complete account of how *stare decisis* works.

One glaring problem is the application of Gerhardt’s theory of limited path dependence to particular precedential lines. Gerhardt does not have a formula for determining which precedents have created path dependence, and his definitions of the various properties of path dependence and the meanings of super precedents are likely too amorphous to satisfy many *stare decisis* skeptics. Consider, for example, Gerhardt’s discussion of the Court’s Commerce Clause jurisprudence, which of course rests on one of the longest and most contested lines of precedents in the Court’s history. Gerhardt notes that Richard Fallon has contended that the Rehnquist Court, even in its Lopez and Morrison decisions that radically reshaped the law by resuscitating what had been a nearly moribund Commerce Clause, displayed a commitment to path dependence, because the Lopez and Morrison framework did not explicitly overrule any of the Court’s broad Commerce Clause precedents. Instead, the Court announced a tripartite test that it asserted harmonized the uneven terrain of this area of the law. Under this test, Congress has the power to regulate three areas: (1) the channels of interstate commerce (e.g., roads), (2) the instrumentalities of interstate commerce (e.g., manufactured goods), (3) economic activities
bearing a substantial effect on interstate commerce (e.g., racial discrimination practiced by local hotels and restaurants). This third category was of course the most tenuous under the Rehnquist Court’s resuscitation of the Commerce Clause, and many feared that the Court would overrule these precedents — most prominently *Heart of Atlanta Motel Inc. v. United States*\(^\text{381}\) and *Katzenbach v. McClung*,\(^\text{382}\) which held that Congress may prohibit local racial discrimination because of its national economic impact.

Fallon argues that the Court’s unwillingness to overrule these precedents reveals the underlying path dependence in legal adjudication in that the Court’s commitment to adjudicative consistency resisted even the Rehnquist’s Court’s most revolutionary agenda, its restoration of limitations on congressional regulatory authority. Gerhardt, however, has doubts about whether there really is evidence of such path dependence here, because before the Court’s 1937 “switch in time,” the Court had not recognized Congress’s plenary authority over economic activities, and this issue did not become settled until the Civil Rights Movement and the concomitant expansion of congressional regulation of racial discrimination. Indeed, when Congress passed the Civil Rights Act of 1964, there was a lot of debate and concern about whether it went beyond even the expansive Commerce Clause interpretations provided to authorize the New Deal. Given that this plenary congressional authority existed only between 1937 and 1995, and there was even in some concern about the reach of the Commerce Clause leading up to the Heart of Atlanta and Katzenbach decisions, Gerhardt does not believe we can say that *stare decisis* has created much path dependency here, though Gerhardt acknowledges that there are early signs of this.

We might want to push back on Gerhardt here, in that he seems overly cautious in finding path dependency in this area of the law, conceding too much to the skeptics. It is striking that

\(^{381}\) 379 U.S. 241 (1964).

\(^{382}\) 379 U.S. 294 (1964).
the Rehnquist Court’s formulation of Commerce Clause doctrine explicitly authorized a category of congressional regulation that many legal conservatives found objectionable: the national regulation of private discrimination. Many political scientists would likely explain this third category in terms of political attitudes (e.g., the conservatives actually favored this third category of congressional regulation) or rational choice theory (e.g., the Lopez Court needed to create a doctrine with this third category to secure the two moderate votes, Kennedy and O’Connor, for a majority opinion). But given the widespread hostility toward anti-discrimination law within the legal conservative movement, these explanations seem less persuasive than the fact that the Lopez Court simply felt bound by *stare decisis* to reflect these precedents in the third category of the Court’s Commerce Clause formulation. Indeed, the attitudinalist explanation does not seem right (none of the members of the majority have ever expressed much sympathy with a broad national regulatory authority), nor does the strategic model explanation (although Kennedy and O’Connor proved to be important swing votes on many issues, particularly those relating to social libertarian causes, they were consistently and radically conservative when it came to federalism).

We thus seem to have here the five elements of path dependency. The Rehnquist Court carved out this third category because it treated the economic activity precedents as *permanent*. There is little doubt that *sequence* mattered here; it is difficult to imagine the Lopez Court explicitly authorizing congressional regulation of economic activity were it not for the fact that the Court had upheld the constitutionality of Title II and Title VII more than 30 years earlier. *Consistency* was also at issue, because the Court seemed to create the third category so that its decision would “fit[] logically or coherently into a sequence of cases.” *Compulsion* was also present, as the economic activity cases seemed to “forc[e] Justices to reach, or to forego, some
choices or decisions and favor others they might personally prefer not to make.” That is, they seemed to feel compelled to forgo a vision of the Commerce Clause that limited Congress to truly interstate activity. Finally, although Lopez was a shock to the legal community, invalidating a law under the Commerce Clause for the first time in almost 60 years, we can say that precedents made the decision more predictable in that the earlier Commerce Clause cases “made forecasting future or subsequent ones easier.” While earlier cases had not explicitly used this language concerning the three categories of permissible Commerce Clause regulation, this formulation was highly foreseeable, given both the language used and outcomes reached in those cases. Indeed, the Lopez opinion culled this formulation from an exhaustive analysis of the Court’s Commerce Clause precedents.

We see further evidence of path dependence in the Court’s Commerce Clause jurisprudence in the Court’s landmark Affordable Care Act decision, National Federation of Independent Business v. Sebelius, where the Court upheld the individual mandate as a permissible tax under the Court’s Taxing and Spending Clause. A curious feature of the case is that Chief Justice Roberts wrote the opinion upholding the mandate, but he also insisted that if the mandate were a regulation and not a tax, it would have violated the Commerce Clause as a regulation of inactivity (i.e., the decision not to buy health-care insurance). The four other conservatives, who dissented from the decision to uphold the mandate, agreed with Roberts that the mandate violated the Commerce Clause under the third category of the Lopez formulation. The liberals, however, did not join this part of Roberts’s opinion, instead asserting that the mandate was permissible under the Commerce Clause, because the decision to forgo health-care insurance is an activity that has a tremendous impact on the national economy, and moreover,
even if a decision not get insurance is not actually an activity, such a hyper-technical distinction between activity and inactivity is not consistent with the Lopez Court’s third category.

Two important elements of the ACA opinions relate to Gerhardt’s theory of path dependency, particularly as it applies to Commerce Clause jurisprudence. One, the liberal Justices, though refusing to sign on to Chief Justice Roberts’s opinion on the Commerce Clause, still accepted the Lopez formulation, as they had done in Gonzales v. Raich in using the third category to uphold Congress’s regulation of the intrastate production of marijuana for personal medicinal purposes. This is notable because in Lopez and Morrison the liberals had disagreed with the conservatives on the doctrinal framework for interpreting the Commerce Clause. In those cases, the liberal had urged for a more fluid and plenary Commerce Clause, so that its guarantee of federalism would be protected through the political process rather than legal adjudication. But in Raich and the ACA case, the liberals accepted the framework but disagreed on its application. Indeed, in the ACA case they simply disagreed about whether the decision not to get health-care decision at a particular moment constitutes an economic activity. The liberal-conservative disagreement in ACA case was thus one of precedential application, not precedential correctness. The skeptic will of course retort that this distinction between precedential application and correctness does not mean that much for purposes of adjudicative consistency, since courts often agree not on doctrines but on applications to facts. This is, after all, what makes case-distinguishing so central to legal adjudication, and the whole notion of consistency so difficult to capture, as we discussed in chapter two. But it is nonetheless worthwhile to note that there was some path dependency here – the conservatives felt bound by the economic activity lines of cases in framing the Lopez formulation, and the liberals in turn felt bound by the Lopez formulation. This is what Gerhardt means by the golden rule. It does not
create absolute agreement, but it does create some convergence around certain issues, because the golden rule induces each side to give up some ground.

The second relevant point relates to Roberts’s decision to make the Commerce Clause argument in the first place. This was dictum, of course, because he could have simply found that the individual mandate was a tax and therefore permissible under the Taxing and Spending Power. But Roberts made the Commerce Clause argument to plant the seed for a later decision to find that such an exercise of congressional power is invalid under the third category of the Lopez formulation. Indeed, many legal academics have noted that this has become Roberts’s favored tactic, striking middle-ground positions between the two poles of the Court, while including language that could be used to favor conservative positions later down the road. Many have warned of Roberts’s tendency to do this, claiming that while liberals might have won the battle in some cases, this language suggests that they will ultimately lose the war.

This interpretation of Roberts’s work, however, requires an assumption that legal language in a decision will bind judges in a later case. Otherwise, there is no meaning to the notion of “losing the battle but winning the war” through precedential language. There could be no ultimate victory unless there is some path dependency created through the language. For this reason, Adrian Vermeule, in his review of Gerhardt’s book, questions whether Randy Barnett, the lead counsel in the ACA case, should feel confident that “even though the Affordable Care Act was upheld, the opinions handed his side a long-run victory by announcing a more restrictive set of Commerce clause doctrines.” Vermeule observes that Barnett, who is of course not only an eminent libertarian scholar but also an accomplished Supreme Court advocate, “is too shrewd not to understand that judicial opinions by themselves cannot produce long-run victories,”
because “[w]hether the gambit will work will be a function of the then-prevailing circumstances, not of what some Justices said back in 2012.”

Vermeule is right to point out this tension in how we talk about the law. As we discussed in chapter two, judges can, and often times do, distinguish cases based on some factual difference that might not have appeared to matter under the precedent decision’s rationale. For this reason, the language used in case x provides no guarantee of consistency in later case y. As the realists such as Llewellyn pointed out, there are so many different ways to interpret precedents that the language used in a precedent case does not constrain courts confronting similar issues down the road at all. Yet so many practices in legal adjudication defy this reality. As we discussed in the preface, there is a pervasive, even obsessive, pre-occupation with judges needing a lawyer to show the judge how to reach a particular result, as though the judge cannot reach a result without the lawyer’s logically consistent guidance through the path. Likewise, we see some of our most sophisticated public-interest lawyers strategizing to plant language in judicial opinions, in the hope that even if they lose the case, that language will lead to an eventual victory for their side. And we see judges signing on to this agenda, reasoning in a way that presupposes that their language will constrain later judges.

This brings us back to the question we began with at the start of this dissertation: Why do lawyers and judges reason and talk about the law in this way, if they know that precedent does not mean anything? Gerhardt does not seem to have an answer for this crucial question, because his theory of path dependency focuses principally on how the entrenchment of precedents creates path dependency, largely bypassing the antecedent question of how language contributes to the entrenchment necessary for path dependency to occur in legal adjudication in the first place. To understand how entrenchment works to create path dependency, we need to pay particular
attention to how the scope of a precedent and the different types of consistency shape how path dependency works for a given line of cases.

We explored the scope issue in some depth in chapter two and the types of consistency in chapters three and four. So far we have encountered three distinct ways of treating the scope of a precedent decision. We discussed at length Goodhart’s results-approach, whereby a precedent is a rule consisting of the prior case’s material facts that the deciding court later determines to have been necessary for the prior court to have reached its result. We also discussed criticisms of this approach, giving rise to the rules-approach, whereby a precedent is a rule consisting of whatever rule or doctrine that the prior court announces as necessary to reach its result. So whereas the results-approach considers the facts triggering the prior court’s result, the rules-approach considers the rule announced by that court. And in the previous chapter, we saw through Ronald Dworkin’s theory of law as integrity what is sometimes referred to as a third approach to interpreting the scope of precedents, though it is much less commonly discussed than the rules- and results-approaches. Some scholars, such as Dworkin, have contended that precedents can be, and often times are, viewed as principles that provide a “gravitational pull” on judges. This pulls judges away from interpreting precedents as particular rules and toward seeing them instead as expressing the moral principles undergirding the legal system as a whole.

These different ways of conceptualizing the scope of precedents relate to the different ways of conceptualizing legal consistency. A results-approach will focus judges on creating a factual consistency, leading to a case-by-case analysis in which precedents are distinguished or followed on the basis of their perceived similarities with later fact patterns. Later cases absorb these distinctions made by prior courts; Justice Scalia thus compares this process to a Scrabble game, whereby words become more and more complicated as additions to words that had been
assembled previously within the game. A rules-approach is much more fixed, with judges engaging in a logical or linguistic inquiry into whether the facts of the current case fall within the semantic content of the precedential rule. And the principles-approach will be much broader, inviting judges to examine the legal system as a whole and to resolve the current case in a way that fits coherently with the principles established in previous cases.

Different scopes and different consistency types will create different paths within legal adjudication. Before we illustrate how this is so, and in the process create our own theory of how path dependency works and *stare decisis* creates consistency, let us examine briefly the primary political science models of judicial decision-making – the attitudinal and strategic models – as these models will contribute to our carving out a theory of path dependency and *stare decisis* that provides a fuller, richer theory of legal consistency.

**The Attitudinal Model and Consistency**

Legal scholars, as discussed above, have tended to overlook these two critical questions in *stare decisis* – the different scope and consistency types – and that neglect has been a major weak point in some excellent works on *stare decisis*, such as Gerhardt’s theory of path dependency. While some legal scholars have glossed over these two issues of scope and consistency, most political scientists have entirely ignored them, and this has doomed many otherwise sophisticated political science studies of *stare decisis*. In this section, we will cover the leading attitudinalist study of *stare decisis*, Harold Spaeth and Jeffrey Segal’s *Majority Rule or Minority Will*, before moving on to how the strategic model conceives of *stare decisis* and legal consistency.

As we discussed in chapter two, attitudinalists contend that although the law may appear consistent on its face, due to how judges use precedent-based reasoning to justify their positions,
the law is not consistent in reality, because precedents rarely, if ever, actually induce judges to vote against their preferred positions. If a judge prefers to reach conclusion x, she will cite all the relevant legal norms that are consistent with that conclusion to justify it as the legally required result, and if there is a faction of the court preferring conclusion y, the judges in that faction will cite all the relevant legal norms that are inconsistent with conclusion x to criticize it as the legally prohibited result. This process makes legal decision-making appear like a highly rational, even scientific, process, following the strictures of formal logic. But if the attitudinalists are right that consistency norms simply provide ex post facto ways of writing decisions, as opposed to ex ante reasons for making decisions, then law is not scientific, and perhaps not even rational, at all. Rather, the attitudinalists contend, law is “a low form of rational behavior,” akin to “creative writing, necromancy or finger painting.”

Stare decisis is one way in which judges seek to make the law appear scientific and consistent, and for this reason many attitudinalists have sought to expose the doctrine as a sham. The most influential and comprehensive empirical study in this respect is Majority Rule or Minority Will, where Spaeth and Segal set out to test whether “precedentialists,” “legal moderates,” or “preferentialists” are right about how the U.S. Supreme Court’s own precedents have constrained its decision-making. Precedentialists, in Spaeth and Segal’s terminology, “consider traditional legal factors, including adherence to precedent, to be important, if not primary [to judicial decision-making].” 383 In this group, Spaeth and Segal include anyone who adheres to a conventional account of legal decision-making, including such strange bedfellows as conservatives like Justice Scalia, 384 liberals like Ronald Dworkin, 385 and just about all legal

383 Harold Spaeth & Jeffrey Segal, Majority Rule or Minority Will 10 (1999).
384 Id. at 9.
385 Id. at 10.
scholars who write about law from a conventional perspective. As we have discussed in previous chapters, these are very different types of thinkers, with sharply discordant views on legal consistency. Nevertheless, Spaeth and Segal group these divergent types together because, according to Spaeth and Segal, they all share the belief that precedents exert significant force on how judges decide cases. Most members of the legal academy, even realists, as we discussed in the above section in this chapter, fall into this category because all but the most ardent realists, who are perhaps more aptly categorized within the critical legal studies movement, generally accept that precedents exert some normative force on judicial decision-making.

The other two categories consist principally of political scientists. On the opposite end of “precedentialists” are the “preferentialists,” who argue that judges decide cases according to their preferences rather than according to precedents. Within the legal academy, this group includes many critical legal theorists, and within political science departments, it includes just about all those who adhere to the Spaeth and Segal attitudinalist modal of judicial decision-making.

In the middle of these two extremes are the “legal moderates,” who believe that precedents exert some force on judicial decision-making – though, unlike precedentialists, these moderates acknowledge that such force is only limited and often is connected strategically to policy goals rather than formally to legal commands. Such an example for Spaeth and Segal is Walter Murphy, who claimed that Justices strategically adhere to stare decisis to enhance the Supreme Court’s power and institutional legitimacy. We will explore this strategic view of stare decisis in more detail below, when we review Lee Epstein and Jack Knight’s work on stare decisis.

386 Id. at 11.
387 Id. at 17.
388 Id. at 21.
389 Id. at 13.
To test whether the precedentialist, moderate, or preferentialist accounts best fits with the Supreme Court’s treatment of its precedents, Spaeth and Segal built an elaborate research design around the notion that *stare decisis* has an observable effect only when a precedent causes a judge to make a decision she would not have made had that precedent not existed. Thus, for their research design, “determining the influence of precedent requires examining the extent to which justices who disagree with a precedent move toward that position in subsequent cases,” what Spaeth and Segal call “progeny cases.”390 This design rests on the two pieces of information we identified above as critical to identifying when *stare decisis* is working: whether a judge would have decided precedent x at time t like progeny case y at time t+1 and whether those two cases are sufficiently similar to say that the cases should have been decided the same way according to *stare decisis*. To find this information, Spaeth and Segal centered their study around cases when a Justice was in the dissenting opinion of a precedent case, since according to Spaeth and Segal “[o]nly dissenters can experience conflict between their stated preferences and the precedent the majority established in that case,”391 but then later wrote or joined an opinion in a progeny case that explicitly or implicitly expressed support for that precedent.

They count only such an instance as evidence of *stare decisis* working because if the judge voted with the majority in the precedent case, there is no way to tell whether it was that precedent’s legal force that controlled the judge’s vote later in the progeny case. Indeed, the vote in the progeny case may be due simply to the fact that the judge preferred that outcome all along, as expressed in how the judge voted in the precedent case. Or it may be that the judge no longer adheres to that position for preferential reasons but nonetheless continues to adhere to it because she is following her own voting history, what some scholars have dubbed personal *stare decisis*.

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390 Id. at 5.
391 Id. at 24.
Either way, we cannot say for sure here that institutional *stare decisis* is working in this instance. And if for some reason in the progeny case the judge voted inconsistently with the precedent case, against the judge’s prior vote, then *stare decisis* would not be working at all – there is neither institutional nor individual consistency here. In this case, the judge must have switched her preferences.

When we have a judge dissenting in the precedent case, however, then we do have evidence of institutional *stare decisis* working, but if and only if the judge in the progeny case switched sides to vote consistently in the later case with the majority in the precedent case. If the judge were to stay in the dissent, then we would have an example again of either the continuity of personal preferences or an instance of personal *stare decisis*, but we clearly would not have *stare decisis*, for the precedent decision should have led to a switch in voting.

Spaeth and Segal want to find when Supreme Court Justices are in that lower right box. This is when, according to Spaeth and Segal, institutional *stare decisis* is demonstrably effective. Note, however, that even this box does not provide conclusive evidence of *stare decisis* working, because the switch from dissenting in the precedent case to voting in the majority in the progeny case may be due not to institutional *stare decisis* but rather to a change in the judge’s personal views. There is simply no way to quantify *stare decisis* conclusively, for what we are trying to gauge is the mental state of a judge. This is one of the themes we have been developing throughout the dissertation – that *stare decisis* does not consist of an essence and efforts to point to a single instance when it is operating in legal decision-making are thus doomed to fail. There is not a single *stare decisis* doctrine. Rather, it is a fluid and multifarious concept, applicable in different ways depending on various legal and social factors that are thoroughly imbricated in adjudicative practices. Indeed, logic, language, and politics are all relevant to how *stare decisis*
will influence judges in particular cases. To see how these factors relate to the doctrine, we must de-essentialize it, something we will be returning to in the next chapter when we use the works covered in this chapter to develop our own account of *stare decisis*.

This is not to say that Spaeth and Segal’s essentialist approach to *stare decisis* teaches us nothing about the doctrine. To the contrary, their findings are quite telling – but not necessarily of *stare decisis* working. Rather, they are measuring a single phenomenon, how often Supreme Court Justices switch from dissenting to majorities in similar cases, and this phenomenon is certainly part of, and perhaps the biggest part of, *stare decisis*. Their study is therefore worth investigating in greater depth here. But before we go further, we should bear in mind that we are getting information about only a part of *stare decisis*.

Turning back to their study, let’s examine how they found the precedent cases to measure this phenomenon of Justices switching from dissents to majorities. Spaeth and Segal combined two groups of cases: (1) all cases that had dissenting opinions and were listed as “Major Decisions” in Congressional Quarterly's 1990 *Guide to the U.S. Supreme Court*, and (2) a random sample of all other cases, decided between 1793 and 1995, that had dissenting opinions. Next, to identify the progeny of each of these precedent cases, Spaeth and Segal used LEXIS’s *Shepard’s Citations* to review all of the cases that cited these precedents. If a Justice who had dissented from one of the precedent cases later voted in one of these cases citing the precedent case, and if that later case involved legal issues or factual scenarios closely resembling one of the precedent cases, then Spaeth and Segal counted that Justice’s later vote as a progeny vote. Spaeth and Segal finally examined whether the progeny vote involved a vote shift so as to indicate the influence of the cited precedent.
Using this model, Spaeth and Segal coded how Justices voted in a progeny case on a six-point ordinal scale: strongly precedential, moderately precedential, weakly precedential, weakly preferential, moderately preferential, and strongly preferential. For a vote to count as strongly precedential, a Justice must formally state that, due to the precedent, she has gone from dissenting in the precedent case to joining the majority to support that precedent in the progeny case.\textsuperscript{392} To count as moderately precedential, a Justice in the progeny case must write or join an opinion that specifically supports and cites as an authority for her vote the precedent case from which she had previously dissented.\textsuperscript{393} And to count as weakly precedential, a Justice in the progeny case must vote “compatibly with the direction of the precedent (e.g., liberal or conservative) where the issue in the progeny is effectively the same as that of the precedent”\textsuperscript{394} from which she had dissented, but “the syllabus/summary either does not cite the precedent or the text of the prevailing opinion only cites the precedent incidentally.”\textsuperscript{395} The preferentialist votes were scaled in a parallel way, with a weakly preferential vote involving indirectly supporting the Justice’s previous dissent instead of the precedent,\textsuperscript{396} a moderately preferential vote involving dissenting from or concurring in a progeny decision that approvingly cites the precedent from which the Justice had dissented,\textsuperscript{397} and a strongly preferential vote involving explicitly or implicitly asserting adherence to the Justice’s dissent from the precedent case.\textsuperscript{398}

Based on this model, Spaeth and Segal found overwhelming support for the preferential over the precedential and legal moderate accounts. In total, their analysis included 341 precedents, producing 1,206 progeny cases in which 77 different Justices issued 2,425 progeny votes.

\textsuperscript{392} Id. at 35.  
\textsuperscript{393} Id.  
\textsuperscript{394} Id. at 36.  
\textsuperscript{395} Id.  
\textsuperscript{396} Id.  
\textsuperscript{397} Id. at 37.  
\textsuperscript{398} Id. at 38.
votes, and only 11.9 percent of these progeny votes counted as precedentialist under Spaeth and Segel’s criteria. Moreover, based on Spaeth and Segel’s notion that a Justice is a precedentialist if and only if she votes according to precedent more than 66.7 percent of the time, no Justice throughout the Court’s existence has ever cast ten or more landmark progeny votes and been a precedentialist. And based on their notion that a Justice is a legal moderate if only and if she votes according to precedent between 33.3 percent and 66.7 percent of the time, only two Justices – Justices Harold Burton and Lewis Powell – have ever cast ten or more landmark progeny votes and been legal moderates. The rest of the Justices who have cast ten or more landmark progeny votes have been preferentialists: They have consistently voted according to what they think the law commands in a particular case rather than what precedent does. Thus, although Spaeth and Segal concede that over time many factors have affected this relationship between precedent and Supreme Court decision-making, they conclude that, based on their data, precedent exerts almost no force on judicial decision-making on the Supreme Court at all.

As Spaeth and Segal argue at length, their findings directly undermine many of the claims of those legal theorists who believe that legal materials exert a politically independent normative force on judges. In making this argument, Spaeth and Segal take particular aim at Ronald Dworkin’s theories. They claim that, given their findings, Dworkin’s work can have only theoretical value, bearing no relationship to how judges actually decide cases in practice. In making this claim against Dworkin, however, it seems that Spaeth and Segal actually do not go

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399 Id. at 287.
400 Id. at 290.
401 Id.
402 Id.
403 For example, some periods of Supreme Court decision-making have been more precedentialist than others. Likewise, some Justices have been more precedentialist than others, with conservatives tending to follow precedents slightly more often than liberals. The subject matter of the precedent case has also mattered, with ordinary cases being followed at a higher rate than landmark cases, and statutory cases also being followed at a higher rate than constitutional cases.
far enough. Their findings jeopardize nearly the entire enterprise of legal philosophy, collapsing some of the most fundamental theoretical inquiries on judicial decision-making into a mere matter of politics. Indeed, they threaten our own investigation here. Any discussion of how adjudicative consistency is central to the rule of law is vastly undermined by the claim that judges are almost never affected in practice by *stare decisis* concerns.

Some legal scholars have identified flaws in Spaeth and Segal’s findings, however, including Michael Gerhardt, who as we discussed above, has argued that the attitudinalists have asked too much of *stare decisis* in rejecting it.\(^{404}\) Many political scientists have likewise challenged their findings, principally on the basis that their research design is based on the assumption that “[o]nly dissenters can experience conflict between their stated preferences and the precedent the majority established in that case.”\(^{405}\) Recall that Spaeth and Segal base this assumption on their view that there is no proof of *stare decisis* working when a Justice would have voted the same way had the precedent in question not existed. Some scholars have argued that precedent still works in these instances, because even in such situations precedents still provide *additional reasons* for reaching the Justice’s preferred outcome. But Spaeth and Segal appear right in arguing that this is not an instance of precedent guiding decision-making so much as it is an instance of precedent strengthening decision-writing.

Spaeth and Segal seem wrong, however, in treating such a shift from a dissent to a majority as the only way in which constraint can be measured. First of all, as we discussed above, this shift does not reveal the internal mind-state of the judge. The judge might have switched her vote due to a change in her view of the law, not due to *stare decisis*. But more importantly, judges can be constrained by precedents in many ways besides those relating to the


\(^{405}\) Spaeth & Segal, supra __, at 24.
ultimate voting outcome of the decision. As we saw above in discussing the Commerce Clause jurisprudence, a precedent might lead Justices to justify their conclusions in ways they would not have otherwise done but for the existence of that decision, and this can create path dependency in the law, with significant repercussions for how lower courts, as well as the Supreme Court itself, decide later cases. Spaeth and Segal cannot account for this feature of *stare decisis* by looking only at the outcomes of decisions, a point we will discuss in further depth below when we examine how Spaeth and Segal overlook the importance of precedential scope in counting cases.

Similarly, just as the study is too narrow in simply counting ultimate votes, it is unduly narrow in determining when a Justices disagrees with a precedent case so as to be subject to *stare decisis* forces. Spaeth and Segal assume that such disagreement can be measured only through a Justice formally writing a dissenting opinion in the precedent case. But Justices of course often express disagreement with a precedent case through means other than writing dissenting opinions. For example, in *Newdow v. Elk Grove Unified School District*, Justice Thomas declared that he disagreed with applying the Establishment Clause to non-federal actions under the incorporation doctrine, but Thomas issued this statement in a concurring opinion, because he agreed with the majority of the Court that Michael Newdow should lose his claim against his daughter’s school district. So in every post-*Newdow* case in which Justice Thomas has considered the constitutionality of a non-federal action under the Establishment Clause, such as *Van Orden v. Perry*, it arguably could count as an instance of *stare decisis* working. But Spaeth and Segal’s research design would not pick up any of these cases, because the *Newdow* case did not produce any dissents and therefore could not produce any progeny votes under the Spaeth and Segal analysis.

\[^{406}\text{542 U.S. 1 (2004).}\]
\[^{407}\text{545 U.S. 677 (2005).}\]
Likewise, Justices often express their disagreement with precedents through means other than their judicial opinions, such as through their previous work as lawyers, as well as through public speeches and academic writings before and during their tenure on the Court. For example, in Chief Justice Rehnquist’s 1971 confirmation hearings, it was revealed that as a clerk for Justice Jackson while *Brown v. Board of Education* was being considered by the Court, Rehnquist had authored a memo explaining why the Court should rule to uphold the constitutionality of racial segregation. When asked about the memo during his confirmation hearings, Rehnquist explained that he had supported the Brown decision and that the memo reflected Jackson’s and not Rehnquist’s views of segregation at the time. In Rehnquist’s words, “the memorandum was prepared by me as a statement of Justice Jackson’s tentative views for his own use.” Many were skeptical of this claim, and recently discovered Rehnquist letters cast further doubt on the veracity of Rehnquist’s assertion.\(^\text{408}\) Indeed, it seems highly likely that Rehnquist would have dissented from Brown had he been on the Court at that time. Thus, it is reasonable to think that in all of the decisions dealing with desegregation, where Rehnquist never bothered to question the correctness of Brown, *stare decisis* was at least part of what led him to accept that state-sanctioned racial segregation is unconstitutional. Spaeth and Segal do not count any of those decisions, however, as involving *stare decisis*, simply because Rehnquist did not cast a vote in Brown. This seems unduly narrow, since we have strong evidence that Rehnquist *would have* dissented from Brown were he on the Court.

In fact, we often know with reasonable certainty how various Justices would have decided certain landmark cases, because they are often express their views on the merits of those cases. This is particularly common for a direct and outspoken person like Justice Scalia. For example, in his academic writings Justice Scalia has expressed his serious doubts about whether

\(^{408}\) http://bclawreview.org/review/53_2/05_snyder_barrett/.
Marbury v. Madison\textsuperscript{409} was right as an original matter, but he has also declared that whether it was right as an original matter is not relevant to his decision-making as a Supreme Court Justice, because \textit{stare decisis} compels him to follow that decision. In fact, he has made this claim on behalf of all those “faint-hearted originalists” like himself – i.e., those originalists who believe that at times non-originalist considerations should trump the original meaning of the Constitution. As Scalia puts it, “almost every originalist would adulterate [originalism] with the doctrine of \textit{stare decisis} – so that \textit{Marbury v. Madison} would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong [as an original matter].”\textsuperscript{410} Therefore, given Justice Scalia’s own admission that he might have dissented from Chief Justice Marshall’s opinion in \textit{Marbury} if Scalia had been on the Court in 1803, it seems arbitrary to exclude Scalia’s reliance on \textit{Marbury v. Madison} now as an instance of \textit{stare decisis} working. And if we count as a precedentialist decision each time that Scalia has supported the use of judicial review, Spaeth and Segal’s findings regarding Scalia would be turned upside down, with Scalia being a strong precedentialist instead of a strong preferentialist.

Another point that many political scientists have made in challenging the Spaeth and Segal model is that its measuring dissent-majority shifts makes it impossible for Justices who serve on the Court for only a short period to demonstrate the effect of \textit{stare decisis}, since these Justices are unlikely to be on the Court long enough to dissent from a precedent case and then later have the opportunity to vote in a later progeny case dealing with that same issue. This method is also prejudiced against the Court’s oldest precedents, which, as Michael Gerhardt argues, are often said to have the strongest \textit{stare decisis} force, because they are the most likely to become embedded into our legal fabric. Indeed, under Spaeth and Segal’s study, cases like

\textsuperscript{409} 5 U.S. (1 Cranch) 137 (1803).
Marbury and McCulloch v. Maryland – both of which revolutionized our legal system and are often cited by legal scholars such as Gerhardt as paradigm examples of the efficacy of *stare decisis* – cannot even count as evidence of *stare decisis* under Spaeth and Segal’s research design, because neither case produced a dissent, as was the case for almost all Supreme Court decisions of that period. In all of these ways, Spaeth and Segal’s assumption that “[o]nly dissenters can experience conflict between their stated preferences and the precedent the majority established in that case”\(^{411}\) is wildly prejudiced in favor of the preferential model, thus making it no surprise that their data strongly support this view.

A point that many have overlooked in criticizing Spaeth and Segal’s research design, however, is one that we alluded to above and is at the heart of this dissertation: The research design treats everything outside of the outcome of a case as having no precedential value. As explained above, their study proceeded principally in three steps: (1) they established a set of ordinary and landmark precedent cases that had dissenting opinions; (2) they determined which later cases citing the precedent cases had progeny votes – i.e., votes by Justices who had dissented from the precedent cases; and (3) they identified whether these progeny votes supported the precedent case or the Justice’s dissenting opinion from that precedent case.

This final step is a matter of interpretation, calling for close and subtle readings of what is part of the Justice’s original position in the dissent and what is part of the Justice’s later position in the progeny case. Spaeth and Segal do not seem aware of the deep theoretical issues underlying this task. To be sure, Spaeth and Segal do acknowledge that this part of their analysis is a sensitive inquiry, requiring them to consider “the issue in the case, the basis for the dissenting justice’s subsequent vote(s) and the direction of these votes.”\(^{412}\) But they quickly

\(^{411}\) Spaeth & Segal, supra __, at 24.

\(^{412}\) Id. at 34.
dismiss anything outside of the outcome of the case as forming part of what in the precedent and progeny cases must be consistent with each other. That is, without explicitly acknowledging it, they stepped a foot in the heated debate about the different scopes of precedent, opting for the results-approach without seriously considering the literature on the rules- and principles-approaches to precedent. Indeed, after noting that there is a question about whether the standard of review constitutes a part of the precedent, they quickly dismiss such “[s]implistic decision rules” as not being part of the precedent, because for Spaeth and Segal, if a Justice switches from rejecting the standard of review employed in the precedent case to employing it in the progeny case, that by itself does not establish that the precedent case had any effect on the Justice. According to Spaeth and Segal, such a rules-approach to precedent would lead to “irrational results.”

