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PARTICIPATION, REPRESENTATION, AND PRINCIPLED ADJUDICATION

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I. THE PAST VERSUS THE FUTURE

A central concern of theories of adjudication is the question of whether that form of decision-making is more a matter of existing entitlements or of prospective rules. Sometimes the question is stated in terms of "principle" versus "policy": Must a judge decide on the basis of existing principles, or may she take into account the best policy for the future?[1] Sometimes the question is put in terms of "individual rights" versus "the common good": Must a judge render only the decision that best implements the existing rights of the parties, or may she consider what impact her decision will have on the good of the community as a whole?[2]

However it is cast, the issue comes down ultimately to a battle between the past and the future. Is a judge bound to respect the past—to decide in accordance with, perhaps only with, the existing entitlements of the litigants? Or may a judge "do the best [she] can for the future," as Ronald Dworkin puts it?[3]

Dworkin has provided probably the most influential answer to this question. According to Dworkin, a judge must implement the existing entitlements of the litigants before her—she must render a decision of *principle*—because she is commanded to do so by a norm of political morality Dworkin calls "integrity."[4] The norm of integrity, when applied to adjudication, requires a judge "to see and enforce [the law] as coherent [in

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1. *See, e.g.*, Ronald Dworkin, LAW'S EMPIRE 27–29 (1986) (hereinafter Dworkin, LAW'S EMPIRE); Ronald Dworkin, *Hard Cases*, *in* Ronald Dworkin, TAKING RIGHTS SERIOUSLY 81, 82–84 (1978).

2. It is this dichotomy, I think, that Lon Fuller had in mind when he wrote that "whatever [courts] decide, or whatever is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

3. *See* Dworkin, LAW'S EMPIRE, *supra* note 1, at 161.

4. *See id.* at 164–275. I describe and critique Dworkin's defense of integrity in Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2073–2112 (1996) (hereinafter Peters, *Foolish Consistency*).

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principle]"—to allow "the past . . . some special power of its own in court."[5] A forward-looking judicial decision—what Dworkin calls a "pragmatic" decision[6]—denies a duty of consistency to past decisions and thus violates the requirement of integrity.

Dworkin thus underwrites his defense of principled adjudication and his rejection of pragmatism with a commitment to the idea that consistency across judicial decisions is a good in itself. If one rejects consistency as an inherent good, then (on Dworkin's account) one has no compelling reason to support principled adjudication.[7] And there is strong reason to reject the

5. Dworkin, LAW'S EMPIRE, *supra* n.1, at 167.

6. *See id.* at 95, 151–164.

7. There are many complexities in Dworkin's theory of adjudication that I elide in the text for the sake of simplicity. For example, Dworkin's theory requires *coherence* among legal decisions, which is a stronger requirement than mere consistency: Coherence appears to demand not only that legal decisions not logically contradict one another, but also that each legal decision both proceed from and contribute to an explanation of the reasons that justify (at least some) prior decisions. Coherence thus involves not just a relationship of consistency, but one of both causation and justification. *See, e.g.*, Dworkin, LAW'S EMPIRE, *supra* n.1, at 219–224, 225–258. Still, bare consistency remains in my view a basic requirement of Dworkin's theory: He rejects legal decisions that do not meet it, without the necessity in such cases of inquiring about the more complex qualities that produce full-blown coherence. *See* Peters, *Foolish Consistency*, *supra* n.4, at 2073–2080 (interpreting Dworkin's understanding of the requirement of consistency). (Dworkin does hold that judges must sometimes reject "narrow" consistency with particular prior decisions in favor of more "fundamental" consistency with the "scheme as a whole," that is, with the principles of justice and fairness underlying the entire legal-political system. *See, e.g.*, Dworkin, LAW'S EMPIRE, *supra* n.1, at 219–24.)

Nor is coherence alone sufficient for a correct judicial decision, on Dworkin's view: Where more than one decision satisfies the requirement of coherence, the judge must reach the decision that she believes amounts to the morally *best* justification of the relevant prior decisions. *See, e.g.*, Dworkin, LAW'S EMPIRE, *supra* n.1, at 231–232. Here again, though, consistency among decisions serves as a base requirement for Dworkin which, if not met, obviates the need to take the further interpretive step of moral justification. (If one potential decision does not meet the requirement of consistency while another does, a judge will reject out of hand the inconsistent possibility.)

A requirement of consistency among legal decisions—albeit a subtle and complex one—thus serves, for Dworkin, as a threshold (but not the sole) requirement of correct adjudicative decision-making. And, as I have explained elsewhere, Dworkin's supposed norm of integrity animates the requirement of consistency. *See* Peters, *Foolish Consistency*, *supra* n.4, at 2073–2080. A rejection of integrity thus removes from Dworkin's theory the threshold requirement of consistency among decisions.

In a related vein, it is somewhat misleading to categorize integrity (as conceived by Dworkin) as an "*inherent* good" as I describe it here. Dworkin notes that integrity "would not be needed as a distinct political virtue in a utopian state. [In such a state,] [c]oherence would be guaranteed because officials would always do what was perfectly just and fair." Dworkin, LAW'S EMPIRE, *supra* n.1, at 176. In other words, if all political and legal decisions were absolutely correct ones, then coherence would become irrelevant (or, rather, would arise automatically from the fact that every decision is correct). In this sense, integrity is only instrumentally, not inherently, a good thing. In the real world, however, not all political and legal decisions will be morally correct ones; and, once incorrectness leaches into the system, it becomes (for Dworkin) a deontological imperative to strive for the (second-best) goal of integrity. Integrity for Dworkin is thus "inherent" or deontological in this sense: It is, in the real world, a value worth pursuing quite regardless of whether (again, in the real world) it produces any instrumental advantages. Again, *see* my discussion of Dworkin's theory in Peters, *Foolish Consistency*, *supra* n.4, at 2073–2080, as well as my understanding of the difference between deontological and consequentialist defenses of decision-making consistency in *id.* at 2039–2044.

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idea that consistency is an inherent good. (I have made this case extensively elsewhere[8] and will allude to it only briefly here.) First, if Dworkin's integrity is simply an implication of the egalitarian principle that "likes should be treated alike" (admittedly a rather shallow reading of Dworkin), it is subject to a substantial and growing body of literature exposing the vacuity of that supposed norm.[9] The case, I think, is convincing that the command to "treat likes alike" either is entirely empty—devoid of any independent normative content—or is analytically incoherent. What we mean when we demand that likes be treated alike is simply this: Each person should be treated according to the rules (of morality, justice, adjudication, or whatever) that apply to him or her. We certainly do not mean that a person should be treated a certain way *just because* another person has been (or will be) treated that way. Thus the egalitarian prescription to treat likes alike cannot support a norm of consistency in adjudication—of deciding one case in a certain way just because another case has been (or will be) decided in that way.

Second, to the extent that Dworkin's integrity is intended to stand independently of equality as a separate, substantive political norm of its own (as I believe Dworkin intends it)[10], its existence is at best ill-supported by Dworkin's own arguments and at worst entirely illusory. Dworkin's case for the existence of integrity ultimately depends upon a demonstration that certain intuitions about how government should behave cannot be traced to any other norm besides a concern for consistency *qua* consistency.[11] If it turns out that consistency in decision-making is only instrumentally valuable, then there is no inherent reason for courts to act on principle, as Dworkin believes; whether to follow precedent in any given case becomes

8. *See* Christopher J. Peters, *Outcomes, Reasons, and Equality*, 80 B.U. L. REV. 1095 (2000) (hereinafter Peters, *Outcomes*); Christopher J. Peters, *Slouching Towards Equality*, 84 IOWA L. REV. 801 (1999) (hereinafter Peters, *Slouching Towards Equality*); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997) (hereinafter Peters, *Equality Revisited*); Peters, *Foolish Consistency*, *supra* n.4.

9. The germinal article in the legal academic literature is Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (hereinafter Westen, *Empty Idea*). Other critiques of the idea of equality as a substantive norm include Peter Westen, SPEAKING OF EQUALITY (1990); Peters, *Outcomes*, *supra* n.8; Peters, *Slouching Towards Equality*, *supra* n.8; Peters, *Equality Revisited*, *supra* n.8; Peters, *Foolish Consistency*, *supra* n.4; Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); Peter Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

Defenses of equality as a substantive norm include Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000); Joshua D. Sarnoff, *I Come to Praise Morality, Not to Bury It*, 84 IOWA L. REV. 819 (1999); Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377 (1999); Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265 (1997); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985); Kent Greenawalt, *How Empty Is the Idea of Equality?* 83 COLUM. L. REV. 1167 (1983); Anthony D'Amato, *Is Equality a Totally Empty Idea?* 81 MICH. L. REV. 600 (1983); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983).

10. *See* Peters, *Foolish Consistency*, *supra* n.4, at 2073–2077.

11. This is the point of Dworkin's discussion of "checkerboard statutes" in Dworkin, LAW'S EMPIRE, *supra* n.1, at 176–86. *See also* Peters, *Foolish Consistency*, *supra* n.4, at 2077–2080 (describing Dworkin's defense of integrity).

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essentially a policy decision, involving a trade-off between competing interests and values, and the concept of principle loses all its meaning.

But Dworkin does not convincingly demonstrate that integrity is an independent moral norm—that is, that consistency in decision-making is valuable for its own sake. Every moral intuition Dworkin explains by reference to integrity can be explained as well or better as the product not of a concern for consistency in itself but rather of the desire to ensure morally correct treatment of each individual. Our discomfort with decision-making inconsistency seems to arise entirely from the knowledge that if two or more decisions really are inconsistent, one of them therefore must be wrong. And any impulse to create consistency, even at the expense of duplicating incorrect results, can sensibly be attributed to underlying concerns of strategy (or of what Dworkin would call policy) rather than to some inherent desire for consistency *qua* consistency.[12]

There is good reason, then, to think that Dworkin is wrong about consistency being a good in itself. But I think Dworkin is right about adjudication being primarily and necessarily a matter of principle—that is, an enterprise whose goal is to implement existing entitlements rather than to create desirable prospective rules.

I attempt here to offer a more satisfying interpretive account of the role of principle in adjudication, one that relies not on a supposed norm of deontological consistency but on the nature of the adjudicative process and on the conditions under which that process must operate in order to be politically legitimate. In my view, the requirement of judicial principle arises from the fundamentally participatory and representative nature of the adjudicative enterprise, characteristics that themselves confer political legitimacy upon that enterprise. Thus principle is indeed essential to the political legitimacy of adjudication, as Dworkin believes. It is essential, however, in a way that implicates not just the judge herself—the focus of Dworkin's account—but rather the entire process of decision-making of which the judge is only a part.

