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NOTE

JUDICIAL ESTOPPEL AND INCONSISTENT POSITIONS OF LAW APPLIED TO FACT AND PURE LAW

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INTRODUCTION

The doctrine of judicial estoppel, in its most generic form, prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by that same party in an earlier proceeding.[1] The precise elements necessary for the application of judicial estoppel vary from jurisdiction to jurisdiction,[2] but in general, it will apply only when the two positions are clearly contradictory[3] and when the first position has been accepted by a court.[4] This doctrine is designed to protect the integrity of the courts, not the litigants.[5]

Although the purpose and contours of the rule can be sketched, it is not clear what types of legal positions, once successfully asserted, will trigger judicial estoppel. When a litigant attempts to contradict a prior statement of fact made under oath, the application of judicial estoppel is easy to understand. For example, in *Lowery v. Stovall*, the Fourth Circuit applied judicial estoppel to a plaintiff who claimed in a civil action that a policeman had attacked him without provocation after the plaintiff had already pleaded guilty and testified in criminal proceedings to maliciously attacking another officer on the scene.[6] But should judicial estoppel apply to a litigant who in one proceeding asserts that a will provides for a residence to be held in trust, and then later argues that the will provides for the residence to be distributed outright?[7] What about a litigant who states to one court that an ordinance amounts to a tax, then argues in another that it does not?[8] Or a litigant who characterizes a particular action as in personam, then as

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1 *See, e.g.*, Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988); Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987); Lawrence B. Solum, *Caution! Estoppel Ahead:* Cleveland v. Policy Management Systems Corporation, 32 LOY. L.A. L. REV. 461, 471 (1999).

2 *See Patriot Cinemas*, 834 F.2d at 212; *see also* New Hampshire v. Maine, 532 U.S. 742, 750 (2001) ("Courts have observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'" (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982))).

3 *See New Hampshire*, 532 U.S. at 750.

4 *See id.*; *infra* Part II.

5 *See New Hampshire*, 532 U.S. at 749–50 ("Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is 'to protect the integrity of the judicial process. . . .'" (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982))); *see also* Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 205 (5th Cir. 1999) ("[T]he doctrine is intended to protect the judicial system, *rather than the litigants* . . . .").

6 *See* Lowery v. Stovall, 92 F.3d 219, 220, 224 (4th Cir. 1996). The court described Mr. Lowery's behavior as "wanting to 'have [his] cake and eat it too,'" because by pleading guilty, he received a greatly reduced sentence, the benefit of which he had already reaped when he tried to repudiate his own testimony. *Id.* at 225 (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1974)).

7 *See* Helfand v. Gerson, 105 F.3d 530, 536 (9th Cir. 1997) (answering yes).

8 *See* Folio v. City of Clarksburg, 134 F.3d 1211, 1218 (4th Cir. 1998) (answering no).

quasi in rem?[9] Finally, should judicial estoppel apply to a litigant who changes positions on the question of whether a court has jurisdiction over a particular type of claim?[10] These scenarios illustrate contradictory positions on matters ranging from the purely factual[11] to the purely legal.[12] In the middle ground are "combined questions of fact and law"[13] and a category that has variously been described as legal positions, opinions, conclusions, assertions, theories, or contentions,[14] in which the positions taken are ones of law applied to the specific facts of a case.[15] With respect to inconsistent positions other than the purely factual, the circuits are divided as to whether judicial estoppel applies.[16]

Despite the split in authority as to the application of judicial estoppel to inconsistent legal positions, until recently Supreme Court

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9 *See* Jett v. Zink, 474 F.2d 149, 154–55 (5th Cir. 1973) (answering yes). It should be noted, however, that subject matter jurisdiction may present a different question. *See* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000) ("[T]he issue of subject matter jurisdiction is one we are required to consider, even if the parties have ignored it or . . . have switched sides on the issue.").

10 *See* United States v. Hampton Tree Farms, Inc., 860 F. Supp. 741, 747 (D. Or. 1994). In a related action, Hampton had argued that a federal district court lacked jurisdiction to review determinations made by government contracting officers, a position Hampton did not take in the instant action. *Id.* The court did not apply judicial estoppel, however, because Hampton had not been successful in asserting the earlier position, or, alternately, because Hampton had not engaged in behavior that undermined the integrity of the courts. *See id.*

11 The Supreme Court has given as examples of purely factual positions such statements as, "The light was red/green," and "I can/cannot raise my arm above my head." Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802 (1999) (internal quotation marks omitted).