The principal “irrational result” they have in mind here is that counting the rule announced by a precedent as part of the holding would lead Spaeth and Segal to find that a precedent exerts force whenever a Justice dissents from a precedent case and then later uses the rule employed in the precedent case to reach a result incompatible with the outcome of the precedent case. To illustrate how this is an “irrational result,” Spaeth and Segal point to how counting such an instance as preceptual would lead one to interpret West Coast Hotel Company v. Parrish to have followed rather than overruled Adkins v. Children’s Hospital, because, according to Spaeth and Segal, both decisions used the rational basis standard, though West Coast Hotel used it to uphold the constitutionality of a minimum wage law after Adkins had used it to invalidate a similar law.

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413 Id.
414 Id.
415 300 U.S. 379 (1937).
416 261 U.S. 525 (1923).
But even their examples do not support their point, illustrating the deep defect in Spaeth and Segal’s facile dismissal of the rules announced in precedent cases. Indeed, *West Coast Hotel* and *Adkins* actually employed very different legal rules to reach their discrepant outcomes. In fact, these cases illustrate the opposite point: Judicial fights over standards of review involve weighty and complicated matters of legal interpretation, with serious consequences for case outcomes, and this is precisely why Justices fight so mightily over which standards to apply. By failing to count as precedentialist all of the progeny votes in which a Justice adopts a rule that she had rejected in dissenting from the precedent case, Spaeth and Segal fail to count many instances in which *stare decisis* works to constrain judicial discretion and thereby promote judicial convergence.

Consider, for example, the Court’s affirmative-action jurisprudence. In *Grutter v. Bollinger*,[417] the Court, in a liberal 5-4 majority opinion, appealed to various precedents to uphold the University of Michigan Law School’s use of race in its admissions decisions. The Court cited the *Adarand* opinion for the proposition that strict scrutiny applies to all racial classifications, even those purportedly benevolent in nature, such as affirmative action. The liberal *Grutter* majority thus accepted as constitutionally settled what was once considered a very conservative and controversial matter, the applicability of strict scrutiny to racial classifications designed to benefit disadvantaged minority groups. The Court also used *Regents of the University of California v. Bakke*[418] in applying strict scrutiny to Michigan’s admissions program. The Court found that Justice Powell’s plurality opinion in *Bakke* applied strict scrutiny to mean that diversity in higher education is a compelling interest and that a public university’s use of race in a holistic, individualized way can be narrowly tailored to achieve that compelling

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interest. Framed as a syllogism, in the way that MacCormick conceived of legal reasoning to operate, the Grutter Court deduced the permissibility of Michigan’s program accordingly:

**Syllogism One:**

**Major Premise One:** All racial classifications, whether benevolent or not, are subject to strict scrutiny (i.e., the classification must be narrowly tailored to achieve a compelling governmental interest) (Adarand)

**Minor Premise One:** Affirmative action in public institutions of higher education constitutes a racial classification

**Conclusion One:** Michigan Law’s affirmative action program is subject to strict scrutiny (i.e., the classification must be narrowly tailored to achieve a compelling governmental interest)

**Syllogism Two:**

**Major Premise Two:** Diversity in higher education is a compelling interest under strict scrutiny (Bakke)

**Minor Premise Two:** Michigan Law sought to achieve diversity through its affirmative action program

**Conclusion Two:** Michigan Law’s affirmative action program satisfies the compelling interest prong of strict scrutiny

**Syllogism Three:**

**Major Premise Three:** Holistic, individualized uses of race in admissions decisions are narrowly tailored (Bakke)

**Minor Premise Three:** Michigan Law’s affirmative action program used race in holistic, individualized ways
Conclusion Three: Michigan Law’s affirmative action program satisfies the narrowly tailored prong of strict scrutiny

The Grutter opinion demonstrates how precedents can be interpreted as rules to guide deductive decision-making; this is a point we discussed in the previous chapter, when examining MacCormick’s theory of consistency. We also see through the Grutter example how precedent led the Court to accept some major premises at odds with the Grutter majority’s liberal agenda. Indeed, liberals had fought previously for decades to resist the major premise that strict scrutiny applies to racial classifications, but in Grutter, the Court accepted it rather plainly, as though it was a matter of settled law. This would have shocked previous liberal Justices, most notably Justices Thurgood Marshall and William Brennan, who had strenuously resisted the proposition that there is any constitutional presumption against the government using race to benefit racial minorities, and had even intimated on several occasion that in some circumstances there may even be a positive right on the part of certain minorities to benefit from such discrimination. But the liberals on the Grutter Court placidly accepted the applicability of strict scrutiny and proceeded to analyze the case on the basis of that standard of review. The fight thus shifted gears, from the war in the 1970s, 80s and 90s over the proper standard of review to affirmative action, to the 21st century front, over how to apply strict scrutiny to affirmative action. The new question became whether diversity is a compelling governmental interest and whether using race without numbers – i.e., specific quotas or point awards – is narrowly tailored to achieve that interest.

This is nicely illustrated in the Court’s Parents Involved oral argument, involving the constitutionality of using race in the assignment of students to K-12 schools. At oral argument, Justice Breyer asked Solicitor General Paul Clement, “Are you prepared to just say, all right,
they can do it some, just be careful about it?” By this question, Breyer was pushing Clement on whether the federal government’s position was that schools are categorically prohibited from using race in assigning students to schools (the Brown rule) or whether there is simply a strong presumption against schools doing so. To this question, Clement responded flatly: “I think everybody concedes that strict scrutiny is going to apply here.” In other words, it is not just that schools must “be careful about” using race, as Breyer had put it, but that they must be so careful that they could satisfy strict scrutiny. That is, schools must be able to show how their use of race is narrowly tailored to achieve a compelling government interest. Justice Breyer accepted Clement’s statement as clearly right as a matter of law. In fact, the entire Court accepted it, including Justice Stevens, who had been the most critical member of that Court of applying strict scrutiny to affirmative action.

By the time Fisher v. University of Texas419 arose, ten years after Grutter, the strict scrutiny question had been completely resolved, leading to a surprisingly dull 7-1 affirmative action decision, with Justice Kennedy remanding the case back to the Fifth Circuit to re-apply the narrowly tailored prong of strict scrutiny so that the University of Texas had to demonstrate that it used race “in good faith” to achieve its admittedly compelling interest in diversity. Only Justices Scalia and Thomas bothered to challenge whether Grutter had settled whether diversity constitutes a compelling government interest under strict scrutiny, and only Justice Ginsburg bothered to dissent from the ruling to remand the case (she contended that the Fifth Circuit had properly applied strict scrutiny). Thus, what had been a controversial position up until Adarand – that strict scrutiny applies to affirmative action – had now become entirely settled. The Court unanimously (but without Justice Kagan’s participation) held that strict scrutiny applied. And perhaps even more strikingly, the Grutter Court’s acceptance of diversity as a compelling

government interest, which had been so controversial in 2003, now was accepted by the entire Court, except for Justices Scalia and Thomas. Just as Adarand had tugged the liberal Justices to accept strict scrutiny’s applicability to affirmative action, Grutter had pulled three of the Court’s conservative Justices – Kennedy, Alito, and Roberts – to accept diversity as a compelling interest. The agreement on strict scrutiny, what Spaeth and Segal call “simplistic decision” rules, did not produce absolute consensus in this area of the law, and it is unlikely to create such agreement on such a controversial issue as affirmative action. But it has worked to create more and more convergence in the Court’s race jurisprudence. This distinction between agreement and convergence is a point that we will come back to in the next chapter, when we explore how different types of precedential scopes and consistencies relate to path dependency.

We should note here that a skeptic will be quick to point out that the rules do not necessarily create this consensus or convergence, but that the rules may have emerged from it. Indeed, we would be wise to question the causal mechanism here. After all, the liberal Justices in the Grutter opinion are certainly of a different ilk from the Marshall and Brennan variety. Likewise, Roberts, Alito, and Kennedy are quite different from the Scalia and Thomas brand of legal conservatism. Nevertheless, we can see how rules push for convergence among quite distinct Justices. Indeed, the liberals in Fisher – Sotomayor and Breyer – sharply diverge from Alito, Kennedy, and Roberts on race matters, but they were able to get past that division and at least agree that strict scrutiny should apply to Texas’s program and how it should apply – an agreement that seems incredibly unlikely without precedents operating as rules.

Further evidence of the importance of thinking deeply about this scope issue is that Spaeth and Segal are not even internally consistent on this matter, for many of the progeny cases that they count as instances of preferentialism actually involve disputes over the correctness of
the general doctrinal rule employed in the precedent case. For example, between Justice Scalia’s first year on the Court in 1986 and 1995, Spaeth and Segal’s model counts only five landmark progeny votes for Scalia, all of which were preferential, and three of these progeny votes were in church-state cases that, according to Spaeth and Segal, were progenies stemming from the precedent case of *Allegheny County v. ACLU*. The *Allegheny* case involved the constitutionality of various religious and holiday displays placed in the Allegheny County Courthouse and around the City-County Building. The Court upheld some of the displays but invalidated some of the others, producing several fractured opinions. Justice Scalia joined Justice Kennedy’s *Allegheny County* dissent on the ground that all of the displays were constitutional, and that the majority of the Court reached the wrong conclusion concerning these particular displays, because the majority of the Court applied the “endorsement test,” whereas it should have, as Kennedy’s dissent argued, applied the “coercion test.” In the three progeny cases that Spaeth and Segal identify as exhibiting Scalia’s preferentialism—*Westside Community Board of Education v. Mergens*, *Lee v. Weisman*, and *Capital Square Board v. Pinette*—Justice Scalia asserted his doubts about the correctness of the endorsement test.

But these cases involved vastly different issues from *Allegheny County v. ACLU*: *Mergens* involved the statutory question of whether the Equal Access Act authorized religious student groups to meet within public schools, and if so whether the Act violated the Establishment Clause; *Lee* involved whether a public school violated the Establishment Clause by authorizing a Rabbi to give a prayer at a graduation ceremony; and *Pinette* involved whether the Free Speech Clause guaranteed the Ku Klux Klan the right to place a cross on the Statehouse.

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Plaza in Columbus, Ohio. The only one of these three cases to involve a religious display, as the
Allegheny County case did, was Pinette, and that case involved a completely different legal
question – not the constitutionality of the state authorizing a religious display under the
Establishment Clause but rather a private group’s right to access a public forum for displays
under the Free Speech Clause. In fact, Lee was the only one of these three cases to involve the
Establishment Clause. The only way in which the Allegheny County case was a precedent case
for these three cases is that these three later cases involved Justices disputing whether the
endorsement test, the general doctrinal rule applied in Allegheny County, is the proper test under
the Establishment Clause.

Therefore, if, as Spaeth and Segal claim, the standard of review is merely a “simplistic
decision rule,” not subject to stare decisis analysis, then Allegheny County cannot be a precedent
case for these three progenies, which would reduce Justice Scalia to having only one landmark
decision in Spaeth and Segal’s analysis of ten of Scalia’s years on the Court. But if the standard
of review is in fact subject to stare decisis analysis, then Spaeth and Segal’s numbers would be
very different, with each time a Justice dissented over a standard of review but then later applied
it counting as an instance of stare decisis working, thus making the Court significantly more
precedentialist than Spaeth and Segal represent it as being. Spaeth and Segal cannot have it both
ways: Either they adopt a results-approach to precedent and treat the rule announced by the court
as not counting for precedential purposes, which would substantially limit the scope of their
analysis, or the rule does count, which would make the Court substantially more precedentialist
than Spaeth and Segal argue it is.

Another major problem in Spaeth and Segal’s analysis is that they fail to consider how, as
Gerhardt argues in his work, several major legal decisions have come over time to form the
foundational principles of our legal system, and this is partly due to *stare decisis*. Each time Justice Scalia invokes judicial review, for example, he is following *stare decisis*, because, as mentioned above, he has made it clear that as an original matter he is uncertain whether *Marbury v. Madison* was decided correctly. Likewise, each time Justice Thomas reviews the constitutionality of a non-federal action under one of the first nine Amendments to the Constitution, Thomas is following *stare decisis*, because Thomas has made it clear that as an original matter he doubts whether these Amendments should have been incorporated through the Due Process Clause to apply against the states. Moreover, as explained above, Thomas proclaimed in *Newdow* that, even accepting the incorporation doctrine in general, the Establishment Clause should not apply to the states, so in every post-*Newdow* case since in which Justice Thomas has entertained a challenge to a non-federal action under the Establishment Clause, it could be counted as an instance of *stare decisis* working.

But Spaeth and Segal’s research design would not pick up any of these cases. One reason is that, as explained above, Scalia and Thomas have not expressed disagreement with these issues in dissenting opinions: Scalia has questioned *Marbury’s* correctness as an original matter in speeches and academic articles, and Thomas has expressed his opposition to incorporating the Establishment Clause in his concurring opinion in *Newdow*. Another reason that their research design would overlook such instances is that, also discussed above, many of the most foundational doctrines were established long ago, before Scalia and Thomas were on the Court, thus making it impossible for Scalia and Thomas to dissent from the relevant cases and thereby make their disagreement with these doctrines subject to Spaeth and Segal’s analysis.

Many political scientists have attacked Spaeth and Segal’s analysis for failing to consider those two factors, relating to how Spaeth and Segal measure disagreement and the temporal issue
discussed above, but perhaps a more damning problem for their account is that foundational principles, what Gerhard calls “super precedents,” cannot be measured accurately through counting citations because these principles are rarely cited in judicial opinions. They are simply assumed, as if they frame our constitutional grammar. When the Court invokes judicial review, it does not cite *Marbury*. It simply exercises that power. Likewise, when the Court applies one of the first eight Amendments to a state government, it does not cite all of the incorporation cases. It simply assumes the applicability of these constitutional provisions. Super precedents have become so embedded in our legal culture that, even when applicable in a given case, they often go uncited – and therefore unnoticed by Spaeth and Segal’s study.

The final major problem in Spaeth and Segal’s study is the problem at the core of this dissertation: They fail to acknowledge that cases can be consistent with one another in various ways. Indeed, we have found various types of consistencies relevant to precedents, such as consistencies of facts, rules, principles, function, and logic. Thus, while there might be instances when a Justice is willing to depart from *stare decisis* and create a functional inconsistency within the legal system by sticking to her dissenting opinion from a precedent case, she might not be willing to create a logical inconsistency in doing so. As we discussed in chapters three and four, various legal philosophers, including Bentham, Kant, and Kelsen, have distinguished between logical and functional legal consistencies, and held that a pure legal system must extirpate all logical inconsistencies, though this may not need be required for functional inconsistencies. For these thinkers, a logical inconsistency within a legal system tracks the foundational theorem of deontic logic – that a conflict of obligation norms is impermissible. Spaeth and Segal overlook how these different types of consistency might relate to the constraint that *stare decisis* places on judicial decision-making. That is, *stare decisis* might work in some instances by binding judges
from moving from a precedential obligation norm to a conflicting progeny obligation norm, and this might be how the doctrine creates adjudicative consistency in some contexts, but we will not see that if we look only at whether the Justice entirely follows the precedent.

Consider again the *Locke v. Davey* example we discussed in chapter three. Spaeth and Segal, by ignoring the various ways in which judicial decisions can be inconsistent with one another, would not be able to explain why Chief Justice Rehnquist might have been willing in *Zelman* to follow his conservative preferences to undermine *stare decisis* and create some adjudicative inconsistency by *permitting* an action that the Court had arguably held in cases like *Nyquist* to be *prohibited* by the Constitution, but still been unwilling in *Locke v. Davey* to follow his conservative preferences and create a sharper adjudicative inconsistency by *requiring* an action that the Court had held to be *prohibited* by the Constitution. Such a conflict of two obligation norms has a different logical status from a conflict of an obligation and a permission norm, and this distinct logical status could have provided the intellectual foundation for Rehnquist’s invocation of the “play in the joints” principle to reject Davey’s claim. Indeed, the whole notion of a “play in the joints” principle is that the Constitution cannot require conflicting obligations, so when such a conflict threatens to appear in adjudication, the government must have some flexibility to navigate within these constraints. As we have discovered repeatedly throughout our discussion, to have a richer view of what *stare decisis* means and how it works, we must consider the various ways in which judicial opinions can be consistent with one another.

In sum, while *Majority Rule or Minority Will* is probably the most impressive, and certainly the most influential, study of *stare decisis* in political science, its defects substantially limit what it can teach us about *stare decisis* and adjudicative consistency. Many scholars have focused too much on a particular shortcoming, the study’s narrow focus on measuring shifts
from dissents in precedent cases to majority decisions in progeny cases. But this is actually one of the virtues of the work. It is, to be sure, too narrow of a focus, for precedent may work in many other important ways besides directing dissent-to-majority shifts, as we will see below in covering the strategic account. But Spaeth and Segal seem right in focusing our attention on this shift, for it lies at the core of *stare decisis*. Nevertheless, the Spaeth and Segal work still misses the mark. It fails to consider how precedents can be followed over time through entrenchment without being cited, a point that Gerhardt so adeptly brings to our attention through his discussion of path dependency and super precedents. Perhaps more importantly, however, Spaeth and Segal simplify the two questions at the heart of our investigation here: What constitutes a precedent decision and what does it mean for two cases to be consistent with each other so that we can measure the efficacy of *stare decisis*? To answer these questions, we need a theory of precedent and a theory of consistency, a project we are getting close to completing. Before we continue in that pursuit, though, we have one more stop in investigating what the political science literature can teach us about *stare decisis* and adjudicative consistency. We will next cover how the strategic model has complicated the attitudinalist approach to *stare decisis*.

**The Strategic Model and Consistency**

The attitudinalist view of judicial decision-making is not shared by all scholars of judicial politics. While almost all political scientists accept that political attitudes play a significant role in determining how judges decide cases, certainly a more important role than the content of legal norms themselves, many political scientists have deviated from the attitudinalist approach and advanced a slightly different way of understanding how courts operate. The strategic model holds that two types of constraints limit judicial discretion. One type of constraint arises internally. Judges must co-operate with their colleagues to form majority opinions, leading them
to form coalitions with judges who do not share their political preferences. This means that often times judges sign on to opinions that do not fully express their views on a given subject. Attitudinalism, by contrast, holds that opinions correspond directly with a judge’s attitudes; judges simply do what they want. But the strategic model counters that this it too facile a view of how judging works, because it overlooks many important internal constraints imposed on judges throughout the opinion-making process. Indeed, strategic scholars have drawn our attention to how the Supreme Court operates as a political institution, focusing on how opinion-writing responsibilities are assigned, how opinions are circulated in the opinion-drafting process, and how the Justices bargain over inclusion and exclusion of the language that ultimately appears in the opinion. By focusing on the opinion-forming process, strategic scholars point to how judges often times change their views to form coalitions.

Another type of constraint is external. The strategic model points out that judges, particularly Supreme Court Justices, have audiences, and it is important that judicial decisions appear legitimate by these audiences for fear of penalty. Such penalties can arise in various ways. If the Supreme Court issues a radically unpopular ruling, the President might not enforce it, Congress might limit the Court’s jurisdiction, or the public might push for judicial reform. In all of these ways, courts must be attentive to how their opinions are received, and this places a limit on the extent to which judges may act simply according to their own preferences.

Institutional consistency thus has a greater place in judicial decision-making under this model than under the attitudinalist account. But while the strategic model concedes that consistency norms do place some constraint on judging, the strategic model holds that this is not the same type of constraint imagined by legal academics, because this consistency constraint does not operate through an inherently legal or logical mechanism. The constraint from
consistency comes instead through its efficacy in facilitating the formation of coalitions with other judges. This is indeed how many scholars in the strategic camp have conceived of *stare decisis* – not as binding judges through its legal force per se, but rather through its ability to help judges reach coalitions for majority opinions.

Knight and Epstein have written the classic work in this area, arguing that Spaeth and Segal too narrowly focus on measuring dissent-to-majority shifts. As Knight and Epstein put it, “just as one would be unable to make claims about the operation of the no-dissent norm by looking only at the content of Marshall Court votes, one would be unable to demonstrate the importance of precedent by merely considering dissents cast by justices in the progeny of important cases.” By this, Knight and Epstein refer to how Chief Justice Marshall established the norm that there would be consensus in the Court’s rulings, and this induced many of the Justices on the Marshall Court not to write separate opinions. One cannot study this no-dissent norm by simply counting the number of dissenting or concurring votes during the Marshall Court. Rather, one would have to engage in a deep and thorough examination of how the Marshall Court produced decisions as an institution. Counting votes will provide less insight into how this no-dissent norm worked than would a close study of how the Marshall Court Justices interacted with each other.

Similarly, Knight and Epstein argue, to understand how precedents constrain judicial decision-making, we cannot simply count all of the instances when Justices moved from dissents to majorities. Rather, we must look at the role that precedent plays in the Court’s internal decision-making process. To do this, Knight and Epstein focus on three instances when precedents can constrain the Justices: (1) how attorneys cite
precedents in Supreme Court case briefs, (2) how the Justices appeal to precedents during discussion of these cases in conference, and (3) how the Justices invoke precedents in circulating and drafting their opinions.

Looking at various areas of the law, Knight and Epstein document how precedents are often used by the Justices to make compromises with each other so that they can produce outcomes that are the closest to their policy preferences. Thus, even when precedents do not induce a shift from a Justice’s dissenting in a precedent decision to being in the majority in a progeny decision, precedents can constrain judicial decision-making, an important point that Spaeth and Segal overlook in their narrow way of looking at *stare decisis*. But again, the strategic model does not contend that this constraint operates formalistically as a matter of law. Rather, it is a matter of strategy. This is the way that legal argumentation and judicial practices have developed to facilitate strategic co-operation within the Supreme Court.

To illustrate how this model cashes out in an actual decision, consider how the strategic model views the Dickerson decision, discussed above, differently from legal academics. For example, Daniel Katz has argued that Rehnquist’s appeal to *stare decisis* in Dickerson was simply a defensive strategic move. According to Katz, Rehnquist knew that he did not have O’Connor’s and Kennedy’s support for overruling Miranda – meaning that if Rehnquist had not joined them in upholding Miranda, then Stevens, as the senior associate Justice in the majority, would have had the power to assign the opinion. This of course would have been highly undesirable to Rehnquist, because a Stevens majority opinion would endorse, and perhaps even expand on, the rationale of Miranda substantially beyond the tepid *stare decisis* reasoning that Rehnquist ultimately adopted in his opinion. Therefore, the strategic model holds, it was this
internal institutional dynamic that led Rehnquist to depart from his long-held stance against Miranda, not anything inherent in the Court’s doctrine of *stare decisis*.

The Dickerson opinion illustrates how consistency norms can facilitate compromise. Rehnquist, O’Connor, and Kennedy were not likely to join an opinion expressly endorsing the reasoning of Miranda, leaving the liberals with only four votes for a strong opinion in favor of Miranda. But, Katz argues, O’Connor and Kennedy were not likely to join an opinion overruling Miranda. So, to achieve a majority, Rehnquist had to accept Miranda. And in turn the liberal Justices were induced to join Rehnquist’s decision centering around *stare decisis* rather than the merits of Miranda, for to refuse to join this opinion could deprive them of Kennedy’s and O’Connor’s votes, thereby depriving the liberals of a majority decision upholding Miranda. The result of this strategic co-operation is an opinion based largely on the need for legal consistency – on the virtue of following the Miranda rule, not on the virtue of the Miranda rule itself.

But this is not because, as many in the legal academy hold, Miranda controlled any of the Justices as a matter of law. The four liberals wanted to follow Miranda because they agreed with it. Justices O’Connnor and Kennedy, as moderates, wanted a narrow ruling accepting the validity of Miranda but limiting its scope. And Chief Justice Rehnquist wanted to overrule Miranda altogether. But precedent served as an axis around which three distinct sets of Justices, with sharply divergent views on the correctness of Miranda, could reach a compromise. This is not an illustration of *stare decisis*, in the legal sense that the Justices felt compelled by law as a normative order, but it is an illustration of precedent’s utility, in that precedent’s place in judicial practices made it a part of reasoned deliberation in the pursuit of judicial policy goals. This, according to Knight and Epstein, separates the judiciary from the other political branches. It is not that courts do not pursue policy agendas. Rather, it is that courts, operating as legal
institutions with specific normative practices, pursue policy goals in different ways. And these ways are often limited by the need to make the legal system appear consistent.

Strategic accounts of *stare decisis* do not have the same flaws as the Spaeth and Segal study, because strategic accounts are less focused on rooting out the *essence* of *stare decisis*. They instead look at areas of law to see how precedents are used in the course of litigation. This largely bypasses the problem of scope, because they are interested principally in how precedents are *used* by lawyers and Justices, not specifically whether precedents actually *constrain* judicial decision-making in analogous cases. There is also not as much of an issue of consistency types, because strategic scholars do not focus on what it means to *follow* a precedent. They care more about whether precedents lead a Justice to choose an outcome that it is not ideal for that Justice given what we know about her policy preferences.

But while the scope and consistency problems are not as significant in the strategic model, they still have some importance, and a strategic account would be much richer by considering these issues, for they would reveal that precedents are *used* differently for different strategic purposes based on how scope and consistency are conceptualized in a given line of cases. When precedents are conceptualized as rules, we will often see how precedents foreclose paths, much as Gerhardt argues is the case with certain area of law. But when precedents are viewed as principles, this opens up the way for mediation; in such a situation, we will see more of the strategic reasoning that Knight and Epstein find at the core of the law. And when precedents are interpreted as factually driven outcomes, we see precedents as Scrabble-like paths, with the Justices often arranging these paths according to their preferences, in accord with how the attitudinalists see precedent. Thus, based on the different precedential scopes, we will see the legal, strategic, and attitudinal model prevailing in different ways. Some lines operate
more like rules, and therefore the legal model captures it best, while others work more like principles, supporting the strategic model, and others are more outcome-based, driven by judicial attitudes. To see how this is so, we will look in the following chapters at various lines of precedents, and see what these different lines teach us about the models covered in this chapter.

**Chapter Summary**

This chapter began by reviewing how the legal model conceptualizes *stare decisis*. We found that legal models have been quantitative and qualititative, and each has had its strengths in measuring the efficacy of *stare decisis* in constraining judicial discretion. The quantitative studies have allowed legal scholars to think of how *stare decisis* applies to a large number of cases, but they have not been able to capture how and when *stare decisis* works. In discussing various legal studies, we focused on one particularly promising work, Michael Gerhardt’s theory of how some types of precedents create path dependency within a legal system. By path dependency, Gerhardt refers to how *stare decisis* can make permanence, sequentialism, consistency, compulsion, and predictability a part of judicial decision-making. This theory bridges the chasm between the quantitative and qualitative by allowing us to think of *stare decisis* as applied to a large number of cases, but still encouraging scholars to give sufficient attention to particular cases and areas of the law so that we can see the constraint created by *stare decisis*. Some types of cases, Gerhardt teaches us, might create more path dependency than others. Although we found that Gerhardt failed to consider the two critical elements of *stare decisis* we have covered throughout this dissertation – the different types of precedential scope and consistency – Gerhardt’s theory is immensely helpful in directing us to examine path dependency in different lines of precedents and to consider the different types of precedents in examining these lines.
This chapter also covered how some leading political scientists have studied *stare decisis*. Our discussion of the attitudinalist model focused on Spaeth and Segal’s immensely influential *Majority Rule or Minority Will*. We found that although the study provides very important insights into *stare decisis* by directing our attention to how frequently Supreme Court Justices shift from dissents to majorities, the study errs in treating such shifts as the singular essence of *stare decisis*, as though other ways in which precedents constrain judicial-decision-making do not count at all in measuring *stare decisis*. An even greater problem in the Spaeth and Segal study is its failure to take into account the different types of precedential scope and consistency – a mistake that led to their greatly understating precedent’s force even within their parsimonious vision of *stare decisis* as involving only dissent-to-majority shifts. We also looked at the strategic model, focusing in particular on how Knight and Epstein have examined various stages of Supreme Court adjudication to demonstrate how Supreme Court Justices use precedents strategically to achieve their particular policy agendas. Knight and Epstein teach us that precedents do exert force, but it is not because judges feel compelled by the semantic content contained in those precedents, but rather because precedents are useful as a strategic matter in promoting judicial co-operation and compromise.

In the remaining three chapters, we will pull from all of these studies to develop our own *stare decisis* account that seeks to maximize their virtues while minimizing their defects. This theory will be based on the argument made throughout the dissertation that *stare decisis* and adjudicative consistency are overlapping and multifarious concepts, not consisting of a singular essence, but rather having different meanings and applications in different legal contexts. We will begin to develop our theory by seeking to provide a preliminary taxonomy of the different
types of legal consistency in Chapter 6, pushing us one step closer toward understanding the relationship between consistency and the rule of law.
CHAPTER 6

A TAXONOMY OF LEGAL CONSISTENCY:
AUTHORITY, QUALITY, AND MODALITY

Throughout the dissertation, we have encountered different types of legal consistencies, ranging from distinctions between facts and law, individuals and institutions, precedents and statutes, logic and function. We have seen how different legal theorists have touched on these distinct ways of thinking about legal consistency, but none has been able to provide a full account of these distinctions and how they relate to the rule of law. That is what we will seek to do in this chapter. We will move away from parsing various theories and thinkers, and toward developing our own account, in an effort to organize the distinctions we have covered thus far into a coherent way of conceptualizing the relationships among legal consistency, \textit{stare decisis}, and the rule of law.

We will organize legal consistency into three different categories: authority, quality, and modality. A legal inconsistency based on authority turns on which person or institution is the source of the inconsistency. A legal inconsistency based on quality turns on how the quality or content of the legal norms in question relate to their being inconsistent with one another. A legal inconsistency based on modality turns on how our mode of understanding the law in general relates to how we think about the inconsistency. In other words, we can distinguish inconsistencies based on \textit{who} is responsible for creating it, \textit{what} content or quality in the law is creating the conflict, and \textit{how} or to what extent the conflict constitutes a legal inconsistency. We will use these three categories of \textit{who}, \textit{what}, and \textit{how} to develop a new account for thinking about the relationship between legal consistency and the rule of law.

\textit{Authority: The Who Question}
There are two principal types of legal inconsistencies based on authority. One type is jurisdictional – i.e., an inconsistency based on two conflicting legal authorities governing the same area or space. The other is institutional – i.e., an inconsistency arising from different types of legal institutions. As we will see below, each of these raises problems for the rule of law, but both are easily resolved through various adjudicative methods.

**Jurisdictional Inconsistencies**

Jurisdictional inconsistencies can be broken down into vertical and horizontal inconsistencies. Vertical jurisdictional inconsistencies arise when similarly ordered legal institutions within the same legal system govern the same territory in inconsistent ways. We see such examples in American law when a state government passes a law that conflicts with a law in the federal system. Horizontal jurisdictional inconsistencies arise when similarly ordered legal institutions within the same legal system govern the same territory in inconsistent ways. Such examples arise when two different state governments seek to regulate in inconsistent ways the same class of action within the same territory. For example, if New York and New Jersey had different tort standards for a certain type of negligent conduct, and we had a legal dispute involving a New Jersey corporation’s allegedly negligent conduct toward a New York resident, we would have such a horizontal jurisdictional inconsistency. Both legal entities would be regulating the same class of conduct but in discordant ways.

Horizontal and vertical jurisdictional inconsistencies present problems for a legal system’s ability to guarantee the rule of law. Indeed, without a method of eliminating vertical and horizontal jurisdictional inconsistencies, a system would fail many of the conceptions of the rule of law we discussed in Chapter 4. For example, such inconsistencies would fail to satisfy Fuller’s minimal requirements of law because a system with these inconsistencies would not be
able to give citizens clear guidance on how to conform their conduct in accordance with the law so as to avoid penalty. In the case of a vertical inconsistency, citizens would not know if the federal or state law would govern their conduct, and in a horizontal one, they would be uncertain about which state’s law would control.

Such inconsistencies would also fail to satisfy a more formal conception of the rule of law, such as MacCormick’s or Kelsen’s theories holding that a legal order requires basic elements of rationality. Recall how von Wright, the important philosopher of normative systems, held that “[t]he only possibility . . . [for] showing that norms which are prescriptions can contradict one another is to relate the notion of a prescription to some idea about the unity and coherence of a will.”^424 By this, he meant that a system could not be considered rational so as to be subject to the law of non-contradiction unless we could first locate a fundamental element of epistemological coherence or unity within the system. There must be some way within a system to trace the system’s content to a single source. There must be, so to speak, a single intelligence from which all of the system’s epistemological content emanates. That is what jurisdictional inconsistencies are about – we must have a way of harmonizing horizontal and vertical inconsistencies, so that there is some hierarchical order imposing a unity of sovereign will on the system. Otherwise, we will have independent and discordant laws vying to govern the same territory, and none of these laws will contradict one another, because they will come from independently legitimate sources. It would be like two parents directing a child in inconsistent ways. Those inconsistent orders would not contradict one another unless we first had a method of deciding which parent’s orders governed which situations.

For this reason, it is hard to imagine the existence of a legal system that does not have a method of dealing with such basic things as jurisdictional inconsistencies. This of course was

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424 Id. at 151.
Kelsen’s contention – it is part of the Grundnorm to presuppose something like our preemption jurisprudence (to deal with vertical conflicts) and our conflict-of-laws jurisprudence (to deal with horizontal conflicts). As we discussed in Chapter 4, Hart criticized Kelsen on this point, arguing that it is conceivable to have a legal system without such conflict-harmonizing methods. Such a system might not be a very efficacious one, because in many situations citizens would not know which laws would govern their conduct, but it would be a legal system nonetheless. Hart seems right that, if one accepts positivist principles about the nature of law, there is nothing inherent in the concept of law requiring that judges presuppose these methods. Nevertheless, although these methods are perhaps not required for law toexist, it is hard to imagine how a legal system without such methods could be effective, because jurisdiction-harmonizing norms seem to be required for a system to guarantee the rule of law. This is because there is consensus that the rule of law requires a basic element of rationality, both in the formal logical sense of rationality, as a matter of making sense of a system, and in the functional common-sensical sense of rationality, as a matter of informing citizens of how to conform their conduct in accordance with the law’s commands. We will come back to this distinction between logical and functional rationality and what it means for the rule of law in the closing pages.