My argument has several layers, and a brief overview might be helpful. I begin, in Section II.A, by interpreting adjudication as a fundamentally participatory enterprise that derives significant political legitimacy from that participatory quality. In Section II.B, I contend that litigant participation in adjudication is meaningless without concomitant responsiveness by the ultimate decision-maker, the judge. In Section II.C, I argue that such responsiveness requires efforts by each of the litigants to *persuade* the judge; where a decision is the product of persuasion, I contend, it can be seen as politically legitimate with respect to both the winning and the losing parties. In Section II.D, I offer two important clarifications regarding the connection among persuasion, responsiveness, and political legitimacy. Then, in Section II.E, I assert that there are two types of potentially persuasive

12. *See* Peters, *Foolish Consistency*, *supra* n.4, at 2080–2112.

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arguments a litigant might make: arguments of *principle* and arguments of *policy*. In Section II.F, I contend that litigants typically have reason to make only arguments of principle, not arguments of policy, because litigants typically are concerned with adjudicating only existing entitlements rather than prospective rules. It follows from this conclusion, I contend, that judges typically are required by the duty of responsiveness to decide cases on grounds of only principle rather than policy. I address three potential objections to these conclusions in Section II.G and I summarize my arguments up to that point in Section II.H.

Section III is designed to address two special cases in which my conclusions might be thought not to apply: cases involving *altruistic litigants* and cases involving *repeat players*, both of whom litigate precisely for the purpose of creating prospective rules. Both of these special cases, I argue, can best be understood by interpreting adjudication not just as a participatory process but also as a *representative* one in which litigants represent the interests of nonlitigants and, as representatives, take on certain duties with respect to their conduct during litigation. These representative duties, I contend, generally restrict altruistic litigants and repeat players to making arguments of principle rather than policy. Finally, in Section IV, I review my conclusions and attempt to place them in context: as facets of a procedural theory of adjudicative legitimacy, a theory in which principle is an internal requirement of the adjudicative process rather than an external norm imposed upon that process in Dworkinian fashion.

II. PARTICIPATION, RESPONSIVENESS, AND PRINCIPLE

A. Participatory Adjudication[13]

Start by viewing adjudication from the perspective of the practicing lawyer rather than the legal theorist. Legal theorists tend to assume that the judge is the only decision-maker who matters in adjudication. Dworkin's Hercules is the classic example—a judge who is personally responsible for and personally capable of weaving widely diverse strands of authority into a single and singly correct judicial decision. Dworkin is not naïve enough to think that Hercules actually exists or could exist, but for Dworkin that is a product of the personal shortcomings of actual judges, not of any institutional constraints to which judges are subject. Real judges can try to emulate Hercules,[14] and the extent to which they try is a matter entirely within their own control.

For the practicing lawyer, however, the judge is not quite so central to the universe. Lawyers recognize that their own roles in the adjudicative decision-making process can be decisive. A lawyer knows that bad lawyering can

13. Much of the analysis in this section derives from the more extensive discussion in Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 347–360 (1997) (hereinafter Peters, *Adjudication as Representation*).

14. *See* Dworkin, LAW'S EMPIRE, *supra* n.1, at 264–265.

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lose a close case and good lawyering can win it. She knows, for instance, that particularly thorough or particularly sloppy discovery often makes the difference between winning and losing a summary judgment motion. She knows that methodical legal research and well-crafted legal arguments are often important to the outcome of a case. She knows there is a reason why some lawyers can charge $500 an hour and others cannot.

From the lawyer's perspective, in other words, it is the lawyers themselves—as agents of the litigants themselves—who do much of the heavy lifting in a lawsuit and make much of the difference to the decision that results. And, as anyone familiar with the workings of Anglo-American litigation knows, this view is not merely a product of lawyers' hubris; it reflects an important piece of reality. In Anglo-American adjudication, the judge does not act in a vacuum. She is in a meaningful sense bound by the efforts of the parties through their attorneys: by the facts they elicit, by the authorities they uncover, by the arguments they make. Before the questions of principle or integrity even arise, the judge is constrained, significantly so, in making her decision or decisions in a case—constrained by the integral litigant-driven nature of the process.[15]

This, of course, is not the only way to do adjudication. Civil-law systems tend to approach adjudication in a significantly more judge-centered, "inquisitorial" manner, assigning to judges or other government agents the principal responsibility, even in civil cases, for finding facts and, sometimes, framing legal arguments.[16] As Mirjan Damaška has shown, such judge-driven models of adjudication tend to appear in political systems that exhibit a general preference for state decision-making over individual decision-making, while litigant-driven models tend to appear in political systems that reverse these priorities.[17]

This connection between approaches to adjudication and more general political philosophies is not accidental. Litigant-driven adjudication and democratic government both stem from the premise of *participation*—the idea that government decisions are more politically legitimate to the extent they reflect the participation of the governed in the process of making them. There are many justifications of democracy, but most or all of them can ultimately be traced to a preference for decision-making by participation over decision-making by fiat.[18] There is, for example, a large family of what might

15. For my elaboration of these points, including examples and citations to authority, *see* Peters, *Adjudication as Representation*, *supra* n.13, at 378–399, and Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1481–1491 (2000) (hereinafter Peters, *Minimalism*).

16. *See* Henry J. Abraham, THE JUDICIAL PROCESS 95–100 (6th ed., 1993); Mirjan R. Damaška, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 154–173 (1986); Martin Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 148–156 (1981); Herbert Jacob, *Introduction*, *in* Herbert Jacob et al., COURTS, LAW, & POLITICS IN COMPARATIVE PERSPECTIVE 1, 6–8 (1996).

17. *See generally* Damaška, *supra* n.16.

18. For a lengthier survey of the most influential types of democratic theory and their connections to the idea of participation, *see* Peters, *Adjudication as Representation*, *supra* n.13, at 320–337.

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be called *proceduralist* theories of democracy: theories that value the process of democratic government itself, without regard for the substantive decisions that process might produce.[19] On a proceduralist theory, the participation of the governed is essential because it effectuates or produces some ancillary good—autonomy, individual character, or collective dynamism.[20] There is also a family of what might be called *functionalist* theories of democracy, which value democratic government on the ground that it produces good decisions;[21] participation is essential to these theories as well, because it distributes decision-making authority to those who are best qualified to hold it and fosters productive debates and exchanges of information.[22]

19. *See id.* at 323–330.

20. *See id.* There are many influential examples of theories with proceduralist aspects. Locke and Kant, for instance, connected participatory government to individual autonomy. *See, e.g.*, John Locke, TWO TREATISES OF GOVERNMENT 316–318, 369–394 (Peter Laslett ed., 1963) (1690); Immanuel Kant, *On the Common Saying: "This May Be True in Theory, but It Does Not Apply in Practice"* (hereinafter Kant, *Theory and Practice*), *in* KANT: POLITICAL WRITINGS 61, 74–87 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (1793); Immanuel Kant, THE METAPHYSICS OF MORALS, *excerpted in* KANT: POLITICAL WRITINGS, *supra*, at 131, 136–143, at 136–143 (§§43–49).

For their part, Rousseau and J.S. Mill (with a debt to Aristotle) connected participatory government to individual character development. *See, e.g.*, Jean Jacques Rousseau, THE SOCIAL CONTRACT at 24–25 (bk. 1, ch. VII) (Willmoore Kendall ed. & trans., 1954); John Stuart Mill, *Considerations on Representative Government* (1861), *in* John Stuart Mill, UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 187 (H.B. Acton ed., 1972); *see also* Aristotle, POLITICS bk. III, ch. 4; bk. VII, ch. 2–3, 14 (Benjamin Jowett trans.), *in* THE BASIC WORKS OF ARISTOTLE 1113, 1180–1182, 1279–1282, 1296–1299 (Richard McKeon ed., 1941); Carole Pateman, PARTICIPATION AND DEMOCRATIC THEORY 22–35 (1970) (discussing Rousseau's and Mill's views).

Another proceduralist was Tocqueville, who connected participatory government to social dynamism. *See* Alexis de Tocqueville, DEMOCRACY IN AMERICA 244 (George Lawrence trans. & J.P. Mayer ed., 1969); *see also* Stephen Holmes, *Tocqueville and Democracy*, *in* THE IDEA OF DEMOCRACY 23 (David Copp et al. eds., 1993) (discussing Tocqueville).

21. *See* Peters, *Adjudication as Representation*, *supra* n.13, at 330–337.

22. *See id.* Influential examples of theories with functionalist elements include those of James Madison and Alexander Hamilton. *See, e.g.*, THE FEDERALIST 10, at 126 (James Madison) (Isaac Kramnick Ed., 1987); THE FEDERALIST 57, at 344 (James Madison) (Isaac Kramnick ed., 1987); THE FEDERALIST 70, at 405 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

Others whose views of democracy were partly or primarily functionalist include Edmund Burke, J.S. Mill, Herbert Spencer, and John Dewey. *See, e.g.*, Edmund Burke, *Speech to the Electors of Bristol* (Oct. 13, 1774), *excerpted in* BURKE'S POLITICS 114 (Ross J.S. Hoffman & Paul Levack eds., 1959); Mill, *supra* n.20; Herbert Spencer, *Representative Government—What Is It Good For?* *in* Herbert Spencer, THE MAN VERSUS THE STATE 331, 375 (1981) (1892); John Dewey, *Intelligence and Morals*, *in* ETHICS (1908), *in* JOHN DEWEY: THE POLITICAL WRITINGS 66 (Debra Morris & Ian Shapiro eds., 1993); John Dewey, *The Ethics of Democracy*, *in* THE EARLY WORKS (1967), *reprinted in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 59; John Dewey, *The Public and Its Problems*, *reprinted in* 2 JOHN DEWEY: THE LATER WORKS 1925–1953, at 235 (Jo Ann Boydston ed., 1984) (1927); John Dewey, *The Democratic Conception in Education*, *reprinted in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 110; John Dewey, INDIVIDUALITY, EQUALITY AND SUPERIORITY (1992), *in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 77; John Dewey, *The Ethics of Democracy*, *in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 59; John Dewey, DEMOCRACY AND HUMAN NATURE (1939), *in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 219; John Dewey, *Creative Democracy: The Task Before Us*, *in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 240; John Dewey, JOHN DEWEY RESPONDS (1950), *in* JOHN DEWEY: THE POLITICAL WRITINGS, *supra*, at 246.

More modern functionalist theories include those propounded by many contemporary theorists of deliberative democracy. *See, e.g.*, Amy Gutmann & Dennis Thompson, DEMOCRACY

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The litigant-driven—that is, participatory—nature of Anglo-American adjudication thus serves values that should be thought of as *democratic*. Just as we think of a democracy as more politically legitimate than a dictatorship, we can think of participatory adjudication as more politically legitimate than a system of adjudication by unfettered judicial fiat. The practicing lawyer's perspective on adjudication ultimately leads to an understanding of the legitimacy of adjudication from the perspective of political theory.

B. The Requirement of Responsiveness

In this way, litigant participation in the decision-making process lends political legitimacy to the result of that process. But there is a difference—a big one—between real participation and mere performance. Consider an extreme and rare case: A judge takes a bribe to decide a lawsuit in a certain way. In such a case, the litigants and their lawyers, by conducting discovery, making legal arguments, and so on, are merely performing; their mouths and pens are moving, but only for show—nothing they do will have any effect on the judge's decision. When the (inevitable) decision is rendered, the litigants cannot be said to have *participated* in it in any meaningful way.