12 In the context of interrogatories, courts have defined issues of pure law as "'legal issues unrelated to the facts of the case.'" O'Brien v. Int'l Bhd. of Elec. Workers, 443 F. Supp. 1182, 1187 (N.D. Ga. 1977) (quoting FED. R. CIV. P. 33(b) advisory committee note to 1970 amend.). In *O'Brien*, the court considered an interrogatory that asked for the opposing party's analysis of the applicability of a statute to a provision of the IBEW constitution to be a question of pure law. *Id.* at 1187–88.

13 Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987).

14 *See, e.g.*, Helfand v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997).

15 *See O'Brien*, 443 F. Supp. at 1187 (finding that an interrogatory seeking an explanation of how the plaintiff's utterances violated his responsibilities was a "legal theory based on the facts").

Throughout this Note, the generic phrase "legal position" refers to all positions not purely factual. This phrase therefore includes positions of law applied to fact as well as positions of pure law. The phrases "position of law applied to fact" and "position of pure law" will be used to differentiate between those two categories when necessary in order to avoid confusion.

16 *See, e.g.*, *Helfand*, 105 F.3d at 535. The Ninth Circuit, in stating its position, noted the split in authority:

> [The plaintiffs] contend that judicial estoppel applies only to factual positions, not to opinions or legal conclusions. There is some support for this view. The greater weight of federal authority, however, supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.

resolution of this matter seemed unlikely.[17] The Court did not officially acknowledge judicial estoppel as a viable doctrine until 2001 in *New Hampshire v. Maine*,[18] even though it had recognized the principle behind the doctrine as early as 1895.[19] Despite this recognition, however, *New Hampshire* did not directly address whether judicial estoppel should apply to nonfactual positions. Nevertheless, the Court's official recognition of the doctrine in *New Hampshire* lends new meaning to the Court's reasoning in *Cleveland v. Policy Management Systems Corp.*,[20] which was decided two years earlier and indicates that the Court is concerned with the issue.

While the Court in *Cleveland* did not tether its decision to the doctrine of judicial estoppel, it did not reverse a grant of summary judgment that the district court based on the doctrine, in part because the inconsistent positions were legal conclusions and not "purely factual matters."[21] The plaintiff in that case, after suffering a stroke and losing her job, claimed that she was unable to work; as a result, she was awarded Social Security Disability Insurance (SSDI) benefits.[22] She then sued her former employer under the Americans with Disabilities Act (ADA), claiming that she could have performed her job with reasonable accommodations.[23] Although its decision focused on the interplay between the SSDI and ADA statutes,[24] the

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Id. (citations omitted); *see In re* Cassidy, 892 F.2d 637, 641–42 (7th Cir. 1990) ("It has been said that judicial estoppel applies only to positions on questions of fact. We disagree." (citing United States v. Siegel, 472 F. Supp. 440 (N.D. Ill. 1979))).

17 The obscurity of the doctrine of judicial estoppel made Supreme Court review even less likely. *See* United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993) (calling judicial estoppel "an obscure doctrine").

18 532 U.S. 742 (2001).

19 *See id.* at 749. The Court stated:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Id. (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)).

20 526 U.S. 795 (1999).

21 *See id.* at 802–03, 807.

22 *Id.* at 798.

23 *Id.* at 799.

24 *Id.* at 797–98. The Court's choice to focus on the ADA and SSDI statutes, and thus the fact that this case concerns the disabled, rather than any discussion of the legal workings of judicial estoppel can perhaps be explained as a nod in the direction of public sentiment. The situation in which Ms. Cleveland found herself is a frequent one, and as soon as the Supreme Court granted certiorari, scholars began speaking out against the use of judicial estoppel to prevent these claims. *See* Paul B. Ferrara, Comment, *Avoiding Injustice: Let's Shut the Door on the Use of Judicial Estoppel in ADA Claims*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 215, 216 (2000) (concluding that judicial estoppel frustrates the purpose and spirit of the ADA); Christine Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?*, 73 ST. JOHN'S L. REV. 349, 352 (1999) (arguing that judicial estoppel should not be automatically applied in ADA cases); Solum, *supra*