Note that we confront again here the familiar question of what it means for two things to be inconsistent with one another. Interestingly, in American law, we have integrated both logical and functional conceptions into our understanding of jurisdictional consistency. In preemption law, for example, a federal law applies instead of a state law that would otherwise apply if any of the following three conditions are satisfied: (1) Congress has clearly expressed its intent to trump state law on that issue, (2) Congress occupies the field of regulation so pervasively in that area that there is no room for state law, or (3) federal law conflicts with state
law on that subject, either directly, in that it is impossible for someone to comply with both federal and state law at the same time, or indirectly, in that it is possible for a subject to comply with both federal and state law but such joint compliance would undermine the federal government’s purpose in the law.

This analysis is primarily functional in that it is generally about how the federal and state laws operate together as a matter of practice. To simplify the doctrine, if the federal and state laws can co-exist, so that the federal law still has force despite the state law’s inconsistent command, then the state law is not preempted, but if the state law covers so much ground that it deprives the federal law of too much of its power, then the state law is invalid. There is also, however, a formal or logical element to this analysis. Direct-conflict preemption is based on a semantic analysis of the concepts inhering in the state and federal commands, rather than a functional or pragmatic inquiry into how the two commands actually interact with one another in practice. In fact, to make this analysis more predictable and coherent, some scholars, such as Caleb Nelson, have urged for the direct-conflict analysis to track deontic logic, with the principal question being whether there is a conflict of obligations created by the federal and state laws. Justice Thomas has likewise urged for the Court to abandon the indirect-conflict part of preemption doctrine, because, according to Thomas, this functional analysis is too amorphous to ensure a predicable zone of autonomy for state law. We will come back to the ambiguity of functional analyses of consistency when we talk about how the modality of understanding the law relates to how we conceptualize legal consistency.

If we do not have an inconsistency between jurisdictions, we can still have a different type of inconsistency relating to legal authority, an institutional inconsistency – i.e., an inconsistency relating to which type of legal institution generated the discordant command.
When we have two institutions with the same jurisdictional authority issuing conflicting commands, this will raise distinct issues for the rule of law.

**Institutional Inconsistencies**

An intra-institutional inconsistency arises when a single institution of government holds a law to have divergent meanings, such as when in the ACA case the Supreme Court held the individual mandate to be a penalty and not a tax so as to be justiciable under the Tax Anti-Injunction Act, but to be a tax and not a penalty so as to be constitutional under Congress’s taxing power. By contrast, an inter-institutional inconsistency arises when one institution of government issues a legal command that is inconsistent with a command issued by another institution, such as when the Supreme Court held the mandate to be a tax despite Congress’s specifically proclaiming that the mandate is a penalty and not a tax.

Both intra- and inter-institutional inconsistencies bear on the meaning of the rule of law, for they both raise ambiguity and unpredictability within a legal system, thereby rendering it impossible for a legal subject to know how to conform herself to the law’s requirements. But, as we discussed earlier, only intra-institutional inconsistencies deal with notions of rationality in legal discourse. When multiple legal authorities vie for control of the meaning of the law, that is a matter of political power or will, not rationality, because each authority may be acting rationally in contradicting the other. This, again, is like two parents issuing discordant commands to a child, such as if one parent forbade what the other required. Even in such an extreme case of normative conflict, each parent would not be acting irrationally. Although the child might feel like the combination of the two commands creates an irrational child-rearing system, for the child cannot comply with one command without violating the other, it would not be the case that the system would be actually illogical, because each parent would be able to
display what von Wright called a “coherent will.” To say that this child-rearing system was irrational, we would have to develop a way of assimilating each parent’s commands into a unified system, so that the law of non-contradiction could apply to that system’s edicts.

For this reason, when a single legal authority issues conflicting legal norms, this does touch on matters of rationality, because in this instance the institution is displaying a singular will. But as we will see below, how this relates to the rule of law will turn on the type of institution issuing the command. Some types of legal institutions are not designed to act consistently, and for this reason, we do not generally say that they are acting irrationally when they contradict themselves.

We see a neat illustration of this in the ACA case. Many commentators disagreed with the Court’s finding the mandate to be a tax despite Congress’s insisting it was a penalty. But few would characterize the Court’s introduction of an inter-institutional inconsistency as an irrational act. Rather, we accept such an inter-institutional inconsistency as a rather ordinary element of judicial politics and decision-making. Courts often disagree with how a legislative body defines the law. But many accused the Court of acting irrationally in holding the mandate to be a tax under the Taxing and Spending Clause but a penalty under the Tax Anti-Injunction Act. This was different from ordinary judicial politics because it involved the Court contradicting itself within a single opinion. Our legal culture accepts the existence of conflict within the Court (as displayed in dissenting opinions), within individual Justices over time (this is why we value institutional over personal stare decisis), and even within the Court as an institution over time (this is why stare decisis permits overrulings). But the Court appears irrational, and therefore to be threatening the rule of law, when the majority opinion for the Court contradicts itself as it did in the ACA case.
Why do we hold the Court to this standard of rationality? Because rationality carries special significance for the judiciary, and this is because in our legal system we have come to think of the judiciary as the government’s principal organ of reason. We covered this in some depth in Chapter 2 when we discussed the different periods of legal thought – how despite the many changes in legal theory and practice since the creation of the American legal system, there has been a persistent notion that the judiciary has a special obligation, distinct from the other branches of government, to act rationally. This is of course what Hamilton was referring to in Federalist 78 when he wrote that while the executive has the power of the sword, and the legislature the power of the purse, the judiciary has the power of the pen.

*Stare decisis* grows out of this expectation that the judiciary will act with a special attention to reason. Indeed, recall the many commentators covered in Chapter 2 extolling *stare decisis* as the primary way that courts promote rationality in the law; this is because it is the legal doctrine most directed to inducing courts to comply with the law of non-contradiction in their decision-making. It is therefore no coincidence that in the very essay in which Hamilton identified the judiciary as the organ of reason in the American legal system, he also explained how *stare decisis* must constrain its power: “To avoid an arbitrary discretion in the courts, it is indispensable that [federal courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” 425 For a court to act rationally, it must ensure that it acts consistently with its prior judgments.

There is no concomitant need for intra-institutional consistency in the legislative or executive branches, because we do not expect these branches to serve the rule of law through their rationality. Indeed, although some thinkers, most famously Edmund Burke, have urged for legislators to show deference to tradition, and some commentators have talked of a diluted

version of *stare decisis* applying to legislative and executive decision-making,\textsuperscript{426} it has a very different application in the judiciary. Because the judiciary serves the rule of law principally through its guarantee of rationality in the law, we place a particularly high value on its promotion of intra-institutional consistency. By contrast, the legislative and executive branches serve the rule of law primarily through their co-operation with other branches – that is, in promoting inter-institutional consistency.

We see this contrast vividly in examples of inconsistency within the presidency. When a president contradicts how Congress has promulgated a law or the judiciary has interpreted that law, such an inter-institutional inconsistency threatens the rule of law, because it comes at the cost of enlarging the executive’s discretion and threatening legal certainty. But when the executive branch contradicts itself, either through a conflict between agencies or within the presidency itself, we do not see this as undermining legal certainty or rationality. Such instances of intra-institutional inconsistency within the executive branch present very minimal rule-of-law concerns.

Consider how people responded when President Obama changed his view of the constitutionality of DOMA, a law signed by Clinton and defended vigorously by Bush. Obama alerted Congress that he would continue to enforce the law, but he would no longer defend its validity against constitutional challenges. Many faulted Obama for breaching his duty to execute the law, and many accused him of engaging in an opportunistic attempt to gain popularity immediately after the polls had indicated that the tide had turned in favor of same-sex marriage, but no one accused him of violating the rule of law by creating an inconsistency between his own and past administrations’ views on the constitutionality of DOMA. Even his most ardent critics

\textsuperscript{426} Trevor Morrison on *stare decisis* in OLC opinions – how it is different from and similar to *stare decisis* in judicial opinions.
did not see this as a threat to the rule of law, because no one saw this as an irrational act, undermining the coherence of our legal system, or an unstable act, making our legal system unpredictable so that citizens could not know how to conform their conduct in accordance with its commands. It may be true that a President might threaten the rule of law if he were to switch his policies frequently on particular matters, for such fluctuations might create the type of uncertainty and unpredictability that legal systems ensuring the rule of law seek to eliminate so that subjects may organize their lives around the law. Indeed, this seems to be the concern that Bush exploited in his 2004 campaign against Kerry, and that Obama emphasized in his 2012 campaign against Romney: A President who frequently switches his positions cannot adequately serve the important presidential function of contributing to the rule of law through consistent articulations of United States policy. But for the most part we have come to expect such intra-institutional inconsistencies within the presidency, because the position, as the popularly elected head of the federal government, is designed to respond to changing political coalitions and environments. This is in sharp contrast with the federal judiciary. As a life-tenured, unelected, and largely isolated body of elite lawyers, its role in the rule of law is largely in creating a coherent or rational legal system, so its intra-institutional inconsistencies carry a very deep significance for the rule of law. Again, consistency’s relationship to the rule of law is highly contextualized, turning on what type of legal institution is involved.

Whereas intra-institutional inconsistencies within the presidency do not present significant rule-of-law concerns, inter-institutional ones do, but just as it matters what type of institution is involved in determining whether intra-institutional or inter-institutional inconsistencies matter for the rule of law, it matters for presidential inter-institutional inconsistencies which type of institution the president is contradicting. As mentioned above,
Obama’s inconsistency with regard to DOMA did not raise controversy because he contradicted himself, but rather because he contradicted Congress in refusing to defend the law. It was his refusal to execute the law that stirred up controversy. But this was mostly political noise, without much significance for the rule of law, because it has long been part of the American tradition that it is within a president’s prerogative, as part of the separation of powers, to establish his own vision of what the Constitution requires and to pursue policies consistent with his own political agenda, independent of legislative determinations. Indeed, this has deep roots in our political tradition, going all the way back to President Jefferson’s decision not to execute the Sedition Act on the ground that he believed the Act to be unconstitutional under the Free Speech Clause. Presidential signing statements, outlining the executive’s interpretation of its duties pursuant to a particular law, have become pervasive in the modern presidency. Although some scholars have questioned their legal pedigree, particularly due to the Bush Administration’s use of such statements in the war on terror, they are part of a broader tradition, giving the executive leverage in determining the contours of its duties under laws passed by Congress. There are to be sure some instances when such executive actions will overstep, creating a rule-of-law problem through its usurpation of the legislative power, but generally this is part of our political process and therefore these inter-institutional inconsistencies do not pose threats to the rule of law.

A president raises deeper rule-of-law concerns, however, when the inter-institutional inconsistency involves the executive’s abnegation of a judicial ruling. Contrast the DOMA situation with the uproar that followed when Judge Brett Kavanaugh proclaimed, in dissenting from the D.C. Circuit’s upholding the ACA in *Seven-Sky v. Holder*, that even if the ACA was ultimately found constitutional by the Supreme Court (which of course it was), a future President
would still be free to ignore the statute. In a widely read New Yorker article, Jeffrey Toobin observed, what should have been plainly obvious to a federal judge like Kavanaugh, that this is “not how [our system] works.” Toobin is clearly right that this is not how our system works, and that a presidential abnegation of the law could very well amount to a violation of the rule of law. But this is not necessarily because it would involve the president defying the law. Rather, this would create a problem for the rule of law in our system because it would involve the executive creating an inter-institutional inconsistency with a judicial ruling. That is, Obama could, without raising serious rule-of-law concerns, defy Congress, past presidents, as well as himself when it came to the validity of DOMA, but he could not do that with a judicial ruling, because it is part of our system that the judiciary, and not any of these other institutions, provides the final word on the meaning of law.

This is of course why the precious few examples we have of presidential defiance of judicial rulings, such as Andrew Jackson’s challenge to the Marshall Court and Abraham Lincoln’s defiance of the Court during the Civil War, are so controversial. We should note here that although Cooper v. Aaron is notorious for developing the imperial judiciary, the Cooper opinion is defensible to some extent as an accurate portrayal of the judiciary’s role in our political system dating back all the way to the Founding. Indeed, when the Cooper Court interpreted the phrase “a government of laws and not of men” to mean that “[e]very act of government may be challenged by an appeal to law, as finally pronounced by this Court,” it was essentially saying that the rule of law requires that there be some final institutional authority to make the system work. And although this dictum from the Cooper decision has been widely assailed as a judicial usurpation of power, a criticism certainly justified based on the surrounding
political context, there was also something much deeper to the opinion, extending beyond the particular political issue of dealing with the aftermath of Brown.

That deeper issue is this: the rule of law requires that a legal system have a final institutional authority. In our system, it did not need to be the judiciary, but, starting even before Marbury, that is how our system has developed. Defying a system’s final institutional authority creates different problems for the rule of law than does defying a coordinate authority within the system. Thus, in the American system, the executive’s inconsistent command with the legislative branch does not raise the same concerns as its inconsistent command with a judicial ruling. Conversely, the final institutional authority’s defiance of another branch does not raise the same rule-of-law problems as does its repudiation of itself. *Stare decisis* and judicial review are thus intimately connected, a link that Hamilton identified in Federalist 78. The power of judicial review corresponds with the constraint of *stare decisis*.

This is what is meant above in saying that the relationship between institutional consistency and the rule of law turns on the type of institution within the particular legal system. An institution with final authority, such as the U.S. Supreme Court, will need to exercise some level of rationality in its decision-making, because, as MacCormick argued, that is how such institutions contribute to the rule of law. They sit as an ultimate body of reason over the system and render the law coherent. This does not mean that a system without judicial review or *stare decisis* cannot have the rule of law. But it does mean that a system guaranteeing the rule of law will need some institution to harmonize the system’s commands, and this institution will best promote the rule of law by rendering the other institution’s commands coherent, in the process striving to be consistent with itself, so as to make the law more rational. The doctrines of
judicial review and *stare decisis* are the ways the American system has developed to deal with these issues.

Through this section we have seen how a system seeking to create the rule of law needs to create a certain type of consistency among legal authorities. It will need to sort out how to reconcile horizontal and vertical jurisdictional conflicts, and it will need to invest an institution of government with the power to harmonize conflicts that will arise within, between, and among other institutions. In the American system, the doctrines relating to preemption, conflicts of laws, judicial review, and *stare decisis* create a consistency of legal authority. Now that we have covered the issues of authority relating to creating a consistent legal system, we can look at how the quality or content of laws relate to this enterprise in ensuring the rule of law.

**Quality: The What Question**

There are two ways in which the quality or content of law relates to legal consistency. One is based on where in a legal hierarchy a legal norm is placed – i.e., whether it is a statute, a constitutional provision, an administrative regulation, and so on. Another way is how the norm is interpreted – i.e., whether it is derived from a text’s plain meaning, a precedent, a policy concern, and so on. These two types of consistency relating to the quality of the legal norm will raise different issues for the rule of law.

*Hierarchical Inconsistencies*

Every legal system positions its legal norms differently within a hierarchy, with some types of laws trumping others. An inter-hierarchical inconsistency is an inconsistency between laws positioned at different ranks within that system’s hierarchy, and an intra-hierarchical inconsistency is an inconsistency between laws positioned at the same rank. In the American system, for example, legislatures frequently pass statutes that are seemingly inconsistent with
constitutional requirements, thus creating a need to determine whether statutory or constitutional law is supreme. But just as with an inter-jurisdictional inconsistency, where all we need for resolution is a method for settling which legal authority’s norms prevail, with an inter-hierarchical inconsistency all we need for resolution is a method for settling which type of norm is positioned higher within that system’s legal hierarchy. The Supremacy Clause, just as it resolves vertical jurisdictional conflicts, also resolves American inter-hierarchical conflicts; indeed, the Supremacy Clause, under the Supreme Court’s decision in Marbury, means that the Constitution, as interpreted by the Court, is supreme over all other types of laws. Thus, so long as we have a method of placing the norms within a hierarchical order, inter-hierarchical inconsistencies, just like inter-jurisdictional inconsistencies, bear little relationship to the rule of law.

Intra-hierarchical inconsistencies, however, do potentially raise significant problems for the rule of law, because in these instances it is not immediately clear which law within that same rank should prevail over the other. Here, in discussing intra-hierarchical inconsistencies, we must explore the distinction between what I will call internal and external intra-hierarchical inconsistencies. We can have internal intra-hierarchical inconsistencies, when there are inconsistent commands within the same law, as well as external intra-hierarchical inconsistencies, when different laws of the same hierarchical type conflict.

External intra-hierarchical inconsistencies are of course more common. As an example of such an inconsistency, consider the conflict leading up to the Court’s recent same-sex marriage decision, Hollingsworth v. Perry. In May 2008, the California Supreme Court held in In re Marriage Cases that state laws banning same-sex marriage violate the California Constitution. Then, in November 2009, after a heated referendum on the issue, same-sex marriage opponents

427 183 P.3d 384 (Cal. 2008).
succeeded in passing Proposition 8, amending the California Constitution to require the
government to ban same-sex marriage. Thus, the voters moved what had been a constitutional
prohibition under a California Supreme Court ruling to a constitutional requirement under a
popular initiative, creating an external intra-hierarchical inconsistency. Proponents of same-sex
marriage challenged the constitutionality of Proposition 8 in *Strauss v. Horton*, partly on the
ground that voters may not amend the state constitution so as to override rights found to be
inalienable by the California Supreme Court. This struck many observers as an incoherent
argument, for it required treating some constitutional provisions as having greater legal value
than other provisions in the same constitution. Perhaps even more problematically for some
commentators, this argument reeked of judicial supremacy, treating a constitutional guarantee as
interpreted by the California Supreme Court as unalterable, even through the democratic process

But this is an incoherent argument only if one assumes that all provisions in a
constitution must have the same value. This is by no means required of every constitutional
order. In fact, some constitutions, such as the Basic Law for the Federal Republic of Germany,
expressly contain so-called “eternity clauses,” providing that certain fundamental guarantees,
such as human rights, may not ever be amended. In such an order, it would not be strange to say
that external intra-hierarchical inconsistencies can be resolved by consulting the eternity clause. But because the California Constitution did not entrench any of its guarantees as having a
superior status over others, the California Supreme Court rejected this challenge to Proposition 8,
instead holding that Proposition 8 had become part of the California Constitution and had
thereby overturned the court’s ruling in *In re Marriage Cases*.

The same-sex marriage proponents responded by taking their case to the federal judicial
system on the ground that Proposition 8 violated the Equal Protection Clause of the 14th

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Amendment to the U.S. Constitution, and in February 2012, in *Perry v. Brown*, the Ninth Circuit agreed and invalidated Proposition 8, a ruling that the Supreme Court eventually reversed in *Hollingsworth v. Perry* on the ground that the defenders of Proposition 8 did not have standing to appeal the decision in the Ninth Circuit. The point for our purposes here is that the inconsistency between Proposition 8 and the 14th Amendment did not present a problem for the Ninth Circuit, because, as discussed above, this is merely a vertical inter-jurisdictional inconsistency – a conflict between a federal and a state constitutional guarantee – and this could be easily resolved through the Supremacy Clause without raising rule-of-law problems. But had there been a prohibition of same-sex marriage in the U.S. Constitution, such as the proposed Federal Marriage Amendment, then the Ninth Circuit would have faced an external intra-hierarchical inconsistency between the Equal Protection Clause prohibition on sexual orientation discrimination and the Federal Marriage Amendment’s requirement that only opposite-sex couple marriages be recognized.

To understand how a court might grapple with this inconsistency, let’s assume that the 2004 Federal Marriage Amendment was ratified, providing the following: “Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.” There would be a question here of whether the Federal Marriage Amendment carved out an exception to any prohibition that the Court might find in the Equal Protection Clause’s prohibition of arbitrary discrimination on the basis of sexual orientation.

This would raise serious problems for the rule of law, and there would be no clear way of resolving it. One way would be to prioritize time as a value, as Kelsen argued is a necessary
product of the Grundnorm. Bruce Ackerman has likewise suggested that this is part of the judiciary’s function within a democracy, in responding to the citizenry’s constitutional moments. Therefore, he has conceded that if the Constitution were to be amended to make America formally a Christian state, it would be, in Ackerman’s view, the judiciary’s obligation to enforce that pro-Christian guarantee over any conflicting prohibition provided in the Establishment Clause.

Another approach might be to place priority not on time but on substantive value, such as how Dworkin has argued courts should look to the underlying purpose of the entire legal system in reconciling conflicts between norms. A variation of this approach has been advanced recently by Neil Buchanan and Michael Dorf in dealing with the conflicting constitutional obligations President Obama would have faced had Congress stayed true to its threats, in 2011 and 2013, not to raise the debt ceiling, an issue of continuing concern as Congress has consistently agreed only to suspend, not to eliminate or significantly raise, the debt ceiling. Buchanan and Dorf argue that President Obama thus faced, and continues to face, conflicting constitutional obligations between the Take Care Clause, which requires the President to “take Care that the Laws be faithfully executed,” and Section 4 of the Fourteenth Amendment, which requires that “[t]he validity of the public debt of the United States . . . shall not be questioned.” Buchanan and Dorf propose that, when faced with such a conflict of constitutional obligations, political actors should take the “least unconstitutional course” by selecting the option that most effectively accomplishes the following three goals: 1) minimizes the unconstitutional assumption of power, 2) minimizes sub-constitutional harm, and 3) preserves the ability of other actors to undo or remedy constitutional violations. Based on these principles, Dorf and Buchanan concluded that
the President should ignore the debt ceiling, thereby trumping the President’s Fourteenth Amendment over Take Care Clause obligations.

Presenting an even greater problem for the rule of law, though, are internal hierarchical inconsistencies, because there is no way to prioritize them in terms of time or value. These are quite rare, but they do arise every now and then, and they raise particularly poignant rule-of-law concerns. In fact, we have already encountered several in this dissertation. The early conflicts over abortion involved such a potential inconsistency, with the pro-choice movement arguing that the Due Process Clause prohibited the state from regulating abortion and the pro-life claiming that the Due Process Clause actually required such regulation as part of its protection of fetal life. Likewise, we saw in *Locke v. Davey* how the Establishment Clause was marshaled to claim for a right for religious organizations to be included in generally available funding programs, despite the fact that it had been interpreted by the Supreme Court throughout the 1970s to require that such organizations be excluded. And in the Court’s most recent affirmative-action case, *Schuette v. Coalition to Defend Affirmative Action*, challengers to Michigan’s Proposition 2 invoked the Equal Protection Clause’s so-called “political process” doctrine in seeking to invalidate a state constitutional amendment that was designed to restore what some saw as an enfeebled strict scrutiny standard after the Grutter decision. In all of these instances, there was a potential inconsistency between the same constitutional provision, with one social movement arguing that the guarantee prohibited precisely what another group argued it required. We cannot reconcile such conflicts through recourse to time or value, because they stem from the same constitutional provision.

Consulting the interpretive methodologies that yielded the conflict can help solve this problem, however, because we can prioritize some methodologies over others. For example, an
originalist will often prioritize an Equal Protection Clause command derived from the original meaning of the Clause over one derived from the Court’s precedents. This is indeed what Justice Scalia urged the Court to do with regard to the “political process” doctrine in his Schuette concurrence. But as we will see in the next sub-section on the how the quality or content of a legal ruling implicates the relationship between the rule of law and consistency, a conflict within the same interpretive methodology will create further problems for harmonizing laws within the same hierarchical order.

Methodological Inconsistencies

Inter-methodological inconsistencies arise when different interpretive methodologies yield different results for applying the same law to the same set of facts. Intra-methodological inconsistencies arise when the same interpretive methodologies yield different results. As Phillip Bobbitt has pointed out in his influential work Constitutional Interpretation, there are six interpretive methodologies in constitutional adjudication – what Bobbitt calls the modalities of constitutional interpretation – based on (1) text, (2) history, (3) constitutional structure, (4) judicial doctrine, (5) pragmatic considerations, and (6) cultural ethos. Bobbitt writes that when these modalities conflict with each other, judges do and should turn inward to their consciences to resolve what he calls “modal conflicts.” Bobbitt calls this inward movement a “recursion to conscience,” which he sees as “the crucial activity on which the [modal] constitutional system of interpretation . . . depends.” This recursion is so crucial for Bobbitt because it provides “[t]he space for moral reflection on our ideologies, just as garden walls can create a space for a garden.” Some have argued that these modal conflicts reveal the lawlessness lurking in Bobbitt’s theory. But this seems overstated. Indeed, there seems to be no threat to the rule of law in Dworkin’s Hercules privileging the ethical modality over the others. Likewise, while many may
not like Justice Scalia’s prioritizing text and history over pragmatic considerations, his approach to judging does not create the incoherence in the law that we are concerned about when we talk about the rule of law. This may make him a bad judge, in some people’s view, but it does not make him a lawless one. Nor would it make Justice Scalia a lawless judge if he were to act inconsistently in applying his own originalism by sometimes prioritizing pragmatism over text and history, as he seemed to do in Bush v. Gore. This might make him a bad originalist, but not, again, a lawless judge. Bobbitt’s proposal for a “recursion to conscience” is nothing more or less than a judge’s reconciliation of a modal conflict through the judge’s theorizing about which modalities are most applicable in that case, a process that may invite controversy and dispute, but not necessarily, or even often, a serious threat to the rule of law.

A more significant problem arises, however, when a conflict arises within the same modality, a possibility that Bobbitt does not consider, which is quite surprising, given that the American legal system contains an abundance of such intra-methodological conflicts. Consider, for example, the Heller decision, where Justice Scalia, writing for the majority, and Justice Stevens, writing for the dissent, each engaged in textual analysis to achieve conflicting interpretations of the Second Amendment. Whereas Scalia interpreted the Second Amendment as an individual right by placing special emphasis on the second clause of the Amendment, what he called the “operative clause,” guaranteeing a right of the people to bear arms, Stevens focused on the first clause to find that the Second Amendment created a collective right, linking any individual right to bear arms to the need for a well-regulated militia. The Heller case also involved historical inconsistencies, as evidenced again in the Scalia and Stevens opinions, with Scalia citing the historical evidence supporting an individual right and Stevens marshaling competing evidence for a collective right. Inconsistencies also arise within structural
interpretations. For example, while the U.S. Constitution creates a distinct separation of powers, these powers often blur, as evidenced in cases like Morrison v. Olsen, where the majority interpreted the separation of powers in a functional way to permit Congress’s creation of the Independent Counsel’s power over the executive branch, and Justice Scalia, in dissent, interpreted the doctrine much more formally to forbid such blurring of powers. We see here how judges could appeal to the Constitution’s structural guarantees to reach conflicting interpretations.

Doctrinal inconsistencies are pervasive in the law, as we have seen throughout this dissertation. Indeed, the U.S. Supreme Court often creates a line of precedents that later turn out to conflict with another line. This is precisely why *stare decisis* is such a difficult concept to grasp. There are always precedents to support each side. As is often said, there are always enough precedents to go around. Recall from Chapter 2 that this was Karl Llewellyn’s point about why *stare decisis* fails to ensure adjudicative consistency; a system of precedents is always Janus-faced, pointing courts in opposing directions. We will come back to this point in the final chapter when we try to come up with an account of how *stare decisis* preserves some consistency, despite this feature of precedent-based decision-making.

We should note here, a point we have made earlier, that the precedent methodology is not univocal, something that Bobbitt overlooks in his taxonomy of the six modalities of constitutional interpretation. A single line of precedents might come to conflict with itself due to contradicting interpretations based on whether the rules-, results-, or principles- approach is used. This is not a distinction limited to precedent-based decision-making. As noted earlier, all forms of legal interpretations can be divided among rules, facts, and principles. For example, some originalist methodologies derive rules from historical meaning, some use historical
materials to limits judges to fact-driven results, and others generate broad principles of application. This creates a further problem for creating any consistency within a legal system with the use of *stare decisis*, a problem we have run up against throughout the dissertation.

The final two interpretive methodologies can also create internal conflicts. These methodologies are more functional and less formal than the previous four, and for this reason are more strongly disfavored by those, particularly legal conservatives, seeking to constrain judicial power. Conservatives have long inveighed against these two methodologies for opening up judicial discretion. It is no doubt true that these two modalities of constitutional interpretation are especially amorphous, and for this reason lend themselves to internal contradiction. Indeed, practical considerations often favor opposing sides of a dispute, and in a plural nation like the U.S., our system is full of competing ethical considerations that weigh and tug against one another, muddying any interpretation based on practical and ethical factors. But legal conservatives seem wrong in singling out these methodologies as the only ones that are so amorphous so as to create problems for the rule of law. Rather, we will have rule-of-law problems whenever an interpretive methodology turns on itself, threatening the coherence at the heart of the judiciary’s role in guaranteeing the rule of law. In the final chapter, we will search for ways to escape this reflexivity that is so threatening to the rule of law.

As we have seen in this discussion, quality inconsistencies raise much more significant problems for the rule of law than do authority inconsistencies. We saw in our examination of authority inconsistencies how the doctrines of preemption, conflict of laws, judicial review, and *stare decisis* help to minimize the problems arising from authority conflicts. But when conflicts arise within a legal norm, particularly within one methodology for interpreting that norm, we
have little recourse for ensuring the rule of law. Our final recourse will be to how we conceptualize the law in general, what I call the modality with which we interpret the law.

**Modality: The How Question**

There are generally two overarching modalities to how we conceptualize a legal system, one based on time and another based on logic. Both of these will be important in understanding the judiciary’s role in rendering a legal system consistent to preserve the rule of law.

**Temporal Inconsistencies**

Mark Twain is reputed to have said “history doesn't repeat itself, but it rhymes.” This quote, though of somewhat dubious origin,\(^{429}\) has become a popular one in legal discourse, partly because it captures some of the difficulty we have encountered thus far in applying consistency norms to legal adjudication. A legal system, particularly one based on judge-made law, is constantly adapting according to new fact patterns, emerging social movements, and changing political contexts. No two judicial rulings are the same, and no two cases deal with the same issues. But there are many ways in which rulings and cases are similar. The law does not repeat itself; but it does rhyme. The rule of law, then, cannot require that legal norms repeat themselves over time, but it may require that courts preserve some rhyme within a particular scheme. This means that when the system has undergone a fundamental change, to the point that the rhyme scheme has changed, we may be liberated from a past ruling.

We thus have a further distinction when discussing consistency in legal adjudication – a distinction between inter-and intra-temporal inconsistencies. Whereas an inter-temporal inconsistency is a difference between what a law requires at time x and at time y, when there has been a legally significant event in between those periods, an intra-temporal inconsistency is a

\(^{429}\) Note that Twain scholars generally “agree that the quotation sounds very much like something Twain would say, but none seems able to find the actual words in Twain's papers.” Lawrence P. Wilkins, Foreword, 28 Indiana Law Review 135 (1995).
difference between what a law requires at time x and at time y, when there has not been a legally significant event in between those periods. As these definitions illustrate, “temporal” in this context refers to legal rather than to actual time – i.e., to whether there has been a legally significant event marking a new legal period. Here, I have in mind something like a weaker version of Bruce Ackerman’s notion of “constitutional moments,” those deliberative movements of great social magnitude in which We the People have come together to re-conceptualize how we think of our constitutional commitments. A legally significant event, under my temporal framework, does not necessarily rise to this level of importance that it transforms our constitutional concepts, in the way that Ackerman’s constitutional moments do, but a legally significant event does shift our frames so that we see particular legal guarantees in fundamentally different ways.

Examples from both within the presidency and the Supreme Court might help clarify how this distinction will help us clarify what I have in mind here. In 2011, when President Obama decided not to defend DOMA any longer, Attorney General Holder submitted a memo to Congress outlining the reasons why the Administration no longer found the law constitutional. Holder pointed to intervening legal events since the passage of DOMA, particularly Lawrence v. Texas, to justify the Administration’s change in position with regard to DOMA. Of course, Lawrence was decided five years before Obama even took office, but Holder contested that the Lawrence decision, in conjunction with more-recent lower court opinions dealing with same-sex marriage, should lead courts to apply a heightened standard of review to DOMA and, more importantly, warranted Obama’s disavowing the statute’s constitutionality on this basis. Obama was therefore arguing that his volte face did not represent a personal or arbitrary inconsistency, but was rather a product of a significant intervening legal event, thereby making it what we are
calling here an *inter*-temporal inconsistency. Obama seemed to think that such an inconsistency would be much less damaging to the rule of law, and more practically his approval ratings, than would creating an *intra*-temporal inconsistency, in which Obama simply changed his mind on DOMA without a significant Supreme Court ruling warranting such a reversal. For the executive branch, as discussed above, its institutional duty with regard to the rule of law is to be consistent with the Supreme Court, not necessarily Congress, so a significant temporal event for the executive’s consistency obligation is a Supreme Court ruling marking a new legal framework for that particular issue. One could of course bicker with whether Obama is right that Lawrence is such a ruling, for it did not formally raise the standard of review for sexual orientation discrimination, nor did it deal directly with same-sex marriage, but the point for our purposes is not the merit of Obama’s decision. Rather, the significant point for us is that the Administration defended its inconsistency through recourse to an intervening Supreme Court ruling.