In order for litigant participation to be meaningful—to be real *participation*—the ultimate decision must to some extent be the *product* of the (legitimate) activities of the litigants and their lawyers. The judge, of course, will finally *make* that decision. But if participation is to be real and meaningful, the judge's decision must be *responsive* to the parties' actions; it must actually reflect what the parties have done. There must be, in Lon Fuller's phrase, some "congruence" between the parties' efforts and the decision that is imposed upon them; "if this congruence is utterly absent . . . then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning."[23] Without responsiveness to the parties' efforts, a court decision is only a *judge's* decision, not a decision of which the parties can claim some authorship and in which they have some stake. An unresponsive decision is no better than rule by fiat.

In adjudication, the primary evidence that the court's decision is responsive to the efforts of the litigants is the written (or sometimes oral) judicial opinion. A well-crafted opinion demonstrates that the arguments of the losing litigant have been considered in good faith and rejected on their merits. Absent a judicial opinion, as Fuller noted, "the parties have to take

AND DISAGREEMENT (1996); Joseph M. Bessette, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994); Cass R. Sunstein, THE PARTIAL CONSTITUTION 17–39 (1993); Cass R. Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241–252 (1993); Jürgen Habermas, *Popular Sovereignty as Procedure*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 35 (James Bohman & William Rehg, eds., 1997); Joshua Cohen, *Deliberation and Democratic Legitimacy* (hereinafter Cohen, *Deliberation*), *in* DELIBERATIVE DEMOCRACY, *supra*, at 67.

23. Fuller, *supra* n.2, at 388.

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it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments."[24] Judicial opinions, that is, evince responsiveness and thus validate, in a visible way, the meaningful participation of the litigants. And their existence as a central and time-honored aspect of judicial craft itself demonstrates the importance of responsiveness to our conceptions of judicial legitimacy.[25]

It is vital to note that the judge's duty of responsiveness runs to *both* (or all) the litigants in the case before her, not just (or even primarily) to the winning party. The winning party is likely to view the decision as legitimate simply for the reason that it favors her. But the losing party has no such consolation. More to the point, it is the losing party upon whom the decision can in a significant sense be said to be *imposed*. Questions of political legitimacy are ultimately questions of coercion; they finally boil down to the single problem of when it is justifiable for government to coerce somebody, to force somebody to do something he or she otherwise would not do. In adjudication, this problem arises only with respect to the losing litigant, who must now pay damages, or perform a contract, or go to jail, or do something else that he or she would prefer not to. Thus the central question of political legitimacy in adjudication is the question of whether and when it is justifiable to impose a judicial decision upon the losing party.

I have suggested that the answer, or at least a partial answer, to this question arises from the participatory nature of the adjudicative process. If so, then the party whose participation is in some sense the most important must be the losing litigant. In order to be legitimate, therefore, the court's decision must be responsive to, perhaps especially to, the activities of the losing litigant leading up to the decision. But how can a decision be meaningfully responsive to the efforts of the *losing* litigant? The court, after all, has been persuaded by the other side's arguments. In what sense can the activities of the loser be said to have contributed to the court's decision?

C. Responsiveness and Persuasion

The key to answering this question is an understanding of what *persuasion* means. A judge who rules for the plaintiff based on racial bias has not in any sense been *persuaded* by the plaintiff's arguments; she has decided solely

24. *Id.*

25. Of course, written opinions also can serve the function of promoting predictability in the law. But trial judges, whose decisions have little or no precedential value, customarily write opinions just as appellate panels do, and even appellate panels who intend no precedential effect for their decisions write "unpublished" opinions. *See, e.g.*, Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROB. 157 (1998) (describing and assessing data on use of unpublished opinions and "without comment" dispositions in Courts of Appeals). These phenomena suggest that fostering predictability is not the primary purpose of written opinions.

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because of a previously existing bias that has nothing to do with the facts of the case. In the same sense, a judge who accepts a bribe to rule for the plaintiff has not been *persuaded*, nor has a judge who decides based on her own self-interest. Because no real persuasion is involved in these kinds of cases, the decision in fact has nothing to do with the participation of the litigants; it is entirely unresponsive to their efforts.

Now consider a default judgment: The judge rules for the plaintiff because the defendant fails even to show up and litigate. There is no *persuasion* involved here, either; the plaintiff has won by forfeit, not by the superior force of her arguments. And thus the judge's decision is not really responsive in the relevant sense (although it may still be legitimate, in the same way that binding someone who chooses not to vote to the laws passed without his participation is legitimate).

But compare the case of a default judgment to a contested lawsuit in which both parties litigate vigorously and the judge ultimately sides with the plaintiff. In the latter case, the judge has been *persuaded* by the plaintiff's arguments; her decision is truly responsive to the participation of the plaintiff. Note, however, the sense in which the judge's decision *is responsive to the participation of the (losing) defendant as well*. The losing defendant's efforts have *forced* the winning plaintiff to engage in persuasion; they have compelled the plaintiff to put on proofs and arguments rather than simply show up to collect her judgment. Moreover, and crucially, the defendant's efforts have also forced the judge to *justify* her decision on its merits—to explain it in a way that responds not only to the plaintiff's arguments, which she has adopted, but also to the defendant's arguments, which she has rejected.

In an important and meaningful sense, then, the judge's decision in a contested lawsuit is indeed responsive to the participation of the losing litigant. Without those efforts, the decision would be a mere formality, a ministerial act—something having little to do with rational argument, with persuasion. The losing litigant's efforts have transformed the decision into more than just a show of authority; they have transformed it into an act of reason.

D. Two Clarifications

So political legitimacy can be connected to meaningful participation and thus to responsiveness by a political decision-maker (the judge) to the efforts of those bound by her decision (the litigants). Persuasion, I have argued, is a condition of true responsiveness. It is worth pausing at this point to make two important and closely related clarifications.

First, I do not want to argue that responsiveness, and thus persuasion, are necessarily the *only* indicia of political legitimacy in adjudication. Indeed, I do not want to take a position on that question. It may be that a judicial

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decision that is entirely responsive to the parties' efforts at persuasion can nonetheless be politically illegitimate for other reasons. For example, a judge acting in good faith to assess the litigants' arguments might egregiously misjudge those arguments, thus reaching the "wrong" outcome. On a view of political legitimacy to which particular outcomes matter, such a decision might be politically illegitimate despite complete responsiveness. Or perhaps one of the litigants or his attorney is incompetent and fails to present the strongest arguments for his position; if so, the judge might again reach the "wrong" result while being perfectly responsive. I do not mean to preclude a conception of legitimacy on which these kinds of outcomes might be considered politically illegitimate in whole or in part.

I *do* mean to claim, however, that a judicial decision that is responsive in the way I suggest here is for that reason politically legitimate in a particular sense: namely, in the sense in which democratic government more generally is politically legitimate. In democratic government too, political decision-makers might (and surely often do) render decisions that are in some sense "wrong"—the product of a faulty assessment of the competing arguments or perhaps of the inadequate presentation of the otherwise strongest argument. Legislators acting in the best of faith might nonetheless vote for bad pieces of legislation; executives might erroneously promulgate and enforce unfortunate regulations; voters might stupidly elect ill-qualified public officials. Nothing about the participatory nature of democracy prevents this kind of erroneous decision-making (although, on a functionalist account, participation at least reduces the chances and mitigates the effects of error). But if, despite the potential for error (even egregious error), we nevertheless perceive democratic government to be generally legitimate—and I am willing to grant the fact of uncertainty implied by the "if"—then we should understand adjudication, when operating properly as a meaningfully participatory enterprise, to be generally legitimate in the same way. That is my claim.

Second, I do not want to suggest that the existence of any gap in responsiveness must be fatal to legitimacy or to take a position on the question of how large a gap is too large. It may be the case that no judge can ever make a decision that is entirely divorced from her own predispositions or value preferences and thus that no judge can ever make a completely responsive decision.[26] If this psychological picture of judges is accurate, however, it need not imply that every judicial decision must be condemned as illegitimate. A standard of political legitimacy cannot demand the impossible; so long as fallible, biased humans are running the system, there must be some levels of fallibility and bias that are acceptable without casting legitimacy into doubt. I make no contentions here regarding where the lines should be drawn. But I note, again, that the potential for bias in decision-making,

26. A classic statement of this view is Jerome Frank, LAW AND THE MODERN MIND 159–171 (1949); a contemporary statement is Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

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like the potential for error, seems to exist across the democratic political spectrum; it is difficult to imagine that judges have a materially greater susceptibility to it than do legislators, or executives, or other public officials, or the voters themselves.[27] If the potential for (or inevitability of) biased judging produces a legitimacy gap in adjudication, it is a legitimacy gap shared by democratic decision-making generally.

E. Arguments of Principle and Arguments of Policy

Persuasion, then, is a requirement of true responsiveness; responsiveness is a requirement of meaningful participation; and meaningful participation confers political legitimacy on court decisions. What is required in order for a judge to be persuaded?

There are two general kinds of decisions a judge might make and therefore two general kinds of arguments that might persuade a judge to make a decision. A judge might make a *descriptive* (or *factual*) decision, such as a decision that the traffic light was red when the defendant drove his car through it. The kind of argument that can persuade a judge to make a particular factual decision is a descriptive (or factual) argument: an argument that the traffic light was or was not red.

A judge also might make a *normative* decision. The judge might decide, for example, that a driver has a legal duty to avoid driving through red traffic lights. Or a judge might decide that the defendant in a particular case violated his legal duty by driving through a particular red traffic light. The first decision is an example of a *purely* normative decision, because it doesn't depend upon any concurrent descriptive conclusion. The second decision is an example of a *mixed* descriptive and normative decision, because it depends upon both a descriptive conclusion about the defendant's conduct and a normative evaluation of that conduct. The kinds of argument that can persuade a judge to make a particular normative or mixed decision are normative or mixed arguments: an argument that drivers do have a legal duty to avoid running red lights, or an argument that the defendant violated that duty on the facts of a particular case.

Descriptive decisions are what typically are referred to as "decisions of fact" in procedural case law. Normative decisions correspond roughly to what are typically referred to as "decisions of law," although we might imagine a judge making a normative decision that cannot accurately be called a "legal" one (e.g., a decision that the plaintiff has some "natural"

27. It is not, however, *impossible* to imagine this, and I readily acknowledge that my supposition here is almost entirely intuitive and is subject to refutation by empirical evidence. Even if evidence were to turn up, however, that judges are typically more prone to bias than legislators, voters, etc., the possibility would remain that judicial decision-making can still be meaningfully responsive and thus acceptably legitimate. A system of adjudication in which the judge's bias necessarily is tempered by the necessity of responding to the litigants' arguments might still be more legitimate than any of the practical alternatives.

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right to recovery). Mixed descriptive and normative decisions correspond roughly to what are typically called "mixed decisions of fact and law" or "applications of law to fact."

