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THE CORNERSTONE OF OUR LAW: EQUALITY, CONSISTENCY AND JUDICIAL REVIEW

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ABSTRACT. *Equality before the law is a foundational principle of the common law and is of particular importance for administrative law, given the connection between judicial review and the rule of law. Analysis as to the precise requirements of this principle can help us better to understand the role that obligations to act consistently play within judicial review. This article will examine whether consistency ought to be classed as a separate ground of review and argue that this is unnecessary. Examination of the role that legal equality plays within common law reason generally will shed light on the role that it plays within administrative law in particular. Consistency is best conceived as a background principle, informed by the value of legal equality, housed within reasonableness review and not as a separate ground of review that could elide the distinction between review and appeal.*

KEYWORDS: *equality, consistency, judicial review, legal reasoning, common law.*

I. INTRODUCTION

Equal treatment, the principle that like cases should be treated alike, occupies a paradoxically ambivalent place within moral and legal discussion of equality. On one hand, it is regularly claimed that justice requires similarly situated persons be afforded similar treatment and that differences in treatment should be adequately justified.[1] On the other, equalisation of treatment for its own sake gives rise to the now well-established "levelling-down" objection where a requirement of equalisation can be satisfied by replicating wrongful forms of treatment; either by treating people equally badly or by removing benefits from the advantaged.[2] Common

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[1] See Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15; *Politics*, III.9. 1280a8–15, III.12. 1282b18–23.

[2] N. Holtug, "Egalitarianism and the Levelling Down Objection" (1998) 58 Analysis 166; D. Brake, "When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law" (2004) 46 William and Mary Law Review 513; S. Fredman, "Breaking the Mold: Equality as a Proactive Duty" (2012) 60 A.J.C.L. 265; S. Fredman, "Substantive Equality Revisited" (2016) 14 International Journal of Constitutional Law 712.

law courts tasked with determining the contours of legality and enforcing limits on the actions of the executive are therefore faced with a sincere challenge when seeking to balance these concerns within administrative law doctrine. The provision of justice to individual cases in common law adjudication necessarily entails some recourse to comparative moral standards of fairness and consistency, given the principle of equality before the law. Yet it is regularly argued that equal treatment is not in itself morally valuable, calling into question both what connects consistency to justice and the role that it ought to play within judicial review.[3] The purpose of this article is to explore the different ways that consistency could manifest within the doctrines of judicial review. In particular, it will focus on the emerging concern that consistency ought to constitute a distinct head of review.[4]

Calls to establish consistency as a separate ground of review, I will argue, result from a confusion as to the true requirements and existing doctrinal manifestation of the principle of legal equality. Equality before the law, a principle central to the rule of law, is not exhausted by a requirement of equal treatment. In fact, it may permit or even require unequal treatment in many circumstances. Equal treatment or consistency in treatment is ultimately derivative of a broader constitutional principle of treatment *as an equal*.[5] The rule of law, as it manifests within administrative law principles of judicial review, instantiates a political and moral obligation on organs of state adequately to respect the equal dignity of legal subjects, protecting them from the arbitrary misuse of public power.[6] Properly understood, the existing grounds of review provide all the doctrinal and theoretical resources needed to ensure that legal subjects are treated appropriately by the state, at least as regards concerns of consistency. What matters for equality before the law is not identicality of treatment in all cases, but a respect for the moral equality of persons such that we are all

[3] P. Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537; C.J. Peters, "Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis" (1996) 105 Yale L.J. 2031; J. Raz, *The Morality of Freedom* (Oxford 1988), ch. 9.

[4] M. Elliott, "A 'Principle' of Consistency? The Doctrinal Configuration of the Law of Judicial Review" [2018] C.L.J. 444; M. Elliott, "Consistency as a Free-standing Principle of Administrative Law?", available at https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/ (last accessed 18 March 2022); K. Steyn, "Consistency: A Principle of Public Law?" (1997) 2 Judicial Review 22; A. Schymyck, "Vulnerable Detainees in Prison Illustrate the Need for Consistency as a Ground of Review", available at https://ukconstitutionallaw.org/2020/02/24/alex-schymyck-vulnerable-detainees-in-prison-illustrate-the-need-for-consistency-as-a-ground-of-review/ (last accessed 18 March 2022). Cf. S. Wilson Stark, "Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?" in J. Varuhas and S. Wilson Stark (eds.), *The Frontiers of Public Law* (Oxford and New York 2020).

[5] R. Dworkin, *Taking Rights Seriously* (Cambridge, MA 1977), 227–28.

[6] See J. Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge 2016); M. Foran, "Equality Before the Law: A Substantive Constitutional Principle" [2020] P.L. 287; T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001), chs. 5, 8.

subject to a coherent body of legal principles, themselves consistently and impartially applied. Should these principles be attuned to the differences which arise in particular cases, they will accommodate the need to allow public bodies to evolve their policies through time and depart from previously mistaken forms of conduct when needed.

Analysis of the value of equality has sometimes proceeded from the position that equality means consistent treatment and that it is to be valued only insofar as consistent treatment is valued. This is the understanding that motivates many prominent critiques of the principle of equality before the law, particularly within analytical jurisprudence: equal treatment is not intrinsically morally valuable and so it should not have pride of place ahead of other competing principles.[7] According to theorists such as Raz, Westen and Peters, this idea of consistency as equal treatment is empty, collapsing into simple rule application which requires only that "people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard".[8] Similarly H.L.A. Hart, when discussing justice in the administration of law notes that "this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules".[9] On this view, consistency or equal treatment only arises where there is a pre-existing rule, say that applications for planning permission will be rejected if the building in question is listed. Determining whether two cases are sufficiently alike, according to this line of argument, is done by determining whether both cases deal with listed buildings. If they are both listed or if they are both unlisted, then they are sufficiently alike and should be treated equally under the rule. If one is listed and the other is not, they are unalike, and the question of consistency does not apply. As such, equality as a value or consistency as a principle are adding nothing: the only thing provided in this context is a commitment to applying the rules.

Within administrative law, this understanding of consistency would collapse any concerns relating to equal treatment into a related but separate concern with the consistent application of policy in the exercise of discretion.[10] Where discretion is concerned, the presence of a general policy will

[7] On some accounts, the principle is nothing more than an empty vessel to be filled by external rules or principles, rendering equal treatment of no value whatsoever. See Westen, "Empty Idea of Equality"; Raz, *Morality of Freedom*, ch. 9; cf. F.K. Thomsen, "Concept, Principle, and Norm: Equality Before the Law Reconsidered" [2018] Legal Theory 1. Thomsen falls into this camp insofar as he agrees that equality before the law manifests as a rule demanding equal treatment, but argues that this requirement is nevertheless instrumentally valuable and so ought to carry some normative weight. See also Foran, "Equality Before the Law".

[8] Westen, "Empty Idea of Equality", 547.

[9] H.L.A. Hart, "Positivism and the Separation of Law and Morality" (1958) 71 Harv. L. Rev. 593, 623–24.