An easier example is that of Brown v. Board of Education. Brown created an *intra*-temporal inconsistency with Plessy, because between 1896 and 1954 there were no legally significant events altering the meaning of the Plessy decision. To be sure, there were important pre-Brown decisions, such as Sweatt v. Painter, narrowly interpreting the separate-but-equal doctrine in the realm of higher education, but none of these decisions fundamentally uprooted segregation so as to signal a complete overhaul of the relationship between the Equal Protection Clause and racial segregation.

The Brown decision did just that. We therefore can think of the desegregation decisions following Brown as creating *inter*-temporal inconsistencies, because those decisions came after this dismantling of segregation. Because Brown marked the beginning of a new race-relations
paradigm under the Equal Protection Clause, it was as if the post-Brown desegregation decisions came during a different legal time period than did the pre-Brown cases.

This insight provides the answer to the question posed earlier in the dissertation about whether Brown or Gayle or some other decision overruled Brown. As alluded to earlier, they all did, together, in signaling the end of segregation and creating a new legal framework for dealing with race. We would be missing the point by engaging in a parsimonious analysis of these cases to see which one was precisely inconsistent with Plessy so as to require its overruling. These decisions were not created to work in this way. Rather, they were designed to shift frames, so that the Equal Protection Clause would be not about the formally equal distribution of public goods or resources, as the Plessy framework provided, but about eliminating, or at least substantially weakening, the role of race in government decision-making. As we will discuss in the final chapter, some judicial decisions are designed to be parsed closely, so that *stare decisis* calls for a rigorous examination of the factual and legal similarities between the precedent and progeny cases, but *stare decisis* is not a univocal doctrine, and in some contexts, such as Brown, the Court abandoned Plessy without having to do so formally, because it was an issue of such magnitude and breadth that the Brown ruling marked a new legal time period. For this reason, it would be incongruous to speak of post-Brown decisions as being inconsistent with Plessy and to search for which one formally overruled Plessy. This would be a mere matter of legal trivia, not a matter of understanding the law. Brown had changed the rhyme scheme, so we no longer needed to engage in dialogue with Plessy.

*Logical Inconsistencies*

Finally, overarching all of these matters is the question that we have kept coming back to in this dissertation – whether we conceptualize legal consistency in a functional or a logical
matter. This *how* question is perhaps the most perplexing in our taxonomy of legal consistency, because it seems to create an insuperable gap between different theories of law. This is because whether we think that the law must be logically or functionally consistent is inextricably connected to broader questions relating to how we theorize the nature of law. Those that see law as a species of logic or philosophy will often interpret the consistency requirement in logical terms, but those that see law as a part of politics will see this requirement in more functional terms. There is no way to bridge this gap without first resolving the age-old debate over the division between law and politics, creating a seemingly insurmountable barrier to resolving how to conceptualize the consistency requirement in the rule of law.

Let us recap now some of the key figures in this division, so that we can see more clearly how important this division is and how deep it cuts in legal theory and practice. Recall some of the legal theorists and jurists who have viewed legal consistency as a logical matter, as though logic compels judges to eradicate inconsistencies from a legal system. In Chapter 2, we covered some of the most notable proponents of this approach, the much-maligned late 19th and early 20th century legal formalists, who viewed law as a logical system consisting of internally consistent necessary and sufficient conditions. In Chapter 3, we explored how various philosophers have conceptualized the relationship between law and consistency in logical terms, which influenced the pure theory of law advanced by the Austrian legal philosopher Hans Kelsen. In Chapter 4, we examined his theory of law, holding that all legal systems have a Grundnorm that compels judges to presuppose the non-existence of logical inconsistencies. For Kelsen, this means that courts must avoid interpreting the law to create competing obligation norms. Removing the Kantian metaphysical baggage from Kelsen’s argument, Neil MacCormick argued that although it is mere mysticism to say there is a Grundnorm requiring the
extirpation of inconsistencies, it is true that courts, given their special institutional role in securing the rule of law, do and should base their decisions on deductive justifications, requiring that they eliminate logical inconsistencies from their decisions.

We also have discussed how, against this logical account of why judges must eradicate inconsistencies from legal systems, some jurists and theorists have provided more functional approaches to legal consistency. Responding to the legal formalists, the legal realist and critical legal studies movements have rejected the idea that adjudication must be logically consistent; in fact, some critical legal studies scholars have held that legal systems are necessarily inconsistent, reflecting the deep antinomies in a pluralistic society. These are the “vegetables” that Aristotle so excoriated. Also taking a more functionalist view was H.L.A. Hart, who challenged Kelsen’s claim that all legal systems must presuppose the non-existence of logical contradictions; Hart explained that logical contradictions must be eliminated from a system not according to Kelsen’s mystical basic norm, but only according to a rule positively promulgated within that system, and Hart further attacked Kelsen’s theory by questioning his definition of a legal contradiction as including only conflicts of obligations. Likewise, Lon Fuller and Ronald Dworkin have challenged MacCormick’s account for why courts are institutions whose distinct roles in securing the rule of law require judges to eliminate logical inconsistencies; by contrast, they have argued that courts are institutions whose special moral roles in securing the rule of law require judges to extirpate only those inconsistencies that undermine that moral function. Substantiating Fuller’s view that conflicting legal requirements do not “trespass against logic,” the logician and Danish legal realist Alf Ross challenged von Wright’s claim that conflicts of obligations are a special type of inconsistency as a logical matter, and moreover, whether there could be such a thing as a logic of norms in the first place. According to Ross, conflicts of obligations are “not
of the nature of a logical contradiction,” because “whether it is possible at the same time to order, or to accept, both directives is a question to be decided by experience.”

In the previous chapter, we saw the deep importance this division over whether legal consistency is a logical or a practical concept holds for understanding *stare decisis.* We discussed the possibility that in some instances courts might be willing to create a functional inconsistency with prior rulings, but not go so far as to create a logical inconsistency. By ignoring this distinction, studies of *stare decisis* have overlooked the force that *stare decisis* might exert on judicial decision-making.

We have likewise seen in this chapter how the judiciary’s role in preserving the rule of law relates to logical consistency. In contrast to the univocal ways in which we often talk about legal consistency, it is a multifarious concept, containing different meanings and applications for the rule of law depending on the type of legal institution and quality of legal norm that are at issue. The judiciary’s rule-of-law obligation is to preserve normative coherence. We have seen how the greatest threats to the judiciary’s preservation of the rule of law arise when a legal norm derived from within the same hierarchical order of the judiciary contradicts a similarly sourced and positioned norm. Therefore, one of the judiciary’s principal rule-of-law obligations in preserving normative coherence is to ensure that its rulings do not turn on themselves. In other words, courts must safeguard precedents against their reflexivity. We can have conflicts between jurisdictions, institutions, types of laws, legal norms, interpretive methodologies, and time frames. We simply need ways to order these into a unified will or scheme. But when we have internal conflicts, so that the law threatens to turn against itself, there is no simple way to

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430 ALF ROSS, DIRECTIVES AND NORMS 169 (1968).
431 Id.
harmonize the law. In these instances, the judiciary’s role in preserving legal rationality is at stake.

But this brings us right back to that question – what kind of rationality is this, one of function or logic? In discussing the rule of law, we have co-mingled these two, sometimes talking about the need for the law to be functionally coherent so that people can conform their conduct in accordance with its commands, as well as the need for the law to be logically consistent so that it makes sense as an abstract matter. The reason we have co-mingled these two is that the rule of law seems to require both senses of rationality. This is indeed what MacCormick argued, that courts must make the law cohere, so that it functions, but also logically consistent, so that it makes sense. But MacCormick was not clear about how to deal with situations when logical and functional consistency conflict. Such conflicts often arise, creating a need to resolve which is more central to the rule of law.

Consider again Schuette v. Coalition to Defend Affirmative Action, discussed above. The Court ended up upholding Proposition 2, but in a fractured opinion. Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, upheld Proposition 2 on the ground that the so-called “political process” doctrine did not forbid it. The plurality distinguished the Court’s limited “political process” jurisprudence as involving cases where there was a serious risk of a race-based harm or injury. The plurality explained that this was not the case here, because the prohibition of affirmative action in public institutions does not constitute racial discrimination; rather, it is just the opposite, an effort to eliminate one type of racial discrimination. The two dissenting Justices, Justices Sotomayor and Ginsburg, disagreed, arguing that Proposition 2 represents precisely the type of law that the “political process” doctrine was designed to prohibit – a racial majority’s use of the political process to deny a benefit that had been found at
one level of government to be an appropriate remedy for prior discrimination against a disadvantaged minority group. These two opinions essentially battled over the scope of the “political process” doctrine and how to apply that doctrine to Proposition 2.

But what made the case striking for our purposes are Justice Breyer’s and Justice Scalia’s separate concurring opinions. Both Breyer and Scalia engaged with the plurality and dissenting opinions on the scope of the “political process” doctrine, but they also made some very interesting jurisprudential moves bearing on logic’s role in understanding legal consistency. Justice Breyer cited his Parents Involved dissent for the proposition “that the Constitution does not ‘authorize judges’ either to forbid or to require the adoption of diversity-seeking race-conscious ‘solutions’ (of the kind at issue here) to such serious problems as ‘how best to administer America’s schools’ to help ‘create a society that includes all Americans.’” Breyer explained that he “continue[s] to believe that the Constitution permits, though it does not require, the use of the kind of race conscious programs that are now barred by the Michigan Constitution.” What Breyer was arguing here is that affirmative action is a matter of policy, not constitutional law, because it is neither prohibited, nor required. It is subject to political discretion, to the electorate’s deliberated decision about what is best for that particular polity. This recalls the point we covered in Chapter 3, on how permission norms occupy a distinctly non-legal area, between the legal norms of prohibition and requirement. Permission norms open up the way for politics; prohibition and requirement norms close the paths of legal discourse by binding political actors.

Justice Scalia, joined by Justice Thomas, put the issue more poignantly. He began his opinion with the bold proclamation: “It has come to this.” By this dramatic introduction, Scalia sought to draw our attention to the extreme normative precedential conflict at hand: the Court
has been “[c]alled upon to explore the jurisprudential twilight zone between two errant lines of precedent,” requiring it “to confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires?” That is, Michigan, by prohibiting state-sanctioned racial discrimination in its state constitution, could not have violated a prohibition in the U.S. Constitution against the same type of discrimination. As Scalia put it, it is impossible for the state to track a federal constitutional requirement and to “simultaneously offend it.”

Now, of course, one could bicker with Scalia about whether the Equal Protection Clause actually creates such a general and all-encompassing prohibition on all forms of racial discrimination, but even so, the question presented to the Court still has an odd logical quality. Indeed, Scalia acknowledged that even if one accepts the Grutter decision and its enfeebled application of strict scrutiny to affirmative action, the Equal Protection Clause still requires a strong presumption against state-sanctioned racial discrimination. Thus, even accepting Grutter, Scalia “find[s] the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits?” Scalia’s point here is that there is something strikingly odd about a constitutional system that presumes a class of action to be impermissible (as everyone on the Grutter Court agreed should be the case) but then in another context requires that same class of action. By calling such a system “frighteningly bizarre” and “strange,” Scalia seems to have in mind a logical requirement to consistency. As a matter of logic of systems, it is illogical to require what the system prohibits.

Why, then, did Justices Sotomayor and Ginsburg think that the “political process” doctrine required invalidating Proposition 2? They did not find such a ruling “frighteningly
bizarre” or illogical because they saw consistency in more functional terms. For Sotomayor and Ginsburg, it does not matter that there is a specter of a logical inconsistency in invalidating a state constitutional amendment that, at least on its face, mimics the non-discrimination norm the Court has found to inhere in the Equal Protection Clause. What matters for Sotomayor and Ginsburg is that Proposition 2 prevented the Equal Protection Clause from functioning properly – that is, from creating a more open, inclusive, and diverse nation. As a result, the upholding of Proposition 2 is what creates an inconsistency for Sotomayor and Ginsburg. Logic has no place in this analysis, just function.

Interestingly, we had something very close to a mirror of these positions in Parents Involved, where the conservatives invalidated the use of race in K-12 student assignments in schools that were no longer subject to, or had never been subject to, a judicial desegregation decree. The conservatives did not see a logical problem in using the Equal Protection Clause to prohibit a class of action – the use of race for the purpose of desegregation – that had at one point been required under the Equal Protection Clause. The conservatives did not see a logical problem here, because in one instance, the Equal Protection Clause required the use of race as a remedy for de jure segregation, and in the other instance, the Equal Protection Clause prohibited the use of race when it no longer served this purpose.

But Justice Breyer, in a dissent joined by Justices Ginsburg, Souter, and Stevens, emphasized the absurdity of going from a constitutional scheme that, through Brown and its progeny, had required the use of race to integrate public education, to a constitutional scheme that now prohibits such use. As Breyer put it, the Court “has repeatedly required, permitted, and encouraged local authorities to undertake” the types of race-conscious programs that the Seattle and Louisville school boards had adopted, and the Court had long “understood that the

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432 PICS, supra, at __ (Breyer, J., dissenting).
Constitution permits local communities to adopt desegregation plans even where it does not require them to do so. For Breyer, there was an important distinction between (1) on the one hand, the Court going from a requirement norm to a permission norm, as it had done from Brown II in requiring desegregation orders to Milliken v. Bradley in dissolving this requirement but still permitting them, and (2) on the other hand, the Court later moving all the way to a prohibition norm, as the Court did in the Parents Involved decision.

In oral argument, Justice Ginsburg also pointed out the oddity of this reasoning, in pressing the lawyer for the petitioner on how nonsensical it would be for the Constitution to prohibit what it had recently required, even if there might be some precedents within our system supporting that prohibition:

Mr. Gordon: It's the same remedial program that... this Court has found even in Dowd that when the remedial program has achieved its result we should no longer carve out that exemption under the Equal Protection Clause.

Justice Ginsburg: Do you think that there's something of an anomaly there, that you have a system that is forced on the school, that it doesn't want it, works for 25 years, and then the school board doesn't have to keep it any more, but it decides it's worked rather well, so we'll keep it. What's constitutionally required one day gets constitutionally prohibited the next day. That's very odd.

Here, Justice Ginsburg nicely summarizes many of the themes covered above. It is an odd constitutional order, indeed, if today’s winners could become tomorrow’s losers. Such a system would make the Supreme Court the center of an all-or-nothing battle between warring factions, in which victory for one side would mean an absolute loss for the other, with no available recourse to the political process, other than to change the composition of the Court to get yet another reversal of precedent. This seems to strike at the heart of stare decisis and the Court’s

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433 Id. (emphasis in original).
role as the government’s organ of reason in preserving the rule of law. Indeed, if precedent is going to mean anything on the Court, and if the requirement of consistency is going to have any power in ensuring the rule of law, it seems that it must mean at least that once the Court has found an obligation in the Constitution, it may not then provide its opposing obligation.

Most, if not all, of the Justices seem to agree with this statement, but they do not agree when they are dealing with an “opposing obligation.” For example, whereas the liberals saw an opposing obligation in Parents Involved, the conservatives did not see one, because race was not used there as a remedy pursuant to a judicial desegregation decree. Likewise, whereas Justices Scalia and Thomas focused on the opposing obligation presented by the challenge to Proposition 2, Justices Sotomayor and Ginsburg did not see one there, because invalidating Proposition 2 would not technically require the type of affirmative action at issue in Grutter. Instead, it would simply make it harder for states to prohibit such affirmative action. As a result, it was not technically the type of conflict of obligations that some of the legal philosophers and logicians covered in Chapters 3 and 4 have written about as being at the heart of legal consistency.

As we can see here, at the core of the division between a functional and a logical approach to legal consistency is that logic, in its technical sense, cannot truly apply to judicial decision-making, because cases rest on facts, and no two sets of fact patterns are identical. Even when courts announce rules, and even when we treat those statements as binding under the rules-approach to precedent, it is often times difficult to agree what language is encompassed by the rule so as to create an inconsistency of obligations. This makes it nearly impossible, if not entirely fruitless, to subject judicial statements to the law of non-contradiction that philosophers have derived to apply to normative systems.
But we also see the problem in looking to consistency through the modality of function. A functional approach to consistency is too easily merged into a judge’s substantive theory of the law, rendering the entire purpose of the consistency requirement – to make the law more coherent so that judges and citizens of different viewpoints can agree on basic elements of the system – a nullity. A logical requirement does not seem to work because of the case-specific nature of judicial decision-making, and a functional requirement seems to lead to a substantial weakening, if not elimination, of the judiciary’s role in the rule-of-law enterprise. We need a way out of this logic-function divide. The next and final chapter will help us out by looking at legal consistency not as a form of formal logic or practical function, but as a feature of language.

Chapter Summary

In this chapter, we organized legal consistency into three different categories – authority, quality, and modality – to help conceptualize the different ways in which legal consistency relates to the rule of law. We saw how some types of legal consistency are easier to reconcile than others and therefore present less threatening problems to the rule of law. Authority conflicts are the easiest to resolve. In the American legal system, for example, the doctrines of preemption and conflict of laws resolve must jurisdictional inconsistencies, and the doctrines of judicial review and *stare decisis* help in minimizing institutional inconsistencies. We found that although a legal system might not need to develop these doctrines to make law, it does seem that some features are necessary for the rule of law to exist in that system. There must be a system of norms for harmonizing jurisdictional and institutional conflicts. We also saw how institutional inconsistency is a highly contextualized inquiry. Different legal institutions are designed to preserve consistency in different ways. That is why we cannot talk of consistency generally as a requirement of the rule of law, which is a mistake that many of the theorists discussed in Chapters 2 and 4 have made. The consistency required by the rule of law has a different
meaning depending on the institution and legal task at issue. To investigate the relationship between the rule of law and consistency fully, we would need to examine each legal institution within a particular system in depth, an inquiry outside the purview of this dissertation. Our primary interest here is in the judiciary, particularly in how its institutional duty to rationality imbues our understanding of how consistency relates to judicial decision-making. We saw in this chapter that this means that while executive or legislative duties with regard to consistency may relate more to their being consistent with the other branches, the judiciary’s consistency duty is primarily in acting consistently with itself, an insight of significance for understanding how *stare decisis* relates to the rule of law.

As opposed to authority inconsistencies, quality inconsistencies present more troubling, but still manageable, problems for the rule of law. A consistent legal system needs to prioritize the different types of law into a coherent order. The American legal system accomplishes this partly through the Supremacy Clause, as interpreted in *Marbury*, making the U.S. Constitution supreme over all other laws. Likewise, we have developed a hierarchy for other types of laws so that statutes trump administrative regulations, administrative regulations trump administrative interpretations, and so on. We encounter more serious problems when interpretive methodologies conflict, but again, we can resolve this by prioritizing some methodologies over others. We are in the biggest crisis, as a matter of quality consistency, when two laws of the same hierarchical order and derived from the same interpretive methodology conflict with one another. In this instance, the law threatens to turn on itself, and as we discussed, the judiciary has a special obligation, as the principal governmental organ of reason, to prevent such legal reflexivity.
Modal inconsistencies are the most perplexing. Distinguishing intra- from inter-temporal inconsistencies helps provide some understanding into how time relates to inconsistency. We can accept inconsistencies arising during different legal periods, but many inconsistencies arise during similar legal periods, making it unclear which legal norm should prevail. Logical modality inconsistencies – between function and formal logic – threaten the entire enterprise of searching for consistency within the law, because if we do not have a way of conceptualizing consistency in general, then all of the foregoing manners of ordering legal consistency collapse, thus threatening to dismantle our entire effort to grasp the rule of law. The final two chapters will seek to help us escape this fly trap.
CHAPTER 7
THE RULE OF LAW AS A LANGUAGE GAME

In this chapter, we will further explore the distinction between logical and functional consistency in an effort to disaggregate the ways that the law can be inconsistent so that we can develop a broader, and richer, account of the rule of law. In this effort, we will recruit for help the great philosopher of language, Ludwig Wittgenstein, who first developed the idea that linguistic meaning is use – i.e., that we can understand language best through an examination not of its logical components but of how it is used in particular contexts. Through Wittgenstein, we will see that neither logic nor practice is the touchstone for understanding legal consistency. Language is.

Our exploration will begin by examining how legal adjudication fits with Wittgenstein’s view that language operates like a game; this section will examine in particular Thomas Morawetz’s claim that law is more like a deliberative practice than a language game because it does not rest on settled rules. We will then consider Wittgenstein’s writings on the law of non-contradiction to determine whether consistency norms might operate like a language game in particular contexts. This section will demonstrate that Wittgenstein viewed consistency norms as working differently in different systems; indeed, as we have seen throughout this dissertation, legal theorists and jurists have illustrated this phenomenon in their discordant appeals to consistency in legal adjudication. The final section will examine whether Wittgenstein’s work On Certainty can provide any refuge from this discord by clarifying when consistency norms can provide certainty within a language game. Here, we will bring the foregoing discussion together by arguing that even when judges disagree with each other about the scope and application of stare decisis, they are often covertly agreeing on some background propositions – what
Wittgenstein called “hinge propositions” – relating to the rule of law and adjudicative consistency. These hinge propositions are generated by certain Supreme Court precedents and work to foreclose the possibility of introducing the negations of those precedents into our legal system. This function of framing legal conflicts is central to the judiciary’s role, as the primary governmental organ of reason, in preserving the rule of law. The following and final chapter will seek to test this theory through a closer examination of oral arguments and judicial opinions in various areas of constitutional law.

**Background on the Philosophy of Language Games**

To understand how consistency norms can operate as language games, we will begin by briefly summarizing Wittgenstein’s philosophy of language, particularly as expressed in his later and most influential work, *Philosophical Investigations*. Wittgenstein’s later philosophy of language, as expressed in the *Investigations*, is often summarized by the proposition that meaning is use. Wittgenstein makes this claim most directly in Section 43 of the *Investigations*, where he writes: “For a *large* class of cases of the employment of the word ‘meaning’ — though not for *all* — this word can be explained in this way: the meaning of a word is its use in the language.” This was a significant departure from his earlier view in the *Tractatus* that meaning is representation – i.e., the view that a proposition has meaning because it *represents* another thing. In the *Investigations*, Wittgenstein took the view that meaning is constructed by using a language, as opposed to his claim in the *Tractatus* that meaning is discovered by

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437 *PI*, 43 (emphasis in original). A note on citation – when citing sections from the *Investigations*, I will use the shorthand “*PI*” to indicate that the material is from the *Investigations*, followed by the appropriate section number. Hence I cited the section 43 quote above as *PI*, 43. I will be using the revised fourth edition by P.M.S. Hacker and Joachim Schulte.

logically examining it to determine what it represents. Wittgenstein thus admonishes us in the *Investigations* “don't think, but look!”\(^{439}\) That is, to understand a proposition’s meaning, we must look at how language is *used* in particular concrete instances. And to facilitate our looking into how language is used, Wittgenstein introduces us in the *Investigations* to the idea of a “language game.” Whereas in the *Tractatus* Wittgenstein uses the idea of a picture to explain how language works, in the *Investigations* he moves away from this picture analogy and toward the game analogy to account for his increasing awareness of how linguistic meaning does not consist of necessary and sufficient conditions but rather is constructed through context-dependent and open-ended use.

Wittgenstein’s comparison of language to a game generally consists of three features that games and language have in common, features that will help us in understanding how the theory of languages games can apply to legal adjudication. One feature is that games and language both have constitutive rules – i.e., rules that determine what moves within the system are correct. John Searle famously elaborated on this distinction between constitutive and regulative rules in his 1969 book *Speech Acts*. According to Searle, “[r]egulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules,”\(^{440}\) whereas “[c]onstitutive rules constitute (and also regulate) an activity.”\(^{441}\) For example, the rules of etiquette are only regulative rules, for they “regulate inter-personal relationships which exist independently of the rules.”\(^{442}\) By contrast, the rules of games and language “do not merely regulate”\(^{443}\); in addition to regulating our conduct, “they create or define new forms of

\(^{439}\) *PI*, 66.


\(^{441}\) Id.

\(^{442}\) Id.

\(^{443}\) Id.
behaviour.” For example, in baseball we have the rules governing what constitutes an out, thereby creating a new behavior of swinging a cylindrical object at a ball. Likewise, in language, we have rules governing what constitutes a grammatical sentence, and in employing these rules we are constantly creating new ways of communicating with one another.

A second important similarity for our purposes between games and language is that we learn each one through use, not by learning the objects that the various pieces of the game or language represent. For example, we do not understand the Queen’s role in chess by simply learning that the Queen represents an actual object; rather, we learn what “Queen” means in chess by using the piece in an actual chess game and seeing how it can be maneuvered to achieve the object of the game. Likewise, we do not learn what the word “Queen” means in our language by learning the actual object that the word represents; rather, we learn its meaning by communicating with others and coming to understand how we can use the word in different types of sentences to discuss, for example, a head of state, a rock band, or a university in Canada.

Finally, both games and language involve moves or uses that are correct or make sense only insofar as they are part of a larger system. That the Queen generally should not be exchanged for both a Rook and a Bishop, even though the Rook’s horizontal-vertical power and Bishop’s diagonal power together form the same power as the Queen, makes sense only by understanding the Queen’s overall value in the system – namely, how the combination of a diagonal and horizontal-vertical mobility in a single piece makes the Queen more useful in securing checkmate. Likewise, we cannot understand what a single sentence means unless we understand the language of which it is a part. In Wittgenstein’s words, “To understand a sentence means to understand a language. To understand a language means to have mastered a

\[444\] Id.
technique.\textsuperscript{445} That is, to communicate a proposition, we must already have a language formed governing how that proposition can be used.

Given these similarities between language and games, scholars of various disciplines, ranging from the natural to the social sciences, have employed Wittgenstein’s notion of a language game. In fact, many legal scholars have appealed to this idea in seeking to understand how lawyers and judges interpret legal rules. At first blush, this analogy between legal adjudication and language games is appealing, because legal adjudication seems to share the same similarities with games as does language. Indeed, law also has constitutive rules. What counts as a violation of the First Amendment’s Establishment Clause, for example, is constituted by the factors the Supreme Court has created for prevailing in court on such an action – principally, the three elements of the \textit{Lemon v. Kurtzman}\textsuperscript{446} test we discussed earlier. The ritual of going to court and alleging these elements would not exist without these constitutive rules. Moreover, we learn the law by coming to understand how various legal doctrines can be used in practice. A law student learns what the Establishment Clause means by learning how courts use the \textit{Lemon} test to adjudicate actual Establishment Clause cases, not by simply reading the elements of the test. Finally, like games and language, legal claims also make sense only insofar as they are part of a larger system – namely, the legal system as a whole. To understand the Establishment Clause, we must also understand that there is another part of the Religion Clauses, the Free Exercise Clause, which guarantees religious liberty, and we must understand all the differences and similarities between the Establishment Clause’s prohibition on governmental promotion of religion and the Free Exercise Clause’s prohibition on governmental burdens on

\textsuperscript{445} PI, 199.

\textsuperscript{446} 403 U.S. 602 (1971).
religious exercise.\textsuperscript{447} More importantly, we cannot understand either Religion Clause without understanding how constitutional adjudication, and indeed legal adjudication in general, operate in concert with these constitutional provisions.

Given these similarities between games and law, some legal scholars have marshaled Wittgenstein’s criticism of formal analyses of language to mount similar attacks against formal accounts of law.\textsuperscript{448} These commentators have argued that just as language cannot be reduced to a singular essence, because it operates like a game and not a logical operation consisting of necessary and sufficient conditions, law cannot be understood this way either, because it too operates like a game. Thus, when confronted with a legal controversy, a judge does not look for The Law to resolve it, as some natural law theorists might have it.\textsuperscript{449} Law as a language game rules out this natural-law approach, because, if law is a language game, that means there is no such thing as The Law. This is of course Justice Oliver Wendell Holmes’s famous point, quoted earlier in the dissertation: the law “is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”\textsuperscript{450} But neither, according to the language-game theory, is the law identified with a singular meaning traceable to the sovereign, as some legal positivists might have it.\textsuperscript{451} Rather, law as a language game holds that the law is fluid and open-textured, endlessly changing and developing meaning through the arguments that lawyers and judges make in various stages of adjudication.

\textsuperscript{447} In fact, this relationship between the Free Exercise and Establishment Clause is critical to interpreting each Religion Clause, as will be discussed infra.\textsuperscript{.}

\textsuperscript{448} For a discussion of some of these anti-formalist uses of Wittgenstein, see Brian Langille, Political World, in WITTGENSTEIN AND LEGAL THEORY 233-247 (Dennis M. Patterson ed., 1992).

\textsuperscript{449} This is of course a vulgar simplification of natural law. Not even a natural lawyer like Aquinas would look only to divine law when there was positive law directly dealing with the subject at issue.

\textsuperscript{450} Southern Pacific Company v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

\textsuperscript{451} Again, just as I oversimplified natural law above, I have done so with positivism here for the purpose of highlighting how law as a language game relates to the most extreme versions of these two theories of law. Of course, many positivists do not see law as being so clear, though Austin and Bentham at times certainly presented a view of law close to this caricature of legal positivism.
Law as a language game means that courts do not adjudicate Establishment Clause claims, for example, by searching for the essence of the meaning of the Clause. That is, they do not seek to identify Establishment Clause violations by parsing out the necessary and sufficient conditions of such a violation. On first glance, this might be somewhat surprising to the uninitiated participant in Establishment Clause discourse, because this area of the law does indeed rest on the application of tests, and these tests do have the appearance of having necessary and sufficient conditions. Consider how the Lemon test, described above, seems to rest on such conditions. The test announces that it is a necessary condition for an Establishment Clause violation that a governmental act either: (1) lacks a secular purpose, (2) has the primary effect of advancing or impairing religion, or (3) results in an excessive entanglement of religion and government. The test also holds that satisfying any of these conditions is sufficient for proving an Establishment Clause violation.

But proponents of the law-as-language-game approach contend that beneath this pristine logical surface is a tangled web of discourse among judges and lawyers who have become skilled participants in the game of law, a training that has enabled them to understand how legal arguments can be marshaled in different contexts for various purposes. Indeed, any trained participant in Establishment Clause adjudication knows how to manipulate any of the Lemon test conditions, and understands how this manipulation has led the Court to adopt new tests, such as the “endorsement test” and later the “coercion test,” that operate in tandem with the Lemon analysis. Through experience with the evolution of Establishment Clause law, a skilled participant in the Establishment Clause game knows not to focus exclusively on the Lemon test factors, for none of these factors operates in practice as a sufficient or necessary condition,

\[\text{452 See supra } \_\_\text{ for a definition of the “endorsement test.”}\]
\[\text{453 See supra } \_\_\text{ for a definition of the “coercion test.”}\]
though in form each factor logically operates as a sufficient condition for establishing a constitutional violation. In practice, however, the factors operate as arguing points – issues to be analyzed in relation to how they fit with other Establishment Clause tests, as well as with broader principles of jurisprudence and judicial policy. Viewed in this light, Establishment Clause adjudication does indeed seem similar to a game.

Despite the seeming tractability of this game analogy, however, some scholars, most notably Thomas Morawetz, have challenged the analogy’s applicability to legal adjudication on the ground that it does not go far enough in seeing the indeterminacy of law. For law to operate like a language game, Morawetz explains, courts would need to make decisions according to agreed-upon rules. Indeed, as just mentioned, if the adjudication of Establishment Clause actions operated like a game, then judges and lawyers would analyze a given set of facts under a set of settled rules, such as the three elements of the Lemon test. But courts do not operate this way, Morawetz argues, because there is always the possibility that the judges on a given panel will disagree on the governing rules, as we see in many church-state cases. This is of course most obvious on the Supreme Court, where, as a result of the Court’s certiorari procedures, the majority of the cases on the Court’s docket are there by virtue of their raising contentious and contestable matters of legal interpretation.

To illustrate Morawetz’s point, let’s briefly consider what happens when the Supreme Court agrees to hear an Establishment Clause case. Going into the case, everyone involved is aware that the more liberal Justices will believe that the Lemon test applies, but the more conservative Justices will contend that some other form of analysis controls the controversy, such as Justice Kennedy’s “coercion test” or Justice Scalia’s focus on whether the particular
government act at issue would have been permissible in 1791 when the Establishment Clause was enacted. These Justices, in effect, are not playing by the same rules, and each side is not really trying to persuade the other side to play by its rules. Rather, each side simply asserts that its rules are better.

Because the Justices disagree so frequently and sharply on the governing rules, Morawetz believes that a better way to look at law, under Wittgenstein’s framework, is as a deliberative practice. Although Wittgenstein did not explicitly consider the notion of a deliberative practice, he did generally discuss the idea of practices – such as the identification of color. Wittgenstein emphasized the communicative component of these practices: a color exists for us because there is a pre-existing sphere for relaying that experience to others. For example, in questioning how we know that a color is red, Wittgenstein’s answer is that we have learned to speak English. Even though Morawetz accepts the communicative component of practices, he does not see practices as analogous to games in the way that language is, because the rules of a practice are not constitutive of the enterprise and the rules of a practice do not proceed in discrete moves to reach a particular goal. Indeed, although we might be engaging in a community’s language in identifying a color as red, that simple identification of the color does not seem to constitute the enterprise of seeing color or operate in particular steps in the way that playing a language game like chess does.