Purely descriptive judicial decisions and their corresponding arguments do not concern me here, because they have nothing to do with the question of principle. Normative and mixed decisions, however, have everything to do with principle. There are two types of normative decision that a judge might make and therefore two types of normative argument a litigant might make to persuade a judge. The first is a decision about whether a person has an existing entitlement, which I will refer to (following Dworkin) as a *decision of principle*.[28] The second is a decision about whether a course of action would produce desirable effects, which I will refer to (again following Dworkin) as a *decision of policy*.[29] Both types of decision might in fact be mixed descriptive and normative decisions, because both might be based in part upon some assessment of facts: A decision of principle might be based upon an assessment of particular factual conditions contributing to an entitlement, while a decision of policy might—indeed, I think, inevitably will—be based upon a prediction about what factual conditions are likely to arise as the result of the decision.

In order to persuade a judge to make a particular decision of principle, a litigant must make an *argument of principle*; in order to persuade a judge to make a particular decision of policy, a litigant must make an *argument of policy*. A litigant who argues that she has an entitlement based upon prior case law (or some other source of rights) is making an argument of principle. A litigant who argues that a particular decision would produce the best state of affairs for the future is making an argument of policy.

F. Principle, Policy, and Participation

I have been writing in the last few sections as if the type of argument a litigant will make is determined by the type of decision a judge will make. In fact, however, the arguments chosen by the litigants are the horses that

28. *See* Dworkin, *supra* n.1, at 82–83.

29. *See id.* This distinction should not be confused with the distinction between *deontological* and *consequentialist* grounds of moral argument. A deontological ground is one that assigns intrinsic moral value to some state of affairs, quite regardless of the consequences that state of affairs might produce, while a consequentialist ground is one that assigns moral value to a state of affairs solely by reference to the consequences it might produce. *See, e.g.*, Peters, *Foolish Consistency*, *supra* n.4, at 2041–2043 (distinguishing deontological from consequentialist theories). A decision or argument of principle might have either deontological or consequentialist roots; that is, a claim of existing entitlement might be based either in the supposed intrinsic value of the entitlement or in the supposedly desirable consequences of recognizing such entitlements. A decision or argument of policy might also have either deontological or consequentialist roots; it might be based either on the supposed intrinsic value in a consequence sought to be produced or in the supposedly desirable effects of that consequence.

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pull the cart. A court decision, remember, is politically illegitimate to the extent it fails to respond to the litigants' participation. If the judge herself chooses unilaterally the type of decision she is inclined to make—a decision of principle or a decision of policy—then she is deciding to a large extent by fiat rather than by participation. The *entirety* of the judge's decision should be responsive to the participation of the litigants—*including* her decision regarding what type of decision to make. In other words, the question whether a judge renders a decision based on principle or a decision based on policy should depend only upon which type or types of normative argument the litigants make, just as her descriptive decisions should depend only upon what facts the litigants produce.

The question, then, of what type of normative decision a judge will make—a decision of principle or a decision of policy—will depend, or *should* depend, upon how the litigants argue the case. To preserve as much legitimacy as possible, the litigants should not find themselves tailoring their arguments to what they think the judge wants to hear. The judge, rather, should tailor her decision to the arguments chosen by the litigants themselves.

And rational litigants, if left to their own devices, will in most cases strongly prefer to make arguments of *principle* rather than arguments of *policy*.

This is true for the simple reason that litigants will typically not care about the prospective rules a precedential court decision will establish; they will care only about the consequences the decision will assign to events that already have occurred. A plaintiff suing for injuries from an auto accident does not care about a rule that might arise from the decision through *stare decisis*; she cares about whether she is entitled to recover from that particular defendant for her particular injuries. A defendant fending off a suit for breach of contract does not care about a prospective rule; he cares about whether he must pay damages for a breach that has already occurred. As such, litigants will typically have no interest in making arguments about the prospective effects of a decision in their case. They will want to argue only about entitlements arising from past (or sometimes ongoing) events.

Arguments about the prospective effects of a decision are, of course, arguments of policy; they are arguments about whether a course of action (deciding a case a certain way) would produce desirable results. To say that litigants typically have no reason to make arguments about the prospective effects of a decision, therefore, is to say that litigants typically have no reason to make arguments of policy.

If litigants typically have no reason to make arguments of policy, they typically will not make such arguments. And if a judge is to render a decision that is truly responsive to the participation of the litigants—and thus truly legitimate with respect to them—she must not render a *decision* of policy unless the litigants have made *arguments* of policy. A judge acting

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legitimately, then, typically will not have license to render a decision of policy.

All that is left to the conscientious judge, therefore, is a decision of *principle*—that is, a decision about whether one of the litigants has an existing entitlement. For the most part, legitimate judicial decisions will thus be decisions of principle.

G. Three Objections

Let me now address three possible objections to my (still tentative) conclusion that legitimate judicial decisions usually will be decisions of principle. In Section III, I address two additional objections that are based upon special cases.

1. Common Practice

The conclusion that legitimate judicial decisions are usually decisions of principle rests on the premise that litigants typically have no reason to make arguments of policy. But a lawyer might object that litigants in the real world make arguments of policy all the time; they frequently advocate a particular decision on the ground that it will establish the best rule for the future. Surely, the objection goes, the fact that litigants often make such arguments strongly undercuts my assertion that they typically have no reason to do so.

I agree that litigants often make policy arguments to courts. Here, though, is precisely where we have to be careful not to put the proverbial cart before the proverbial horse. There are, I think, two related possible reasons why a litigant might choose to make an argument of policy. First, the litigant might think that the judge is predisposed to be persuaded by policy arguments. Second, the litigant might think that his arguments of principle are so weak that arguments of policy are his best chance to win the case.

If the litigant makes a policy argument because he thinks the judge is predisposed to be persuaded by that type of argument, the litigant is allowing the judge's choices to dictate his own arguments rather than the other way around. This is rule by fiat, not by participation. If the engine of legitimacy is participation, then the judge's decision must be responsive to the arguments chosen by the litigants; but a litigant's tailoring his arguments to (his conception of) the judge's preferences turns responsiveness on its head. To point out that litigants in the real world often *do* seek to tailor their arguments to the perceived preferences of judges, then, is not to demonstrate that, if judges' preferences are taken out of the picture and the litigants are given free reign regarding what types of arguments to make, they *would* choose to make arguments of policy. It is not to establish the existence of a reason for a *free* and rational litigant to make arguments of policy.

But won't a litigant (say, the defendant) have reason to make arguments of policy if his arguments of principle aren't very strong? Probably so. Of course, for the same reason, the opposing litigant (the plaintiff) will

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have an incentive to press her arguments of principle (which will by hypothesis be quite strong) and to urge the judge *not* to accept the defendant's arguments of policy. The judge will then have to decide whether to choose the defendant's arguments of policy over the plaintiff's arguments of principle—a choice that will itself be dictated by the litigants' arguments if that choice is to be legitimate. And the litigants' arguments for or against the defendant's use of policy arguments will themselves ultimately *not* be arguments of policy; they will be arguments of principle. The defendant will argue that he has a *right*, or entitlement, that the court entertain his arguments of policy, and the plaintiff will argue that the defendant has no such right. The fact that the defendant has an incentive to make his arguments of policy (what we might call *first-order* arguments) does not mean he has an incentive to make arguments of policy *about* his arguments of policy (*second-order* arguments). Indeed, the litigants will generally lack incentive to make second-order arguments of policy for the same reason they lack incentive to make first-order arguments of policy: They are concerned not with establishing a rule for the future (in this instance, a rule about which kinds of arguments are acceptable) but rather with adjudicating entitlements arising from past or ongoing events.

So the litigants' second-order arguments about which kinds of first-order arguments are proper are themselves likely to be arguments of principle, not of policy, thus imposing upon the judge the duty to make a second-order decision of principle rather than policy. Of course, one of the litigants might believe that his second-order arguments of principle are weak and thus might have an incentive to make second-order arguments of policy, starting the cycle over again. It is theoretically possible, at least, that this cycle will go on forever, always presenting the judge with a choice between (first-order, second-order, third-order, etc.) arguments of principle and arguments of policy.

But here it is worth noticing another phenomenon about arguments of principle: They can never be invalidated by arguments of policy. Given a choice between an argument of principle and a competing argument of policy, a judge can never use the argument of policy as a ground for rejecting the argument of principle. This is because an argument of principle, by its very terms, denies the power of a competing argument of policy. A litigant (say, the plaintiff) making an argument of principle says, in effect: "I have a *right* to decision *x, regardless* of whether policy arguments support that decision." For a judge to reject such an argument on the bare ground that policy arguments do not support decision *x* would be to beg the question posed by the argument of principle—namely, whether the plaintiff has a *right* to decision *x*, without regard to what might be good policy. In order properly to reject an argument of principle, a judge must first make a *decision* of principle—a decision whether the plaintiff has the right she

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claims. Only if that right is denied *on principle* can the judge then legitimately assess "competing" arguments of policy.[30]

So even in the seemingly far-fetched scenario in which arguments *about* arguments go on forever—one litigant repeatedly pressing arguments of principle, the other repeatedly pressing arguments of policy—the judge, in finally choosing between arguments, must make a decision of principle. To do otherwise would be to beg the question posed by the argument of principle and award premature victory to the argument of policy. Such a decision would not be responsive to the litigant offering the argument of principle.

The upshot, then, is this: Common practice does not threaten the conclusion that legitimate judicial decisions usually will be decisions of principle. True, the perceived predisposition of the judge might create an incentive to make arguments of policy; but doing so would undermine the participatory character and thus the political legitimacy of adjudication. And yes, an incentive to make policy arguments might also arise from the perceived weakness of one of the litigants' arguments of principle. Ultimately, though, the judge must make a decision of principle to adjudicate between competing arguments of principle and of policy. Most likely, both litigants will make second-order arguments of principle *about* their first-order arguments—they are unlikely to have any incentive to do otherwise—and thus the judge will be required by the duty of responsiveness to make a decision of principle. And even if one of the litigants persists in making arguments of policy (because his arguments of principle are weak at every level), that same duty of responsiveness will obligate the judge to make a decision of principle in choosing between the opposing arguments.

2. Arguments from Hypotheticals

A second objection points to the common practice of arguing for a particular result through the use of hypothetical cases. Suppose, for instance, that a court is faced with a wholly unprecedented set of facts in Case *A*. One of the litigants might argue that the case should be decided in her favor because a contrary decision would imply similar decisions in hypothetical Cases *B* and *C*—decisions that, if rendered in those hypothetical cases, would be unsatisfactory in some way. Her opponent might counter that similar decisions in Cases *B* and *C* would in fact be entirely satisfactory, thus supporting the decision in Case *A*; or he might deny that a particular decision in Case *A* implies similar decisions in Cases *B* and *C*. Such arguments, because they are prospective, might seem to be arguments of policy

30. Thus arguments of policy in a sense do not "compete" at all with arguments of principle, since the former do not directly challenge the validity of the latter. Hence my use of quotation marks around "competing" here. Note also that arguments of policy are not symmetrically immune from challenge by arguments of principle: One might validly object to a policy argument on the ground that the decision it supports would violate an existing right.