[10] See Wilson Stark, "Non-fettering"; H. Wilberg, "A Duty of Consistency? The Missing Distinction Between Its Two Forms", available at https://ukconstitutionallaw.org/2020/02/27/hanna-wilberg-a-duty-of-consistency-the-missing-distinction-between-its-two-forms/#:~:text=Duty%20of%20Consistency%3F-,The%20Missing

give rise to the kinds of consistency concerns mentioned above, ensuring that policies are applied to those to whom they purport to apply. In a sense, one would be correct to conclude that equality as a value adds little here; our commitment is to rule application. But it must not be forgotten that the very reason we care about rule application being consistent in the first place is because the rule of law presupposes the moral equality of legal subjects, such that applying the rules to some but not all would be inappropriate or wrongful. An attitude which allows political or social elites to break or ignore rules and regulations flagrantly ignores the comparative demands of the rule of law.

There is another consistency concern which has been subject to its own critique within analytical philosophy. This relates to whether the exercise of discretion ought to be limited where there is no general policy but where there is a previous pattern of conduct, or even a single instance. Should the decision maker be required to act similarly in subsequent cases? Many have argued that to value consistency in this context is to require the replication of mistaken or wrongful conduct where previous decisions are mistaken.[11] If this is what advocates of a principle of consistency or equal treatment have in mind, then they are right to be critiqued according to the levelling-down objection that consistent treatment, in the face of the harm and wrongdoing that might be entailed, is undesirable and misguided. Thankfully, nobody seriously contends that the mere fact of a previous pattern of conduct prohibits any departure whatsoever. The important question is this: what principles should determine when departure is justified? A principle of consistency is necessary to explain why we might have a presumption in favour of equal treatment, even if it cannot be used as the metric by which we evaluate the merits of departure. With that understanding in mind, a body of doctrine could develop to help determine precisely when a requirement of equal treatment can be outweighed, cementing a need for consistency to form a distinct head of review where such questions can be addressed.

While the critiques of consistency above may have purchase in some jurisprudential circles, they do not reflect the doctrinal development of the principle of equality before the law, nor the related requirement of consistency which has never demanded equal treatment as a strict rule. We should not reduce the idea of legal equality to rigid requirements of equal treatment, leaving the determination of when to breach the principle of legal equality to other competing principles. A more expansive understanding of the principle which demands respect for the consistent application of constitutional principle to legal subjects who are respected as moral

%20Distinction%20Between%20Its%20Two%20Forms,distinct%20principle%20of%20administrative%20law (last accessed 18 March 2022).

[11] See Holtug, "Egalitarianism"; Brake, "When Equality Leaves Everyone Worse Off".

equals should be preferred. Consistency has always required consistency in legal principles, with departures from previous patterns of conduct needing to be justified by reference to those very principles. So, it is not accurate to describe equality or consistency as empty principles which can be legitimately breached, even if it is appropriate to focus on questions relating to which circumstances justify departures from patterns of equal treatment. Yet it is precisely this defence of a principle of consistency that explains why consistency itself cannot ground a head of review. In response to the misguided belief that equality before the law demands equal treatment as a strict rule or that it merely requires rule application, we must answer that it instead demands equal respect for legal subjects *such that* it grounds a general presumption in favour of consistent treatment. This presumption should not be taken for granted: it is a central feature of the rule of law and a prime refutation to any claim that legal equality is of minimal value. But with that in mind, consistency cannot then also provide the criteria for assessing justification for inconsistent treatment when it occurs. The existing principles of administrative law already contain such criteria. Where the issue is with rule application, the principles of legality and procedural fairness are sufficient. Where the issue relates to the substantive use of discretion such that a decision maker must decide whether to stick to or depart from a previous pattern of conduct, even where the case before them is similar to previous ones, it is only appropriate for a court to interfere where a failure to act consistently would fall foul of the doctrine of reasonableness. If judicial review is to proceed in a constitutionally legitimate manner, doctrine should not be artificially separated from the general principles of constitutional law and should always be informed by the theory and practice of the rule of law, of which equality before the law is a foundational principle.[12] Administrative law doctrine is legitimate insofar as it is a genuine determination of these general constitutional principles.

II. Equality and Common Law Reason

Constitutional governance under the rule of law rests on a commitment to an ideal of impartiality, manifesting due regard for the moral equality of persons.[13] A "fundamental precept", "constitutive to democracy", the principle that people should be regarded as equals before the law, free from

[12] See Foran, "Equality Before the Law"; cf. J. Jowell, "Is Equality a Constitutional Principle?" (1994) 47 Current Legal Problems 1; C. O'Cinneide, "Equality: A Core Common Law Principle, or 'Mere' Rationality?" in M. Elliott and K. Hughes (eds.), *Common Law Constitutional Rights* (Oxford and New York 2020), 167–92; P. Gowder, "The Rule of Law and Equality" (2013) 32 Law and Philosophy 565.

[13] Dworkin describes this as necessary to justify coercive power on the part of the state. See R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA 2000); R. Dworkin, *Is Democracy Possible Here?* (Princeton 2006). See also W. Sadurski, *Equality and Legitimacy* (Oxford 2008).

arbitrary and unjustified discrimination, is central to the modern UK constitution.[14] Indeed, this principle of equality has been described as "the cornerstone of our law", instantiating within the grounds of judicial review a key principle of non-discrimination.[15]

While the common law commitment to legal equality can be traced back to the time of Sir Edward Coke, our modern democratic state manifests this commitment far more explicitly.[16] To Dicey, legal equality was a central aspect of the rule of law which demanded "not only that with us no man is above the law, but (what is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary laws of the realm and amenable to the jurisdiction of the ordinary tribunals".[17] The equal subjugation of all, including legal officials, to the rule of law is a key feature of our constitutional settlement, ensuring that members of the executive are bound to obey the law as much as any other private citizen.[18] This manifests within the common law a rejection of the arbitrariness that obtains when political or legal officials are free to disregard their legal obligations. Within judicial review, this translates to what we might call the bare principle of legality; where legal officials are required to demonstrate the lawful basis for their actions and to respect the legal limits on their powers.[19]

At an even more fundamental level, however, the value of equality manifests within common law adjudication through the doctrine of stare decisis and the rejection of the arbitrary abuse of power. Marshall argues that a key aspect of Dicey's conception of legal equality is that everyone be equally subject to a body of law that is "impartially applied without fear, favour, or anything similar, by an independent judiciary".[20] There are several upshots from such a commitment. First is the idea that legal subjects are governed by a body of law that manifests in general rules and principles as opposed to particularised commands that single out individuals for undue adverse or beneficial treatment, unconnected to a public scheme of justice.[21] This could also be described as a requirement that the law

[14] See Jowell, "Is Equality a Constitutional Principle?", 7; Foran, "Equality Before the Law"; O'Cinneide, "Equality".

[15] *Gurung v Ministry of Defence* [2002] EWHC (Admin) 2463, at [55]. See also *Matadeen v Pointu* [1999] 1 A.C. 98 and the comments of Lady Hale in *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 A.C. 68, at [237]–[238].

[16] See e.g. *Rooke v Withers* (1597) 5 Co. Rep 99, 100a where Coke noted that "the said statutes require equality", manifesting "cases of equality grounded on reason". The connection between equality and reasonableness will be of central importance to the article further on.

[17] A.V. Dicey, *The Law of the Constitution*, vol. 1, J.W.F. Allison (ed.), *The Oxford Edition of Dicey* (Oxford 2013), 100.