Moreover, Morawetz thinks that this analogy between practices and language games breaks down even further when the practice is complicated and involves deliberation, such as in a practice like legal adjudication. In such deliberative instances, Morawetz argues, we give justifications for our results and we have different strategies for giving those different justifications. We are playing by different rules from one another, and if we were to do this in an
actual game, we would say that we must agree on the rules or stop playing. For example, when a
baseball umpire and manager disagree on whether a particular pitch is a strike, they are engaging
in a language game, because they agree on what constitutes a strike and the importance of that
rule for the playing of the game; they are simply disagreeing on how to apply the rule to a
particular pitch. But they would not be engaging in a language game if they disagreed on the
underlying principles of umpiring – say, if the manager thought the umpire should favor the
home team in calling strikes, and the umpire thought he should favor the most respected players.
In such an instance, they would disagree on the entire enterprise of umpiring, and this is the
scenario in which Morawetz finds judges. They are simply applying different rules because they
have different ideas of how judging should work. Morawetz thus concludes that law is entirely
indeterminate,455 in that it involves the deployment of discordant rules to reach discrepant goals,
and the legal process does not require or even encourage a consensus. It does not seem, then,
that Morawetz could see language creating the type of strategic deployment of *stare decisis* that
Knight and Epstein identified in their work. Rather, Morawetz’s view of legal language supports
the attitudinalist model of *stare decisis* – how judges use precedents simply to support positions
they prefer and to attack positions they oppose. In effect, while we imagine consistency norms
to function like Sirius, the brightest star in the night sky, guiding and bringing us together in the
vast ocean of legal precedents, Morawetz contends that consistency norms in legal discourse
leave us more like ships passing each other on a starless night, with no hope or desire of
navigating toward the same destination.

455 By “completely indeterminate,” I am referring to how some commentators take a moderate view of
indeterminacy and refer to law as underdeterminate, in that legal materials resolve some but not all legal questions,
whereas others, such as those in the CLS movement, take the stronger view that it is completely indeterminate, in
that legal materials never resolve any legal questions and judicial decisions therefore always rest on extralegal (i.e.,
political) considerations. For the canonical overview of the distinction between underdeterminacy and
462 (1987). Morawetz seems to side with CLS in seeing the law as completely indeterminate.
We should emphasize here, though, that in arguing that law is a deliberative practice, Morawetz focuses on *appellate* decision-making. Although Morawetz concedes that trial-level adjudication of some issues might rest on settled rules, and therefore operate like a language, appellate adjudication, particularly in constitutional cases at the Supreme Court level, rarely works this way. Morawetz thus concludes that the game metaphor has been wrongly applied to appellate decision-making – and again, in particular to Supreme Court constitutional decision-making. This misapplication of the game analogy has led legal scholars to conclude, wrongly in Morawetz’s opinion, that when judges do not act unanimously in compliance with shared legal norms, that demonstrates that judges are not actually constrained at all by the law. Morawetz wants to show that “[j]udges are indeed constrained, but not by shared rules,” and he believes that undermining the game analogy demonstrates just that. That is, law does not operate like a language game, but law nevertheless constrains judges, because judges “are constrained individually by a particular way of addressing and understanding interpretive questions.” In Morawetz’s view, consistency norms constrain judges individually but not collectively – we thus have, in the terms used in Chapters 5 and 6, individual but not institutional *stare decisis*.

Morawetz is certainly right in picking up on how consistency norms often operate in judicial decision-making, as we saw in the attitudinalist studies in Chapter 5, but Morawetz, just like the attitudinalists, sweeps too broadly in making this argument, because he overlooks how some important features of appellate decision-making might consist of shared rules and might therefore operate like language games. Indeed, as mentioned above, even when adjudicating a complex church-state case at the Supreme Court level, all participants in the case will agree on some settled rules, such as that the Establishment Clause and not the Free Exercise Clause will

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456 Id. at 27.
457 Id.
govern controversies involving the government’s promotion rather than burdening of religion. More directly related to our investigation, consistency reasoning might work as a language game in judicial decision-making, because, as discussed in the previous chapter, our system of law presupposes the idea that the judiciary, as the governmental organ of reason, must make internally consistent decisions, particularly within the precedent interpretive methodology. Given this requirement, when lawyers and judges discuss the truth of legal proposition \( x \), they might assume the truth of legal proposition \( \neg x \). And this rule of consistency – i.e., that a legal proposition and its negation cannot both be true – might operate as a language game, a possibility we will cover in the following section through an investigation of how Wittgenstein applied his philosophy of language to contradictions.

**Consistency Norms and Language Games**

In his first major work, the *Tractatus*, Wittgenstein examined the logical essence of contradictions and concluded that they are like tautologies in that they say nothing, but in the *Investigations* Wittgenstein looked instead to the effects of contradictions. In particular, in shifting his focus from the essence to the effects of contradictions, Wittgenstein explored the philosopher’s role in dealing with inconsistency. In Paragraph 125, for example, he argued that “[i]t is not the business of philosophy to resolve a contradiction by means of a mathematical or logico-mathematical discovery, but to render surveyable the state of mathematics that troubles us – the state of affairs *before* the contradiction is resolved.”\(^{458}\) That is, when we discover an inconsistency within a system, we should not seek solutions to make the system free from contradictions; instead, after finding an inconsistency, we should re-examine the system to determine what generated it. The inconsistency, then, “throws light on our concept of meaning

\(^{458}\) PI, 125 (emphasis in original).
something,”459 because it reveals how “things turn out otherwise than we had meant, foreseen.”460

Let’s go back to our baseball hypothetical to illustrate this. Suppose that we have a baseball rule saying that foul balls constitute strikes, another rule saying that three strikes constitute an out, and a third rule saying that a batter can get a third strike only by swinging and missing or by not swinging at a pitch that the umpire rules to be within the strikezone. These three rules would amount to a contradiction when a batter, with two strikes, fouls off a pitch: under rules one and two, he would be out, but under rules two and three, he would not be out. For Wittgenstein, the task of a philosopher – or a baseball analyst in this case – would not be to come up with a solution to this contradiction. The baseball analyst’s task, instead, would be to identify the confusion that led to the contradiction – namely, to point to how the third rule will work only if we add an exception to the first rule so that it says that foul balls constitute strikes, except in the event the batter already has two strikes, in which case it will not count as a ball or a strike. This is not a reconciliation of the contradiction but an identification of the confusion in our rules that led to the contradiction. In this sense, then, the contradiction points us to the confusion.

Wittgenstein more extensively explored this relationship between contradictions and philosophical confusion in his Lectures on the Foundations of Mathematics (consisting of notes taken by R. G. Bosanquet, Norman Malcolm, Rush Rhees, and Yorick Smythies on Wittgenstein’s lectures at Cambridge in 1939),461 and his Remarks on the Foundations of

459 Id.
460 Id.
461 When citing the Lectures on the Foundations of Mathematics, I will use the shorthand “LFM,” followed by the page number, from the following edition: LUDWIG WITTGENSTEIN, WITTGENSTEIN’S LECTURES ON THE FOUNDATIONS OF MATHEMATICS CAMBRIDGE, 1939 (Cora Diamond ed., 1976).
Mathematics (consisting of Wittgenstein’s own notes on the philosophy of mathematics). In these works, Wittgenstein frequently came back to the subject of contradictions, emphasizing his point in the Investigations that the philosopher’s role is not to reconcile the contradiction but to identify what led to the contradiction, as that source will reveal a confusion in our language.

Wittgenstein also emphasized in these works that a contradiction does not invalidate a system, the way that a germ might contaminate a body. As he put it in his Lectures on the Foundations of Mathematics, logicians and philosophers act as though “[f]inding a contradiction in a system, like finding a germ is an otherwise healthy body, shows that the whole system or body is diseased,” but in fact the two pursuits are quite distinct because whereas a germ actually produces a problem in a system, a contradiction does not do anything. Indeed, “[t]he contradiction does not even falsify anything.” A contradiction can thus be said not to exist at all outside of our own constructions.

What is a contradiction, then, for Wittgenstein? Recall that in the Tractatus, Wittgenstein held that a contradiction is a tautology in that it is senseless – i.e., a contradiction does not say anything. It seems that Wittgenstein continued to hold this view of contradictions, but in his later work on contradictions he took aim at how logicians and philosophers have treated the law of contradiction – i.e., as holding that a contradiction cannot exist and therefore any proposition can follow from it. According to the later Wittgenstein, this is not necessarily the way we must treat contradictions. Instead of holding that we can draw any conclusions from a contradiction, we can hold that we can draw no conclusions from a contradiction, because it is a senseless

\[^{462}\text{When citing the Remarks on the Foundations of Mathematics, I will use the shorthand “RFM,” followed by the page number, from the following edition: Ludwig Wittgenstein, Remarks on the Foundations of Mathematics (G.H. von Wright et al. eds., 1956).}\]

\[^{463}\text{LFM, at 138.}\]

\[^{464}\text{Id.}\]
Moreover, the later Wittgenstein found that there is no need to search our systems to root out all contradictions, because “[t]here is always time to deal with a contradiction when we get to it.” We can simply deal with a contradiction when we encounter it.

This is because for Wittgenstein it is not logic but culture that is the critical guide to how we should handle contradictions. In a mathematic system, we might want complete strictness, in which case we might hold that all contradictions are forbidden. But in a social system, we might want something less than complete strictness, or want a different “style,” as Wittgenstein puts it. And with this looser style we might require only that contradictions be forbidden to the extent that they create confusion. In Wittgenstein’s words, “given a certain training, if I give you a contradiction (which I need not notice myself) you don’t know what to do.” But if within a particular training or style of communication, you know what to do with my contradictions, then I need not avoid them. My orders in this latter scenario would not be any less logical than if they had not included any contradictions.

Let’s consider a hypothetical example to illustrate this, for it will prove significant for our understanding of consistency in legal adjudication. If in our communication, it is customary that rules must be consistent before we commit to any action, you might not be able to find any normative meaning in my contradictory orders. Say you are my neighbor and on one occasion I told you to turn on the lights to my house if I am out of town and it is dark outside. But on another occasion I told you never to turn on my lights. Given these contradictory orders, it would be proper for you to dismiss both of my orders if we had a custom of entirely dismissing each other’s contradictory statements as lacking meaning. But if, as is more likely, we did not require such strictness in our communication, the inconsistency might just slow you down in

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465 Id. at 209.
466 Id.
467 LFM, at 213.
applying the rules. You might have to think about how the rules fit together, and after some deliberation, you might eventually come to the decision that the purpose of both rules is to ward off burglars; under this interpretation, you might interpret the second rule as applying only when it is light outside, so if you came by my house one night when I was out of town, you would interpret that second order as not applying. Likewise, if you knew me to exaggerate when upset and you remembered that I issued the second order while angry over an electricity bill, you might entirely dismiss my second order as not having any value.

The contradiction thus has a different value given the type of system within which we are working. If our communication were an entirely strict system, you might dismiss the contradictory orders as invalid, but if it were not such a strict system, the contradiction would be a sign that something had gone wrong in our communication, how, in Wittgenstein’s words, “things [have] turn[ed] out otherwise than we had meant,” 468 thus requiring that you use the contradiction as a guide to figure out how to cure the confusion. In this case, you would have to use information external to the specific semantic content of the orders to make sense of the contradiction, just as how we discussed in the previous chapter that the functional approach to consistency often calls for judges to consult the substance of their judicial philosophies to reconcile a consistency within the law. Depending on what you found from that outside information – say if you found that I issued the second order to apply unless there was a risk of burglary, or alternatively that I issued the second order out of anger and did not intend it to constrain you – you would resolve the confusion differently. Because our decision over how we deal with a contradiction comes down to the purpose we assign to the system, our resolution of a contradiction is ultimately a matter of choice, not logic.

468 Id.
As another illustration, consider Wittgenstein’s own example of a hypothetical legal system providing inconsistent demands of the seating of the vice-president at state banquets: one statute provides “that on feast days the vice-president had to sit next to the president, and another statute that he had to sit between two ladies.”\textsuperscript{469} We should note at the outset the sexist supposition of this hypothetical: Wittgenstein is seeking to present a contradiction but there is such a conflict if and only if the president is not a woman, a possibility that Wittgenstein and his contemporaries evidently did not consider. But putting aside this problem and assuming that the president is indeed a man, we can see that there would be a contradiction here: one law requires the vice-president to sit next to a man, and another law requires the vice-president to sit between two ladies, thus requiring the vice-president to sit in two different locations.

To complicate this hypothetical and illustrate his point about hidden contradictions, Wittgenstein also supposes that “[t]his contradiction may remain unnoticed for some time, if [the vice-president] is constantly ill on feast-days.”\textsuperscript{470} In this case, the contradiction would be hidden from our view, and as a result, according to Wittgenstein, it simply would not exist. Indeed, for Wittgenstein, if the vice-president never attended a state banquet, then there would be no contradiction within this legal system, because even though the formal content of the norms would seem to posit two states of affairs that could not co-exist, the impossibility of the co-existence of these states of affairs would have no bearing on real life – i.e., on the seating of the vice-president.

We have encountered such actual legal scenarios throughout the dissertation. Indeed, we saw such a conflict in \textit{Locke v. Davey}, which raised an apparent contradiction between a line of Establishment Clause precedents prohibiting government funding of religious activities and a

\textsuperscript{469} Id. at 210.  
\textsuperscript{470} Id.
more recent line of Free Exercise Clause precedents prohibiting government discrimination on
the basis of religion. These two lines of precedents did not seem to have anything to do with one
another, and most scholars did not anticipate their clash, but they ultimately conflicted once the
Establishment Clause was interpreted in Zelman to permit indirect public funding of religious
activities. Likewise, in the previous chapter we saw how in Schuette the “political process”
doctrine came to run up against the Court’s application of strict scrutiny to affirmative-action
programs, a clash dramatically addressed by Justice Scalia in his concurrence. In these
instances, two independent lines of precedents developed, seemingly with little to do with one
another, until unexpectedly, a particular set of facts emerged in such a way to trigger the
doctrinal clash. That is not to say that the contradiction was entirely hidden from view or that
the Locke or Schuette cases arose out of thin air. To the contrary, the religious-right movement,
led by Jay Sekulow of the American Center for Law and Justice, and the affirmative-action
movement, led by the Coalition to Defend Affirmative Action, Integration & Immigrant Rights,
and Fight for Equality By Any Means Necessary, sought to create this conflict of precedents so
that they could dismantle the line that they opposed. Wittgenstein’s point is that until that clash
was brought to the surface, there was no inconsistency. That is, before Locke v. Davey, there
was no contradiction in the Court’s church-state jurisprudence, just as before Schuette, there was
no inconsistency in the Court’s race jurisprudence.

But what would Wittgenstein believe was the case once the clash was brought to the
surface – say, in his example, if one day the vice-president attended the state banquet? Wittgenstein argues that while this occasion might make us want to get rid of this contradiction,
the contradiction would not compel us to do so. It would be our choice. And even if we chose to
eliminate the inconsistency – for example, by sitting the vice-president next to the president –
that would not make it false or invalid if we had not sat the vice-president next to the president at previous state banquets that the vice-president had attended. In Wittgenstein’s words, it would not “vitiate what we did before.”471 During that time in which we had ignored the requirement to sit the vice-president next to the president, it had still stood as a valid legal rule, just as had the requirement to sit the vice-president between two ladies. It is not as if these requirements became retroactively nullified by our suddenly realizing that they contradict each other, or by our following one requirement over the other. We may ignore the contradiction and seat the vice-president according to one of the statutes but not the other. Or we may seek to comply with both statutes by sitting the vice-president for part of the banquet next to the president and then for a different period between two ladies. But we don’t need to find that the legal system is defective simply because these two rules seem to create a contradiction. Wittgenstein thus admonishes us: “Let it lie. Do not go there.”472

This means that after the Smith decision, even if the Court foresaw the creation of a clash between its newly minted Free Exercise Clause non-discrimination principle and the Court’s already-entrenched separationist precedents, the Court would not need to reconcile the clash. Nor would the Court have to address that inconsistency in a case like Locke v. Davey, where the two lines of precedents seemed to run against one another. Likewise, in Schuette, the Court could have applied the “political process” doctrine to invalidate Proposition 2, even though this would have had the effect of requiring the University of Michigan to practice the very type of discrimination that the Court had held in Gratz and Grutter the Equal Protection Clause generally prohibits. For Wittgenstein, however, this would not matter. The Court could simply

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471 Id.
472 LFM, at 138.
choose which line of precedents to apply. We do not need to address the contradiction to prevent it from contaminating the system. It is not a germ.

Given that Wittgenstein was striking at the heart of philosophy, going all the way back to Aristotle, it should not come as a surprise that Wittgenstein’s claims aroused enormous criticism. For example, in response to Wittgenstein’s complaints about mathematicians exhibiting “fear and awe” in the face of a contradiction, Alan Ross Anderson replied sardonically that given the foundational role of the law of non-contradiction in logical inquiry, Wittgenstein’s injunction not to feel such fear and awe in the face of a contradiction is as ridiculous as telling chess players not to feel “fear and awe . . . in the face of checkmate.” For Anderson, a contradiction deserves such respect because a contradiction does in fact have the power to invalidate a system, just as checkmate indisputably means that a player has lost a chess game. Perhaps the most scathing response came from Charles S. Chihara, who, in reviewing Wittgenstein’s Lectures on the Foundations of Mathematics, excoriated Wittgenstein’s views on consistency as “absurd” and lacking in “rigorous argumentation.” For Chihara, such “rigorous argumentation” is necessary “because much of the fruitful research on the foundations of mathematics in the first half of the century was stimulated or motivated by the goal of understanding or, at least, avoiding such paradoxes.”

Wittgenstein’s views have also been defended, however, including a very powerful argument by Crispin Wright that these critics have misinterpreted Wittgenstein as arguing that we must not use the law of contradiction as a constraint. Wright interprets Wittgenstein

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473 See supra for a discussion of Aristotle’s claim that the law of non-contradiction “is the most indisputable of all principles” because “it is impossible for anything at the same time to be and not to be.” ARISTOTLE, METAPHYSICS 51-52 (W. D. Ross. trans., 2005).
476 Id.
477 Id.
differently, and it is this interpretation that will help us in applying Wittgenstein’s philosophy of consistency norms to legal adjudication. Instead of interpreting Wittgenstein as arguing against the law of contradiction per se, Wright sees Wittgenstein as “want[ing] to question the ordinary conception that this constraint is imposed on us.”\textsuperscript{478} Wright emphasizes that Wittgenstein’s principal purpose is to “alter the attitude towards contradictions and consistency proofs.”\textsuperscript{479} That is, “Wittgenstein is not commending a skepticism about mathematical certainty, but attempting to expose what he takes to be an incoherence in the attitude of someone who thinks that a proof of consistency makes things in some way more certain,”\textsuperscript{480} as though proving the consistency of a system makes it more “rational to depend upon a system in a way in which it was not before.”\textsuperscript{481}

Again, contradictions are not germs. While we should feel more confident that our bodies are functioning properly after expelling all germs, we do not need to feel that way about a system simply by expelling all contradictions. Likewise, while we should feel less confident about our bodily health once a germ has entered, we do not need to feel that way about a system because we have found a contradiction within it. Wittgenstein wanted us to realize that to rely on a system we do not need to expel all contradictions from the system, and conversely, expelling a contradiction from a system does not necessarily mean that we should rely on the system. In either case, it is a choice available to us in engaging in discourse within the system. We may notice the contradiction or not. We may resolve the contradiction or not. But in no scenario does logic compel us to do anything with regard to the contradiction.

\textsuperscript{478} CRISPIN WRIGHT, WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS 296 (1980) (emphasis in original).
\textsuperscript{479} Id. (emphasis added).
\textsuperscript{480} Id. at 312-313.
\textsuperscript{481} Id. at 313.
In interpreting Wittgenstein this way, Wright draws heavily from Wittgenstein’s discussion of games involving self-defeating or conflicting rules. Suppose, Wittgenstein writes, we created a game of Hare and Hounds with rules that permit the hounds always to win, thereby creating “a result which I did not foresee and which spoils the game for me.”\(^{482}\) Or suppose that there is a game whose rules provide that if I move a certain way and you move another certain way, then I must move in a way that conflicts with the original rules – say, that a new rule in chess provided that if I move my King one space, and you move your King one space, then I can move my King like a Queen, in violation of the rule that, unless castling, the King can move only one space in any direction. For many chess purists, this new rule would ruin the game, because a significant feature of the game is that the King is the most important, but least useful, piece. Nevertheless, although this new rule would contradict pre-existing rules of chess and undermine a central feature of the game, it would not by itself destroy chess as a game. Nor would a Hare and Hounds game be defective if it had a feature permitting one side always to win. As Wright puts it, these examples demonstrate for Wittgenstein that there is “no reason why a game with a contradiction, or some other flaw, in the rules must be regarded as essentially defective; nor is there any reason to insist that if the defect comes to light, some sort of remedial action is demanded of us.”\(^{483}\) We could continue playing this form of chess or this Hare and Hounds game whereby one side is guaranteed a victory. There is nothing inhering in logic compelling us to dismiss these versions as defective.

But that is not to say, however, that we must not care about finding inconsistencies within a system. Indeed, Wright acknowledges, “it \textit{may} be that the game is spoiled because we cannot

\(^{482}\) RFM, at __.

\(^{483}\) Wright, supra __, at 299-300 (emphasis in original).
see how to avoid exploiting the inconsistent, or otherwise defective, elements in the rules.” 484 For example, we may “no longer be able to agree whether key moves are admissible or not, or we cannot see how intelligibly to try to win without exploiting the strategy.” 485 This is where Wittgenstein's critics err in interpreting his philosophy of consistency norms. They treat Wittgenstein as saying that because logic does not compel us to dismiss these games, there is no logical basis for wanting to eliminate inconsistencies. This is not Wittgenstein's point. He was simply arguing that we are not compelled, as though it was some sort of mandate from the logic gods, to eliminate inconsistencies from a system; we can choose to deal with inconsistencies in the way that makes the most sense for the participants within that particular system. Indeed, we have all seen how children seem to enjoy playing games like tic-tac-toe for hours, despite the fact that the more often they play, the easier it is for them to exploit the game’s weaknesses to guarantee a tie. They may keep playing because children generally enjoy the act or ritual of playing the game, without regard to the system's susceptibility to such exploitation, and this may be because they do not fully understand how each player's “best play” guarantees a tie, or because they simply care less than adults about whether games are structured in such a way to create a rigorous and even-handed match for each side. This does not make the child illogical for continuing to play the game. Nor does it mean that the adult is illogical for caring about this feature of the game; indeed, the adult also has a logical basis for finding that this same feature of tic-tac-toe makes it a defective game, not worth playing. Wittgenstein's thus readily admits that we have a logical basis for wanting to eliminate inconsistencies, but he vigorously denies that logic compels us to eliminate them. It depends on what the participants of that game expect from the system.

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484 Id. at 300 (emphasis in original)
485 Id.
A player of a more sophisticated language game containing an inconsistency might similarly see it as a defective game due to this inconsistency. But just as the possibility of always inducing a draw does not ruin the game for the uninitiated player of tic-tac-toe, a hidden contradiction does not, by itself, infect or invalidate any other type of language game, including a highly technical one like mathematics. If anything infects or invalidates the language game, it is us – i.e., our distaste for contradictions. As Wright elegantly puts it, “the game survives as long as our innocence survives.”486

This is a notion that we will tie back to legal systems and contradictions in concluding why inconsistencies threaten the rule of law and in determining which inconsistencies do this for us. Just as expert participants in a game like tic-tac-toe might lose interest in playing it because of an easily exploitable defect, some participants in legal adjudication might avoid introducing certain types of inconsistencies into the system because a legal system with such inconsistencies is not worth playing – i.e., it becomes useless to us in adjudicating disputes between conflicting parties. To understand how this is so, we will introduce our final Wittgensteinian notion, the role of hinge propositions in structuring linguistic certainty, before marshaling these insights more explicitly to finalize our account of the relationships among the types, uses, and scopes of legal consistency and the rule of law.

**Consistency Norms and Hinge Propositions**

Wittgenstein most fully discussed the idea of hinge propositions in *On Certainty*, which is often referred to as Wittgenstein’s last work, but it is important to begin our discussion here by noting that it is not entirely accurate to call *On Certainty* “a work,” for it is a collection of notes that he was writing as late as two weeks before his death in 1951. Wittgenstein never had the opportunity to edit and organize the notes, so as they stand, the numbered paragraphs ramble

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486 Id. at 302.
from one point to another. For example, Wittgenstein explores at several points the ways
certainty relates to legal discourse, but these paragraphs appear at various stages in the notes.\(^\text{487}\)
Indeed, many topics appear, vanish, and then re-appear throughout the work. Nevertheless,
although *On Certainty* lacks the structured coherence of Wittgenstein’s earlier works, the notes
still, as a whole, address a singular theme: the role that certainty plays in our language.

Wittgenstein’s goal in the notes was to engage several arguments featured in G.E. 
Moore’s *A Defense of Common Sense* and *A Proof of the External World*, both of which
challenged the skeptical viewpoint that we cannot know any thing with certainty. Moore
challenged this viewpoint in *A Defense of Common Sense* by focusing on common-sense
propositions, such as the proposition that when we look at our hands, we can know with certainty
that “here is a hand.” Even though Moore was not sure exactly what type of evidence we can or
should adduce to say that we know these common-sense propositions with certainty, he still
believed that our interactions demonstrate that we actually know rather than simply assume their
truth. Moore later expanded on this argument in *A Proof of the External World*, where Moore
used these common-sense propositions as proof of an external world. For example, Moore
proclaimed that because when we look at our hands none of us ever questions the validity of the
premise “here is a hand,” we cannot reasonably question the existence of the external world.

In *On Certainty*, Wittgenstein argued that Moore was right in contending that we do *act*
as though we know with certainty that common-sense propositions are true, but Moore was
wrong in claiming that we *know* these propositions. That is, it might be true that we all act in
such a way in which doubting these propositions would seem absurd, but that does not mean that
we actually know the propositions in themselves. Moreover, Wittgenstein took issue with

\(^{487}\) See OC, 8, 335, 441, 485, and 604. When citing *On Certainty*, I will use the shorthand “OC,” followed by the
appropriate paragraph number, from the following edition: LUDWIG WITTGENSTEIN, ON CERTAINTY (G.E.M.
Moore’s claim that we have evidence for always believing with certainty in these propositions. According to Wittgenstein, Moore’s argument overlooked the extent to which some propositions are taken as true only for the purpose of enabling a particular language game. Moreover, Wittgenstein argued, we do not need evidence to support these propositions in order to make them work for us in this way. In fact, we cannot provide grounds for their truth. They simply are taken as true for the purpose of the language game. Wittgenstein referred in *On Certainty* to propositions that serve this function within a particular language game as “hinge propositions,” because just as a hinge enables a door’s rotation, hinge propositions enable the rotation or functionality of other propositions.

Consider Moore’s own example that he knows that when he puts his hand in front of himself, he knows that it is indeed his own hand he is seeing. Wittgenstein explained that while this knowledge might seem irrefutable in some contexts, it would not seem so in others. For example, it might be beyond doubt that I see hands when I observe my own hands typing this dissertation, but it would not be beyond doubt if I were to make such an observation after waking up from a surgery to see bandages at the ends of my arms; after all, in this latter scenario, it might be prosthetic hands that I would be seeing. Wittgenstein’s point here is that when philosophers examine the certainty with which knowledge is claimed, they must consider the practical circumstances surrounding that claim. Just as there is a difference between saying “here is a hand” while typing and making such a statement after a surgery, there is a difference between saying “external objects exist” in ordinary discourse and saying that in a philosophy classroom. This of course resonates with the general theme of the *Investigations*, discussed above, that philosophers create confusion by focusing on the logical form of a proposition rather
than on how the proposition is used in practice. The meaning, and certainty, of “here is a hand” must be examined according to how that statement is used in particular contexts.

An important distinction for our purposes between Moore and Wittgenstein is that whereas Moore saw doubt about basic propositions as categorically excluded from thought, Wittgenstein viewed such doubt as excluded only in the context of a particular language game that warrants such exclusion. This means that we can doubt, for example, whether our hands are indeed hands, but we can do this only in the context of some language game in which the proposition “this is a hand” is not presupposed as true. This sort of doubt, of course, would arise only in special language games, such as in philosophical discourse. Even in these special situations, though, we would be working within a language game in which other propositions would be taken to be true. We cannot doubt everything, for even if we tried, there would have to be a language game, consisting of supporting rules, to structure that doubt. And the supporting rules of the language game would have to be taken to be true before the doubting could even get off the ground. In Wittgenstein’s words, “the questions that we raise and our doubts depend upon the fact that some propositions are exempt from doubt, are as it were like hinges on which those turn.” 488 We thus cannot engage in the language game if we doubt these hinge propositions. So “[i]f you tried to doubt everything you would not get as far as doubting anything,” 489 because “[t]he game of doubting itself presupposes certainty.” 490 To engage in a particular form of doubt, then, requires understanding the language game in which the doubt operates. And to engage in doubt unwarranted by the governing language game precludes a full understanding of the language game.

488 OC, 341.
489 OC, 115.
490 Id.
Applied to adjudication, this means that participants in legal discourse cannot doubt the determinacy of all legal propositions. We must treat some as true for the purpose of the language game. Our question in this dissertation is whether the notion that legal propositions cannot conflict is such a hinge proposition that we cannot doubt it without shifting or jeopardizing the judiciary’s rule-of-law function discussed in the previous chapter. We want to determine in this chapter whether just as “here is a hand” is presupposed as true in some language games, the same might be the case for some ways of conceiving of legal inconsistency, making the law of contradiction operate as a hinge proposition in the language game of law. We will be turning back to this question shortly, in the process examining what it reveals for thinking about the types, uses, and scopes of legal consistency.

Another important distinction for our purposes is that whereas Moore conceived of basic propositions in epistemological terms, Wittgenstein saw them in *logical* terms, a point of significance for our inquiry into whether the consistency required of law is functional or logical. As explained above, Wittgenstein, unlike Moore, did not believe that we *know* the hinge propositions that structure our language games. Rather, Wittgenstein argued hinge propositions function as what some philosophers have come to call “framework judgments” – i.e., beliefs about the world that frame, but are not subject to, our expressions of knowledge. Indeed, in providing evidence for our knowledge, we take hinge propositions as certain but do not subject them to the same epistemological analyses. And we do not subject them to the same analyses for the reason provided above: we cannot do so while still engaging in the language game. That is, Wittgenstein was *not* arguing that we cannot subject hinge propositions to the same epistemological analyses because they are, in themselves, beyond doubt, or because doubting them would be a useless or inefficient endeavor. He was instead making a *logical* argument
about the way propositions must be structured within language games. According to Wittgenstein, “it belongs to the logic of our scientific investigations that certain things are in deed not doubted.” And this is not because “[w]e just can’t investigate everything, and for that reason we are forced to rest content with assumption.” Rather, it is because “[i]f I want the door to turn, the hinges must stay put.” I simply cannot doubt whether this is a hand, for example, while I am writing this dissertation – and not because that would be a waste of time or because I don’t have enough evidence to engage in that doubting, but rather because once I start doubting whether this is a hand, I would not be engaging in the activity of writing anymore. I would, instead, be participating in another language game.

Wittgenstein used diverse examples to illustrate how hinge propositions frame judgments in these ways. Indeed, his notion of hinge propositions covers a wide spectrum of propositions, many of which are currently applicable to the author of this dissertation, such as “I am in the United States,” “I am writing in English,” and “I am sitting at a table writing.” Not only do these hinge propositions arise from diverse experiences, but they also accumulate over a course of a lifetime. Indeed, according to Wittgenstein, I take as indubitably true that I am in the United States, sitting at my desk, writing in English, only because I have developed a way of thinking and communicating within a certain culture in which these propositions are taken as true in particular contexts. Our immersion in a culture necessitates our accepting some propositions as certain and thereby precludes our engaging in certain types of doubt. Our certainties thus constitute who we are.

491 OC, 342 (emphasis in original).
492 OC, 343 (emphasis in original).
493 Id.
494 OC, 421. Wittgenstein’s proposition was of course “I am in England,” as that is where he wrote On Certainty.
495 OC, 158.
496 OC, 675.
Now that we have covered the basic elements of Wittgenstein’s philosophy of language and how it can apply to our thinking about systemic consistency and certainty, we can move on to exploring what insights this provides for our investigation in this dissertation, the relationship between legal consistency and the rule of law. In so doing, we will develop a new theory of the rule of law, the conceptualization of the rule of law as a language game.

**Developing a New Theory: The Rule of Law as a Language Game**

Before we develop this theory, let us return to our hypothetical involving conflicting orders to turn on my lights. As discussed above, if our communication had a strict rule against contradictions, then perhaps you would ignore both my order to turn on the lights and the opposing order not to turn on the lights, as though they amounted to nothing more than nonsense. Our consistency norm, then, would be structuring your interpretation of the validity of these norms. But if, as is more likely, our communication did not have such a strict rule against contradictions, you would not ignore the conflicting orders but rather try to put them together in a way that best effectuated your construction of my purpose in giving the orders. So if you interpreted my orders as having the purpose of seeking to protect my home from burglars, you would turn on the lights when you thought doing so might deter an invasion of my home.

Now let’s change the hypothetical slightly to drive home Wittgenstein’s point about hinge propositions. Imagine under this revised hypothetical that I didn’t give you the orders at the same time. Rather, at first I told you never to turn on my lights while I was out of town, and for a long time this stood as my only order to you. But then at a later point I gave you a general order that might potentially conflict with that order, such as the order that you must protect my house from burglars while I am gone. In this case, if we had a consistency norm in our discourse, it would likely structure your interpretation of this general order. You might reason,
for example, that although turning on the lights would be one possible way of deterring burglars, I could not have intended you to achieve this goal through such means, for that would involve contradicting my long-standing, particular order not to turn on the lights. As a result, you might interpret my general order to mean that you must engage in any burglary-deterring act except turning on my lights. By presupposing the consistency of my orders, you would treat as certain that I did not order you to turn on my lights, even though you would not be certain of this proposition, since, after all, I could have intended my later, more general order to trump my earlier, more particular order in special circumstances, such as when putting on the lights would deter burglars.