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rather than principle, thus undercutting my assertion that litigants have no motive to make arguments of policy.

It is true that an argument from hypotheticals *might* be an argument of policy. A litigant might contend that decision *x* in Case *A* is desirable because it implies the same decision in Cases *B* and *C*, and that deciding *x* in Cases *B* and *C* would be good policy (i.e., would produce good results). For example, a plaintiff might argue that allowing her to state a product liability claim in Case *A* implies allowing similar claims in hypothetical Cases *B* and *C*, and that the fear of such similar claims will encourage manufacturers to make safer products. (It seems likely that most, if not all, policy arguments that might be made in an adjudicative context will take roughly this form.) As a policy argument, however, this kind of argument from hypotheticals falls victim to the difficulties described in the previous subsection.

In any case, an argument from hypotheticals, properly understood, need not be an argument of policy. An argument of policy is an argument about whether a particular decision would produce desirable results. As such, it relies partly upon descriptive claims about what is likely to happen in the physical world. But an argument from hypothetical cases does not, by itself, incorporate such a prediction; it does not make any claims about what is actually likely to occur as a result of a court's decision. It is only an argument about the *logical implications* of a court's decision. A lawyer arguing hypotheticals does not claim that a particular decision in Case *A* actually *will* produce a particular decision in Case *B* in a causal sense; she claims only that a particular decision in Case *A* logically *implies* a particular decision in Case *B*.

An argument from hypothetical cases thus is analogous to an argument from actual prior decisions: Both are arguments about logical implication, not about causation. Once we recognize this fact, we can see that hypothetical cases are really just special types of precedents. In arguing from precedent, a lawyer is saying to the court, in essence: "You *have* decided *x* in Case *A*; so now you *must* [not *will*, but *must*] likewise decide *x* in Case *B*." In arguing from hypotheticals, the lawyer is saying: "You *would* decide *x* in Case *C*; so now you *must* likewise decide *x* in Case *B*." Hypotheticals are just like precedents, except that they are precedents that have not actually been decided yet.

In this way, a lawyer arguing from hypotheticals can be seen as making an argument of principle, not an argument of policy. She can be understood as asserting an existing entitlement, not a prescription for desirable results. It is only that the existing entitlement she is asserting arises from hypothetical decisions rather than actual ones.

3. Arguments of Statutory "Policy"

For similar reasons, another common type of argument that might seem to be one of policy can in fact be understood as an argument of principle. In cases involving statutes or constitutional provisions, lawyers often make

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arguments based upon the "policy" (or the "purpose," or the "goal," etc.) of the statute or provision. For example, tobacco manufacturers recently argued in Lorillard Tobacco Co. v. Reilly[31] that state laws regulating tobacco advertising were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA).[32] The text of the FCLAA was ambiguous regarding preemption, and so the tobacco companies' argument turned in part on the FCLAA's supposed "purpose of 'protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.'"[33] That purpose, the tobacco companies contended, was frustrated by the existence of many different state regimes for regulating tobacco advertising, and thus the state regulations must be overturned as invalid.

In one sense, the tobacco companies' argument was one of "policy": It rested upon the assertion that upholding the state laws in question would undercut the "policy" goal of nationwide uniformity in tobacco advertising regulations. And if the FCLAA had not been in the picture—if the companies had been arguing against the state regulations simply on the ground that their promulgation was a bad idea—then their argument *would* have been one of *policy*, as I understand that term here (that is, as an argument about the best state of affairs for the future), and it would therefore have been subject to the critique in Subsection II.G.1, above.

But the FCLAA *was* in the picture, and thus the tobacco companies' argument was not one of policy pure and simple but rather one of statutory interpretation. The tobacco companies did not just think up the policy upon which their arguments relied; they took it, or purported to take it, from a federal statute. In so doing, they used statutory "policy" or purpose as a kind of *precedent* for the recognition of an *existing* right they claimed to have—a right stemming from the statute they were interpreting. In this way their argument resembled the arguments from hypotheticals analyzed in the previous subsection, with statutory "policy" or "purpose" taking the place of hypothetical cases. By arguing from the statutory "policy" favoring uniformity, the tobacco companies were claiming not that upholding the state regulations would produce *bad* results, all things considered, but rather that upholding the state regulations would produce results that are *inconsistent* with the federal statute. They were claiming not that the Court should independently recognize lack of uniformity as a bad thing, but rather that the Court should implement the recognition by *Congress* (via the statute) that lack of uniformity is a bad thing. They were claiming, that is, that the federal statute (including its "policy") gave them a *right*, or an entitlement, to a particular decision. This was an argument of principle, not of policy.

So, although one might imagine an argument of "pure" policy in a

31. No. 00-596 (U.S. June 28, 2001).
32. 15 U.S.C. §1331 *et seq.*
33. Brief for Petitioners Lorillard Tobacco Co. et al., No. 00-596 (U.S. Feb. 22, 2001), at 21.

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statutory interpretation case—such as an argument that nonuniformity in tobacco regulations is an evil that courts have an independent duty to avoid—this is not the kind of argument that litigants are likely to make. Separation-of-powers concerns deter litigants from asking courts to create statutory law out of whole cloth. Instead, litigants, like the tobacco companies in the *Lorillard* case, are likely to use statutory "purposes" or "policies" as types of precedents, and to argue that they have a right to a particular decision based on those statutory precedents—a kind of argument of principle.

H. A Provisional Summary

Viewing adjudication as a lawyer views it—as a process of deciding by litigant participation rather than by judicial fiat—provides a compelling reason for courts to decide cases on principle, in a way that is in some sense faithful to the past. Litigants, because they care primarily about assigning consequences to past events, will have reason to make arguments about entitlements arising from those past events but no reason to make arguments about rules to guide future conduct. In order to render a legitimately binding decision, a judge must respond to these arguments of the litigants. Thus a judge must render a decision based on existing entitlements rather than future consequences. A judicial decision must be principled, not pragmatic.

It might be objected that there are two important categories of exceptions to this general requirement of principled adjudication. First, there are some litigants—call them *altruistic litigants*—who litigate not primarily to vindicate their own existing rights but rather to create what they think will be a good prospective rule to govern others. Second, there are some litigants—*repeat players*—who litigate partly or mostly for the purpose of creating good prospective rules to govern themselves in future cases. Surely these types of litigants have reasons to make arguments of policy; and surely a judge, deciding a case involving one of these litigants, therefore may legitimately rely upon those arguments to render a decision of policy?

I explore, and mostly reject, this possibility in the next section.

III. REPRESENTATION, PATERNALISM, AND PRINCIPLE

A. Adjudication as Representation[34]

The participatory nature of adjudication can render its results politically legitimate with respect to the litigants who participate in the decision-making

34. As with Subsection II.A, much of the analysis here derives from the more extensive discussion in Peters, *Adjudication as Representation*, *supra* n.13, at 360–374, 378–399.

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process. But what of others who might be said to be bound by the decision but who have not directly participated in the process of making it?

There are two general categories of nonlitigants who might in some way be bound by a judicial decision. The first consists of *subsequent litigants* and conforming nonlitigants, who will be bound by the decision through *stare decisis*. Suppose the decision in Case *A* holds, for the first time in the relevant jurisdiction, that handgun manufacturers may be liable for injuries caused by guns that are sold without safety locks. Handgun manufacturers in Cases *B* and *C*, in which plaintiffs seek to impose the same type of liability on similar facts, will now be bound in a meaningful sense by the result of Case *A*. And other handgun manufacturers may change their practices—by including safety locks on all the guns they sell—to avoid being subjected to lawsuits in potential Cases *D* through *Z*; they too have been bound in a meaningful way by the decision in Case *A*.

The second category of "bound" parties includes everyone who is affected in some material way by a court decision but is not a litigant in that case, a litigant in a subsequent similar case, or a conforming nonlitigant in the sense described above. This is potentially a very broad category, depending upon the nature of the original decision and the threshold of "material effect" one wants to apply. As an example, the customers of the handgun manufacturer who loses Case *A* (and those of other similarly situated handgun manufacturers) might be considered bound by the decision because they will now have to pay higher prices to buy guns with safety locks, whether they want safety locks or not. To take another example, suppose the losing defendant in Case *A* is an individual forced to pay a large monetary judgment; his or her family might be considered bound by the decision because they, as a family, now will have less money to spend on things other than the judgment. Or if the losing defendant in Case *A* is a governmental entity trying to defend the constitutionality of a statute that is ultimately struck down, private parties who in some way benefited from the invalidated statute might be considered bound by the decision. And so on.[35]

Even in a perfectly functioning process of participatory adjudication, in

35. One might believe we should not be concerned about the effects of a court decision on these kinds of nonlitigants—the handgun consumers, the relatives of the tort defendant, and others along these lines. Perhaps we should not; but, as I hope will become clear, the analysis in Subsections III.B and C, below, applies whether or not we are concerned about effects on these parties. That is, the duties a litigant bears as a representative of other bound parties inhere even if we consider a decision's effects only on subsequent litigants and conforming nonlitigants—those who can be said to be "directly" bound by *stare decisis*.

In any case, I believe we owe some concern to the second class of affected nonlitigants I describe here, those who are "indirectly" affected in some way by a court decision. Consider the third example I give in the text: that of private parties who in some way had benefited from a statute that has been invalidated as unconstitutional. In Adkins v. Children's Hospital, for instance, the Supreme Court struck down, on substantive due process grounds, a federal statute establishing minimum wages for women in the District of Columbia. 261 U.S. 525 (1923). That decision's effect on working women in the District of Columbia was not merely one of *stare decisis*: Most such women would never have sought to enforce the minimum wage law in court, nor did the decision in any way force them to change their behavior to avoid an

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which the judge's decision is meaningfully responsive to the arguments of both (or all) the actual litigants, one might think there is a legitimacy problem that arises with respect to at least some of these categories of nonlitigants. Nonlitigants may be bound, perhaps in significant ways, by the result of a court decision; but they have not participated in the creation of that decision. Is the decision therefore illegitimate with respect to them?

1. Subsequent Litigants and Conforming Nonlitigants

In a system of representative democracy, average citizens are considered to be bound, quite legitimately, by the efforts of their representatives, despite the fact that those citizens have not directly participated in the creation of the laws that bind them. Representative government is considered legitimate because the relationship of electoral accountability between the representatives and their constituents is thought to ensure reliability of representation—to create the conditions under which the representatives are likely to act in their constituents' interests. Electoral accountability is thought to transform the indirect participation of citizens, through the

adverse court ruling. Instead, the primary effect on most working women consisted in the immediate fact that they would no longer be paid a minimum wage—that the benefit provided to them by the statute would no longer be provided. This is what I have elsewhere called a "horizontal" kind of effect, to distinguish it from the "vertical" binding effect of *stare decisis*. *See* Peters, *Minimalism*, *supra* n.15, at 1487–1488.