[18] See *M v Home Office* [1994] 1 A.C. 377, 395: "the proposition that the executive obey the law as a matter of grace and not as a matter of necessity is a proposition which would reverse the result of the Civil War."

[19] See *Entick v Carrington* [1765] 95 E.R. 807; J. Varuhas, "The Principle of Legality" [2020] C.L.J. 578; T.R.S. Allan, "Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism" (2011) 9 International Journal of Constitutional Law 155.

[20] G. Marshall, *Constitutional Theory* (Oxford 1971), 138.

[21] See L. Fuller, *The Morality of Law*, revised ed. (New Haven 1969), 46–47.

operates with generality in aim: that it be impersonal, applied only to general classes and contain no proper names, again contrasted with blatant arbitrariness or caprice.[22] Thus, bills of attainder are in clear breach of the principle of equality before the law.[23] In essence, such a bill arises where legal officials wish to mobilise their control over state power, including the power to inflict violence, to punish an individual in circumstances where that individual has done nothing to breach the general law of the land. To issue a bill of attainder is, by definition, to accept that the individual subject to it is not in breach of any other rule that their fellow subjects are governed by or that this specific breach ought to be subject to much harsher punishment than any other would receive; it is to indicate that there are additional standards applied to you and you alone. It is, in essence, the mobilisation of state violence against an individual in complete violation of the rule of law. Importantly for our discussion, however, it is also an unjustified departure from an established set of rules and principles that manifests inconsistency between how one person is treated in comparison to how others are treated.

The second upshot is a related commitment to ensuring that common law adjudication be sufficiently interconnected such that the individual determinations of individual courts are informative of and informed by a general body of legal principles. It is here where the doctrine of stare decisis becomes operative to ensure that legal subjects in sufficiently similar situations are treated similarly and that departures from consistent treatment are adequately justified. The principle of equality before the law will gain greater weight the longer an established doctrine has been in existence, the strength of the requirement to act consistently being directly proportional to the number of persons who have been treated similarly in the past.[24] This is clearly but one aspect of justice and so need not be ultimately determinative, even if it has greater weight in certain circumstances. Thus, this requirement of consistency does not mean that previous decisions must be adhered to in a slavish or uncompromising manner even when there is a long-standing practice. Nevertheless, this does raise an issue as to why previous decisions ought to matter at all. Thinking about why we value consistency within common law doctrine generally can help us to understand how it might manifest within administrative law doctrine specifically. Waldron notes:

> stare decisis is not an absolute, and even in a system of precedent, earlier decisions can be revisited. But stare decisis is supposed to make a difference, and the problem for the rule of law is that the difference it makes is to give a measure of entrenched weight to an earlier decision in a way that might make it

[22] See Marshall, *Constitutional Theory*, 136–37; Allan, *Constitutional Justice*, 122–23.
[23] T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford 2013), 93–94, 140–41.
[24] Thomsen, "Concept, Principle, and Norm".

> more difficult for subsequent generations of judges to apply the law as they understand it.[25]

To give such entrenched weight to an earlier decision needs to be justified. Waldron offers some rule-of-law-based reasons to do so. Several justifications can be offered to justify the doctrine of stare decisis, with different justifications often attaching to slightly different conceptions of the doctrine. A frequently critiqued justification is the intrinsic value of consistent treatment itself.[26] This has been addressed above and so need not be replicated here. Most justifications, however, are underpinned by a broader commitment to legal equality understood to inform a general commitment to consistent treatment without collapsing into an uncompromising rule: it makes very little sense to attach weight to previous decisions if legal subjects are not entitled to be treated as equals before the law. When a party to a case raises previous case law and argues that the case is similar enough for the same rules and principles to apply to it, the party is tacitly relying on the fact that it is a general axiom of justice that like cases should be treated alike and that they are entitled to be subject to the same laws of justice as others are. Not all will accept the contention that the common law strives towards justice and that the general principles of justice are essential properly to understand the nature of common law reasoning.[27] A sustained defence of classic common law theory is beyond the scope of this paper.[28] Indeed, whether one views the common law presumption in favour of stare decisis as derived from a general commitment to justice is in some ways irrelevant for the purposes of this paper. What matters is simply that we recognise that such a presumption exists within common law reasoning, regardless of whether it is grounded in concerns for justice, even if that is a readily available explanation.

[25] J. Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012) 111 Mich. L. Rev. 1, 7.

[26] See ibid.; Thomsen, "Concept, Principle, and Norm"; cf. Peters, "Foolish Consistency".

[27] In particular, those who reject a necessary connection between law and morality may take issue with this account of common law reasoning. See J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford 1979); cf. J. Gardner, *Law as a Leap of Faith* (Oxford 2012), 19–53; M. Kramer, *In Defence of Legal Positivism: Law without Trimmings* (Oxford 1999). It should be noted, however, that only exclusive legal positivists such as Raz would argue that justice or morality cannot form an existence condition for legal doctrine. Inclusive legal positivists are readily willing to accept that justice and morality can form essential aspects of doctrinal law within a given legal order, so long as that is what legal officials accept as a matter of social practice. Thus, the contention that there is a connection between justice or morality and common law principles of fairness and consistency is only controversial to a subset of positivists. Anyone who studies administrative law doctrine, particularly the rules of procedural fairness (often described as the principles of natural justice) will see ample examples of judges making direct reference to justice and fairness. These principles as are relevant for common law reasoning as they are for administrative decision-making. Indeed, a key claim of this article is that analysis of the principles relevant to one will help shed light on those relating to the other.

[28] But see G. Postema, *Bentham and the Common Law Tradition* (Oxford 1986); T.R.S. Allan, "The Moral Unity of Public Law" (2017) 67 U.T.L.J. 1; J. Laws, *The Common Law Constitution* (Cambridge 2014); T. Fairclough, "The Reach of Common Law Rights" in Elliott and Hughes (eds.), *Common Law Constitutional Rights*.

There will be times when the entrenched weight afforded to previous decisions will not be sufficient to prevent the development of legal principle. One clear example occurs when the cases in question are not sufficiently similar to warrant similar treatment. If the cases are not alike in the appropriate legal sense, because additional or different principles are applicable, then there is no need to justify departure from the previous pattern of conduct precisely because there has been no departure; the previous case law is simply not applicable. Indeed, this is one way that the common law developed historically:

> The most powerful engine of change in the common law was, strangely enough, the great "principle" that like cases should be treated alike. Courts acting on that principle could change the law, indeed make law, without arrogating to themselves undue power because they always seemed to apply past precedents or principles in new ways to situations *made* new by the world around them.[29]

One should be wary of describing this as a process of judicial creation of law, however. As Postema stresses, within common law theory, it is *the case*, not the judge that extends the law.[30] The role of the judge here is to *express* the law, acting as mouthpiece of a law which transcends the judiciary – *Judex est lex loquens*.[31] On this view, departure from previous formulations or expressions of law does not breach the principle that like cases should be treated alike precisely because the cases are not alike.