Notice how in this scenario a consistency norm generates a hinge proposition by foreclosing particular interpretations of my later, more general order. After I had already entrenched the command not to turn on my lights, you applied a consistency norm to rule out interpretations that would involve protecting my house through means that would contradict the first command. This illustrates how Wittgenstein believed that certainties develop over time and through culture. It becomes inconceivable to satisfy my second order by turning on the lights only once the first order has become entrenched and a consistency norm has worked with that entrenchment to generate the hinge proposition, “there is no command to turn on the lights,” around which interpretations of the second order turn. This hinge proposition prevents a contradictory order from emerging in the system.

It is important to contrast this reasoning with a related but distinct scenario where the subject considers how, for the purpose of interpreting the general order, she can protect my property, if it is the case that she cannot turn on my lights. In this latter scenario, a consistency norm would not generate a hinge proposition, because it would rest on conditional reasoning that
would leave open the possibility that the antecedent is false. To be clear, Wittgenstein was not referring in *On Certainty* to such conditional reasoning, in which, for example, a person engaging in baseball says *if* this is a hand, *then* I can throw this ball with it. In such a case, “here is a hand” would not be functioning as a hinge proposition. Rather, Wittgenstein was referring to how hinge propositions are *necessary* to structuring thought, so that the proposition “here is a hand” cannot be doubted while playing baseball, because presupposing “here is a hand” is necessary to the very structure of that activity.

This is how the proposition “there is no command to turn on the lights” functions in the reasoning above. The subject of these orders questions how, for the purpose of interpreting the general order, she can deter burglars *without* turning on my lights; in our hypothetical, she does not even consider the possibility that she can turn on the lights, because a consistency norm has produced the certainty that there is no conceivable way there was an order to turn on the lights. The consistency norm has foreclosed the possibility that I could have ordered the agent to turn on the lights, just as playing baseball eliminates the possibility of questioning whether this is a hand.

This helps us understand how some types of consistency norms may operate in legal discourse in guaranteeing the rule of law. Just as in the above examples, in which my order not to turn on my house lights created a hinge proposition that foreclosed the possibility of reaching contradictory conclusions, it may be that in our legal system a precedent decision produces a hinge proposition that forecloses the possibility of reaching a decision that would contradict that precedent. When this happens, we are dealing with a special, or deeper, form of *stare decisis*. Under the traditional *stare decisis* analysis, the one that the empirical works covered in Chapter 5 have sought to examine, *stare decisis* is efficacious if and only if the deciding court determines that the precedent case was decided wrongly by the previous court. And once the deciding court
makes this determination, then it must evaluate precisely how erroneous the precedent decision was – with grave errors, either in terms of legal or social harm, warranting correction, but less severe errors, again in either terms of legal or social harm, not warranting such correction. Because judges will reasonably disagree on what in a precedent case is binding so as to be subject to *stare decisis*, how inconsistent a later decision must be with the precedent decision so as to trigger the *stare decisis* balancing of factors, and when a precedent decision is sufficiently wrong so as to warrant overruling, judges will reach vastly different conclusions on how to apply the *stare decisis* doctrine to particular cases. As a result, this version of *stare decisis* often does not generate adjudicative consistency, as the attitudinalists have found in their empirical studies. This is why so many realists and critical legal theorists, such as the ones discussed in Chapter 2, have abandoned viewing adjudicative consistency as an achievable or even desirable goal within a legal system.

But perhaps, in addition to this ordinary form of *stare decisis*, there is a deeper form of *stare decisis* – a form that is not explicit in any particular judicial decision but that nonetheless underlies the entire judicial enterprise, and a form in which these disagreements over precedential scope and consistency do not lead to vastly different applications of the doctrine. I submit that, under this deeper form of *stare decisis*, courts treat it as a requirement of the rule of law that they cannot go from one constitutional pole to the other for the same class of action, which will often mean that we will not create conflicting obligation norms in the system. I also submit that, for cases involving the prospect of moving from one obligation norm to another for the same class of action, a Wittgensteinian approach to legal consistency and certainty explains how *stare decisis* works better than does the ordinary view of *stare decisis*. In these cases, an obligation precedent works with an adjudicative consistency norm to generate a hinge
proposition, foreclosing the possibility of the court shifting to a complementary obligation norm. So even though both obligation norms might be plausible interpretations of the Constitution, the deciding court treats shifting from the obligation precedent to its complement as an impermissible move in the language game of legal adjudication. So, for example, if at time $x$ the Court held that the Constitution requires the government to perform $y$ action, and if at time $x+1$ the Court decided that the prior ruling was wrong, the Court would feel liberated to rule that the Constitution permits the government to perform $y$ action, resulting in the government having discretion on the matter. This permission norm opens the path, as we discussed in Chapter 3’s discussion of Kant, for pragmatism to operate in a legal system – it carves out a space for public deliberation and disagreement. But the Court would not feel so liberated to rule that the Constitution forbids the government to perform $y$ action, even if there were plausible bases in law and policy for such a ruling. An obligation norm creates a hinge proposition, turning judicial decision-making around the obligation norm and its permission counterpart, thereby removing the complementary obligation norm from the scope of judicial cognizance.

The reason why such a move from one obligation norm to its logical complement is seen as impermissible, whereas shifting from an obligation to a permission norm is seen as entirely permissible, is that our legal culture holds that the judiciary, as discussed in the previous chapter, has a limited role in using constitutional interpretation to constrain political decision-making and is similarly expected in its exercise of judicial review to constrain itself. This of course brings us back to Hamilton’s Federalist 78, an incredibly prescient piece on the judiciary’s role in our system in preserving the rule of law. When the judiciary issues an obligation norm, it binds the government to a particular legal interpretation – whether it is the obligation that the government

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497 As discussed in Chapter 3, the term “complementary” in this context refers to the status of opposing obligation norms in deontic logic. When an act is prohibited and forbidden, these obligation norms are said to be complementary.
must integrate schools, or must not regulate the abortion of pre-viable fetuses, or must not fund religious organizations. But when the judiciary issues a permission norm, it creates a legal vacuum, as Kant would have put it, opening up the space for governmental discretion, the zone in which political discourse operates to decide, for example, whether to integrate schools, whether to regulate pre-viable fetuses, or whether to fund religious organizations. This move from an obligation to a permission norm sweeps the judiciary away and opens up the floor for political activity. But if the judiciary were to come back into the picture with the complementary obligation norm, such a move would turn the entire constitutional scheme upside down, so that the integrationist’s right would become the segregationist’s, a woman’s right to choose would become a fetus’s right to live, and the taxpayer’s right to be free from funding religious schools would become the religionist’s right to receive governmental support.

A helpful way to visualize this paradigm is by imagining precedential ceilings and floors. The floor is made up of the precedent obligation decision. For example, the Court’s affirmative-action decisions set the floor that the government may not use racial quotas. The complementary obligation – i.e., the obligation that the government must use racial quotas to redress past discrimination – is the ceiling that opponents of this precedent obligation are trying to reach. But the distance between the floor and ceiling is too great, so that the opponents of the precedent would need to jump off the floor, so to speak, to touch the ceiling. If precedents did not tug on courts, pulling them down to the floor, the ceiling would be graspable, but in our legal system, the floor exerts too much pull on the judiciary, preventing it from ever reaching the ceiling and issuing such a ruling.

This analogy calls to mind our discussion in Chapter 4 of Dworkin’s distinction between a precedent’s “enactment force” and its “gravitational force.” The former, narrower type of
precedential force refers to the semantic content in judicial precedents bearing a canonical form so as to bind later decisions in the same way as statutory enactments do. But the latter type of force refers to precedential content that is sufficiently broad and weighty so as to exert a general thrust even over later decisions that do not directly relate to the precedents in which the content first appeared. In this sense, the latter type of precedential force grounds the system as a whole, providing the gravity that tugs all judicial decisions in this direction, so that all decisions within the system must bear some coherence with the broad content appearing in these precedents.

The central difference between Dworkin’s theory, and the one I am presenting here through Wittgenstein’s work, is that whereas Dworkin grounds his entire scheme on moral norms (principally on the notion that fairness requires a certain degree of consistency), the stare decisis framework I am presenting is a more conceptual analysis of the grammar or logic of the rule of law. That is, in Dworkin’s scheme the gravitational force of precedent comes from morality, particularly the morality inhering in a liberal democratic legal system, but in my scheme, this force radiates from the logic of legal discourse. So while Dworkin’s gravitational force tugs courts back to precedents so as to preserve the moral integrity of the legal system, the gravitational force I am identifying here tugs courts back to the logical modality of the precedent decision because that is a function of how our entire language game of judicial reasoning operates. Due to this important difference between our approaches, my framework rests on the modal or logical relationship between the precedent decision and the decision under consideration, whereas Dworkin more broadly considers as exerting gravitational force any decision of sufficient moral importance to the legal system.

We could see this contrast more sharply by distinguishing how these two approaches would treat the Supreme Court’s abortion precedents. As discussed in Chapter 4, Dworkin
argued in his 1993 work, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, that the threshold question in the abortion issue is whether a fetus has a constitutional right to life, so that “states not only may forbid abortion but in some circumstances must do so.” Dworkin explained there that the Supreme Court had to consider this issue in Roe before it could determine whether women have a right to choose to have an abortion, thus requiring the opposite conclusion – i.e., that states may not forbid abortion. Recall that in Dworkin’s philosophy of law, there are two central inquiries – one of fit and justification. Because the proposition that the state may regulate abortion does fit our legal practices, the next question for Dworkin is whether it justifies our legal system as a whole, so that this interpretation would make the legal system the best that it could be.

Based on this justification inquiry, Dworkin finds that the state may not regulate abortion, principally for two reasons. One, Dworkin finds that the Supreme Court’s procreative autonomy cases exert a gravitational pull, tugging toward the conclusion that women have a constitutional right to make for themselves reproductive choices involving their own bodies. Two, Dworkin contends that the issue of when life begins is a sacred matter, and for this reason, the Court’s religious freedom cases pull toward the conclusion that it would be impermissible for the government to involve itself in sacred questions by regulating abortion. To make the law the best that it could be, therefore, a judge would need to find that these precedents exert a gravitational pull toward invalidating all restrictions on abortion. The only right answer to the abortion question – i.e., the only interpretation that both fits and justifies our legal system – is that the state may not regulate abortion. For Dworkin, then, if the Court were to issue a decision permitting the government to regulate abortion, that decision would violate the rule of law just as

498 RONALD DWORIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABDOTION, EUHANASIA, AND INDIVIDUAL FREEDOM 110 (1993).
would one requiring the government to regulate abortion, because both decisions would involve departing from settled values in our legal scheme.

In my *stare decisis* framework, by contrast, only a judicial decision *requiring* the government to regulate abortion would undermine the rule of law, because only such a decision would annihilate the precedent in place, *Roe*, by announcing an obligation that is the logical complement of that precedent decision. This is because I believe that the gravitational pull of the rule of law comes from the *modal* rather than the *moral* thrust of legal decisions. Overruling *Roe* so as to permit states to regulate abortion would not involve a complete overhaul of our system, because states would still be free not to regulate abortion, as surely many liberal states would choose to do. Such a decision would therefore open up the space for political discourse. It would remove the law and open up the way for politics. But overruling *Roe* so as to require states to regulate abortion would involve a complete transformation of our system, because states would be required to do what they had just been forbidden to do, leaving states no discretion on the matter and thereby completely closing the space for political discourse. Such an overhaul would be like flipping a room upside down, with the floor that had exerted a gravitational pull becoming the ungraspable ceiling. It is this type of room re-arrangement that the rule of law forbids. And this is for both the practical and the logical senses of consistency discussed in the previous chapter. Such transformations make it extremely difficult for subjects, both state actors and private citizens, to rely on judicial decisions, and they also make the system appear incoherent, so that today’s losers can become tomorrow’s winners. The judiciary violates the rule of law by transforming our legal framework in this way.
But such disputes between opposing poles, what Robert George calls the “clash of orthodoxies” in the church-state context or what Laurence Tribe dubs the “clash of absolutes” in the abortion context, are pervasive in American legal discourse. This has become an interest for moral philosophers seeking to examine whether there are any “first principles” in society and if so, how a diverse population like ours can reach consensus on those principles. For example, philosopher Alasdair MacIntyre argued in his hugely important work, *After Virtue*, that American political discourse illustrates the lack of any “shared moral first principles” in our society. In making this argument, MacIntyre took particular aim at Dworkin, claiming that any attempt to derive “a set of consistent principles behind” the Supreme Court’s resolution of our conflicts “is to miss the point” of the Court’s role in our society. This misses the point, MacIntyre argued, because the Court plays “the role of a peacemaking or truce-keeping body by negotiating its way through an impasse of conflict.”

MacIntyre focuses on the Court’s tripartite fracture in the *Bakke* decision to illustrate his contention: (1) how four of the Court’s conservative Justices saw race-conscious affirmative-action programs as categorically prohibited, (2) how the liberal Justices viewed these programs as appropriate remedies for prior racial discrimination, but (3) how Justice Powell, who of course wrote the binding plurality opinion, explained why such programs are permissible only if executed in certain ways and for certain purposes. For MacIntyre, *Bakke* reveals how divided our society is on important moral and political matters like affirmative action, and the Court, as the governmental body charged with resolving these conflicts, reflects these deep inconsistencies through decisions that appear muddled, unprincipled, and contradictory.

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My point here is that not only does the Court often play this role of resolving such conflicts, but that the Court must play that role as the governmental organ of reason in a society consisting of conflicting reasons. And part of playing this role is that the Court’s muddled, unprincipled, and contradictory resolutions of conflicts are constrained over time by consistency norms. This is where MacIntyre misses the point. Indeed, MacIntyre may be right that Dworkin simplifies the adjudicative enterprise by holding that all legal decisions must be individually consistent to be moral and therefore lawful. But MacIntyre, in criticizing Dworkin, accepts too much inconsistency in our system. Although individual decisions will create inconsistencies, the judiciary is constrained by consistency norms over time and this creates judicial convergence, even when dealing with deeply contested and contestable matters like affirmative action. That is the judiciary’s role in serving the rule of law – to prevent the oscillation between constitutional extremes.

**Chapter Summary**

This penultimate chapter has sought inspiration from Wittgenstein’s philosophy of language as a guide to developing a deeper understanding of how judges and lawyers use the term “consistency” in legal discourse. Our goal here was to find some agreement on the meaning of adjudicative consistency, with the hope that this could further our project of facilitating empirical investigations of *stare decisis* as well as more theoretical inquires on the rule law. In undertaking this task, we have explored whether Wittgenstein’s views on consistency fit better with the logical or the functionalist accounts of adjudicative consistency, discussed in previous chapters, and in the process, questioned whether some features of the law operate like a language game, an inquiry with significant implications for how we understand legal determinacy.
Wittgenstein, at first glance, would seem to favor a functionalist account like Fuller’s view of consistency covered in Chapter 4. This is because, in Wittgenstein’s writings on consistency, he contended that contradictions need not be extirpated from all systems. Rather, it is a choice up to us, and in making this point, Wittgenstein used a legal example, in which no harm would be done to a legal system by permitting a contradiction between two laws to exist. This seems to support the notion that legal consistency discourse does not operate as a language game.

But we have also established here how some consistency norms – such as the requirement that legal obligations must not conflict – might operate as a language game in legal adjudication, thus refining Morawetz’s view that legal adjudication operates like a deliberative practice and not a language game. Contra Morawetz, we have established that some features of law do in fact operate like language games, and one of these games appears in one of the most controversial and disputed aspects of legal adjudication, the use of *stare decisis*. Indeed, it may be that in the *stare decisis* language game a requirement established by a precedent functions as a Wittgensteinian hinge proposition around which future decisions rotate, and that hinge proposition is accepted as a certainty for purposes of those decisions, even though we do not actually *know* that the precedent case was decided correctly. Rather, it frames the rationality of our legal discourse, so that a later decision supporting the complementary obligation is viewed as transgressing the bounds of legal logic – an impermissible zone for the judiciary, as the governmental organ of reason, to enter.

This view of *stare decisis* holds the key to resolving, or perhaps *dissolving*, many of the most important debates in constitutional law and theory, including many of the ones we have encountered throughout this dissertation, such as the increasingly rancorous fights over whether
law or politics controls Supreme Court decision-making, whether logic has any place in legal adjudication, whether precedent ever constrains the Court, and whether there is any agreement on the meaning of the rule of law. If our Wittgensteinian account is right, then we would have a strong basis for concluding that, although a substantial portion of law is politics, there are some domains of law that operate independently of political forces. In these areas, logic often prevails, though perhaps more in the Wittgensteinian linguistic sense of logic than in the stricter formal conception of logic required by the theorems of deontic logic covered in Chapter 3.

This account would also demonstrate that *stare decisis* does ensure some degree of adjudicative consistency. At least in areas of the law where the Court has already adopted a general obligation norm on a subject, precedents work to constrain judicial decision-making – though, again, not in the ordinary way provided for in the traditional account of *stare decisis*. And although this approach would not resolve fundamental disagreements about the meaning of the rule of law, it would suggest the beginning of a consensus, with the foundation of adjudicative consistency resting on the proposition that courts, as institutions of reason with limited roles in constraining political action, must not adopt into law complementary obligation norms, for doing so exceeds the bounds of legal discourse.

Understood in this light, Wittgenstein’s views on consistency and certainty establish a middle-ground between the functionalist and logical conceptions of consistency. Under this middle-ground approach, consistency does not come down to the functionality of a legal conflict, but it does not turn either on whether it violates some formal rule of logic. Rather, the precedent case frames the parameters of rationality, so consistency has a logical component, but this is not a logic imposed on us from the outside world, as some of the philosophers covered in Chapter 3 would have it. Instead, it is a legal logic, apart of who we – as participants in legal discourse –
are, argue, and conceive of the rule of law through our *legal language*. The final chapter will engage in a preliminary empirical examination of this theory – a discussion necessarily *preliminary* because of the scope of this dissertation, but one that will set the bounds for more detailed and thorough testing in future research.
CHAPTER 8
APPLYING THE RULE OF LAW AS A LANGUAGE GAME:
THE TYPES, USES, AND SCOPES OF LEGAL CONSISTENCY NORMS

In this final chapter, we will examine more closely how our theory of the rule of law as a language game operates in practice, by returning to the first paragraph of the Introduction, where we discussed how opposing sides in the abortion, church-state, and affirmative-action debates have marshaled constitutional arguments to favor their preferred positions. We will also return to some of the empirical works on *stare decisis*, covered in Chapter 5, to demonstrate how consistency norms operate in distinct ways in different legal contexts. We will see how in some contexts judges use consistency norms in a way that fits with the strategic model, in seeking to maximize their judicial efficacy through collaboration with other judges. But in other situations, judges use consistency norms in a way that better fits with the attitudinal model, simply as an expression of their judicial preferences. And in some cases, judges use consistency norms in accord with the legal model, as a constraint that exists independently of judicial strategy and preference. We will see how the question of *scope* relates to these *uses*, with the results-approach often corresponding with attitudinalism, the principles-approach facilitating strategic decision-making, and the rules-approach coinciding with legal frameworks operating as decision-making constraints.

By completing our taxonomy of the *types*, *uses*, and *scopes* of legal consistency, we will see more clearly and precisely how *stare decisis* is a multifarious doctrine and how it relates to the rule of law. There is no essence to *stare decisis*, no dichotomy between its political and legal dimensions. The doctrine contains both elements, because it is a language game that constitutes and is constituted by our system of legal adjudication, a process that is imbricated with law and politics.
Applications: Abortion, Church-State Relations, and Affirmative Action

As we have seen at various points in this dissertation, pro-lifers have relied on the 14th Amendment’s guarantee that the state may not “deprive any person of life . . . without due process of law” to argue that the state must prohibit abortion. On the other side, pro-choicers have advanced the opposing constitutional-obligation argument – that the state must not prohibit abortion – by appealing to the Court’s procreative autonomy cases leading up to Roe. Both arguments, in isolation, are reasonable. The former argument is a plausible interpretation under the textual modality of constitutional interpretation; this textual argument simply requires holding that a fetus is a person under the U.S. Constitution – which might not be entirely persuasive as a matter of science, but given that the science on fetal personhood is debatable, the proposition is a reasonable interpretation of law.\footnote{For an especially sophisticated defense of this interpretation, see George, Robert. The Clash of Orthodoxies: Law, Religion, and Morality in Crisis (Wilmington; ISI Books, 2001).} The pro-choice argument is likewise reasonable because it of course follows, indirectly if not directly, from the Court’s long line of pre-Roe cases dealing with privacy and reproduction, starting with Meyer v. Nebraska\footnote{262 U.S. 390 (1923).} and going all the way up to the landmark privacy case, Griswold v. Connecticut.\footnote{381 U.S. 479 (1965).}

Likewise, both sides of the affirmative-action debate also make reasonable constitutional arguments in support of their case. Affirmative-action proponents claim that the government must adopt racial preferences to redress previous discrimination, a proposition that plausibly follows from the post-Brown cases requiring race-conscious measures as remedies for past discrimination. But similarly, opponents also make cogent constitutional arguments in claiming that the government must not adopt such preferences, given the long line of cases holding that
the Constitution requires strict color-blindness.\footnote{Again, for an elaboration of the role that the color-blindness principle has played throughout our constitutional history, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).} As the conservative Justices are fond of citing, the first direct enunciation of this principle appeared in Justice Harlan’s dissent in \textit{Plessy v. Ferguson},\footnote{163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”).} and it eventually became part of the law, perhaps as early as in 1917, when the Court invalidated a residential segregation ordinance in \textit{Buchanan v. Warley}.\footnote{245 U.S. 60 (1917).}

Church-state separationists also rest on solid ground in arguing that the government \textit{must not} fund religious organizations, given that between 1947 and the mid-1990s, this generally had been the law. Moreover, this interpretation of the Establishment Clause rests on a tradition going all the way back to Madison’s \textit{Memorial and Remonstrance Against Religious Assessments}, and Jefferson’s famous letter to the Danbury Baptists. But church-state accommodationists reasonably counter that the Free Exercise or Free Speech Clause \textit{must} include religious organizations in generally available funding programs because excluding them would burden the beliefs or speech of these organizations. This proposition can also be plausibly derived from various Supreme Court cases – specifically, cases like \textit{Widmar v. Vincent}\footnote{454 U.S. 263 (1981)} and \textit{Employment Division v. Smith},\footnote{494 U.S. 872 (1990)} which, as discussed earlier, held that the critical requirement of church-state law is neutrality or equality between religion and non-religion.

Nevertheless, although these are all plausible interpretations of law based on an isolated set of precedents within our system, they are not equally plausible \textit{within our entire system of precedents}. That is, while it makes sense to say, for example, that in the abstract \textit{Smith} stands for the proposition that the Free Exercise Clause requires equal treatment between religion and non-religion, it does not make sense to apply that requirement to government funding programs,

\footnote{163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”).}

\footnote{245 U.S. 60 (1917).}

\footnote{454 U.S. 263 (1981)}

\footnote{494 U.S. 872 (1990).}
when that would eviscerate the long line of Establishment Clause precedents prohibiting such funding of religious organization. This is what we saw in *Locke v. Davey*, where three of the conservative Justices, led by the ardent anti-separationist Chief Justice Rehnquist, refused to overhaul our church-state jurisprudence by turning what had been a constitutional prohibition, in cases like *Nyquist*, into a constitutional requirement. Indeed, while the Court has often moved from an obligation precedent to a permission norm for the same class of action, as the Court was willing to do in *Zelman*, it very rarely has done so for the complementary obligation norm.

Rather, when presented with such an opportunity, the Court has often treated such proposals as what Jack Balkin has termed “an off-the-wall argument”510 – i.e., as an argument that is nonsensical in our legal discourse. The Court has treated these arguments as off-the-wall, even when there have been reasonable bases in our system for treating the argument as “on-the-wall,” because, as explained above, when the Court shifts from a precedent obligation norm to its logical complement, that move completely annihilates the precedent decision, flipping the federal and state constitutional schemes upside down, so that what had previously been the floor exerting a gravitational pull becomes the ungraspable ceiling. By contrast, the Court does not treat a shift from an obligation to a permission norm as off-the wall, because such a move does not completely annihilate the precedent obligation norm. Rather, such a shift leaves that obligation as an open political option, with some state governments finding the obligation in their own constitutions or adopting it into law through the legislative or referendum process.

We could see the political consequences of the Court’s willingness to move from an obligation to a permission norm, but unwillingness to move to a complementary obligation norm, in all of these areas of law. For example, as we discussed earlier, starting in the 1990s and extending to the current day, the Supreme Court has moved away from the separationist church-
state precedents that had prevailed in the 1970s and 1980s, so that government funding of religious organizations through various types of programs has gone from prohibited to permitted. This move has been most apparent in two cases: *Agostini v. Felton*,\(^{511}\) which dramatically weakened the Establishment Clause standards limiting the government’s *direct* funding of religious organizations, and *Zelman v. Simmons-Harris*,\(^{512}\) which, as we discussed in earlier chapters, did the same for indirect funding programs. Together, these two decisions provided that the Establishment Clause permits most types of religion-neutral programs that fund religious organizations, thereby signaling the collapse of the wall of separation between church and state.

Even though during this period the Court implicitly, and at times even explicitly, overruled its separationist precedents, some states still turned to the principles underlying those separationist precedents as guides to finding in their own constitutions, particularly their Blaine Amendments, the requirement that they must not fund religious organizations.\(^{513}\) As a result, the Supreme Court’s shift from the separationist obligation norm to a permission norm did not annihilate the separationist precedents; rather, this shift simply opened those precedents up to be used as principles by states that favored those precedents, and to be rejected or ignored by states that disfavored them.

But had the Court opted to overhaul the system by turning the separationist obligation norm into its logical complement, *requiring* states to fund religious organizations in certain types of programs, as the Court was urged to do in *Locke v. Davey*, the Court would have extinguished

\(^{511}\) 521 U.S. 203 (1997).
\(^{512}\) 536 U.S. 639 (2002).
\(^{513}\) For example, in *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004), the Florida Supreme Court appealed to notions of educational equality in invalidating a Florida voucher program strikingly similar to the one the U.S. Supreme Court upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In a sense, then, the Florida Supreme Court expressed its support in this case for the pre-*Zelman* Establishment Clause jurisprudence, something states would not be able to do if the Court had opted to shift the church-state paradigm in *Locke v. Davey*. 
political discourse on the matter. Public entities would have been forbidden to deliberate on whether they favored the separationist obligation norm or a permission norm; instead, they would have been required to comply with the complementary accommodationist obligation norm, entirely vanquishing the separationist norms that had existed as precedent. Because our cultural conception of the rule of law forbids judicial intrusion in this way, turning today’s constitutional winners into tomorrow’s losers, it is nearly unheard of for the Supreme Court to engage in such room re-arranging behavior. Indeed, the best way to reconcile the Court’s willingness to permit such funding in Zelman, but to refuse to require it in Davey, is that the gravitational pull for the Court came from the modality of the separationist precedents, not the Dworkinian obligation to render decisions that furthered the moral principles underlying those precedents. The rule of law forbad the Court to turn the room upside down by requiring states to fund religious organizations, but it permitted the Court in Agostini and Zelman to open up the issue for political deliberation and action.

A similar pattern can be seen in the affirmative-action context. Between Regents of the University of California v. Bakke, 514 and City of Richmond v. J.A. Croson Co, 515 an eleven-year span over which the Supreme Court heard seven cases addressing the constitutionality of state-sponsored affirmative action, the Supreme Court did not have a single majority opinion clearly enunciating the standard of review applicable to affirmative-action programs. But one year after Croson, in Metro Broadcasting, Inc. v. FCC, 516 the majority of the Court applied intermediate scrutiny to uphold the FCC’s affirmative-action policy in television and radio broadcasting. Five years later, however, in Adarand Constructors v. Peña, 517 the majority of the Court overruled the

Metro Broadcasting decision by applying strict scrutiny to invalidate an affirmative-action policy in government contracting. At the time, it was generally understood that the Adarand decision did not apply only to affirmative action in issuing government contracts. Rather, the Adarand decision seemed to apply to all forms of government-sanctioned affirmative action, including affirmative action in public education.

Nevertheless, to ensure that their state governments did not seek to evade Adarand by reading it to apply only to government contracts, California and Washington State voters passed referenda prohibiting their respective state governments from practicing affirmative action in all contexts. These referenda turned out to be necessary, because in Grutter, a case involving the University of Michigan Law School’s affirmative-action program, the Supreme Court, while nominally applying strict scrutiny, permitted all but the most radical forms of affirmative action in higher education.

The Grutter decision led to even more political activity on the issue at the state level. Michigan voters struck first, responding to the Supreme Court’s permission of the University of Michigan Law School’s affirmative action in Grutter by voting for a referendum in 2006 prohibiting the state from sponsoring any form of affirmative action. This of course was Proposition 2, the subject of the Schuette decision, discussed in Chapter 6.

This political activity mounted two years later, in 2008, when the American Civil Rights Institute led a ballot initiative, dubbed the “Super Tuesday for Equal Rights,” to prohibit state-sponsored affirmative action in Arizona, Colorado, Missouri, Nebraska, and Oklahoma. The American Civil Rights Institute failed to get the initiative on the ballot in Missouri and Oklahoma, and although the Institute succeeded in getting the initiative on the Colorado ballot, Colorado voters rejected the initiative. But the referendum passed in Nebraska and Arizona, so
now in those two states, just as in California, Michigan, and Washington State, affirmative-action programs that might be permissible under the Fourteenth Amendment’s Equal Protection Clause, such as the admissions program at issue in *Grutter*, are prohibited if sponsored by these respective governmental entities.

This referendum activity illustrates how just as the Court’s shift in church-state law opened up channels for political deliberation, a similar shift in affirmative-action law (from the color-blind prohibition precedent in *Adarand* to the permission norm in *Grutter*) cleared the path for public debate on the fairness and efficacy of affirmative action. These shifts weakened the church-state and affirmative-action obligation precedents but did not annihilate them, for some states were able to marshal these precedential obligation norms in support of incorporating similar obligation norms into their own constitutional schemes.

This is a sort of “negative incorporation,” whereby the Court’s negation of a right in the federal scheme leads to the incorporation of the right at the state level. What is striking about this process for our purposes is how the content of the negated federal precedent animates the incorporation of the right in the state constitution. Indeed, just as the Florida Supreme Court in *Bush v. Holmes*518 invoked some of the principles underlying the Court’s separationist precedents to invalidate Florida’s voucher program, the social movements leading the affirmative-action initiatives similarly relied on the Court’s race jurisprudence to support their opposition to affirmative action. And the Supreme Court, in upholding Proposition 2, did not simply rely on distinguishing the “political process” doctrine from the facts at issue in *Schuette*. Rather, the Court, in preserving a space for affirmative-action disagreement at the state level, appealed to its precedents holding that affirmative-action programs are subject to strict scrutiny and are therefore presumptively invalid. This is a point most vividly raised in Justice Scalia’s

518 886 So. 2d 340 (Fla. 1st DCA 2004.)
concurrence, which focused on the “frighteningly bizarre” and “strange” question before the Court: whether the Constitution permits the state, through its initiative procedures, to prohibit a class of action that is, under the Court’s race precedents, at most only provisionally permissible.

In all of these instances, the Supreme Court’s move from an obligation norm to a permission norm opened up that path for political discourse, and then subsequent challenges to move the permission norm to the opposing obligation were widely rejected by the Court, involving a stronger majority than the Justices’ individual preferences would suggest. Indeed, that *Locke v. Davey* was a 7-2 opinion, and *Schuette* a 6-2 opinion upholding Proposition 2, would not be foreseeable under the attitudinal model. In Locke, as discussed earlier, three of the Court’s conservatives were in the majority, and all of those three had been in the *Zelman* opinion moving the Court’s separationist prohibitions to a permission norm. If judging were simply a matter of political preference, one would think that all three of those conservatives would have voted with Justices Scalia and Thomas, thereby creating a majority in favor of Joshua Davey. Chief Justice Rehnquist’s vote in *Locke* is particularly difficult to understand through the attitudinal model, because Rehnquist had been one of the strongest critics of the Court’s separationism, second only to Justice Scalia in openly seeking to dismantle the wall of separation in funding cases. Justice Breyer’s vote in favor of upholding Proposition 2 in *Schuette* is also difficult to explain based on the attitudinal model, given that he has been one of the most consistent supporters of the constitutionality of affirmative action. Indeed, as we discussed in the previous chapter, in *Parents Involved* Justice Breyer wrote a strongly worded dissent defending the constitutional permissibility, and often times practical necessity, of using race-conscious measures as redress for prior discrimination. Yet in *Schuette* he voted with the conservatives in
upholding a state’s authority to deny blacks and Latinos the right to such measures in the state’s institutions. This cannot be explained easily through Breyer’s political preferences.

Nor are these cases explainable under the strategic model. Chief Justice Rehnquist, as well as Justices O’Connor and Kennedy, had little strategic motivation to vote the way they did in Locke, as they would have had the majority had they voted according to what would seem to be their political preferences based on Zelman and other cases in this area of the law. It is of course possible, though unlikely, that O’Connor and Kennedy voted with the liberals because their political preference was actually in the middle between separationism and accommodationism in funding cases. Indeed, it is conceivable that as a matter of politics they did not want the church-state pendulum to swing too far in the accommodationist favor, and this is why they voted with the liberals. But even under this scenario, which again is unlikely based on their Zelman votes, the strategic model would not be able to explain Rehnquist’s vote, for he had little to gain by siding with the Locke majority. It is of course true that as the Chief, his decision to vote with the majority did give him the right to write the opinion, but unlike in a case like Dickerson, this meant precious little in Locke, because Rehnquist’s ultimate majority opinion was unlikely very different in tone or content from any of the opinions that would have been written for the majority had he been in the dissent.