I believe that such horizontal effects are often the most salient effects of public-law decisions like that in *Adkins*, and indeed are the kinds of effects that trigger the deepest concerns about the legitimacy of judicial review. We would not worry so much about the political legitimacy of decisions like *Adkins* if the only parties affected were the litigants in that case and others who might realistically become litigants. What concerns us most about *Adkins* is that it overturns a generally applicable law rather than merely allocating costs or benefits among particular private parties. The point can be amplified by imagining that the minimum wage law in *Adkins* had been repealed by Congress rather than invalidated by the Court: If that had occurred, it would be strange to deny that working women in the District of Columbia were somehow "bound" by Congress's repeal of the law. The point can be underscored even further by noting the undeniably "binding" effect upon employers of the minimum wage law passed by Congress in the first place, and by asking whether those employers were any less "bound" when, in West Coast Hotel Co. v. Parrish, the Court overruled *Adkins* and upheld a law setting a minimum wage for women. 300 U.S. 379 (1937). If employers were meaningfully bound, or coerced, by the enactment of a minimum-wage law, they were no less bound by the Supreme Court's constitutional validation of that law in *West Coast Hotel*; and if female employees would have been meaningfully bound by the repeal of a minimum-wage law, they were no less bound by the Court's invalidation of that law in *Adkins*.

If nonlitigants who are benefited or burdened by a statute are in this sense bound by a court decision invalidating or upholding that statute, it is only a small step to see nonlitigants who are benefited or burdened by other aspects of the status quo as meaningfully bound by a court decision changing or preserving those aspects. Thus the handgun consumer can be seen to be bound, to some extent at least, by a court decision holding a manufacturer liable for omitting safety locks (and thus forcing manufacturers to include expensive safety locks on all guns sold in the future); and the dependent family member of the defendant forced to pay a large judgment can be seen to be bound by that decision. This is not to say that lines should not be drawn somewhere—that no type or amount of "binding" is too insignificant to merit concern, or that countervailing considerations can never force us to overlook this kind of horizontal coercion. It is only to say that these horizontal binding effects raise problems of political legitimacy that must, in my view, be considered.

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election of representatives, into something that can meaningfully be called *participatory* government.

A neglected but important element of electoral accountability is *interest representation*.[36] Electoral coercion—the fact that, in Madison's words, representatives "will be compelled to anticipate the moment when their power is to cease . . . unless a faithful discharge of their trust shall have established their title to a renewal of it"[37]—cannot be the only dynamic of reliable representation; otherwise it would not matter *whom* we elect, as long as she is rational (or irrational?) enough to want reelection. Given a choice between two equally rational and power-hungry candidates seeking to represent us, we are likely to choose the one who we think possesses more values and interests in common with our own. We do so because commonality of interests provides an additional safeguard of reliable representation. Electoral coercion may break down: Not every decision made by a representative is easily visible to her constituents, and in any case, constituents must evaluate a representative's decisions as a package, not individually, in deciding whether to reelect her. But a representative who shares important interests with her constituents is, for that reason, likely to pursue those interests even when the system of electoral coercion functions imperfectly. She will do so because her constituents' interests are her own interests. This dynamic is what Madison meant to invoke when, in *The Federalist* No. 57, he extolled the "communion of interests and sympathy of sentiments" arising from the fact that representatives "can make no law which will not have its full operation on themselves and their friends, as well as the great mass of society."[38]

The idea of interest representation proves especially attractive, I think, to those who reject a nakedly aggregative conception of politics in favor of a more deliberative one.[39] A representative who shares the interests of her constituents can truly deliberate about how best to serve those interests; she can take account of opposing arguments and consider the benefits of compromise in a way that a mere electoral slave cannot. The result might be a decision that her constituents *would* have made had they been privy to the facts and arguments she was privy to—a decision likely to be better than one made without the benefit of those facts and arguments. It is this value of interest representation to which Burke referred when he told his constituents that he owed them "not his industry only, but his judgment,"[40] and to which Roger Sherman adverted when, in the first Congress, he spoke against a constitutional "right to instruct" on the ground that it would frustrate true deliberation.[41]

36. Here I follow Peters, *Adjudication as Representation*, *supra* n.13, at 338–346.

37. THE FEDERALIST 57, *supra* n.22, at 344–345.

38. *Id.* at 345.

39. On the differences between the two conceptions, *see* Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 1, 1–5 (Jon Elster ed., 1998); and Cohen, *supra* n.22, at 412–413.

40. Burke, *supra* n.22, at 115.

41. *See* 1 ANNALS OF CONG. 735 (Joseph Gales ed., 1834) (quoting remarks of Sherman).

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Once the importance of interest representation to political legitimacy becomes clear, the binding of subsequent litigants through *stare decisis* takes on a different light. By definition, subsequent litigants will be bound by a prior decision only to the extent that they are similarly situated, in material respects, to the litigants in the prior case. The firearm-manufacturer defendant in Case *B* may not be bound by the result in Case *A* if it can demonstrate that its situation is materially different from that of the Case *A* defendant: Perhaps its handgun came with a clear warning of the absence of a trigger lock, or perhaps some supervening cause can be said to have attenuated the chain of causation in Case *B*. If the binding effect of the decision in Case *A* upon the defendant in Case *B* is clear and inarguable, it is because the defendant in Case *B* cannot materially distinguish itself from the defendant in Case *A*.

And to say that the defendants in Case *A* and Case *B* are materially indistinguishable is to say that they share identical *interests* with respect to the decisions of the respective cases. The Case *A* defendant's interest in avoiding liability is identical to the Case *B* defendant's interest in doing so. And the factual and legal arguments available to the defendant in Case *A* are identical to those available in Case *B*.[42]

The defendant in Case *A* thus can be seen as an *interest representative* of the defendant in Case *B*. The similarity of interests between the two parties lends legitimacy to the representative relationship between them—to the fact that the actions of the defendant in Case *A* will have a legally binding effect on the defendant in Case *B*. The legitimacy of this binding is of the same sort as the legitimacy that attaches, through interest representation, to lawmaking in the democratic political process.[43]

Of course, the element of electoral coercion that is present in the politi-

42. Or rather, they are identical to those that *would* have been available to the defendant in Case *B*, if not for the earlier decision of Case *A*.

43. As I have explained elsewhere, legitimacy problems might arise if the precedent-setting litigant, despite her similarity of interests with subsequently bound litigants, has litigated the precedential case incompetently. Perhaps the precedent-setting litigant has inadequate resources; perhaps she has retained an incompetent attorney; perhaps she has insufficient incentive to litigate the case vigorously (because, for example, very little money is at stake). If so, it might seem illegitimate to bind subsequent litigants or conforming nonlitigants to the decision she helped to make, despite material similarity in the facts of the respective cases. The apparent harshness of doing so, however, is mitigated by the opportunity subsequent litigants will have to distinguish their cases from the prior one:

> A subsequent litigant who demonstrates that a party to a potentially precedential case failed to present key evidence or to make the best available argument thereby distinguishes her situation from the situation of the prior litigant. She tells the court that because she has presented material evidence that the prior litigant did not present, or because she has made a valid argument that the prior litigant did not make, she is situated differently from the prior litigant and should not be bound by the rule of that case. We would expect the court to credit this line of reasoning and recognize that it is not bound to reach the same decision in the subsequent case. Indeed, the later litigant's mere act of presenting different evidence or making different or stronger arguments, whether or not the previous litigant's failure to do so is recognized, might be sufficient to convince the subsequent court to discount or disregard the precedent. With respect

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cal process is absent from adjudication. But note the sense in which subsequent litigants have the opportunity to "choose" their representatives—by making arguments regarding which precedents should be followed and how they should be followed. Rarely are two litigated cases so closely on point that the binding effect of the first upon the second is beyond debate. The defendant in Case *B* might deny the binding force of Case *A* and point instead to Case *C* as an appropriate precedent. The process of determining who a subsequent litigant's interest representatives will be is itself a matter of participatory decision-making.

It should be obvious that the same relationship of interest representation also exists with respect to conforming nonlitigants—parties who change their behavior in anticipation of litigation or to avoid litigation altogether. Aware of the result in Case *A*, a firearm manufacturer (with its lawyers) will attempt to determine how that result affects it—in other words, whether and how it is similarly situated to the losing defendant in Case *A*. The manufacturer will then conform its behavior as necessary to avoid suffering the same fate as the defendant in Case *A*. The binding effect on the subsequent manufacturer, if it can be called "binding," is driven by the same similarity of interests as that upon the subsequent litigant in Case *B*; it is only that the decision about similarity of interests has been made unilaterally, by the manufacturer itself, rather than by the litigants and a judge in a courtroom.

The bottom line here is the fact that *stare decisis* can be conceived of as an engine of interest representation and thus as an engine not only of coercion, but of coercion that is politically *legitimate*. This means that every litigant is potentially a representative of future litigants and conforming nonlitigants. With this representative role comes responsibility, as I explain in subsections III.B and III.C below.

2. Other Bound Nonlitigants

Court decisions often affect nonlitigants in ways that might be thought of as "binding," or coercive, but that have little or nothing to do with *stare decisis*. The firearm customer must pay more for guns with safety locks; the tort defendant's family must suffer the consequences of a large judgment; beneficiaries of a statute are harmed when the statute is declared unconstitutional. It is not clear that the binding effects on such people are safeguarded by the same process of interest representation that operates

to most defects in representation, then, the proper operation of stare decisis should eliminate the problem.

Peters, *Adjudication as Representation*, *supra* n.13, at 376–377. Consider also that litigants with insufficient incentive to litigate a case vigorously will for that reason be motivated to settle (or at least not to pursue an appeal), thus avoiding the establishment of a binding precedent. And consider, finally, whether the potential for representative incompetence might be insufficient by itself to raise grave questions about the political legitimacy of adjudication, given the presence of that potential in the context of democratic lawmaking as well. *See id.* at 377.

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through *stare decisis*. Such people are affected despite their lack of apparent similarity with the litigants participating in the precedential case.

As an initial matter, it seems likely that ancillary coercion like this usually has its worst effects on those who are in fact meaningfully represented in the decision-making process, or who have the opportunity to be. It is not clear that the firearm customer's interest in paying less for a handgun is meaningfully different from the manufacturer's interest in charging less for a handgun; as such, it might not be unreasonable to suppose that the manufacturer in such a case serves as a legitimate interest representative not only of other manufacturers, but also of its own and other manufacturers' customers. Nor, for similar reasons, does it seem unreasonable to suppose that the individual defendant facing a large money judgment legitimately represents the interests not only of future similar defendants, but also of those closest to him who will suffer the effects of the judgment along with him. And in public-law cases, one of the litigants is often the government itself, which is charged by the constitutional system with representing the interests of its citizens.[44]

Moreover, to the extent that nonlitigants have important interests that might be affected by a court decision but are not adequately represented by the existing litigants, those nonlitigants have opportunities to become litigants.[45] Procedural rules typically allow such parties to intervene directly in an action or, barring that, to participate as *amici curiae*.[46]

In some cases, however, it may appear that significant ancillary binding effects cannot realistically be avoided by allowing broader participation in this way, and that the legitimacy gap with respect to those binding effects cannot reasonably be filled by equating the litigants' interests with those of the bound parties. To take a recent example, consider the Supreme Court's decision in Bush v. Gore, the case in which the Court halted the recount of presidential votes in Florida.[47] That litigation featured the participation, as parties or *amici*, of litigants representing a fairly broad spectrum of potentially affected interests: the candidates themselves,[48] the Florida secretary of state,[49] the Florida attorney general,[50] the Florida legislature,[51] several

44. *See* my more lengthy discussions of these points in Peters, *Adjudication as Representation*, *supra* n.13, at 373–374, 411–420, and Peters, *Minimalism*, *supra* n.15, at 1486–1491.