At other times departure is justified by reference to the overarching commitment of the common law to the provision of justice to individual cases: the development of principle and the consequent abandonment of erroneous doctrine is essential if the common law is to work itself pure.[32] Background principles of consistency and adaptability each pull towards justice and so should not be seen as being in strict conflict with each other; they operate harmoniously to guide the development of law in a manner compatible with the requirements of justice and the common good. It is this insight that informs Laws' account of the constitution as requiring a balance between competing moralities while remaining committed to a distinctive common law method which relies on a similar balance between experimentation and precedent.[33] Ultimately, it is a matter of judicial interpretation whether a given case is sufficiently similar to others to warrant similar treatment. It is also an essential feature of legal reasoning that courts are tasked with ensuring that relevant legal principles apply to given cases, but the weight

[29] G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA 1982), 13, emphasis in original.
[30] Postema, *Bentham and the Common Law Tradition*, 11.
[31] *Calvin's Case* (1608) 77 E.R. 377, 381.
[32] On the common law method generally, see G. Postema, "Integrity: Justice in Workclothes" (1997) 82 Iowa L. Rev. 821; Postema, *Bentham and the Common Law Tradition*; Laws, *Common Law Constitution*.
[33] J. Laws, *The Constitutional Balance* (Oxford and New York 2021), ch. 4.

to be afforded to each principle will vary depending on the circumstances of the case in question, including what other applicable principles are in view.

The significance of judicial determination of the relevant legal principles and variation in their weight will become relevant later in the article. For now, it is important only to note that determination of whether certain cases are relevantly alike is a key feature of all legal reasoning qua legal reasoning. Indeed, Waldron is therefore mistaken, when assessing the costs involved in adopting a principle of stare decisis, to presume that it is even possible for a court or public body to assess a case "on its merits" in a manner which would ignore previous cases.[34] Legal reasoning cannot sensibly operate if divorced from the institutional practice of law; cases cannot begin to be decided if courts are unaware of the applicable legal rules and principles, and they cannot become aware where previous case law and doctrine is ignored. Deciding a case on its merits, if this is to be an instance of judicial determination and not abstract political or moral determination, can only be done from within the law and that cannot be done in isolation from past practice.[35]

Similarly, to adhere to the doctrine of stare decisis is not slavishly to abide by previous decisions without consideration of the case before you. While there may be some costs involved in adhering to this doctrine, choosing to follow precedent *instead* of deciding a case on its merits is not one of them. Judges do not and cannot reason in a vacuum any more than Parliament can legislate in a vacuum.[36] A judge cannot apply, or disregard, settled principle and applicable precedent without first accounting for and weighing the importance of both adherence and departure. Determining what principles are applicable and whether a development of the law is warranted is what it means to decide a case on its merits: to decide on the basis of applicable legal principle, including principles derived from past practice. A judge who takes no notice of previous decisions, deciding a case entirely on the basis of her own personal morality, flouts the rule of law and the principle of equality before the law. To decide a case as if there were no body of established principle to guide deliberation is to substitute the rule of man for the rule of law.

Common law reason, manifest partially in the doctrine of stare decisis, contains an inherently comparative aspect to it. It is one thing to come before a court and appeal to the wrongfulness of a particular form of treatment, or to the harm that it has caused you, and seek redress. But, within the confines of the common law, a claimant can only do this where they

[34] Waldron, "Stare Decisis", 3, 12, 14–15.

[35] See Allan, "Moral Unity of Public Law". Indeed, given the importance of legal practice for understanding the background context of political and moral obligation, it must be doubted whether a legal case could ever be decided on its merits without some recourse to how fellow members of one's community have been treated when in a similar situation.

[36] *R. v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539 (Lord Steyn).

can rely on established legal principles derived from how others have been treated by the court. To make a legal claim, you must point to those who are in a similar situation and demand that you be treated similarly to how they have been, or you must point to generally applicable rules and principles in full knowledge that they are rules that apply to others as much as they apply to you. To make claims of justice under law is to demand a consistent application of principle, given the requirement of equality before the law and the presumption of the moral equality of legal subjects which gives that principle meaning and weight. Yet justice cannot be assessed in a vacuum. If the only metric that mattered where cases genuinely were alike was the concern of consistency, then it would not be open to the court to develop or change the law when broader considerations of justice demand or where a previous line of reasoning is mistaken. It would equally not be open to administrative decision-makers to remain unfettered in their exercise of discretion, the previous decision's having reduced the range of reasonable options available. Sometimes concerns of justice reach beyond concerns of consistency such that the provision of justice to an individual case or the comity required of courts in their review function will permit a departure from previous patterns of conduct, even where the cases in question are identical. Where this occurs in the process of judicial reasoning, courts are expected to provide good reasons to justify their departure in their judgment. Where it occurs in the process of administrative decision-making, I will argue, courts are only permitted to interfere where existing principles of judicial review indicate that departure from a previous pattern of conduct is unlawful. These instances are rare, given the principle against fettering discretion.

The principle of equality before the law is not exhausted by the foregone discussion. Informed as it is by a general commitment to treat legal subjects as moral equals under law, it cannot be neatly summarised or confined to purely formal or procedural constraints. For the purposes of this article, it is sufficient to note the central role that the principle of consistency occupies both within the rule of law and within common law adjudication. If judicial review is to reflect the requirements of the rule of law, the conclusions drawn above will help to resolve difficulties encountered below. We cannot divorce the principle of consistency as it arises within legal reasoning generally from the principle as it arises within administrative law specifically. If the foundation of judicial review is that administrative bodies ought to be bound by the rule of law, then principles of the rule of law articulated in general ought to apply in this context unless there are strong reasons for them not to. As it stands, the principle of consistency is a consideration that is relevant in all areas of law, including administrative law, as a background principle. This is how it should remain if its significance as a pillar of legal reasoning in all areas of doctrine is fully to be appreciated.

III. The Principle of Consistency

The grounds of judicial review are the doctrinal manifestation of the principles of the rule of law, ensuring that courts are both empowered and confined to assess the legality of administrative conduct but not the all-things-considered merits.[37] How the rule of law manifests in this context is a matter of doctrine, developed through time as judicial understanding evolves. It is for this reason that the court has sometimes expanded the grounds of review, as was done with the now well-established doctrine of legitimate expectations.[38] Such expansion was informed by the principles of the rule of law where the concerns raised in certain cases could not find full resolution within existing doctrinal structures. A key question that we then face is whether the principle of equality before the law can find full expression within our existing grounds of review, or might the court need to develop new doctrine. We know that the principle of equality and its correlated commitment to consistency operates as a background presumption within administrative law such that "public bodies ought to deal straightforwardly and consistently with the public".[39] There is even some suggestion that this might amount to as a "free-standing" principle.[40] Before we can decide whether this principle ought to ground a separate head of review, however, we must first explore how the principle of consistency, itself derived from the principle of equality before the law, might arise within doctrine. There are two ways in which it might do so.

A. Requirement of Consistent Treatment

The first way that a principle of consistency might manifest is as a "strict" requirement of equal or consistent treatment. As mentioned above, the maxim that like cases should be treated alike is characterised by a surprising degree of ambivalence within legal and moral discussion of equality. At first glance, we can see recurring judicial support for the principle of equality, its being referred to as "the cornerstone of our law" in *Gurung v Ministry of Defence*.[41] Indeed, this principle is regularly characterised as a central aspect of justice and clearly informs the normative underpinning of the doctrine of stare decisis discussed above. It has an important place within the

[37] This is so even under the ultra vires school of thought where the constitutional position is that Parliament intends administrative discretion to be exercised in accordance with the rule of law. See M. Elliott, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] C.L.J. 129; M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford and New York 2001); T.R.S. Allan, "The Constitutional Foundations of Judicial Review" [2002] C.L.J. 87; P. Craig, "Constitutional Foundations, the Rule of Law and Supremacy" [2003] P.L. 92.