Court in *Cleveland* did express doubts about the propriety of using judicial estoppel when the contradictory positions taken are not factual assertions, such as "'The light was red/green,' or 'I can/cannot raise my arm above my head.'"[25] These two hypothetical contradictions, to which the Court presumably would apply estoppel, are clearly positions of fact. Whether a traffic light was red or green at a particular point in time does not depend on the applicable law. The actual positions asserted by the plaintiff in *Cleveland*, on the other hand, present questions of mixed law and fact; that is, they turn on whether the requirements of a particular statute have been met. Had *Cleveland* not preceded the Court's acceptance of judicial estoppel in *New Hampshire*, one might have been able to construe *Cleveland* as settling the circuit split in favor of applying judicial estoppel only to positions of fact. Instead, however, the circuits have continued to develop their own doctrines of judicial estoppel. Given this divergence, it seems likely that the post-*New Hampshire* Court will choose to revisit the standard for situations in which judicial estoppel may be used for legal positions.

This Note considers whether judicial estoppel should be applied to contradictory positions of law applied to the facts, and if so, whether the doctrine should also be available for contradictory positions of pure law. One might question outright the importance of the doctrine of judicial estoppel, much less the value of delineating which types of inconsistent positions the doctrine prohibits. After all, the doctrine is invoked somewhat infrequently compared with its better-known cousins—claim preclusion (res judicata) and issue preclusion (collateral estoppel).[26] Furthermore, even in jurisdictions that do invoke the doctrine, cases rarely turn on this issue because courts often find no direct contradiction in a litigant's two legal positions, and thus

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note 1, at 463 (arguing that the Supreme Court should either reject the doctrine of judicial estoppel outright or at least refuse to decide *Cleveland* on grounds of judicial estoppel).

25 *See Cleveland*, 526 U.S. at 802.

26 *See* Solum, *supra* note 1, at 468; *see also* United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993) (describing judicial estoppel as "an obscure doctrine"). Judicial estoppel is used more frequently in the context of bankruptcy against debtors who failed to list assets, which are themselves often potential legal claims, on their bankruptcy schedule. *See* Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1211–12 (2002). However, these cases are often very different from nonbankruptcy applications of judicial estoppel, because bankruptcy courts already have the power to deny a discharge for concealing property, to revoke a discharge for fraud, and to reopen cases to amend a bankruptcy schedule, all of which distinguish these proceedings from most other types of cases. *Id.* Even the rationale for the application of judicial estoppel in bankruptcy claims is different. The doctrine "protect[s] the integrity of the bankruptcy process and . . . promote[s] finality of confirmed reorganization orders." Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n, 932 F. Supp. 859, 868 (E.D. Tex. 1996).

find that the doctrine is inapplicable.[27] However, like many procedural doctrines, judicial estoppel can produce harsh results for litigants and corresponding windfalls for their opponents.[28] Windfalls may easily result because the doctrine requires neither privity nor detrimental reliance.[29] Therefore, it is important to consider whether the purpose of judicial estoppel—to protect the integrity of the courts—justifies its potentially harsh effects.

This Note provides a novel resolution to this issue of the applicability of judicial estoppel to legal positions by importing considerations from the doctrine of issue preclusion and by examining the rationale behind judicial estoppel itself.[30] Although no court has yet taken this approach, several considerations used by courts to determine questions of issue preclusion logically extend to judicial estoppel. In the area of issue preclusion, courts have identified several concerns about the wisdom of applying estoppel to issues of law, namely, potential unfairness to litigants and ill effects on the courts themselves. Based on an analysis of both the threat to judicial integrity—the harm judicial estoppel is designed to prevent—and issues of unfairness deriving from the doctrine of issue preclusion this Note argues that judicial estoppel should bar contradictory assertions of law applied to fact, but that it should not bar contradictory positions of pure law.

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27 *See, e.g.*, Maharaj v. Bankamerica Corp., 128 F.3d 94, 98–99 (2d Cir. 1997) (describing judicial estoppel as applicable to "factual positions," but refusing to apply estoppel on the basis that "there is no clear inconsistency between plaintiff's present and former positions" even though the issue—whether the plaintiff remained a shareholder until the dissolution of a corporation—was not purely factual); *see also Cleveland*, 526 U.S. at 802-03 (noting that "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict . . . because there are too many situations in which . . . [the] claim[s] can comfortably exist side by side").