45. Here I follow the discussions in Peters, *Adjudication as Representation*, *supra* n.13, at 417–419, and Peters, *Minimalism*, *supra* n.15, at 1488–1491.

46. *See, e.g.*, FED. R. CIV. P. 24 (allowing intervention); SUP. CT. RULE 37(1) (allowing amicus curiae participation).

47. Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000).

48. *See* Brief for Petitioners, No. 00-949 (U.S. Dec. 10, 2000); Brief for Respondent Albert Gore, Jr., No. 00-949 (U.S. Dec. 10, 2000).

49. *See* Brief on the Merits of Katherine Harris, Florida Secretary of State, Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, No. 00-949 (U.S. Dec. 10, 2000).

50. *See* Brief of Amicus Curiae Butterworth in Support of Respondent Gore et al., No. 00-949 (U.S. Dec. 10, 2000).

51. *See* Brief of the Florida House of Representatives and Florida Senate as Amici Curiae in Support of Neither Party and Seeking Reversal, No. 00-949 (U.S. Dec. 10, 2000).

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groups of Florida voters,[52] a potential Bush elector from Florida,[53] the executive branch of another state (Alabama),[54] the National Bar Association (an organization of African-American lawyers and judges),[55] and the Brennan Center for Justice at New York University School of Law.[56] It is far from clear, however, that the interests of millions of American citizens likely to be profoundly affected by the result of the election found adequate representation within this morass of competing litigants. If they did not, then the decision—its substance aside—can be seen as illegitimate with respect to those millions of citizens in a rather egregious way.

The Bush v. Gore case suggests that some judicial decisions, because they significantly affect a very broad spectrum of unrepresented interests, might be inherently illegitimate or underlegitimate, at least on the measure of legitimacy that I am using here (one tied to meaningful participation and accurate interest representation). It may be that this is the unavoidable price to be paid for the gains otherwise produced by the availability of adjudication to settle certain kinds of disputes. Or it may be that cases involving inevitably broad impacts on unrepresented nonlitigants present nonjusticiable "political questions" that courts should not entertain precisely for reasons of legitimacy—an intriguing possibility that is beyond my scope here. For present purposes, though, the important point is this: To the extent significant effects on unrepresented nonlitigants can be avoided, a judicial decision has that much greater claim to political legitimacy.

B. Interest Representation and the Problem of Altruistic Litigants

Now consider a case in which it might seem that a litigant has a reason to make arguments of policy that is entirely nondependent on the preferences of the judge or of the opposing litigant. A litigating party might seek not primarily to vindicate its own narrow interests, but rather to establish a prospective rule that the litigant believes will be beneficial for society as a whole. Suppose, for example, that a conservation group brings a lawsuit challenging a Department of the Interior regulation regarding endangered

52. *See* Brief of Respondents/Intervenors Carr, Harrell, Richardson, Shuler, Temple and Thomas in Support of the Relief Requested by Petitioners, No. 00-949 (U.S. Dec. 10, 2000); Brief of Robert Harris, Steven Medina and Other Florida Voters as Amici Curiae, No. 00-949 (U.S. Dec. 10, 2000); Brief Amici Curiae Supporting Petitioner of William H. Haynes, Connie Mendez, Bert Carrier, et al., No. 00-949 (U.S. Dec. 10, 2000).

53. *See* Brief for Respondent John E. Thrasher in Support of Petitioners, No. 00-949 (U.S. Dec. 10, 2000).

54. *See* Brief for the State of Alabama, by and Through Its Attorney General and Secretary of State, as Amicus Curiae, Supporting Reversal, No. 00-949 (U.S. Dec. 10, 2000).

55. *See* Brief Amicus Curiae of the National Bar Association in Support of Respondents, No. 00-949 (U.S. Dec. 10, 2000).

56. *See* Brief Amicus Curiae of the Brennan Center for Justice at New York University School of Law in Support of Respondents, No. 00-949 (U.S. Dec. 10, 2000).

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species.[57] The group's primary purpose is not to remedy some past or ongoing injury to its own (or its members') personal interests,[58] but rather to effect a change in policy going forward. Such a plaintiff might be called an *altruistic* (or perhaps an *ideological*) litigant. Surely an altruistic litigant will have reason to make arguments of policy, since its primary goal is the *establishment* of policy?

Perhaps so. The conservation group, for instance, might choose to argue against the government regulation on the ground that it would endanger the habitat of the spotted owl (an argument of policy) rather than on the ground that it violates a particular entitlement of the plaintiff or its members (an argument of principle). The group might make such an argument not for tactical reasons—because, for instance, it believes that the judge is predisposed to policy arguments—but rather because, unlike most litigants, it has a strong preexisting interest in the prospective rule that will result from the decision.

Suppose, then, that the altruistic conservation-group plaintiff makes an argument of policy (based on endangerment of the spotted owl) in its case to the judge. Suppose further that the judge rejects the argument and rules against the plaintiff, upholding the challenged government regulation. Now along comes another party with an interest in preserving endangered species—say, a bird-watcher who enjoys observing spotted owls. That party probably will be precluded, through *stare decisis*, from successfully challenging the government regulation that was upheld in the prior case. She will, that is, be bound by the (unsuccessful) efforts of the altruistic litigant in the prior case.[59]

As the analysis in Subsection III.A demonstrates, however, the coercion of the subsequent would-be litigant on these facts can be seen to be illegitimate because it does not arise from a relationship of true interest representation. The interest of the subsequently bound litigant—the bird-watcher—is to protect and preserve her own perceived entitlement to observe spotted owls; but the interest of the precedent-setting litigant—the conservation group—was to protect and preserve the perceived societal interest in avoiding harm to endangered species. The bird-watcher's interest is selfish, or at least self-centered; the conservation group's interest was altruistic, or at least idealistic.

Why should this matter, from the perspective of legitimacy? Is it that we can't *trust* the altruistic litigant really to serve the interests of future bound litigants like the bird-watcher? That is indeed a large part of the problem.

57. This hypothetical is loosely based on Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (which did not, however, involve the spotted owl).

58. Although the group must adequately allege the existence of some such injury in order to have standing to sue. *See id.*

59. Of course, courts sometimes can be persuaded to overrule or modify precedents, and so the potential binding effect on the subsequent litigant need not be absolute. To the extent the subsequent litigant can persuade the court to reconsider its precedent, the representative aspects of the decision-making process recede and its directly participatory aspects grow in importance.

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Like, I suspect, those of many altruistic litigants, the conservation group's interests are likely to differ somewhat even from those of future bound parties, like the bird-watcher, who generally find themselves on the same side of the issues. For one thing, the conservation group's interests may be different in *scope* from those of the bird-watcher: It may have an interest in preserving endangered species *in toto*, across the board, not just in preserving a single species in a single habitat. Thus the conservation group might be willing, in essence, to trade off one particular goal (preservation, say, of the particular habitat of the spotted owl) against another in order to achieve what it believes to be the best overall result. Subsequent litigants like the bird-watcher, though, may care primarily about specific goals (like preserving the habitat of the spotted owl), and thus their interests might be compromised by the altruistic litigant.

Another possibility is that the conservation group's interests are simply different in *kind* from the bird-watcher's: The conservation group may think that spotted owls are intrinsically valuable and thus worth protecting despite, or even without regard to, consequences to human beings, while the bird-watcher may think spotted owls are worth protecting primarily because of the pleasure they bring to him and other enthusiasts. Such a difference in motives might again produce a divergence in ideal outcomes and thus a difference in litigation tactics. The conservation group, for example, might demand preservation of the owl's habitat across the board, even in areas where bird-watchers are unlikely to go, while the bird-watcher might settle for conservation of specific habitats in easily accessible locations. The conservation group's extreme demands might backfire and produce an unfavorable decision that then will bind, to some extent at least, the less ambitious bird-watcher.

From the perspective of representative legitimacy, the difficulty with these scenarios is that the interests of the precedent-setting litigant do not coincide with those of subsequently bound litigants, and thus there is no safeguard against the precedent-setting litigant abusing its position of power to pursue its own interests at the expense of these others'.[60] Suppose, however,

60. Keep in mind that there will be a class of subsequent bound litigants or conforming nonlitigants whose interests *clearly* diverge from those of the altruistic litigant: those lined up on the side of the issues taken by the altruistic litigant's opponents. For instance, the interests of logging companies, who want to clear the old-growth forests that are the spotted owl's habitat, clearly diverge from the interests of the conservation group bringing our hypothetical lawsuit. This fact of divergence does not threaten the legitimacy of the result with respect to this category of nonlitigants, however, so long as *some* participant in the precedent-setting lawsuit can be said to represent their interests adequately. So the pertinent question is whether some other litigant or litigants in the conservation group's lawsuit—the government, perhaps, or maybe logging companies that have joined (or been joined) in the suit—can be seen as interest representatives of logging concerns that are not parties but might be affected by the decision. For a good illustration of this kind of inquiry as conducted in an actual case, *see* Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341 (10th Cir. 1978), in which the court applied Federal Rule of Civil Procedure 24(a) to allow intervention by mining companies in litigation challenging the issuance of uranium mill licenses.

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that the interests of the altruistic litigant and the subsequent litigant in question do not diverge in this way. Suppose, that is, that the conservation group is concerned precisely with preserving the owl's habitat in a way that will benefit bird-watchers—that its interests are neither different in scope nor different in kind from those of the subsequently bound birding enthusiast. Even in such a case—which in any event seems rather unlikely in the real world—there is still a legitimacy problem, I think, with binding the subsequent litigant to the efforts of the altruistic litigant.

The problem might be called one of *paternalism*, although too much reliance should not be placed on the precise term used to describe it. Interest representation preserves legitimacy because it is participation by proxy: Bound parties are bound by rules created through the efforts—the participation—of others (representatives) acting *just as the bound parties would act* in the same situation. In a perfectly functioning system of interest representation—a fantasy, to be sure, but a useful one—it is as if the bound party has directly participated in creating the rule that binds her, because she would have done nothing different from what the representative did in creating that rule (and thus would have created the identical rule).