The same can be said for Breyer’s vote in Schuette. He had seemingly no strategic motivation for voting with the conservatives, because Proposition 2 would have been upheld with or without his vote. His concurrence seemed designed simply to express his view of the law, and as we discussed in Chapter 6, Breyer’s concurrence was partly about how the state has broad authority in the area of affirmative action, because the Constitution neither prohibits nor requires such programs. This seemed to be more an expression of Breyer’s theory of judicial
power in our constitutional system than an expression of Breyer’s political preferences or strategic machinations. In other words, Breyer’s concurrence was more about the rule of law in the abstract than his personal preferences or strategic interests in the particular.

In sum, in these cases, the Justices have often treated the argument for a shift to a complementary norm as an off-the-wall argument within the context of our entire legal system – i.e., as an argument that is nonsensical in our legal discourse. This is what a hinge proposition does. As explained in Chapter 7, a hinge proposition does not function as an antecedent in conditional reasoning, whereby an agent questions how the proposition under consideration can achieve other ends. A hinge proposition, instead, forecloses the possibility of even considering the validity of that proposition. The invalidity of the complement to the obligation norm is simply taken as true for the purpose of the language game. As opposed to the attitudinal and strategic models, our theory developed in this chapter – the rule of law as a language game – provides the better explanation for this type of decision-making. In the following section, we will use this theory as a foundation for exploring various uses of legal consistency norms, before tying this in the final section to our earlier discussion of the types and scopes of consistency norms.

The Rule of Law as a Language Game: The Uses of Legal Consistency Norms

In our Chapter 5 discussion of empirical works on *stare decisis*, we covered the legal, attitudinal, and strategic models of *stare decisis*. We saw how these models viewed precedents as being used by courts in different ways. The legal model imagines precedents as operating as constraints, as fixing judges to particular points in time. The attitudinal model views precedents as simple arguing points, as ways for judges to defend their preferred positions and thereby disguise the pervasively political and discretionary nature of legal adjudication. Finally, the
strategic model contends that precedents work as strategic opportunities, facilitating cooperation between differently minded judges to maximize their policy-making efficacy.

We can taxonomize these as different *stare decisis* uses. In the attitudinal model, *stare decisis* is used by judges in the majority to justify their winning position and by judges in the dissent to criticize that position. As we discussed in Chapter 2, the realists have emphatically established that there always precedents supporting each side of a position, and that is why, in the realists’ view, *stare decisis* does not create adjudicative consistency. As the Segal and Speath study establishes, Justices often use precedents to defend their positions, with the majority citing those precedents in its favor and the dissent using those same or other precedents to criticize the majority and defend its own position. The attitudinalists, then, see precedents as involving two uses: a *justifying* consistency for the winner, because precedents make the majority’s position look consistent with the law, and a *criticizing* consistency for the losers, because precedents make the dissenting position look more consistent. Whether in the majority or dissent, however, this view of dissent does not involve a transformation of judicial views. The judicial views on the issue remain stagnant. On the abortion issue, for example, attitudinalists imagine precedent working in the following ways, as creating *justifying* and *criticizing* consistency uses, with no change among the liberals and conservatives expressed in the *Roe, Webster, Casey,* and *Carhart* decisions:
This certainly captures some features of *stare decisis*, as abortion is still a deeply divided and divisive issue on the Court, as seen in *Carhart*, a 5-4 decision split along ideological lines. But as we will see below, this does not entirely capture even an area of law like abortion, and does an even worse job of capturing some features of other controversial areas of law.

The strictly legal model assumes that precedents will bring all of the Justices to the same position – whether they did in fact, or would have had they been on the Court, favored or disfavored that position as an original matter. We can therefore call this a transforming consistency because it focuses on how precedents are used to transform or shift positions to a central point. Recall from Chapter 5 that this is the only use of precedent that Segal and Spaeth believe is at issue when *stare decisis* functions, and Segal and Spaeth found that this is an exceedingly rare use on the Supreme Court. If there were such a transforming consistency in abortion, the precedential lineage would look something like the following graph:
This graph of course does not depict what ultimately happened in these decisions, as many of the conservative Justices continued to argue that there is no constitutional right to abortion, and no conservative Justice ended up accepting the *Roe* trimester framework. This is precisely why Spaeth and Segal reject the legal model as the principal account of how precedents are used on the Supreme Court.

The strategic model, by contrast, holds that Justices use precedents as negotiating points so that they can maximize their individual policy-making efficacy. We can call this a *mediating* consistency, because under this model, judges use precedents to mediate or arbitrate between extreme positions. Under this model, we would expect the middle-ground Justices to use precedents to form coalitions, so that while the most extreme conservative and liberal Justices might remain tethered to their original positions, new legal standards would be formed as a product of compromises between conservative-leaning and liberal-leaning moderates. The strategic model would thus predict that the Court's abortion precedents discussed above would be used according to the following graph:
This graph partly, but not entirely, captures what happened in these abortion cases, as *Webster* did indeed involve the enunciation of a new legal standard, the undue-burden test in Justice O’Connor’s concurrence, and this enunciation was later able to secure two more moderate votes, by Justices Kennedy and Souter, in the *Casey* opinion. Moreover, the graph accurately predicts how the liberal Justices voted in *Webster* and *Casey*, sticking to the trimester framework.

But the graph does not entirely capture what happened in these cases because in reality there was more convergence than expected under the strategic model. The liberal Justices ended up abandoning the trimester framework in favor of the weaker undue-burden test as a result of *Casey*, and the conservatives ended up applying the undue-burden test, albeit a substantially weakened form of it, in *Gonzales v. Carhart*. The abortion issue has thus become one of doctrinal application. This of course still brings with it significant division; indeed, throughout this dissertation we have seen that doctrines rarely resolve disagreements among the Justices.
because legal doctrines are often too amorphous to yield singular answers. Nevertheless, the current debate over doctrinal application is a long way from the gap that separated the liberal and conservative poles as recently as the *Casey* decision. Now the two sides are at least speaking the same language.

My point here is that this process is not entirely captured by understanding the Justices as strategic actors. If the Justices had acted more strategically on this issue, we would expect a compromise to emerge among the moderates before the *Casey* decision, and we would also expect at least some members of the losing sides to stick to their positions when conceding ground did not promise any advantage in the future, as seemed to be the case for the liberals in *Gonzales*.

Part of the convergence here seems to be due not simply to strategic machinations but also the need for participants in constitutional discourse to speak the same language as one another. There are, to be sure, significant strategic motivations underlying this convergence, such as the use of middle-ground positions to appeal to the more-moderate Justices or even to the Justices positioned on the entirely opposing ideological spectrum, but many judicial decisions are hard to explain through simple recourse to rational-choice analysis. The constraint often comes not from a rational calculus, as the strategic model supposes, but as a logical mandate of language, as Wittgenstein would put it. We do not choose our hinge propositions. They inhere in the larger cultural framework within which our discourse operates.

Thus, although these four types of precedential uses – to justify, criticize, transform, and mediate – form a significant part of *stare decisis*, it is important to see that limiting ourselves to these four uses would overlook the use of precedent that creates the constraint on judicial decision-making that is at the heart of the rule of law: the way that precedent works as a hinge
proposition to frame legal disputes. Such framing consistency uses do not always create absolute consensus on issues, especially those that are most controversial, but they do often work to foreclose extreme losing positions, thereby creating a convergence or hinge around the winning and less-extreme losing positions.

Let’s take a look at some oral arguments to illustrate how this framing consistency norm has played out in Supreme Court discourse. Here, we will be able to see more precisely how understanding the role of language in legal adjudication clarifies how much constraint is created in judicial decision-making through our legal culture’s acceptance of certain consistency norms inhereing in the rule of law. Consider, for example, Chief Justice Rehnquist’s questioning in Metro Broadcasting v. FCC, in which he pushed the respondent’s lawyer (i.e., the lawyer for the party benefitting from the FCC’s affirmative action) to back off the claim that the First Amendment requires an affirmative-action policy in broadcasting licensing:

Chief Justice Rehnquist: Ms. Polivy, are you suggesting that the First Amendment requires the FCC's diversification program?

Mr. Polivy: Your Honor, this Court and many others and Congress have had occasion over the years, starting with the Associated Press case and going unbroken for almost 50 years, of acknowledging the fact that the First Amendment is certainly part of the Commission's requirement to diversify the ownership of broadcasting, and it's through the ownership of broadcasting that editorial control takes place.

Chief Justice Rehnquist: Well, are you saying that this Court has held that the FCC must -- the First Amendment requires -- the FCC to follow a diversification --

Mr. Polivy: I think the question would come up in the reverse, that the FCC's foundation, reliance upon the First Amendment as part of its reason for diversity, is an appropriate First Amendment finding. I would refer you to the Court's opinion in Red Lion.

Chief Justice Rehnquist: Well, but what is an appropriate First Amendment finding?

Mr. Polivy: Well, that diversification is part of the First Amendment, that the multiplicity of tongues and the encouragement of diversity in the control of media is something that the Commission properly sees as its function under the Communications Act and under the First Amendment.
Chief Justice Rehnquist: But now that's quite different, to say that the Commission sees that as its function under the Communications Act and that this Court has upheld its seeing it that way. That's different than saying that if the Communications Act did not provide for it, the Commission would nonetheless have to do it because of the First Amendment.519

Note how Chief Justice Rehnquist emphasized here the difference between saying that the Constitution permits affirmation action and that the Constitution requires it. In a sense, this is an odd comment for Rehnquist to make, given that the distinction had no real-world consequences for Rehnquist. Indeed, he voted against every single affirmative-action program he heard spanning the 25 years between Bakke and Grutter. So whether the argument before the Court was that the Constitution requires or permits affirmative action, Rehnquist clearly disagreed with the argument, because he firmly believed that the Constitution prohibits state-sanctioned affirmative action. So as a matter of results, there was no difference for Rehnquist between saying that the Constitution permits affirmation action and that the Constitution requires it. According to Rehnquist, both arguments are wrong.

Nevertheless, there is a big difference as a matter of adjudicative consistency, and as a matter of both language and logic, as we have discussed throughout this dissertation. And it is a difference that Rehnquist seemed to appreciate, which is what apparently led him to press the lawyer to acknowledge that these are “quite different” arguments. Whereas Rehnquist found a permission argument to be wrong, it seems that he found a requirement argument to be not only wrong but also nonsensical in our legal discourse. This is like the difference between, on the one hand, saying “It is raining outside” when it is not raining, and on the other hand, saying “It is both raining and not raining outside.” The first statement is factually wrong but intelligible, but the second statement is simply nonsensical. Likewise, it may be an incorrect interpretation of the

Constitution, in Rehnquist’s view, to say it permits state-sanctioned affirmative action, but this is not an unintelligible interpretation. But it is utter nonsense, and therefore irrational within the language game of the rule of law, to say that the Constitution requires affirmative action after the Court had already entrenched a norm provisionally prohibiting such government programs.

Importantly, this requirement argument is not nonsensical because there is not a plausible basis in positive law for holding that the Constitution requires affirmative action as a general remedy for societal discrimination or for the diversification of speech. To the contrary, as mentioned above, and as the respondent’s lawyer alluded to, one can plausibly derive such a requirement from various propositions of law. What is implausible is that our constitutional system can require what it had been interpreted to prohibit. What may be plausible in isolation is not plausible as a system of precedents.

I want to highlight here the importance of the notion of *entrenchment* to this theory. At times, courts confront precedents that support opposing conclusions, and this is true even for opposing obligation norms. Indeed, this was Karl Llewelyn’s, and the other realists’, principal objection to *stare decisis*, as discussed in Chapter 2. We see evidence of this in the case described above, *Metro Broadcasting*, where, as the respondent’s lawyer noted, there were precedents supporting both an affirmative-action requirement and prohibition in that context. Nevertheless, it is almost always the case, if not always the case, that only one side of the debate has an entrenched set of precedents in the system.

Determining which right is entrenched is a tricky and subtle endeavor, because it is not subject to a formal analysis. This determination is, as Wittgenstein would put it, a matter of culture. Participants in legal culture simply know that, due to the breadth and lineage of a set of precedents, one set is entrenched while its opposing set is not. It is like a skilled speaker in a
language being able to distinguish between the primary and secondary meanings of a word. A skilled speaker of English, for example, knows that the primary word “without” means “in the absence of,” but that it could also mean “outside of.” This secondary meaning is increasingly archaic, so that it strikes our modern ears as odd, but not wrong, to say: “Constitutional discourse operates both within and without the courthouse.” This is an odd sentence, but not a nonsensical one, because we know that we are referring here to the archaic secondary notion of “without,” so that the sentence is not suggesting that courthouses can sometimes engage in discourse.

Likewise, when comparing the color-blindness principle against a positive right to affirmative action, we know that in isolation of one another, both are plausible constitutional interpretations, but the color-blindness principle, given its breadth and depth in constitutional law, is an entrenched legal proposition whereas the positive right is not. Therefore, because the color-blindness principle is the only entrenched proposition in that analysis, and because these represent opposing poles of the affirmative-action spectrum, the positive right to affirmative action becomes foreclosed, as though it were utter nonsense. This is how a proposition that is plausible in isolation becomes nonsensical within a system: it represents the opposing pole of an entrenched norm.

We can see how this notion of entrenchment plays out in looking at other exchanges within the Supreme Court. Consider again the Court’s affirmative-action cases. In the early cases, defenders of the program at issue argued that the program was not only permitted but also required by the Constitution. This argument was rejected every time, even by the most liberal Justices. In the Bakke case, for example, UC Davis argued that the Constitution required it to prefer certain racial minorities in their admissions policies, and Justice Marshall questioned Mr. Bakke’s lawyer on this point:
Justice Thurgood Marshall: You're arguing about keeping somebody out and the other side is arguing by getting somebody in?

Mr. Colvin: That's right.

Justice Thurgood Marshall: So it depends on which way you look at it, doesn't it?

Mr. Colvin: It depends on which way you look at the problem.

Justice Thurgood Marshall: It does?

Mr. Colvin: The problem --

Justice Thurgood Marshall: It does?

Mr. Colvin: If I may finish.

Justice Thurgood Marshall: It does?

Mr. Colvin: The problem is --

Justice Thurgood Marshall: You're talking about your client's rights, don't these underprivileged people have some rights?

Mr. Colvin: They certainly have the rights to --

Justice Thurgood Marshall: To eat cake?

Mr. Colvin: They have the right to compete, they have the right to equal competition.520

In this tense colloquy between Justice Marshall and Mr. Bakke’s lawyer, Marshall suggested that racial minorities have a right to be admitted on the basis of their race, at logical odds with Mr. Bakke’s right to be admitted without regard to race. But even Marshall did not adopt this position into law in his dissenting and concurring opinions in that case. In fact, in every single affirmative-action case before Justices Marshall and Brennan, who are probably the two strongest affirmative-action proponents ever to sit on the Court, both Marshall and Brennan resisted explicitly addressing whether there is a constitutional right to a race-conscious remedy.

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Instead, in every one of these cases, Justice Marshall and Brennan rested their reasoning on the significantly weaker notion that affirmative action is generally, though not always, permissible because it does not stigmatize any group and is therefore subject to intermediate rather than strict scrutiny. It is difficult to explain why Marshall and Brennan would adopt such a weak position. Indeed, when they were in dissent, as they often were, urging for the stronger position would not have cost them anything and therefore would have been a perfectly rational choice for them to adopt. Moreover, they seemed to believe that, as a matter of policy, there was a strong argument that the Constitution requires affirmative action, as illustrated in Marshall’s questioning above.

So why, then, did they not support this proposition in their judicial opinions, given that the lawyers had advanced these arguments in their briefs and oral argument, and that Marshall and Brennan seemed to agree with the argument as a policy matter? I believe that a significant factor was that the precedent obligation of strict color-blindness was already entrenched in our legal system, and that this precedent exerted so much gravitational pull on the Court that it was not plausible at that point to say that the Constitution ever required affirmative action. Put in the framework above, the ceiling had become ungraspable because the gravitational pull toward the floor was too great, even for vigorous affirmative-action proponents like Marshall and Brennan. As a result, Marshall and Brennan, no matter how much they might sympathize with the proposition that some racial minorities have a right to special admissions policies, could not enter that proposition into a judicial opinion, for it would involve annihilating an entrenched precedent obligation norm – that the Constitution requires color-blindness – thereby uprooting our entire system governing the adjudication of governmental racial classifications. To go from one extreme to another, from an obligation norm to its complement, would violate the language game of the rule of law.
Due to this foreclosing or *framing* consistency, we get a significant convergence in affirmative-action law. As we discussed earlier, throughout the 70s and 80s, there was a sharp division within the Court over what standard of review to apply to affirmative-action programs, leading to the sharply divided *Adarand* 1995 ruling that strict scrutiny applies, which ultimately generated a consensus at least on whether strict scrutiny applied in *Grutter* and *Gratz*, finally leading to a nearly unanimous opinion on strict scrutiny *application* in *Fisher*. Again, such convergence does not mean that we have reached consensus on this highly controversial matter. Far from it. But it does mean we are now speaking the same language. Indeed, in the next such case that comes before the Court, it will be clear that it would be nonsensical to defend the affirmative-action program on the ground that it is constitutionally required, and it will be clear that strict scrutiny applies. The Court may continue to yield splintered opinions on the subject, but sharp ideologically driven divisions are far less likely now that the Justices have foreclosed certain options as “off the wall” and are speaking the same doctrinal language.

As another example, consider the Court’s abortion cases, where, unlike in the affirmative-action context, the obligation norm complementary to the entrenched precedent norm is a conservative position – i.e., the complementary obligation norm is the governmental obligation to restrict abortion to protect the fetus’s constitutional personhood, on the opposite pole as the entrenched norm stemming from *Roe* protecting a woman’s right to be free from such restrictions. Just as the liberal Justices have done in affirmative-action cases, the conservatives have resisted expressing this extreme pro-life position in their judicial opinions, even though, like the liberals in affirmative-action cases, they have suggested some sympathy with this
position. Consider, for example, Justice Scalia’s questioning in *Webster v. Reproductive Health Services*: 521

Justice Scalia: Let me inquire. I can see deriving a fundamental right from either a long tradition that this, the right to abort, has always been protected. I don't see that tradition. But I suppose you could also derive a fundamental right just simply from the text of the Constitution plus the logic of the matter or whatever. How can you derive it that way here without making a determination as to whether the fetus is a human life or not? It is very hard to say it just is a matter of basic principle that it must be a fundamental right unless you make the determination that the organism that is destroyed is not a human life. Can you as a matter of logic or principle make that determination otherwise?

Mr. Susman: I think the basic question, and of course it goes to one of the specific provisions of the statute as to whether this is a human life or whether human life begins at conception, is not something that is verifiable as a fact....

Justice Scalia: I agree with you entirely, but what conclusion does that lead you to? That, therefore, there must be a fundamental right on the part of the woman to destroy this thing that we don't know what it is or, rather, that whether there is or isn't is a matter that you vote upon; since we don't know the answer, people have to make up their minds the best they can. 522

Justice Scalia's reasoning here is that if the fetus can be a person, it is not possible to interpret the Constitution to guarantee a right to terminate the fetus. That is, if there is the possibility that the fetus is a constitutionally protected life, it is, *a fortiori*, impossible for women to have a right to abort that life. The opposing poles simply cannot co-exist with one another. Thus, even though neither pole is ultimately persuasive to Scalia, each one is plausible and therefore forecloses its complement. It is as if they explode one another, leaving the permission norm as the only surviving constitutional option.

Scalia’s questioning is particularly significant in the context of the *Webster* case because, as we discussed earlier, the Missouri statute announced in its preamble that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life,

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health, and wellbeing.” Given the statute at issue in *Webster*, Justice Scalia could have opted to constitutionalize these statements by holding that the Missouri law is permissible because the fetus does indeed have a constitutional right to life. But Scalia, like the rest of the conservatives on the Court, resisted addressing this issue, instead treating fetal personhood, as Scalia suggested in the quote above, as an open non-constitutional question for the public to resolve through the political process. For Scalia, the Constitution could not guarantee a right to fetal life, due to the *Roe* precedent and its progeny, but nor could the Constitution guarantee a right to abortion, due to the plausibility of the fetus being a constitutionally protected life under the 14th Amendment.

Likewise, although in the early stages of the Court’s abortion jurisprudence the pro-life movement defended abortion restrictions on the ground that there is a constitutional right to fetal life, the movement ended up abandoning this hard-line view, as Reva Siegel has argued so adeptly in her work on how social movements interact with constitutional adjudication.\(^{523}\) Indeed, in *Roe* the appellant and appellee argued against each other from opposing poles of the constitutional spectrum. In the first *Roe* oral argument, Sarah Weddington, in arguing against the Texas law, entirely ignored Texas's claim that its restriction against abortion was justified in ensuring the fetus's constitutionally protected life. This was quite striking because Texas, by contrast, devoted 24 pages of its brief, including nine photographs, to developing the point that a fetus is a human being, protected by the 14th Amendment's Due Process Clause. As Epstein and Kobylka summarize the argumentative strategies advanced by the appellant and appellee, “[t]he competing sides bore little resemblance to one another,” as indicated in the first round of oral argument and briefing, in which “neither side paid much attention to the core arguments of the

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The amicus briefs were similarly at odds with one another. None of the amicus briefs for the appellant addressed the argument about the fetus being a constitutionally protected life, but most of those for the appellee relied principally on this argument in defending the Texas restrictions. Illustrative of this distinction were the briefs filed by various members of the American College of Obstetricians. Whereas the organization filed an amicus brief for the appellant claiminging that the Texas law is unconstititutional because it advances “no legitimate interest in protecting human life,” individual members of the organization filed a brief for the appellee claiming that it is a “scientific fact [that fetuses are] autonomous human beings” and thus constitutionally protected “persons” under the 14th Amendment. These divergent briefs illustrate just how wide the gap was between the pro-choice and pro-life positions when litigation over abortion began in the early 1970s: one side challenged abortion restrictions as constitutionally prohibited intrusions on a woman's bodily autonomy, and the other side defended such restrictions as constitutionally required protections of fetal life.

In the second round of oral argument, however, after the Court decided to have the case re-argued, the appellants did engage each other in debating this point about the fetus's constitutional status. This time, the amicus briefs for the appellant countered this argument, and at oral argument, Weddington was prepared for this question, asserting that “[a]ll of the cases – the prior history of this statute – the common law history would indicate that [the fetus] is not” a person under the 14th Amendment. But, Weddington continued, even if the Court found that the fetus is such a constitutionally protected person, that would not mean that the state would necessarily win. Rather, it would mean only that there would be “a State compelling interest

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524 Epstein and Kobylka, 178.
which, in some instances, can outweigh [the woman's] fundamental right” in obtaining an abortion. So such a conflict of constitutional obligations would play into a court's application of strict scrutiny to the particular facts at hand, but according to Weddington, it would not require ruling for the fetus's over the mother's constitutional interests. By contrast, whereas Weddington argued that the Texas law might still be unconstitutional even if the fetus were a constitutionally protected person, Texas conceded that it would lose its case if the Court found that the fetus was not such a person. Indeed, the Court specifically asked Robert Flowers, arguing on behalf of Texas, whether he would necessarily lose his case “if the fetus or the embryo is not a person,” to which Flowers responded, “Yes, sir. I would say so.”

This concession ultimately made its way into the Roe opinion, but Blackman expanded the proposition to apply to each side: if the fetus is a constitutional person, the Texas law must necessarily stand, but if the fetus is not, the Texas law must necessarily be valid. As Blackmun put it, if Texas were right and “this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.” Blackmun then noted that “[t]he appellant conceded as much on reargument,” which is not, incidentally, entirely accurate, because as mentioned above, Weddington claimed that this would play only into the strict-scrutiny analysis; it would not resolve the case. But Flowers did concede that Texas would lose if the fetus were not a constitutionally protected person. And Blackmun seized on this point, writing that the appellee must lose on this point because “the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.”

Abortion adjudication changed as a result of this discourse. Soon after the Court held in Roe that the fetus is not a person under the Constitution and therefore does not have a protected
life under the Due Process Clause, the pro-life movement switched its legal strategy, with the leading pro-life advocates, as well as the Reagan and Bush Administrations, taking the more moderate view that the Constitution is silent on the subject, leaving it as a permission norm, entirely up to state discretion. Even in *Webster*, a case involving Missouri’s assertion of a right to fetal life, the Bush Administration did not seek to defend this position as a constitutional matter. In fact, Solicitor General Charles Fried began his argument by conceding that the Constitution is agnostic on the matter of fetal life, in direct contravention of Missouri’s hard-line stance. Why did Fried give up so much ground? It seems that he argued in this way because the Supreme Court’s decision in *Roe* structured the abortion-rights language game, so that talk of a constitutional right to fetal life became nonsensical, even among extreme conservative participants in constitutional discourse, after the right to choose had become constitutionally entrenched.

We see this most vividly in how Chief Justice Rehnquist and Justice Scalia, the two most ardent opponents of the pro-choice movement on the *Webster* Court, reasoned in that case, both in oral argument and in their opinions. Just as was the case for Marshall and Brennan in the affirmative-action context, there did not appear to be strong strategic reasons for Rehnquist and Scalia not to take the most extreme pro-life position in *Webster* – i.e., the position that abortion restrictions are constitutionally required because the fetus is a constitutionally protected life. This is a position that both Rehnquist and Scalia have openly expressed supporting as a policy and moral matter, and moreover, as we discussed earlier, taking the extreme pro-life position in *Webster* likely would not have lost them any votes, since Justice O’Connor had already refused to sign on to any of Rehnquist’s statements supporting modifying *Roe* to uphold the state’s interest in pre-viable fetal life. So why did they not make this argument in *Webster*, either in oral
argument or in their opinions? Evidently, they did not make such an argument, because they saw a significant rule-of-law difference between, on the one hand, moving abortion law from prohibiting abortion restrictions to permitting such restrictions, and on the other hand, moving abortion law from prohibiting abortion restrictions to requiring them.\footnote{Of course there could be other reasons explaining their votes. One reason could be Scalia’s originalism, which does not support finding a constitutional right to fetal life just as it does not support a woman’s constitutional right to choose to have an abortion. But this explanation is quite unsatisfying, given Scalia’s frequent departures from his originalist methodology to advance his conservative agenda. Moreover, this would not explain Rehnquist’s decision not to support the extreme pro-life position of a fetus’s constitutional right to life.} Again, the Court’s Roe precedent structured the abortion-rights language game, foreclosing the Roe complement as a breach of the judiciary's role in preserving the rule of law.

Likewise, in religion-funding cases, the obligation norm complementary to the precedent norm is a conservative position, but just as they have done in the abortion context, the conservatives have resisted adopting this position into law, as we have discussed throughout the dissertation. Consider how Justice Kennedy expressed concern in the Davey oral argument about how if the Court held the Free Exercise Clause to require the inclusion of Joshua Davey in Washington’s scholarship program, the Court would then run up against the separationist Establishment Clause rationale for excluding Joshua Davey from the program. In Kennedy’s words, “if we decide in your favor, we necessarily commit ourselves to the proposition that an elementary and secondary school voucher program must include religious schools if it includes any other private schools . . . [and this commitment] would foreclose this Court on the voucher issue.”\footnote{Transcript of Oral Argument, Davey, 540 U.S. 712 (No. 02-1315), 2003 WL 22955928,35-36 (Dec. 2, 2003). For the audio of the oral argument, see OYEZ, Locke v. Davey http://www.oyez.org/oyez/resource/case/1631/audioresources.} If we analyze Kennedy’s language under the traditional stare decisis framework, this seems like an odd and even incoherent point, because, as explained above, the voucher issue had already been foreclosed by the Court’s decision in Zelman, permitting voucher programs that include religious schools. The best way to make sense of Kennedy’s language is through the
deeper *stare decisis* framework that we have developed in this dissertation. By stating that ruling for Joshua Davey “would foreclose this Court on the voucher issue,” it seems that Justice Kennedy was referring to how inserting an obligation ruling complementary to an obligation already in the Court’s system, as opposed to inserting the permission ruling provided in *Zelman*, would involve uprooting the very foundation of church-state law, thereby shifting the parameters of political discourse and upsetting the judiciary’s role in preserving the rule of law.

In the above-quoted oral arguments, and the many cases discussed in this section, we have seen that the Justices are generally in tune with this requirement, at times it seems on an intuitive or subconscious level. What seems to be happening in these instances is that the force of consistency in the law has foreclosed certain constitutional interpretations as off-the-wall, rendering these propositions just as nonsensical as it would be for me to question whether this is my hand while typing this dissertation.

**The Rule of Law as a Language Game: The Types, Uses, and Scopes of Legal Consistency Norms**

In this final section, we will connect these various uses of adjudicative consistency norms to our earlier discussion of the types and scopes of legal consistency. To help us in this effort, let us return to the *Dickerson* decision and its distinction between prophylactic and binding rules. As we discussed in Chapter 5, the primary issue in *Dickerson* was whether the rule announced in *Miranda* was either (1) a prophylactic rule, a sort of fence around the core content of the Fifth Amendment right against compelled self-incrimination, or (2) a binding constitutional rule, integral to the Fifth Amendment requirement itself. The Court had explicitly encountered this problem before in criminal procedure cases, most notably in determining whether the Fourth Amendment’s exclusionary rule was prophylactic or part of the Amendment itself, but often times in constitutional jurisprudence this dilemma is concealed behind the curtain of *stare*
decisis. Indeed, one might make the same distinction – between a prophylactic non-binding rule and a constitutional rule – about most judicial tests in constitutional law.

This is because we often think of constitutional *stare decisis* in terms of the rules-approach. That is, we often view constitutional decisions as establishing precedents for their doctrinal tests rather than for their particular results. And this way of thinking about precedent opens up the path for thinking of the ruling as merely prophylactic – i.e., as not being part of the Constitution itself but rather as simply a temporary and disposable means of enforcing it. Thus, the underlying debate in *Dickerson* was really about the scope of precedent, not any distinction between prophylactic and core rules, and this is a problem that pervades *stare decisis* doctrine. In essence, all constitutional rules can be thought of as prophylactic in the sense that they are not absolutely binding on later courts.

Consider the following three examples. We often think of *Korematsu* as being the first case to announce that the Equal Protection Clause requires courts to apply strict scrutiny to all racial classifications; what is often thought of as binding about the decision is the semantic content of the rule, not how it was applied in the actual case so weakly that it was used to permit the internment of people on the basis of their Japanese ancestry. We can think of the strict scrutiny element of the ruling as prophylactic, in the sense that it is not actually part of the Fifth Amendment’s Equal Protection Clause, but a better way to think about this problem is whether strict scrutiny constitutes a binding part of the *Korematsu* ruling. A rules-approach to precedent tells us that we must treat it as part of the precedent, whereas a results-approach would treat the precedent as being only about the constitutionality of race-based internment during war. Likewise, *Adarand* represents the proposition that strict scrutiny applies even to seemingly benign racial classifications, and this is because we apply the rules-approach to understanding
this precedent. We therefore cite it as the basis for applying strict scrutiny to affirmative action, not simply cases factually similar to what was at issue in *Adarand*, the race-based award of government contracts. And as we have discussed throughout the dissertation, *Lemon* has come to stand for the tripartite Establishment Clause test, applicable to all government action dealing with religion, not just such actions involving public-school expenditures. We implicitly adopt the rules-approach when we cite these precedents to stand for the tests that the Court applied to resolve the factual controversies at issue in these cases.

But they are prophylactic in a sense. These precedents all stand for rules that the Court has created to effectuate the respective constitutional provisions. That is, they are all prophylactic in the sense that they are not considered part of the Constitution itself. No one thinks that, as an original or textual matter, the Equal Protection Clause requires a tiered standard of review or that the Establishment Clause requires the *Lemon* test. The *Dickerson* debate therefore was not any different from debating about whether we have adopted the right constitutional rule to effectuate a particular constitutional provision and whether that rule should be followed under *stare decisis*. *Dickerson* was essentially a debate about the scope of constitutional precedents under *stare decisis*.

Why, then, did the Court frame the *Dickerson* dispute in terms of *Miranda* being a prophylactic rule? The answer seems to lie in the fact that conservative members of the Court had previously signaled that *Miranda* was prophylactic, and this had led Congress to adopt the statute purporting to overrule *Miranda*. The conservative Justices had taken this approach of treating *Miranda* as prophylactic because *Miranda* clearly announced a rule, requiring the reading of *Miranda* rights in the event of a custodial interrogation. Indeed, at that point, it was implausible to read *Miranda* as creating a particular result, applicable only in the precise
conditions at issue in the *Miranda* case. Once a precedent entrenches a rule, generally applicable to varied circumstances, the only plausible way to circumvent it is either to treat it as prophylactic or to overrule it. The attitudinal and strategic accounts of judicial decision-making overlook how this entrenchment alters judicial options with regard to how precedents may be used.

We see a different type of *stare decisis* reasoning when there is not such entrenchment – i.e., when there is not consensus on whether a precedent constitutes a rule. A good example of this is *Hein v. Freedom From Religion Foundation*, 527 a case dealing with the Court’s Article III standing precedents involving Establishment Clause suits. Since *Flast v. Cohen*, 528 the Court had held in various cases that taxpayers have standing under Article III to challenge any government promotion of religion involving the expenditure of public dollars. But in *Hein*, the plurality, in an opinion authored by Justice Alito, distinguished these precedents as involving only legislatively authorized expenditures, thus finding that the plaintiffs in *Hein* lacked standing because the lawsuit involved a challenge to the executive’s use of discretionary dollars. The plurality thus interpreted all of these Article III precedents in terms of their facts – that is, as cases applying only to fact scenarios involving legislative spending mandates. This was quite a shock to many church-state scholars, for the *Flast* precedent and its progeny had been thought of as creating the general rule that taxpayers have the right to challenge all government expenditures that promote religion, whether the expenditure arose in the legislative or the executive branch.