28 For an example of the potentially harsh results of judicial estoppel, see *Whatley v. Nike, Inc.*, No. CIV.98-963-AS, 2000 WL 33201902 (D. Or. Oct. 20, 2000). In that case, the plaintiff sued Nike for millions of dollars on a patent infringement claim. Nike attempted to assert judicial estoppel on the ground that the plaintiff, in the dissolution of his marriage, valued "office equipment and patents" at $2250. *Id.* at *1. The plaintiff's ex-wife asserted that she had known about the patent and believed the dissolution to be fair. *Id.* The court refused to apply judicial estoppel on two grounds, first because the two positions were not directly contradictory, and more importantly, because the result of limiting the plaintiff's claim to $2250 would be too harsh even for a doctrine focused on the protection of the courts and not the parties. *Id.* at *3.

29 Certainly, the American system of justice allows for harsh results in the application of other rules and doctrines, such as limitations periods or the doctrine of forum non conveniens. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) (applying forum non conveniens); Drew v. Dep't of Corr., 297 F.3d 1278, 1294 (11th Cir. 2002) (applying a limitations period); Griffin v. Dana Point Condominium Ass'n, 768 F. Supp. 1299, 1304 (N.D. Ill. 1991) (same).

30 For a discussion of the relationship between these two doctrines, see Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).

Part I discusses the general elements of the doctrine of judicial estoppel and the distinction among positions of fact, positions of law applied to fact, and positions of pure law. Part II examines the stance of each of the U.S. courts of appeals on whether judicial estoppel should apply to inconsistent assertions other than those that are purely factual. Although this analysis highlights a split among the circuits, it also underscores the fact that the courts have not provided sufficient reasoning to determine which, if any, of their approaches is justified. Part III introduces those considerations that this Note will apply. This Part first analyzes the rationale for judicial estoppel, then identifies the impetus for courts to apply the doctrine of issue preclusion to positions of pure law applied to fact, and to pure law. Part IV analyzes whether the application of judicial estoppel to positions of law applied to fact and pure law is justified in light of the considerations presented in Part III, and concludes that although courts should apply judicial estoppel to bar a party's inconsistent positions of law applied to fact, it should not prevent parties from asserting inconsistent positions of pure law.

I
DEFINING THE ELEMENTS OF JUDICIAL ESTOPPEL AND THE CONTOURS OF THE LAW/FACT DISTINCTION

A. Judicial Estoppel in General

Left without guidance, the U.S. courts of appeals have developed various versions of judicial estoppel. Indeed, before *New Hampshire v. Maine*,[31] the Tenth and District of Columbia Circuits expressly rejected judicial estoppel, and may continue to do so.[32] Despite this, a uniform justification for the doctrine nonetheless exists. Those circuits that have developed the doctrine agree that its purpose is to protect judicial integrity.[33] In addition, several courts have justified the

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31 532 U.S. 742 (2001).

32 *See* United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 726 (10th Cir. 2000); United Mine Workers of Am. 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir. 1993). The Tenth Circuit may be moving toward acceptance of the doctrine, although its acceptance is far from clear. Thus far, one district court in that circuit has applied judicial estoppel on the grounds that *New Hampshire v. Maine* mandates acceptance of the doctrine. *See* United States v. McCall, 219 F. Supp. 2d 1208, 1211 (D. N.M. 2002) ("[T]he U.S. Supreme Court recently found judicial estoppel to be a legitimate doctrine to be utilized by the courts, thereby overruling the Tenth Circuit's position on this issue."). Acceptance has also been urged by a Tenth Circuit judge in a concurrence, although the court did not decide the case on the basis of judicial estoppel. *See* Beem v. McKune, 317 F.3d 1175, 1186 (10th Cir. 2003) ("Now is the time to embrace the invitation extended by the Supreme Court in *New Hampshire* and join other circuits in reining in those litigants who play 'fast and loose with the courts.'" (O'Brien, J., concurring) (quoting Sperling v. United States, 692 F.2d 223, 227 (2d Cir. 1982) (Graafeiland, J., concurring))).