But a subsequent litigant bound by the efforts of an altruistic litigant is bound not by someone who acted *as* her, but by someone who acted *for* her. She is bound by a rule formed by some other person who claimed to know what is best for *her*, the future litigant. This, I think, is paternalism; it is akin to rule by fiat rather than rule by participation, although the ruler is a beneficent one. It is a form of what Kant condemned as "paternal government" or "despotism":

> A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a *paternal government (imperium paternale)*, the subjects, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of state as to how they *ought* to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable *despotism*, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever.[61]

Paternalistic litigation by altruistic litigants is not as bad as the full-blown despotism Kant feared, but it is paternalism nonetheless. The altruistic litigant, in making arguments of policy intended to bind future litigants, is offering a "judgement . . . as to how [those future litigants] *ought* to be happy," and the judge, in responding to those arguments, is incorporating that judgment into her own. The result is illegitimate coercion of future litigants and conforming nonlitigants.

The free and rational altruistic litigant, then, may have reason to make

61. Kant, *Theory and Practice*, *supra* n.20, at 74 (emphasis in original).

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arguments of policy, but its responsibility as a representative of future litigants counsels against making such arguments.[62] And there is another, closely related sense in which arguments of policy violate the altruistic litigant's duty of representation. Arguments of policy typically—although, I think, not necessarily—go beyond the facts of the particular case at hand.[63] The altruistic conservation-group plaintiff will argue not simply for a suspension of or an exception to the challenged regulation to redress its own personal injury; it will argue for an across-the-board elimination of the regulation, and its argument will have implications for other, similar government regulations as well. The judge, in attempting to be meaningfully responsive to such an argument, is likely to issue a similarly broad ruling: either invalidating the regulation *in toto* or upholding it *in toto*, and doing so by means of a broad rule that is likely to impact other, similar regulations.

But such an *in toto* ruling is likely to bind many parties who are neither litigants in the case nor similarly situated to those litigants. A ruling that the regulation is facially valid, for instance, will bind others with interests that clearly diverge from those of the altruistic plaintiff: hunters, perhaps, who want to preserve habitats so there will be endangered animals to hunt; perhaps members of the tourist industry who profit when endangered species are readily viewable by the public; perhaps states'-rights groups seeking to rein in federal power. To the extent the bonds of interest representation between the altruistic litigant and these affected parties are attenuated, the binding of those parties can be seen as illegitimate.[64]

And, to the extent that the altruistic litigant expressly *considers* the interests of these ancillary parties in its arguments, we are confronted again with the paternalism problem. There is legitimacy in binding these parties to the results of true interest representation—results that, virtually by definition, they would have produced in exactly the same way. But this legitimacy

62. To say that the altruistic litigant has responsibilities (or duties) to future litigants (and conforming nonlitigants) is not to say, of course, that altruistic behavior in other contexts is constrained by similar duties. The altruistic litigant's representative duties arise because the activity in which it engages—participation in a potentially precedent-setting lawsuit—might have the effect of enlisting the machinery of government to coerce others who are not able to participate directly in the decision-making process (and indeed seeks to have that effect). Similar duties devolve upon elected representatives in the context of democratic politics (which representatives, however, need not be motivated by altruism). But I see no reason to suppose that representative duties arise in other altruistic contexts: in the case, say, of a philanthropist who decides to give money to charity. Nothing about such behavior coerces people in a way that triggers concerns for political legitimacy.

63. In Peters, *Minimalism*, *supra* n.15, at 1499–1513 (and especially at 1500–1504), I describe in more detail (albeit in slightly different terms) the difference in this regard between arguments of principle and arguments of policy.

64. Many nonlitigants with divergent interests would also likely be affected by the opposite ruling: that the regulation is invalid and must not be enforced. But this problem might be mitigated by the fact that the likely defendant in such a lawsuit is the government, whose actions legitimately bind its citizens by virtue of the electoral process. *See* Peters, *Adjudication as Representation*, *supra* n.13, at 414–415; Peters, *Minimalism*, *supra* n.15, at 1488–1491.

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dissolves when the binding result is produced by someone else deciding what is best *for* them.

So the arguments a litigant may make to a judge are not only determined by what it is rational for them to argue as interested parties; they are also constrained by what it is legitimate for them to argue as representatives of other interested parties. This suggests that the altruistic litigant, in order to be truly (and legitimately) altruistic, must act just as a nonaltruistic litigant would act. That is, the altruistic litigant must argue its case on the basis of its own existing entitlements. It must make only arguments of principle. And to meet her obligation of meaningful responsiveness, therefore, the judge must decide based on principle alone. Such a decision will be legitimately binding on future similar litigants and conforming nonlitigants. It will also have an impact that is more likely, at least, to remain narrowly confined to those who are similarly situated to the participating litigants.[65]

C. The Special Case of Repeat Players

The strongest case for the existence of a reason to make arguments of policy is the special case of *repeat players*: litigants who believe they themselves are likely to be materially bound in the future, either as litigants or as conforming nonlitigants, by the rule they help create. Repeat players constitute a special case but by no means a rare one; examples are fairly easy to come by. Manufacturers defending product liability suits, franchisors litigating disputes over franchise agreements, employers litigating discrimination or wrongful discharge cases: All of these are common examples of repeat players.

Like altruistic litigants, repeat players care about the prospective rule a court decision will create. Thus they have a preexisting motive to direct their arguments toward that prospective rule—to make arguments of policy. And the problem of paternalism that arises in cases involving altruistic litigants does not arise in cases involving repeat players, at least not in its starkest form. The future interests the repeat player is trying to protect are its own, not someone else's. As such, the case for arguments (and thus decisions) of policy is stronger with respect to litigation involving repeat players than with respect to litigation involving altruistic litigants.

The difficulties with respect to binding nonsimilar parties by means of a broad rule remain, however, in cases involving repeat players. By making arguments of policy, a repeat player pushes the court toward a broad

65. As I have argued elsewhere, the "personal injury-in-fact" requirement of Article III standing doctrine might be explained as a means to bar litigation by parties with purely altruistic interests, thus preserving interest representation. *See* Peters, *Adjudication as Representation*, *supra* n.13, at 420–430. Another, perhaps better means to protect interest representation might be a general refusal by courts to entertain facial challenges to the validity of statutes and other rules, at least unless the participation in the litigation of all the materially affected interests is assured.

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decision that will bind parties without similar interests (and thus will bind them illegitimately). And the fact that repeat players often litigate disputes of private law—unlike altruistic litigants, who typically litigate issues of public law—means that the government is rarely a party to repeat-player litigation.[66] In public-law cases, the presence of the government as a litigant can mitigate the problem of binding nonsimilar parties, because the government has a duty to represent, in some sense at least, the diverse interests of those parties who favor upholding the challenged statute, regulation, etc. But in private-law cases involving repeat players, the potentially broad binding impact of the decision will not be mitigated in this way, because the litigants on both sides will be private parties whose interests do not perfectly coincide with those of many other bound parties. Whether the repeat player wins or loses, nonsimilar parties who would have benefited from a different result are likely to be bound, and illegitimately so.

There are reasons of representation, then, for repeat players to avoid making arguments of policy. Those reasons may not be as strong as the reasons that apply to altruistic litigants. It is important to note, though, that repeat players may have less reason to make policy arguments than altruistic litigants typically do. I argued in the previous section that policy arguments tend to push courts in the direction of broad rather than narrow decisions—decisions that purposely set out a general rule and thus are more difficult to distinguish in future cases. For this reason, a repeat player knows that an argument of policy may pay large dividends if it is successful, because it is likely to produce a beneficial precedent that will be difficult for future opponents to distinguish. By the same token, however, a repeat player knows that an argument of policy may inflict heavy damage if it is unsuccessful, because it is likely to produce a detrimental precedent that will be difficult for *itself* to distinguish in the future. Making arguments of policy is a high-risk, high-reward strategy. Thus risk-averse repeat players, or repeat players who are not very confident in the strength of their policy arguments, might choose to avoid policy arguments altogether and concentrate on arguments of principle, thereby increasing the chance that an unfavorable decision will be narrow and easily distinguishable. In contrast, altruistic litigants, who have less personal stake in the outcomes of their cases, may for that reason have less reason not to gamble on policy arguments.

Finally (and importantly), repeat players will not always be pitted against other repeat players. Non–repeat players have no preexisting reason to make arguments of policy, and so they will not always, or even often, agree with their repeat-player opponents that the case should be decided on grounds of policy rather than principle. A judge, then, must often choose between the arguments of policy offered by a repeat player and the arguments of principle offered by its opponent. As I explained above,[67] such a

66. Except, of course, when the government itself is a repeat player.
67. *See supra* Subsection II.G.1.

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decision must ultimately rest on grounds of principle, not policy, because to choose an argument of policy without considering principle risks violating a right belonging to the opposing litigant. A decision to accept arguments of policy, that is, must ultimately be a decision that the opposing litigant does *not* have an entitlement to a decision based solely on principle; and such a decision is itself a decision of principle.

If cases involving repeat players form an exception to the general rule requiring principled adjudication, then, that exception is a fairly narrow one. It applies only when all of the following conditions are met: (1) both (or all) the litigants are repeat players;[68] (2) policy arguments can be accepted by the court without producing a broad decision that will inevitably bind many dissimilar parties; and (3) at least one of the litigants is willing to risk the potential of a broad unfavorable decision. In all other cases, repeat players will, or should, ultimately make only arguments of principle.

IV. TOWARD A PROCEDURAL THEORY OF PRINCIPLED ADJUDICATION

Dworkin's interpretive theory of principled adjudication turns on the troubled case for the existence of "integrity," a moral norm requiring consistency across government decisions. But rejecting integrity does not require rejecting judicial principle. A strong case for principle emerges if court decision-making is understood to involve not merely the judge as an autonomous actor but also—and perhaps primarily—the litigants, who participate in the decision both on their own behalf and as representatives of other interested parties.

Litigant participation can confer political legitimacy on binding court decisions, but only if those decisions are meaningfully responsive to that participation. The obligation of meaningful responsiveness requires the judge to rest her decision on only those arguments the litigants make; and free and rational litigants typically have no reason to make arguments of policy rather than principle. Those litigants who may have such a reason—altruistic litigants and repeat players—are usually constrained to avoid policy arguments by their obligations as representatives of others. The general duty of principled judicial decision-making, therefore, is an implication of the participatory and representative character of legitimate adjudication.

We see here the beginnings, at least, of what might be called a *procedural* interpretive theory of principled adjudication. Principled adjudication is the general rule in our tradition, and should be, but not because of a universal norm of consistency that arises externally to the adjudicative process itself and is imposed upon that process. It is the general rule

68. Or a non-repeat-player litigant agrees that arguments of policy are appropriate.

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because the conditions under which adjudication operates—conditions that themselves produce political legitimacy—compel it to be so. The requirement of principle is an aspect of the adjudicative procedure that we choose as believers in participatory democracy. And it is the values of participatory democracy themselves, not some independent obligation of principle, that animate our adjudicative procedure.

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