[38] *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch. 149; *O'Reilly v Mackman* [1983] UKHL 1, [1983] 2 A.C. 237; *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213.

[39] *R. (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, at [68] (Laws L.J.).

[40] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 W.L.R. 4546, at [29] (Lord Wilson).

[41] *Gurung v Ministry of Defence* [2002] EWHC (Admin) 2463, at [55].

principles of judicial review. As Lord Hoffmann noted in *Matadeen v Pointu*, "treating like cases alike and unalike cases differently is a general axiom of rational behaviour . . . frequently invoked by the court in proceedings for judicial review as a ground for holding some administrative acts to be irrational".[42]

This appears to be what was argued and accepted by the Court of Appeal in the leading case of *Gallaher*.[43] This case involved an investigation by the Office of Fair Trading (OFT; now the Competition and Markets Authority) into price-fixing by tobacco companies. The Office of Fair Trading entered into early-resolution agreements with some companies whereby, in exchange for not appealing a determination that they had acted unlawfully, the OFT assured companies that they would benefit if there were successful appeals by other parties. That is then what happened, and certain companies, including TM Retail, had their financial penalty repaid. Gallaher Group was a company that had not entered into an early-resolution agreement but wished to take advantage of the fact that there had been successful appeals by other parties to have their financial penalty repaid just as TM Retail had. There was no question of a legitimate expectation arising, given the fact that there had been no early-resolution agreement, but Gallaher argued that the principle of consistency demanded that they should be treated in accordance with the same rules that TM Retail had benefited from.

Leaving aside, for the moment, the argument that Gallaher was in fact not in a similar situation to TM Retail, given the lack of an early-resolution agreement, the Court of Appeal was tasked with deciding whether the inconsistency in treatment constituted an unfairness amounting to an abuse of power.[44] Lord Dyson concluded that the OFT's refusal to treat Gallaher Group consistently with how it had treated TM Retail breached the principle of equal treatment and so was unlawful.

This conclusion was rejected by the Supreme Court.[45] Lord Carnwath noted that "the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law".[46] Although he accepted that consistency of treatment is a "generally desirable" objective, he stressed that it is "not an absolute rule".[47] Clearly, just because something is not an absolute rule, this does not mean that it is therefore not a general principle. That is surely the central feature of the distinction between rules and principles.[48] A better way of framing this is to note that Lord Carnwath

[42] *Matadeen v Pointu* [1999] 1 A.C. 98, at [9].
[43] *R. (Gallaher Group Ltd. & Ors) v Competition and Markets Authority* [2016] EWCA Civ 719, [2016] Bus. L.R. 1200.
[44] Ibid., at [53]–[60]. See also *R. v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 W.L.R. 1115, 1127B-D (Gibson L.J.).
[45] *R. (Gallaher Group Ltd. & Ors) v Competition and Markets Authority* [2018] UKSC 25, [2019] A.C. 96.
[46] Ibid., at [24].
[47] Ibid.
[48] See R. Dworkin, *A Matter of Principle* (Cambridge, MA 1986).

is correct that consistency is not an absolute requirement within administrative law: it is not a ground of review even if it may be relevant for determining whether one of the grounds of review have been breached. Thus, while Lord Carnwath accepted that there was long-standing endorsement of the principle of equal treatment throughout the history of the common law, he stressed that "it is important in this court to be clear as to the precise content and attributes of the relevant legal principles, and their practical consequences in terms of remedies".[49]

Drawing on Lord Hoffmann's judgement in *Matadeen v Pointu*, Lord Carnwath stressed "the need to distinguish between equal treatment as a democratic principle and as a justiciable rule of law".[50] By this he meant to reject the idea that the principle of equality latent within the common law demands anything in the way of a strict right to consistent treatment – to identicality in treatment where cases are sufficiently alike, regardless of the context or countervailing principles. In fact, a strict requirement of equal treatment that demands any cases which are sufficiently similar be treated consistently manifestly conflicts with our ordinary understanding of common law adjudication discussed above. It also contradicts established principles of administrative law prohibiting the fettering of discretion.[51] It is a central feature of delegated authority that it be exercised as discretion. The decision maker cannot close themselves off from the circumstances of the individual case before them, nor can they adopt rigid rules, general policy being preferred and lawful. Even in circumstances where there exists "a policy so precise that it could well be called a rule" administrative law demands that "the authority is always willing to listen to anyone with something new to say" and to make exceptions to the policy where it is appropriate to do so in the circumstances at hand.[52] Within administrative law doctrine, even the idea of consistency as the consistent application of policy cannot be decided purely by reference to the content of the rules themselves, as was suggested by theorists such as Westen and Peters, or even Raz.

So, the common law has never demanded strict consistency in treatment, under judicial review or under the doctrine of precedent. What, at first glance might appear to be a tension between the need for consistency and the need for law and policy to develop through time, remaining open to the individual circumstances of particular cases, is in fact no tension at all, just as there is similarly no tension between stare decisis and common law development, once each is properly understood. On closer inspection, it becomes clear that, whatever the principle of consistency requires, it is not strict equal treatment in all cases.

[49] *R. (Gallaher Group Ltd. & Ors) v Competition and Markets Authority* [2018] UKSC 25, at [23].
[50] Ibid., at [26] (drawing on Lord Hoffmann in *Matadeen v Pointu* [1999] 1 A.C. 98, at [9]).
[51] See *R. v Port of London Authority, ex parte Kynoch Ltd.* [1919] 1 K.B. 176.
[52] *British Oxygen Co. Ltd. v Minister of Technology* [1971] A.C. 610, 625.

B. A Requirement of Justification for Inconsistent Treatment

An alternative to conceiving of consistency as a strict rule is to view it as a general principle that demands justification for departures from a norm of consistent treatment. This alternative approach captures the idea that equal treatment is not valued simply because treatment is equalised and so responds to those claiming that legal equality is an empty idea.[53] On this view, legal equality has value because departures from consistency in treatment, given the background presumptions inherent within the common law, give rise to normative concerns which must be addressed before departure can be justified.

This approach to understanding the principle of consistency is more reflective of the case law than is a requirement of strict equal treatment. Indeed, in *Gallaher,* it seems that there really was not much separating the Court of Appeal from the Supreme Court on this point. Both Lord Dyson M.R. and Lord Carnwath accepted that the central question here was whether the departure from equal treatment was justified. Lord Dyson concluded that the OFT decision to honour the assurances it had mistakenly given while treating Gallaher Group differently was so manifestly unfair that it was not justified. In contrast Lord Carnwath concluded that it was of central importance that TMR sought and received assurances and the respondents did not. On this view, the decision not to renege on this assurance to TMR while not providing payment to Gallaher Group was reasonable and justified because these cases were not alike; one company sought and received assurances; the other did not.[54]

The clash in *Gallaher* was not between a conception of legal equality that demanded strict consistency in treatment and one which demanded adequate justification for inconsistency. Rather the disagreement between the Court of Appeal and the Supreme Court came down to whether there was adequate justification for the decision in question. In fact, one could say that, on Lord Carnwath's account, the principle of consistency did not even arise in this case because this was not an instance of treating like cases unalike at all. Where cases are unalike, a requirement of consistent or equal treatment does not apply. Where they are alike, there is no automatic rule demanding equal treatment, especially for discretionary decision-making. Consistency is best seen in these contexts as a background principle, an aspect of justice that adds weight in favour of treating such cases similarly and which may contribute to a finding that departure was so unreasonable that it was unlawful.