33 *See* New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

doctrine by reference to the need to protect the sanctity of a litigant's oath.[34] Jurists have described the threat to courts' integrity as occurring when litigants "'play[ ] fast and loose with the courts to suit the exigencies of self interest'"[35] or "'abus[e] the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.'"[36] Courts maintain this rationale despite the windfall benefits accruing to some parties who successfully assert judicial estoppel.[37] The Supreme Court has stated that "[b]ecause the rule is intended to prevent 'improper use of judicial machinery,' . . . judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'"[38]

Notwithstanding their uniform justification of the doctrine, the circuits have not agreed on its precise contours. First, although the doctrine is typically used to preclude inconsistent positions taken in *subsequent* litigation, several courts have held that the doctrine may apply in the same proceeding.[39] Second, the circuits have disputed whether or not a court must have accepted the earlier position.[40] The majority approach has required this before a party can be barred from contradicting itself.[41] The minority approach allows estoppel even if the first court did not accept the position, but only if the litigant is obviously and intentionally playing "fast and loose" with the court.[42] However, in *New Hampshire*, the Supreme Court appeared to endorse the majority approach by offering three factors it considered relevant to the determination of whether judicial estoppel should apply:

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34 For a discussion of this justification for judicial estoppel and its potential conflicts with the traditional rationale, see generally Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1249–54 (1986).

35 *In re* Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)).

36 Warda v. Comm'r, 15 F.3d 533, 538 (6th Cir. 1994) (quoting Teledyne Indus., Inc. v. NLRB., 911 F.2d 1214, 1218 (6th Cir. 1990)).

37 In *Reynolds v. Comm'r*, 861 F.2d 469 (6th Cir. 1988), for example, judicial estoppel was used to bar the Internal Revenue Service (IRS) from attributing a capital gain to the petitioner because the IRS had succeeded in having his ex-wife claim the gain in her bankruptcy proceeding. The petitioner avoided taxes in excess of $370,000. *See id.* at 471, 474.

38 *New Hampshire*, 532 U.S. at 752 (quoting Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980) and Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), respectively).

39 *See, e.g.*, Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 605 (9th Cir. 1996) (citing Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 716 (9th Cir. 1990)).

40 For a more in depth discussion of this dispute, see Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking* Erie *for Judicial Estoppel*, 64 U. CHI. L. REV. 873, 876–79 (1997).

41 *See In re* Coastal Plains, Inc., 179 F.3d 197, 206 (5th Cir. 1999); Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1143 (8th Cir. 1998) (describing the approach requiring judicial acceptance as the majority approach).

42 *See Hossaini*, 140 F.3d at 1143 (internal quotation marks omitted); Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. *Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity.* A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[43]

The Court, however, expressly disclaimed that these factors were either "inflexible prerequisites or an exhaustive formula."[44]

The circuits have also disputed whether judicial estoppel requires privity, with the majority holding that neither privity nor detrimental reliance is required.[45] These courts reasoned that because the purpose of judicial estoppel is to protect the courts and not the litigants, prejudice to litigants is irrelevant.[46] The circuits still further dispute whether the *Erie* doctrine permits federal courts sitting in diversity to apply their own versions of judicial estoppel or instead mandates that they apply the interested state's version.[47] The majority position seems to be that federal courts may apply federal judicial estoppel be-

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43 *New Hampshire*, 532 U.S. at 750–51 (internal quotation marks omitted) (citations omitted) (emphasis added).

44 *Id.* at 751.

45 *See* Hall v. GE Plastic Pac. PTE Ltd., 327 F.3d 391, 399 (5th Cir. 2003) ("[Plaintiff] claims that the district court failed to require a showing of additional 'elements' such as detrimental reliance, privity, and intent. None of these 'elements' are required under Fifth Circuit law."); Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir. 1996).

46 *See, e.g.*, Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002); *see also In re* Coastal Plains, Inc., 179 F.3d at 205 ("Because the doctrine is intended to protect the judicial system, *rather than the litigants*, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary."); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) ("[J]udicial estoppel may be applied even if detrimental reliance or privity does not exist."). Unfortunately, when listing factors to consider in *New Hampshire v. Maine*, the Supreme Court used the language "unfair detriment [to] the opposing party." 532 U.S. at 751. This should not be considered an endorsement of the detrimental reliance view; rather this language addresses the culpability of the party being estopped. *See infra* Part III.A. The factor of detrimental reliance more properly falls under the rubric of equitable estoppel. *See Edwards*, 690 F.2d at 598; Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 416–17 (1987). Equitable estoppel, like judicial estoppel, prevents a litigant from contradicting a position that he has taken in a prior proceeding. *Edwards*, 690 F.2d at 598. Unlike judicial estoppel, however, equitable estoppel also is designed to protect litigants from "less than scrupulous opponents." *Id.* Therefore, privity is a prerequisite, and whether a party will suffer a detriment if a position is not precluded is relevant. Plumer, *supra*, at 416–17.