The dissenting liberal Justices predictably took the plurality to task for interpreting these cases in such a narrow way, but what came as a surprise is that Justices Scalia and Thomas, both

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528 392 U.S. 83 (1968).
fierce critics of *Flast*, refused to join their conservative colleagues, thus depriving the Court of a majority opinion. In a vituperative concurrence, Scalia attacked Alito for authoring a plurality opinion that, in Scalia’s view, distinguished the Court’s precedents arbitrarily on factual grounds. According to Scalia, the rule of law required the Court to treat the Article III precedents as rules. As a result, the Court could rule in the *Hein* case in only two ways: (1) to follow the precedents and find standing for the plaintiffs, or (2) to overrule the precedents and not find standing for the plaintiffs. Either path would preserve the rule of law for Scalia because each path would treat the Court’s precedents as rules and each would be consistent with rules already part of the Court’s Article III jurisprudence – the first with the Court’s Article III precedents involving the Establishment Clause and the second with the Court’s Article III precedents involving other constitutional provisions. But the *Hein* Court’s plurality decision, in preserving the Article III precedents in form while not finding standing in this particular case, “cannot possibly be (in any sane world)” a grounds for a judicial decision, because, as Scalia warned, “[i]f this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides.” In other words, the rule of law compels judicial actors to decide cases logically and therefore consistently – which for Scalia, as discussed in Chapter 2, requires the Court to treat precedents as rules. To do otherwise, Scalia contended, is to abandon the judicial duty. We can see here how both the conservative plurality and Scalia claimed to be bound by precedent, but the plurality felt bound by facts, whereas Scalia felt bound by rules.

Divisions arise not only between the results- and rules- approaches but also between these approaches and the principles-approach. A good example of this is *Casey*. The plurality, consisting of Justices O’Connor, Kennedy, and Souter, contended that *stare decisis* required that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” The
plurality identified three principles as falling within the scope of Roe’s “essential holding,” and contended that “[t]hese principles do not contradict one another,” thus requiring the Court to “adhere to each.” One, women have the constitutional right “to choose to have an abortion before viability and to obtain it without undue interference from the State.” Two, the state may “restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger a woman's life or health.” And three, the government “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.” By interpreting Roe under the principles-approach, the plurality was able to evade the Roe trimester framework, an essential move for the plurality to uphold four out of the five Pennsylvania abortion restrictions at issue in Casey. Indeed, if the plurality were to interpret Roe as a rule creating the trimester framework, the plurality would have to find that it is categorically impermissible for the state to regulate abortion in the first trimester. The only way for the plurality to permit Pennsylvania’s restrictions, while still pledging fidelity to Roe, was to interpret Roe broadly as a principle rather than as the rule it had come to be assumed to represent.

The liberals on the Court, Justices Stevens and Blackmun, took the plurality to task for interpreting Roe as a set of principles rather than as a rule. Indeed, they argued, if any decision has ever been framed clearly as announcing a rule, it is Roe, which clearly announced the following three categorical rules for each trimester of pregnancy:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Justices Blackmun and Stevens, while of course relieved that the plurality did not overrule *Roe*, as many had expected the Court to do, still expressed disappointment with what seemed to be a disingenuous interpretation of *Roe* as consisting of three principles rather than three rules. Indeed, this trimester framework had been designed, by no other than Blackmun himself, to effectuate the strict scrutiny analysis applicable to fundamental rights. As Justice Blackmun wrote, “Roe's requirement of strict scrutiny as implemented through a trimester framework should not be disturbed,” because “[n]o other approach has gained a majority.” As long as strict scrutiny was the governing analysis for restrictions on fundamental rights, and as long as a majority of the Court saw the trimester framework as a factually defensible implementation of strict scrutiny, Blackmun saw no basis for diluting Roe to consist of a set of principles rather than rigid rules.

The conservatives also criticized the plurality for interpreting Roe as a principle. Justice Scalia claimed that the plurality’s principles-approach to Roe was simply a “revised version fabricated today by the [plurality]” for the purpose of affirming Roe in name while evading its implications for the Pennsylvania restrictions. The conservatives thus agreed with the liberals that Roe clearly stood as a rule. As Justice Scalia wrote, “[t]he shortcomings of Roe did not include lack of clarity: virtually all regulation of abortion before the third trimester was invalid.” But whereas the liberals sought to interpret Roe as a rule and to uphold it, the conservatives sought to do the same but to overrule it.

This is similar to the pattern we saw in Hein, where Justices Scalia and Thomas sought to interpret Flast as a rule and overrule it, but the plurality preserved it by interpreting Flast and its
progeny as results. This allowed the plurality to affirm Flast, in agreement with the liberals, but to reject standing in Hein, in agreement with the most conservative Justices. Likewise, in Casey, the plurality struck a middle-ground position, interpreting Roe as a set of principles, thereby allowing the plurality to agree with Justices Blackmun and Stevens in affirming Roe, but to uphold four of the five abortion restrictions at issue in Casey, more in line with the conservative position. In both cases, we see how middle-ground Justices use alternative forms of interpreting precedent to strike compromises between achieving desired results and preserving precedent – if not in whole as a rule then at least some form of it, in results or principles. We see here how precedent can be used in different ways to achieve different strategies and results. Our theory of stare decisis must come to terms with how the doctrine works in different settings for different purposes.

A final example of a conflict between different approaches to interpreting precedent is Lawrence v. Texas, where the Court invalidated a Texas statute that prohibited same-sex sodomy. What seemed to stand in the Court’s way was Bowers v. Hardwick, a decision, issued by the Court only 17 years earlier, upholding Georgia’s sodomy prohibition. Unlike the Texas statute at issue in Lawrence, however, Georgia’s prohibition had applied to both same-sex and opposite-sex couples, a point potentially of significance for stare decisis. Despite this factual distinction, the Court, in a majority opinion written by Justice Kennedy, held that to invalidate the Texas statute it had to overrule Bowers. In so doing, Kennedy appealed to a deeper principle in the Court’s jurisprudence, a principle stemming from Casey and its progenitors, guaranteeing that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Justice Kennedy argued that these precedents created this

530 478 U.S. 186 (1986).
general principle of individual autonomy and that this deep principle defeated the rather shallow rule, represented by the *Bowers* opinion, permitting the state to regular private and consensual sexual conduct. Kennedy thus reasoned in a rather Dworkinian way, holding that adjudicative consistency is more about a consistency of general legal principles than particular rules.

Justice O’Connor concurred to make the point that *Bowers* did not need to be overruled because *Bowers* involved a prohibition on opposite-sex as well as same-sex sodomy. The *Bowers* precedent thus required upholding only such gender-neutral statutes. In other words, the Court could use the results-approach to evade the *Bowers* precedent. Chief Justice Rehnquist and Justices Scalia and Thomas, of course, dissented, claiming that O’Connor was wrong, in that *Bowers* must be treated as a rule, permitting the government to regulate all private and consensual sexual conduct, and that Kennedy was also wrong, in that there was no legal principle stemming from the Court’s privacy jurisprudence authorizing the Court to overrule *Bowers* under *stare decisis*.

*Lawrence* thus represents three distinct approaches to *stare decisis* and again, we see how the Justices use different approaches to reach different outcome – with Kennedy’s opinion using the principles-approach to pursue a broad libertarian agenda for the protection of private, consensual, intimate affairs; O’Connor’s concurring opinion using the results-approach to pursue a middle-ground position that simply distinguishes *Bowers* on factual grounds; and Scalia’s dissenting opinion using the rules-approach to argue for a general authorization for state regulation of private matters. Each of these three positions purported to follow *stare decisis* doctrine in the pursuit of adjudicative consistency, with Kennedy using precedents as principles to guarantee an overarching and deep consistency, O’Connor using precedents as factual results
to guarantee a more narrow factual consistency, and Scalia using precedents as rules to create a broader all-or-nothing rule consistency.

These cases illustrate how consistency norms are widely, but diversely, invoked in judicial discourse. Consistency norms would seem to appeal most to the judges on the poles, such as Justices Scalia and Thurgood Marshall, because these judges are often purists, seeking to make the law “pure” in terms of their ideological preferences. For example, a conservative like Scalia wants the law to be entirely consistent when it comes to permitting the death penalty, banning race-based preferences, and permitting monotheistic government speech, and a liberal like Marshall wants the law to be entirely consistent when it came to banning the death penalty, permitting race-based preferences, and banning government religious speech. This would suggest that consistency does not have as much force with judicial moderates, who often seek a middle-ground between the two opposing forces of judicial conservatism and liberalism.

But consistency as a norm of the rule of law actually seems to have even more currency with Justices in the middle of the ideological spectrum, as evidenced in the many invocations of consistency mentioned in this dissertation by Justices Powell, White, O’Connor, and Kennedy. Indeed, in many of the cases we have discussed, judicial moderates have sought to reconcile judicial conservatism and liberalism by appealing to consistency. Viewed in this light, consistency not only has a purifying function in the law, as we see in Justices like Scalia and Marshall, but also an important mediating function, facilitating negotiation between two warring factions, as we see in the more-moderate Justices.

Consistency is not just a matter of political affiliation but also a matter of rhetorical and methodological style. Justice Thomas is every bit as conservative and absolutist as Scalia, but Thomas will tolerate introducing much more inconsistency in the law to reach his preferred
outcomes. Indeed, it is partly for this reason that Thomas does not accept *stare decisis* to the same extent that Scalia does – to put it simply, Scalia wants the law to be consistent, not necessarily originalist, and Thomas wants the law to be originalist, not necessarily consistent. How much consistency one wants from the law, therefore, is not just a matter of ideological purity or political function on the Court. It is also a matter of judicial style.

This is what was meant in contrasting in the earlier chapters the Emersonian and Aristotelean views of consistency. They are not imposed on us. They come from within us. We choose how to think about the consistency constraint. But as Wittgenstein points out, this is not a choice that we can make individually; it is a choice we can make only within a system – i.e., within a language game. We can play the constitutional law game with a different style, expecting a different level of consistency depending on the player, but we must be playing the same game.

This means that we must agree on basic norms about the level, type, and scope of consistency required in legal adjudication. As a result, the differences separating the Justices on consistency norms are largely overstated because how a Justice expresses her commitment to *stare decisis* is not always, or even usually, a reflection of how committed she is in practice to adjudicative consistency. Often times, the Justices betray in the structure of their reasoning a greater commitment to adjudicative consistency than they expressly acknowledge in their formal expositions on *stare decisis*, and that is because adjudicative consistency forms hinge propositions in the rule-of-law language game.

These different precedential scopes form our *stare decisis* grammar. They can be used in concert with or in isolation of another. And they can be used to pursue different strategies and goals. Using precedents as facts will often open up the path for judicial latitude, and thus will
often, but not always, correspond with the justifying and criticizing uses of stare decisis emphasized by the attitudinalists. We see such a use in Hein, where the conservative plurality seemed simply to be using the results-approach to justify limiting Article III standing in Establishment Clause suits. Using precedents as principles will often facilitate negotiation and for this reason will often, but again not always, be marshaled in support of the mediating use of stare decisis identified by the strategic model. The Casey plurality opinion is of course a paradigm example of this, with the moderate Justices forming a coalition by interpreting the Court’s abortion cases as standing for newly minted general principles rather than for the Roe trimester rules. Using precedents as rules will often frame or structure legal disputes, as we have seen in cases like Dickerson, Adarand, and Lemon, and therefore will often be part of the framing consistency norms we have developed in this chapter.

But a mix of all of these approaches may appear in a single case, a single opinion, or even a single argument – for they are all part of the stare decisis grammar. Stare decisis is thus not just about rules, principles, or facts. It is about all of these things, because it is part of how the judiciary serves the rule of law by creating adjudicative consistency.

As a final note, I want to highlight again what was mentioned in Chapter 1. One may quibble that this is not technically stare decisis, because that doctrine formally involves only the transforming consistency, the type Spaeth and Segal focus on as the only way in which stare decisis is shown to work. But such a parsimonious view of stare decisis misses the force that precedents exert on judicial decision-making. If we see stare decisis as broader than this simple paradigm, as involving the use of precedent to create path dependency within the law, as someone like Gerhardt views stare decisis, then we will see that it is a multifarious doctrine, opening up the path for judicial preference and strategy, but also exerting a significant amount of
constraint on the judicial enterprise. We can refer to this broader concept of *stare decisis* as adjudicative consistency, if we wish to maintain the narrow view of *stare decisis* involving only the shift of opinion due to a *ratio decidendi*. That is why we discussed the possible distinction between adjudicative consistency and *stare decisis* in the Preface. Whatever we call this doctrine, however, it is clear that the rule of law places a constraint on the judiciary as the system’s organ of reason. This constraint imposes what we have called “framework judgments” of adjudication, creating “hinge propositions” that prevent judges from oscillating between warring legal extremes. We can thus say that the essence of the rule of law in adjudication is not consistency but convergence.

**Chapter Summary**

This final chapter engaged in a preliminary analysis of how the theory we developed in Chapter 7 operates in practice. To test our theory, we returned to the three areas of law that we began the dissertation with – abortion, church-state, and affirmative-action law. We saw that once the Court had entrenched as a rule a general obligation norm in one of these areas of law, that entrenched rule generated a hinge proposition, framing legal discourse on the subject, so that any discussion of shifting the law to a complementary obligation norm became seen as implausible or off-the-wall, even by those Justices who would seem otherwise to have reason to sympathize with that position.

This is not to say that no judge, lawyer, or legal scholar would see this shift of poles as conceivable or desirable. There are always mavericks, willing and eager to change the rules of the game. But this is precisely what such shifts involve: changing the rules of the game, and thereby disturbing the judiciary’s role in preserving the rule of law. It may be that sometimes such shifts are warranted, because as discussed in Chapter 4, judicial decisions that serve the rule
of law are not necessarily decisions that serve the law in a moral or just manner. But these shifts, whereby our legal framework is overhauled, do present precisely the type of threats to the rule of law that prompted our initial inquiry in this dissertation.

We can think of such shifts like changes to words within a language. Over time we often accept new meanings of words, and at times this may be a good thing, because these changes often represent the undoing or weakening of the snobbery and elitism that leads language authorities to resist such changes. Nevertheless, when enough words change in such a fundamental way that the language no longer operates as it did, we must acknowledge that the shifting meanings have undermined the old language and created a new one in its place. Similarly, certain shifts in precedents, while perhaps salutary for political or moral reasons, threaten the rule of law by changing the adjudicative language game.

We began this dissertation by asking what type of consistency legal scholars are talking about when they refer to threats to the rule of law. There may be many such threats, as we discussed in Chapter 6, but when we are referring to inconsistencies within the judiciary, the core threat is the judiciary’s shifting its decisions from one extreme to its complement, so that today’s losers become tomorrow’s winners. This chapter also found that, just as there are multiple types and scopes to adjudicative consistency norms, there are multiple uses, and these uses may tend to relate to different scopes.

We saw how judges often use consistency norms strategically to maximize their judicial efficacy through collaboration with other judges. We called this a *mediating* use of consistency, and we found that the principles-approach is particularly useful in facilitating such mediation.

We also found that in many situations, what may in fact form the bulk of adjudication, judges use consistency norms in accord with the attitudinal model to advance their judicial
preferences. We called this attitudinal use a *justifying* consistency when used by the winning position and a *criticizing* consistency when used by the losing position. The results-approach is particularly useful for these purposes because it allows both the winning and losing positions to manipulate the facts so as to distinguish or align case fact patterns in a way that advances each side’s preferences.

Finally, and most importantly for our purposes, we found that judges sometimes use consistency norms in accord with the legal model – *i.e.*, as constraints that exist independently of judicial strategy and preference. We found that too often this use of consistency norms is thought of only in terms of what we called a *transforming* consistency, whereby a consistency norm is part of a judge’s individual transformation of positions. This transformation may be at the core of *stare decisis*, but it is not the only way in which precedents exert force on judicial decision-making. Rather, as Gerhardt argued in Chapter 5, we can see the force of precedent through path dependency, and as we saw in this chapter, precedents can create such path dependency by *framing* legal disputes, evidenced in various oral arguments and the lineal paths of different areas of law. This *framing* consistency is seen most vividly in a precedent’s foreclosing its complementary position, and the rules-approach coincides most with this use of consistency, because, as Wittgenstein teaches us, rules often operate in a language game as hinges that structure our thinking about different possibilities and propositions.

This final chapter thus completes our taxonomy of the grammar of legal consistency. There are various types, uses, and scopes involved in how courts appeal to consistency. Through this taxonomy, we can see more clearly how when lawyers, scholars, and judges appeal to the relationship between the rule of law and consistency, they are vastly oversimplifying a tangled web of concepts, reducing an entire grammar to a single word. We cannot disentangle this
grammar from its legal and political elements, because these forces constitute its operation. To talk independently of the legal or political dimensions of *stare decisis* is to miss that it is part of a language game whose grammar is constituted by both law and politics.
CONCLUSION

We started the dissertation with the following question: Is the rule of law in danger? We posited this question after noting how legal consistency is nearly universally believed to be an essential requirement for the rule of law, and observing how, although courts often cite the importance of consistency in their reasoning, they frequently decide cases inconsistently. We offered two preliminary possible answers to this question. One was that the rule of law is not actually in danger, but our thinking about the nature of the rule of law overstates the threat presented by these inconsistencies. In effect, our rule-of-law discourse is the problem, not the rule of law itself. The other possibility, of course, is that the rule of law is truly under assault, and each inconsistent legal enactment and judicial decision further endangers its existence, both within the U.S. and abroad.

In answering this question, we sought first to understand the culture supporting the notion that legal consistency is essential to the rule of law. This has been one of the major themes in this dissertation: that legal consistency is a cultural value, not a requirement inhering in the concept of law or externally imposed on the system through logic. Chapter 2 began this cultural exploration by surveying how different periods of legal thought, starting with the 17th century common law jurists, have treated the relationship between legal consistency and the rule of law. We saw from this discussion how much disagreement there is, between and within different legal periods, on the meaning of consistency within a given legal system.

To help understand the deeper cultural values supporting these periods of legal thought, we took a step back in Chapter 3 to examine the origins of this issue in Western legal philosophy. This discussion highlighted how different schools of legal philosophy have all held consistency to be an essential requirement for the existence of law – which came as quite a
surprise, given how these different schools, particularly the positivist and natural-law approaches, have differed in conceptualizing the nature of law. Even more strikingly, we saw a deep similarity between how Bentham and Kant conceived of legal consistency – as requiring a consistency of obligation norms – which again is unexpected given the deep cleavages in how they thought about legal and moral philosophy.

Chapter 4 found that this story became more complicated with the advent of analytical legal philosophy, as divisions arose over the relationship between consistency and the rule of law, both within and between the positivist and natural-law traditions. We saw how although the early Kelsen held that legal cognitions must presuppose the non-existence of contradictions, the later Kelsen rejected this Kantian view, putting him more in line with Hart, who argued that while consistency may be a requirement of the rule of law, it has nothing to do with the nature of law. Another important positivist, Neil MacCormick, complicated both Hart’s and Kelsen’s writings on consistency by holding that courts, as institutions tasked with promoting the rule of law, must operate according to certain notions of rationality, requiring that they adhere to deductive decision-making and the law of non-contradiction.

Chapter 4 also covered how leading natural-law thinkers in analytical legal philosophy have conceived of the relationship between consistency and the rule of law. In stark contrast with the positivists, we saw in these natural lawyers, in particular Fuller and Dworkin, greater overlap between the consistency requirements for law and the consistency requirements for the rule of law. But while these natural lawyers required more consistency of law, they also required a different type. For theorists like Fuller and Dworkin, the law requires a more *functional* consistency, one that makes the legal system satisfy the moral purpose of the legal system. This
makes consistency norms turn on the type of natural law we are dealing with – Fuller’s consistency thus differs from Dworkin’s because of how their natural-law theories differ.

We concluded Chapter 4 by noting how this poses a problem for our goal of reaching a consensus on consistency’s relationship to the rule of law. Not only did we encounter in this chapter disagreement about whether consistency is an essential element for the rule of law or the existence of law in general, but we also found substantial disagreement over what type of consistency (i.e., logical or functional) this requirement entails, and how that consistency should be achieved (i.e., through stare decisis or some other mechanism). We acknowledged here that this disagreement posed a significant problem for our project.

Chapter 5 then took an empirical turn, examining how three different models of judicial decision-making – the legal, attitudinal, and strategic models – have sought to measure and understand the efficacy of stare decisis in promoting adjudicative consistency. In discussing various legal studies, we focused on Michael Gerhardt’s theory of how some types of precedents create path dependency within a legal system. Although we found that Gerhardt failed to take sufficient consideration of the different types of precedential scope and consistency, we nonetheless found his theory helpful in directing us to examine path dependency in different lines of precedents and to consider the different types of precedents in examining these lines. We also discussed some of the virtues and defects in Spaeth and Segal’s influential stare decisis study. We found that its principal virtue is its novel method of focusing on and measuring dissent-to-majority shifts, but we also identified several defects, such as its parsimonious definition of stare decisis only in light of such shifts and its failure to take into account the different types of precedential scope and consistency. Finally, in examining the strategic model, we looked in particular at Knight and Epstein’s work, which argued, in contrast to the legal
model, that precedential constraint comes not from the semantic content contained in the precedents themselves, but in how useful those precedents can be in fostering cooperation and negotiation with their colleagues on the bench. Their strategic account helped us see the benefit of looking at the various stages in and reasons for which judges use precedents throughout the litigation process. The force of precedent does not lie simply in causing dissent-to-majority shifts, but in constraining judicial options through the course of adjudication. Precedent is thus part of the judiciary’s institutional policy-making apparatus.

Chapter 6 marked a break in the dissertation, turning away from the survey and synthesis in Chapters 2 through 5, and moving toward creating in Chapters 6, 7, and 8 a new model and theory of legal consistency so that we can better understand its relationship to the rule of law. To begin this effort, Chapter 6 organized legal consistency into three different categories: authority (relating to who created the legal consistency), quality (relating to what is inconsistent), and modality (relating to how we conceptualize the inconsistency). We saw that the American legal system resolves authority and quality inconsistencies in relatively clear and predictable ways, thereby avoiding, or at least minimizing, threats that these inconsistencies pose to the rule of law. Indeed, the doctrines of judicial review, stare decisis, preemption, and conflicts of law help mitigate most authority inconsistencies. And the Supremacy Clause, as well as the traditional canons of statutory construction and constitutional interpretation, help resolve many quality inconsistencies within the judiciary. But Chapter 6 found that modality inconsistencies are the most difficult to resolve and pose the greatest threat to the judiciary’s rule-of-law function. Inter-temporal inconsistencies present significant problems because many inconsistent judicial decisions arise during similar legal periods, making it unclear which one should prevail. And logical modality inconsistencies threaten the entire enterprise of searching for consistency within
the law, because, as illustrated in Chapter 4’s discussion of various analytical legal philosophers, if we do not have a way of agreeing whether the rule of law requires a functional or logical consistency, then all of the foregoing manners of ordering legal consistency collapse, thus threatening to dismantle our entire effort to grasp the rule of law.

Chapter 7 sought to disentangle this function-logic problem. We recruited for help Ludwig Wittgenstein, who dealt with a similar conundrum in his philosophy of language. Drawing from Wittgenstein, Chapter 7 argued that our conception of adjudicative consistency does not come down to the functionality of a legal conflict, but it does not turn either on whether it violates some formal rule of logic. This is because the law of non-contradiction does not inhere in thought or in the concept of law. Rather, its applicability within a legal system arises from the culture governing the language game of legal adjudication. Our cultural conception of the rule of law holds that the judiciary cannot go from one constitutional pole to the other for the same class of action, which will often mean that there will not be conflicting obligation norms in the system.

This is distinct from the traditional *stare decisis* analysis, the one that the empirical works covered in Chapter 5 have sought to examine, whereby *stare decisis* is thought of as efficacious if and only if the deciding court determines that the precedent case was decided wrongly by the previous court. Under the theory of *stare decisis* provided in this dissertation, it does not matter for measuring the doctrine’s efficacy whether the deciding court agrees with the precedent decision. Nor does it matter whether the deciding court follows that precedent. What matters is that the legal requirement entrenched by the precedent forecloses the possibility of its complement entering the system. The entrenched obligation precedent thus functions like a
Wittgensteinian hinge proposition, becoming the focal point around which future decisions rotate.

This theory of *stare decisis* recalled our discussion in Chapters 3 and 4 of how various philosophers and legal theorists have held that the core requirement of legal consistency is that obligation norms cannot conflict. In Chapter 3, we had compared this way of thinking about consistency to M.C. Escher’s *Day and Night*, where he tessellated black and white birds, with the black birds forming the background of night if the viewer focuses on the white birds, and the white birds conversely forming the background of daylight if the viewer focuses on the black birds. Just as various thinkers, such as Bentham, Kant, and Kelsen, have held that a conflict of obligations leaves an agent no logical space to comply with both commands, Escher’s tessellated birds require that either the black or white birds form the background and thereby leave no logical space for both the black and white birds to be birds at the same time.

This is similar to how the *stare decisis* hinge proposition works. An entrenched obligation precedent leaves no logical space for both it and its complement to be valid within the same constitutional system. Just as in Escher’s work how the black birds frame the contours of the white birds and *vice versa*, but we do not think of either set of birds as permanently forming either foreground or background, an entrenched precedent obligation norm likewise frames the rationality of our legal discourse, but it is not necessarily presupposed as valid within the system. Therefore, even though such a precedent may be narrowed or even overruled without violating the rule of law, a later decision supporting the complementary obligation is viewed as transgressing the bounds of legal logic – an impermissible zone for the judiciary, as the governmental organ of reason, to enter.
This way of thinking about precedent helps us with the modality inconsistency problem identified in Chapter 6. Inconsistent precedent norms arising during the same legal period are resolved based on which line of precedents is entrenched, which is like asking in Escher’s work which birds appear in the foreground and which ones in the background. We acknowledged that applied to precedent this is a somewhat informal analysis, involving a particularized inquiry turning on the breadth and depth of each lineage. But it is nonetheless an analysis that skilled participants in an area of law perform consistently; this is part of learning the culture of a legal subject matter and thereby becoming a specialist in its language.

This paradigm also resolves the function-logic issue by holding that when judges reason about consistency, it does not turn on how they perceive the function of the law or the theorems of formal logic that inhere in it. Rather, legal language, as an expression of the culture lawyers and judges constitute and are constituted by through their adjudication of legal disputes, determines which types of inconsistencies are impermissible. The reason, therefore, that so many divergent thinkers have come back to this notion about conflicting obligation norms is not because it is a theorem of deontic logic. It is instead because the deontic theorems we discussed in Chapter 3 are embedded in our legal culture – the structure governing how we think, argue, and reason within our legal system.

Chapter 8 concluded the dissertation by completing the taxonomy of the types, uses, and scopes of legal consistency norms. Here, we found that the legal, attitudinal, and strategic accounts covered in Chapter 5 differ from one another partly because they are looking at different consistency types, uses, and scopes – which constitute the multifarious dimensions of stare decisis. These accounts thus err in treating stare decisis as a univocal doctrine. Once we open up to its protean nature, we can see that stare decisis is used to frame discretion, justify
preferences, and facilitate strategic maneuvers, because what we call law, politics, and judicial strategy are all integral parts of the adjudicative enterprise.

Chapter 8 also looked at several lines of precedents to illustrate how these various types, uses, and scopes relate to one another in actual arguments and opinions. This empirical examination was necessarily preliminary because of the limited scope of this dissertation, but it is one that I hope will set the bounds for more detailed and thorough testing in future research. In particular, future research should focus on whether some lines of Supreme Court precedents are more responsive than others to the path dependency identified in thinking of the rule of law as a language game. A good start in this regard would be to map out how arguments, as reflected in Supreme Court briefing, oral arguments, and opinions, change over time with regard to shifting modalities of a particular subject of law.

Several pertinent research questions follow from this inquiry. At what point in the development of a line of precedents do advocates cease making what we have called “off-the-wall” arguments that contradict previously entrenched precedent obligation norms? Does this coincide with the receptiveness of the Justices to such arguments, as reflected in oral arguments and judicial opinions? Does political ideology relate to an individual Justice’s use of different consistency norms and willingness to shift from an entrenched precedent obligation norm to its complement? Does this framework hold for other judicial institutions, such as lower federal courts, state courts, and foreign courts? These are all important empirical questions that can and should be examined based on the framework developed in this dissertation.

This dissertation also holds significant theoretical implications by complicating the often-facile recitation that consistency is an essential requirement of the rule of law. We have demonstrated here that the judiciary’s consistency function lies primarily in its convergence over
time. Adjudicative convergence, rather than complete consistency, is what makes the rule of law possible. This helps us get past many of the other platitudes abounding in public law, such as the distinctions between law and politics, logic and life, and formalism and realism. While real and meaningful differences do indeed separate legal scholars, practitioners, and judges, and many of these differences may be fairly characterized as political in nature, one of the overarching themes in this dissertation is that there is a lot that brings us together. Much of this agreement is overlooked, however, because it operates tacitly through our language, a process that is necessarily tacit because it is structural. We must follow the same hinge propositions to proceed within the language game set by the rule of law.

We must speak the same consistency language, not because of any metaphysical requirement of logic, as some of the thinkers in Chapter 3 held, or anything inhering in the concept of law, as many of the theorists in Chapter 4 argued, but because of life, because of who we are, because of our particular legal culture. As participants in our legal discourse – i.e., as players in the rule-of-law language game – we believe that there are some bounds to judicial decision-making. This is what we mean by saying that it is a lawyer’s duty to show the court how to get there. Courts must operate within these rule-of-law constraints, given their particular institutional duty in guaranteeing the rule of law, and as a result of these constraints, there are some places that become no-entry zones for courts based on the paths that they have chosen to go in the past. A lawyer must show the court “how to get there,” because it is a feature of our rule-of-law language game that courts must justify their outcomes based on consistency norms. And the court’s ultimate choice of how to get there will determine where it can go in the future, because “there” is determined by “how” in this language game.
We have emphasized here the impermissible zones created by complementary precedent obligation norms, so that one group’s absolute court victory cannot become its absolute defeat in court the next day. Indeed, we believe that a triumph of an integrationist obligation cannot soon turn into a segregationist one, or a woman’s right to choose into a fetus’s right to life, or a church-state separationist into a church-state accommodationist norm. When groups are on opposing extremes of a constitutional debate, as so often is the case in our divided country, we believe that once the judiciary has declared a victor in the form of a constitutional obligation norm, it cannot then switch poles to take the complementary obligation norm favoring the opposing side, though it can issue a permission norm so that the Constitution becomes a neutral participant that lets the two sides duke it out through the political process. As participants in our constitutional scheme, we are believers in it, and as believers, we cannot help but adhere to its language game holding that obligation rulings can stand for only one side.

Otherwise, the game is entirely up for grabs, subject to anyone’s exploitation, as manipulable as tic-tac-toe. And just as we lose interest in playing tic-tac-toe, even when we can guarantee a victory, many of us would lose interest in playing the game of constitutional law if its defects could be so easily exploited. Although there will always be outliers who refuse to follow the rules, who in a sense refuse to speak the same language, this does not apply to the great many us who would rather sustain the game than achieve a short-term victory, for we know that an inconsistent legal system is a game not worth playing.
BIBLIOGRAPHY


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Awards:  
The Connecticut Department of Higher Education Community Service Award for creating and organizing the *Hermandad* program, a mentoring program for Latino Middletown high school students
PUBLICATIONS

Law Review Articles


Peer-Reviewed Articles

- The Stoics and Legal Conservatives: Strange Bedfellows or Just Strange Fellows?, 30 LAW & PHIL. 201-251 (2011)


Book Reviews and Encyclopedia Entries


- Interpreting the Constitution, in The Encyclopedia of the United States Constitution (David A. Schultz ed., 2008), in collaboration with Andre Mura

Pew Forum Articles


- In Brief: Salazar v. Buono (Sept. 2009)

- Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations (May 2009), in collaboration with Ira C. Lupu, David Masci, and Robert W. Tuttle


**Law Practitioner Articles**

**Legal Employment**

**Pew Forum on Religion & Public Life**
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*Research Associate in Religion and Law*
Nov. 2007 - Jan. 2011
- Wrote and edited articles on church-state law
- Managed the Forum’s partnerships with outside legal scholars
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**Center for Constitutional Litigation, P.C.**
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- Litigated constitutional issues concerning access to the judicial system; cases include *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)
- Advised clients (mostly trial lawyers) on the constitutionality of pending and enacted legislation, with a focus on challenging the constitutionality of damages caps, attorney-advertising restrictions, and anti-plaintiff evidentiary and procedural rules

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**University of Maryland Francis King Carey School of Law**
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**John Jay College of Criminal Justice, CUNY**
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**Street Law**
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Apr. 2003-May 2005

**Kaplan**
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### Presentations, Workshops, & Conferences


- Panelist with Dean Robert O’Neil, *Limits of Free Speech on College Campuses*, Johns Hopkins University, Baltimore MD, April 8, 2013


- Presented *The Stoics and Legal Conservatives: Strange Bedfellows or Just Strange Fellows?*, Graduate Student Colloquium, Johns Hopkins University, Baltimore MD, November 12, 2010

- Presented *Spinning Spinoza: An Interpretation of Benedict de Spinoza’s Political Philosophy Against the Background of the U.S. Constitution*, Constitutional Schmooze, University of Maryland School of Law, Baltimore MD, February 27, 2009

### Media Appearances

- *KCRW Public Radio Station of Santa Monica College* (interviewed by Warren Olney on whether religious organizations may endorse political candidates and retain their tax-exempt statuses)

- *Deseret News* (quoted as church-state expert in article entitled “Police Chaplains for a Changing World”)

### Bar Admissions

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