While the Court's reasoning could have been grounded entirely in the contention that these cases were not alike, Lord Carnwath clearly wished

[53] See note 3 above.
[54] *R. (Gallaher Group Ltd. & Ors) v Competition and Markets Authority* [2018] UKSC 25, at [44].

to comment on those kinds of cases where the principle of consistency is genuinely engaged. This raises an important question that Lord Carnwath was centrally concerned with: by what standard is departure justified? Relatedly, does this collapse legal equality into standards of all-things-considered political or moral justification? Lord Carnwath endorsed Lord Hoffmann's view in *Matadeen v Pointu* that equal treatment should be resisted as a distinct, justiciable principle because it could give rise to non-justiciable questions about what should count as justification for differential treatment.[55] Indeed, this appears to have been the underlying concern that motivated his criticism of the Court of Appeal's reasoning. However, as Elliott notes, it is curious that, having admonished the lower court for relying on a principle of consistency for fear that it would raise non-justiciable questions of justification, Lord Carnwath himself concluded that the treatment in this case was objectively justified.[56] The best way to make sense of this is to note that he was not saying that *any* assessment of justification in this context would be non-justiciable. Rather, his concern here seems to have been that Lord Dyson was drawing on standards of equality and fairness to determine whether the decision in this case was justified when he ought to have been drawing on principles of reasonableness.[57] Yet such critique presupposes that standards of equality and fairness are not themselves immanent within reasonableness review.[58] Could we not say that the Court of Appeal's assessment was in fact drawing on principles of reasonableness, including principles of equality and fairness, in determining whether the decision in question was justified?

There was a tension between Lord Carnwath's rejection of standards of equality and fairness in this case and his acceptance of the long line of cases quoted by himself, the lower courts and counsel for both parties to the dispute. In all of these instances a connection was drawn between reasonableness and standards of equality and fairness. Indeed, the leading case on reasonableness review, *Wednesbury*, drew on the example of wrongful discrimination against a red-haired schoolteacher as the prime instantiation of unreasonableness.[59] Further still, there is well-established precedent of explicit reliance on standards of equality and fairness to assess the reasonableness of administrative action. For example, in *Kruse v Johnson*, Lord Russell C.J. concluded that decisions or regulations may be quashed as unreasonable where they are "partial and unequal in their operation as

[55] Ibid., at [26] (Lord Hoffmann in *Matadeen v Pointu* [1999] 1 A.C. 98, at [9]).
[56] Ibid., at [44]. See also Elliott, "'Principle' of Consistency?".
[57] Ibid., at [26]: "in domestic administrative law issues of consistency may arise, but generally as aspects of rationality."
[58] On the connection between equality and reasonableness, see Jowell, "Is Equality a Constitutional Principle?"; O'Cinneide, "Equality"; P. Singer, "Is Racial Discrimination Arbitrary?" (1978) 8 Moral Matters 185.
[59] *Associated Provincial Picture House Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, 229.

between different classes".[60] Similarly, in *Slattery v Naylor*, the court held that a policy that was capricious or oppressive may be set aside as unreasonable.[61] In addition, McCombe J. concluded in *Gurung v Ministry of Defence* that unjustifiable racial or ethnic distinctions were "irrational and inconsistent with the principle of equality that is the cornerstone of our law".[62] More recently, in *R. (On the Application of Adath Yisrole Burial Society) v HM Senior Coroner for Inner North London*, the High Court held that a religiously discriminatory policy was, by that virtue, incapable of rational justification.[63] Further still, Lord Sumption noted in *Bank Mellat* that "[a] measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification".[64]

Lord Carnwath does not appear to have been critiquing this general corpus of case law that was common ground for all parties and courts in this case. Rather, his concern is best understood to have been a concern with relying on standards of justification that would render the assessment in question one that looks to an all-things-considered evaluation of the merits of the decision instead of an assessment of its lawfulness. When Lord Carnwath stressed that consistency is not a "distinct" principle of administrative law, he cannot have meant that consistency is of no relevance to administrative law. Rather, an assessment of justification in this context ought to be grounded in our existing administrative law principles of reasonableness, relevancy, natural justice, procedural fairness and legitimate expectations. The principle's not being *distinct* does not mean that it is not *present*, albeit in the background. A general commitment to consistency is immanent within common law reason itself and so must also be immanent within administrative law doctrine.

Abstract values such as equality or fairness must always be filtered through the doctrinal apparatus of the common law before a justiciable claim can be brought. It is not open to a claimant simply to point to an accepted, even cherished, value of the common law such as liberty or fairness and expect to win their case on that alone. Such values and principles find expression through doctrine, and litigants are expected to ground their claims therein. This does not mean that value judgement is absent from judicial reasoning, however. Judges are not machines dealing only with binary rules; they exercise *judgement* and so the assessment of such claims

[60] *Kruse v Johnson* [1898] 2 Q.B. 91.
[61] *Slattery v Naylor* (1888) 13 App. Cas. 446, 452–53. See also *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] A.C. 700, at [25]; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68.
[62] *Gurung v Ministry of Defence* [2002] EWHC (Admin) 2463, at [55].
[63] *R. (On the Application of Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC (Admin) 969, [2019] Q.B. 251.
[64] *Bank Mellat v Her Majesty's Treasury (Nos 1 & 2)* [2013] UKSC 38, [2014] A.C. 700 and [2013] UKSC 39, [2014] A.C. 700, at [25].

may call back to those values in assessing whether the given decision was reasonable or proportionate. If this has been informed by doctrine and legal principle, it has not collapsed into an all-things-considered assessment of the political merits of a decision. A court that determines that a departure from consistent treatment is so manifestly unjust, so capricious, that it cannot be reasonable, is assessing lawfulness, notwithstanding the discomfort some lawyers have with the reliance on general standards and values to guide the application of legal doctrine. So long as the court is doing this and not declaring a departure to be unjustified merely because the judge would have done things differently, then the concerns identified by Lord Carnwath do not manifest. Bearing this in mind, it seems that this assessment of reasonableness was exactly what both courts were doing. This case should not be seen as a clash between a Supreme Court endorsing an account of justification tied to existing administrative law principles and a Court of Appeal endorsing an account of justification which allowed it to overturn a decision simply because the judge would have made a different one. Rather, this is best interpreted as a clash between different assessments of whether the threshold of unreasonableness had been met.