47 *See* Deeks, *supra* note 40, at 874.

cause the protection of the integrity of federal courts implicates strong federal interests.[48]

B. The Law/Fact Distinction

The significance of whether a position or issue is one of fact, law, or a mixture thereof is by no means unique to judicial estoppel. For example, appellate standards of review depend upon whether the lower court decided a question of law or fact.[49] The distinction is similarly relevant in federal habeas corpus law, under which the designation of an issue as one of fact, mixed law and fact, or pure law can determine the power granted to the federal court.[50] One habeas scholar described such a situation:

> For example, if the question is whether a defendant's confession was voluntary, the definition of "voluntary" is a matter of pure law, while the question whether the defendant's allegation that he or she was denied food and sleep for twenty-four hours is true is a pure question of fact. If the defendant's allegation of fact is found to be true, then the question whether the confession meets the legal definition of "voluntary" is a matter of applying the law to the facts and falls into the category of a mixed question of law and fact.[51]

This example also illustrates that the distinction is blurred. That is, the different variations form a continuum from pure law to pure fact rather than three hermetically sealed categories.[52] Nonetheless, distinguishing amongst these three positions—pure fact, pure law, and law applied to fact—is possible.

The Supreme Court in *Cleveland*[53] defined a position of "fact" in the context of judicial estoppel when it stated that a "purely factual matter[ ]" is of the type: "'The light was red/green,' or 'I can/cannot raise my arm above my head.'"[54] In general, facts are the "who, when,

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48 For a discussion of decisions dealing with the *Erie* question, see *Rissetto v. Plumbers & Streamfitters Local 343*, 94 F.3d 597, 602–04 (9th Cir. 1996) and Deeks, *supra* note 40, at 882–86.

49 At the appellate level, questions of law are often reviewed de novo and questions of fact are generally reviewed with much more deference to the lower court. *See* Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 316 (2002).

50 *See* David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 811–14 (1994).

51 *See id.* at 811 n.225.

52 *See id.* at 811 n.22; Casey et al., *supra* note 49, at 318.

53 526 U.S. 795 (1999).

54 *Id.* at 802.

what, and where."[55] They involve only questions of what actually occurred and require no knowledge of any legal standard.[56]

At the opposite end of the continuum are purely legal matters, defined as "'legal issues unrelated to the facts of the case.'"[57] Thus, an interrogatory seeking an opposing party's analysis of the applicability of a federal statute to a provision of a union constitution presents a question of pure law.[58] Questions of law may be defined as "fact-free general statements applicable to all—or at least to many—cases."[59] Most positions of pure law will involve the interpretation of some constitution, statute, or common law doctrine, such as whether a death penalty statute is constitutional,[60] whether a statute waives a state's sovereign immunity,[61] or "whether a defendant may collaterally challenge prior state convictions for federal sentencing purposes."[62]

Between these two extremes lie positions of law applied to fact, often called "mixed questions of law and fact."[63] A position of mixed law and fact "is the application of a legal standard (such as negligence) to the pure facts (what the defendant did) to yield a legal conclusion (the defendant was or was not negligent)."[64] As the Supreme Court has stated: "'[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard . . . .'"[65] For instance, whether a police officer had probable cause to arrest a suspect is a mixed question of law and fact because it depends both upon the specific facts leading up to the arrest and the legal standard of probable cause.[66] Other examples include a "determination of employment

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55 Casey et al., *supra* note 49, at 317; Jay E. Rosenblum, *The Appropriate Standard of Review for a Finding of Bad Faith*, 60 GEO. WASH. L. REV. 1546, 1569–70 (1992).

56 *See* Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002); Forrest G. Alogna, Note, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1154 (2001).

57 O'Brien v. Int'l Bhd. of Elec. Workers, 443 F. Supp. 1182, 1187 (N.D. Ga. 1977) (quoting FED. R. CIV. P. 33(b) advisory committee note to 1970 amend.).

58 *Id.* at 1187–88.

59 Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1019 (1986).

60 *See* Chaney v. Lewis, 801 F.2d 1191, 1193–94 (9th Cir. 1986).

61 *See* Craven v. Univ. of Colo. Hosp. Auth., 260 F.3d 1218, 1231 (10th Cir. 2001).

62 United States v. Smith, 94 F.3d 204, 211 (6th Cir. 1996).

63 *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).

64 Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002).