IV. A Separate Ground of Review?

The Supreme Court in *Gallaher* concluded that the principle of equality or consistency is already contained within the existing grounds of review.[65] Lord Sumption specifically argued that we ought to resist the "unnecessary duplication" of categories of judicial review for fear that it would "undermine the coherence of the law by generating a mass of disparate special rules".[66] Whether his argument amounts to a rejection of the approach taken by the Court of Appeal or merely a clarification is perhaps less important than the fact that it corresponds with the historic placement of equality and non-discrimination concerns within reasonableness review.[67] Further, it echoes the general approach of the common law itself when it comes to principles of stare decisis and the development of doctrine. Ultimately, the principle of consistency has never demanded identicality of treatment where there have been good reasons to develop doctrine or policy, including the fact that previous practice amounted to a mistake. The important issue is identifying the standard by which departure is to be justified. This is to be assessed by reference to constitutional principle and value, instantiated, as the court here stressed, in the existing grounds of

[65] Note that the principle of consistency in this context is not the principle that administrative action should generally be consistent with their policies. See Wilberg, "Duty of Consistency?". See also Wilson Stark, "Non-fettering".

[66] *R. (Gallaher Group Ltd. & Ors) v Competition and Markets Authority* [2018] UKSC 25, at [50].

[67] This is not to say that such concerns do not also arise within grounds such as relevancy review, the rule against bias or the requirements of procedural fairness. Indeed, *Wednesbury* is a testament to the need to reject sharp distinctions within doctrine.

review. If no constitutionally acceptable justification can be offered, if the reasons for departure are wholly disproportionate, or if the decision fails to adhere to the principles of natural justice, then it will be unjustified and thus unreasonable.

The approach of grounding consistency within the existing heads of review has attracted a sustained body of critical scholarship, both historically and as a direct result of the judgment in *Gallaher*.[68] In particular, Mark Elliott has argued that this case shows that we should recognise consistency as a free-standing ground of review.[69] He presents three reasons for doing so:

1. Reasonableness review is not a suitable home for the principle of consistency because of its lackadaisical judicial application.
2. Recognising consistency as a ground of review would allow a suitable doctrinal superstructure to develop around it, as occurred for the doctrine of legitimate expectations.
3. This would be a fitting way to recognise the normative importance of the value of legal equality and the principle of equality before the law.[70]

Each of these reasons speak to a central concern that Elliott has relating to the distinction he sees the court drawing between the principle of consistency and the doctrine of legitimate expectations. According to the court, one of these warrants the establishment of a separate ground of review and the other does not. To Elliott, this distinction does not withstand scrutiny. I will address each of these concerns in turn.

A. The Lackadaisical Application of Reasonableness Review

It is at the very least arguable that there has been a lack of coherent doctrinal manifestation of the reasonableness standard.[71] My own view is that this concern is somewhat overblown, resulting from a fixation with the reasonableness standard in isolation from the doctrine that has developed around it

[68] See Steyn, "Consistency"; R. Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" [2003] C.L.J. 93; J. Randhawa and M. Smyth, "Equal Treatment and Consistency Before and After *Gallaher*" (2018) 23 Judicial Review 159; Schymyck, "Vulnerable Detainees".

[69] Elliott, "'Principle' of Consistency?". See also Elliott, "Consistency as a Free-standing Principle?".

[70] Elliott, "'Principle' of Consistency?", 447–48.

[71] See e.g. Lord Cooke in *R. v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 A.C. 532; *R. (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397, at [34]–[35]; Carnwath, "From Judicial Outrage to Sliding Scales – Where Next for Wednesbury?", available at https://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf (last accessed 15 July 2021); M. Elliott, "Where Next for the Wednesbury Principle? A Brief Response to Lord Carnwath", available at https://ukconstitutionallaw.org/2013/11/20/mark-elliott-where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/ (last accessed 18 March 2022).

and which pre-dates the *Wednesbury* decision.[72] In isolation, it is very difficult to identify when a public official has acted beyond the range of the reasonable options available to them. It would be equally difficult to identify what counts as an irrelevant consideration or what constitutes bad faith or procedural unfairness if we focused solely on those general standards rather than the case law through which they have been elucidated and solidified.

Nevertheless, for the sake of argument, let us assume that reasonableness review does suffer from a lack of coherent doctrinal manifestation. The solution to that problem would not be to further hollow out those standards and values which might assist in the solidification of a coherent doctrinal structure. If values such as equality can (and arguably already do) help to provide coherence to the reasonableness standard, then removing them from reasonableness review and placing them within their own ground of review will only result in more vagueness and lackadaisicalness. Elliott is concerned that the current approach means that "courts must confront issues of equality/consistency through the prism of rationality".[73] Yet, it seems that the reverse is more likely to be true: courts will often rely on comparative standards of equality as a way of holding administrative decisions to have been unreasonable.[74] It is not that equality concerns are forced to be addressed through an amorphous and unruly reasonableness standard; rather, the reasonableness standard gains coherence by reference to constitutional principles and values, of which equality before the law is central. Thus, we see repeated reference within reasonableness review doctrine to acts of wrongful discrimination being the foundation for a finding of unreasonableness.[75]

Within reasonableness review, at least as it was described by Lord Greene in *Wednesbury*, administrative decisions can be unreasonable in ways that might also fall foul of other principles of relevancy, procedural fairness and so on.[76] Usually however, when discussing *Wednesbury* unreasonableness, focus shifts to those instances where a decision is deemed to be unreasonable in circumstances where the other grounds are insufficient to capture the nature of the wrong in question. Recourse must then be had to general constitutional standards and background principles to guide judicial adjudication if assessment is to confine itself to questions of legality. As Allan argues, the *Wednesbury* description of a decision that is so unreasonable that no reasonable decision maker would have

[72] Daly, for example, presents an excellent overview of the "indicia" of unreasonableness that speak to the presence of an established doctrinal structure. See P. Daly, "*Wednesbury*'s Reason and Structure" [2011] P.L. 238; cf. P. Craig, "The Nature of Reasonableness Review" (2013) 66 Current Legal Problems 131.
[73] Elliott, "'Principle' of Consistency?", 447.
[74] It is for this reason that Daly refers to inconsistency as an indicium of unreasonableness; Daly, "Wednesbury's Reason and Structure", 245–46.
[75] See notes 58–63 above.
[76] *Associated Provincial Picture Houses Ltd. v Wednesbury Corp* [1948] 1 K.B. 223, 229.

made it is not itself a test or rule. Rather, it "expresses the *conclusion* of legal analysis, which encompasses all the relevant rule-of-law criteria as they apply to the facts or circumstances in view".[77] So, from a purely pragmatic perspective, if the concern is that reasonableness review is too lackadaisical in its application, the solution ought to be to use constitutional values such as legal equality and the principles that derive from them to be the lens through which we concretise doctrine.[78] The comparative nature of the consistency standard and the related concept of wrongful discrimination is one such way that courts have historically given meaning to the reasonableness principle. Removing equality and consistency from reasonableness review would make reasonableness even more opaque and indeterminate than its opponents already claim it to be.

Finally, it is not clear that consistency review, if it were to become its own ground of review, would not suffer from exactly the same difficulties attributed to reasonableness review. There remains a question of how justification for departures from patterns of consistent treatment is to be assessed. The suggestion from the Supreme Court in *Gallaher* and accepted by Elliott is that a constitutionally acceptable standard for assessing whether inconsistent treatment is justified defaults to reasonableness review. If this is the case, and it would seem that any other standard would collapse the distinction between appeal and review, then the concern that reasonableness review is lackadaisical remains. Reasonableness review is either the home of consistency review or it is the final destination and means by which justification for inconsistency must be addressed. Either way, any concerns relating to the vagueness of reasonableness review persist and so cannot ground the establishment of consistency as a separate ground of review. This is especially the case, given that doing so would hollow out reasonableness review by removing an important standard used to give it meaning and weight. Far from resolving a perceived issue of lackadaisicalness, this would only make the problem worse.

B. The Development of a New Doctrinal Superstructure

One could respond to the above analysis by pointing to the fact that there is considerable overlap between the grounds of review as they exist within current doctrine. With this in mind, there does not appear to be much need to be concerned with "hollowing-out" reasonableness review by addressing questions of consistency under a separate doctrinal structure. There may even be benefits for doing so. Elliott suggests that establishing consistency as a separate ground of review would allow for the development of a new doctrinal superstructure to flesh out what this principle

[77] Allan, *Sovereignty of Law*, 113, emphasis in original.
[78] See e.g. Daly, "Wednesbury's Reason and Structure".

requires.[79] This is exactly what was done for the doctrine of legitimate expectations, where concerns for fairness were not adequately addressed prior to its recognition.[80] A similar development of consistency review might be desirable. However, this development of new doctrine arose because there emerged new and distinct questions that need to be resolved in addition to the final analysis of reasonableness.

For the doctrine of legitimate expectations, the court must determine what counts as a legitimate expectation and whether one has been established in a given case. Only once this has been done can the court then assess what ought to be done on foot of such an expectation. Doctrinal structures can develop to assist a court in answering these questions, at which point the inquiry then reverts to an assessment of reasonableness. But this is not the case with consistency review. The principle of consistency manifests in two questions: has there been an inconsistency in treatment? Is this inconsistency reasonable? The latter question is already a ground of review; the former involves determining whether two cases are sufficiently alike such that treating them differently would count as an inconsistency. That determination is central to any exercise of legal judgement and so cannot be abstracted to some separate ground of review.

Determining whether two cases are alike is foundational to judicial reasoning itself; it is not a separate doctrinal question that would need a new doctrinal superstructure to develop around it. Indeed, the entire body of common law is itself a doctrinal superstructure built around determining which cases are alike and which ones are not. The principle of equality before the law not only influences the rules and principles which are applied within common law adjudication; it also constitutes a central feature of that adjudication itself. The principle of consistency, derived from the broader commitment to legal equality, has a structural element to it that manifests within the comparative nature of common law reason. Any exercise of that reason will entail an assessment of whether a given case is sufficiently similar to previous cases that they ought to be subject to the same rules and principles. A principle of consistency would require such an assessment to be sure. But it would not be something that would warrant the development of a new doctrinal superstructure.

This means that the only question left to be decided where a claim of inconsistency is brought is whether the claimed inconsistency in treatment was lawful. The mere fact of inconsistent treatment cannot ground a finding of unlawfulness, or else there would be no discretion to speak of in the exercise of discretionary power. Judicial review demands that administrative decision-makers remain open to the circumstances of each individual

[79] Elliott, "'Principle' of Consistency?", 448.
[80] *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch. 149; *O'Reilly v Mackman* [1983] UKHL 1; *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213.

case, and so they cannot bind themselves to strict policies or previous decisions.[81] As such, to make a claim that inconsistent treatment is unlawful, administrative law requires you to demonstrate how the inconsistency in question breaches the principles of reasonableness, or procedural fairness, or the doctrine of relevant considerations and so on. You cannot point to a "doctrine" of inconsistency to explain when unequal treatment is unjustified as that doctrine will be wholly parasitic upon the other grounds of review, depending upon their doctrinal structure and rules to assess justification. If it were not, it would involve non-justiciable considerations relating to the all-things-considered merits of a decision. Given that both the determination of whether two cases are alike and the assessment of justification for unequal treatment do not raise any new legal questions, there is no need to develop a new doctrinal superstructure.

C. Equality's Normative Significance

Finally, Elliott argues that establishing consistency as a separate ground of review is a fitting way to recognise the normative importance of equality. My difficulty with this relates to the first half of this article and the idea that the principle of equality before the law and the related principle of consistency are central to the common law; they are foundational precepts of judicial reasoning and so operate as background values in all areas of common law adjudication. The idea that departures from consistent treatment must be adequately justified by reference to legal principle is central to the common law itself. It is a foundational principle of judicial review *qua* judicial review. Setting it aside as one ground of review among many, even as a ground that is connected to the other grounds, would artificially separate this principle from its proper place as an underpinning normative core of all common law reason. The grounds of review concerned with the implied limits on discretionary power are the rules and principles formed to test the justification for departures from consistent treatment. This is not to say that these grounds are exhausted by this function that they play. One need not point to inconsistency to raise a question of lawfulness, even if, when assessing the lawfulness of inconsistency, one must point to these grounds.

The principle of equality before the law is an underpinning ideal of the rule of law; it is a call towards constitutional value, not a strict doctrinal rule. It manifests the principle that legal subjects are entitled to be treated in accordance with the same body of legal principles, sufficiently attuned to the competing constitutional considerations in view, including the need to exercise discretion as discretion. It is expected that administrative actors will adhere to these standards in all aspects of their decision-making.

[81] See *R. v Port of London Authority, ex parte Kynoch Ltd.* [1919] 1 K.B. 176.

Proper recognition of the principle of legal equality would entail recognition of its central place within all aspects of the common law.

The best way to recognise the importance of legal equality or consistency would be to place it among the kinds of considerations that warrant heightened scrutiny within reasonableness review. Surely consistency is as important as fundamental rights or the rule of law, especially given the connection between the rule of law and legal equality? In one sense, "yes"; consistency is just as important as these other considerations. In another sense, however, consistency is more important because of the role that the presumption of legal equality plays in legal reasoning itself. It is understandable that background principles and values might not seem to be praised as explicitly as those which occupy a more visible place within administrative law doctrine. But this should not be taken to mean that their normative importance is not appreciated. Legal equality, the cornerstone of our law, does most of its work at this structural level. We might focus on what is at the forefront more often, but this should not be taken to mean that what is in the background is not valued and recognised as valuable. Nor should we think that background principles do not affect and shape our understanding of more visible doctrine.[82] Inconsistency in treatment is a trigger for an assessment of lawfulness; it cannot also be the standard by which we measure lawfulness. But this does not mean that the underlying value of equality is of lesser value than more explicit standards, including those which are similarly related to legal equality: non-discrimination, relevancy, the rule against bias and so on.

Without a commitment to consistency, law could not take the form of a body of coherent rules and principles. Common law adjudication is the process of applying these rules and principles to ensure that like cases are treated alike and that departures from this general norm of equal treatment are justified. Principles of legal equality are to the common law what the rules of grammar are to language; they are so foundational to how we use law or language that they may seem less important than great works of poetry or fundamental rights protection. Yet, without these background principles, the system becomes unworkable and outputs become unintelligible. Legal equality is the cornerstone of our law in the totality of what that phrase connotes: it is so ever-present that its significance is often unseen. Yet, it is also a core principle of the rule of law, the fountain from which legal reasoning springs. It is the duality of fundamental principles such as this that renders them difficult to cabin neatly into doctrinal silos. They underpin and inform doctrine but cannot be reduced or transformed into doctrine without losing their significance and role as fundamental principles.

[82] See P. Cane, "Theory and Values in Public Law" in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford 2003), ch. 1, 3–21.