65 *Ornelas*, 517 U.S. at 696–97 (alterations in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

66 *See, e.g.*, United States v. Hernandez, 314 F.3d 430, 433 (9th Cir. 2002), *amended and superseded by* 322 F.3d 592 (9th Cir. 2003); United States v. Fiasconaro, 315 F.3d 28, 30 (1st Cir. 2002).

status"[67] and whether, in a claim for breach of a fiduciary duty, a misrepresentation was material.[68]

II

SURVEYING THE CURRENT LAW OF JUDICIAL ESTOPPEL ON INCONSISTENT POSITIONS OF LAW APPLIED TO FACT AND PURE LAW IN THE U.S. COURTS OF APPEALS

First Circuit

The First Circuit has indicated in passing that it will apply judicial estoppel to parties attempting to contradict their previous legal positions.[69] It is unclear, however, how far the court will go on the spectrum from questions of mixed law and fact to questions of pure law. In *Patriot Cinemas, Inc. v. General Cinema Corp.*, the court described "classic" judicial estoppel as a case in which "a litigant asserts inconsistent statements of fact or adopts inconsistent positions on combined questions of fact and law."[70] It listed as examples "a litigant . . . claim[ing] both that a law firm did and did not represent her[,]" and "a party . . . claiming that he was both an employee and not an employee of the defendant."[71] Few scenarios beyond these examples are certain, however. In *Patriot Cinemas*, the court applied judicial estoppel to prevent a party from contradicting its stated intention not to pursue one count of its claim.[72] A district court, in *UNUM Corp. v. United States*, argued that *Patriot Cinemas* therefore did not extend judicial estoppel to legal positions at all:[73]

> [T]he earlier statement was an assertion made to a court that [Patriot Cinemas] would not proceed on a particular claim in another court, and, therefore, was a "legal" assertion only in the sense that it "pertained to legal proceedings." The case does not provide authority for the . . . argument . . . that inconsistent legal *opinions* of a litigant's counsel can invoke the application of judicial estoppel.[74]

Therefore, although the First Circuit's preclusion of an inconsistent intention suggests a move toward judicial estoppel for at least some legal positions, the current decisions do not conclusively answer the question for the categories of law applied to fact and pure law.

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67 Lilley v. BTM Corp., 958 F.2d 746, 750 n.1 (6th Cir. 1992).

68 *See* James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 449 (6th Cir. 2002).

69 *See* Faigin v. Kelly, 184 F.3d 67, 82 (1st Cir. 1999); Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987).

70 *Patriot Cinemas*, 834 F.2d at 214.

71 *Id.*

72 *Id.*

73 UNUM Corp. v. United States, 886 F. Supp. 150, 159 n.14 (D. Me. 1995).

74 *Id.*

Second Circuit

The Second Circuit has held that judicial estoppel applies only to inconsistent factual positions.[75] Thus far, the Second Circuit's lower courts have scrupulously followed this rule.[76] For instance, the District Court for the Western District of New York has refused to apply judicial estoppel to a litigant's positions on whether an act of Congress had ratified a particular appropriation of land. The court reasoned that "no legal authority" allows judicial estoppel to be applied to nonfactual positions.[77]

It is difficult, if not impossible, to discern why the Second Circuit has chosen to impose this limitation. For instance, in *TLC Beatrice International Holdings, Inc. v. Cigna Insurance Co.*, the Southern District of New York refused to apply judicial estoppel to contrary positions regarding the characterization of a claim as either a derivative suit or a direct action.[78] The court stated that "[t]he statements sought to be used as the basis for estoppel must be presented as statements of proveable facts within the knowledge of the party, and not statements of opinion."[79] However, the cases cited as authority provide only lukewarm support, and little explanation. The first case cited, *Stella v. Graham-Paige Motors Corp.*, for example, "refus[ed] to apply judicial estoppel because prior statements were not statements of fact, but rather statements of opinion made in the regular course of business."[80] *Stella*, however, did not deal with the law/fact distinction at all, but the distinction between a fact (the cost of a particular share of stock) and an estimation or guess, which, although termed an opinion, differs from one regarding the application of a law or a statute.[81] In addition, the court clearly refused to permit estoppel primarily because to do so would dangerously extend the doctrine to statements made, not in court, or even in a quasi-judicial setting, but "in the regu-

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75 Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 288 F.3d 491, 504 (2d Cir. 2002) ("We have held that a party requesting judicial estoppel must demonstrate . . . that . . . the party against whom estoppel is sought has pursued an inconsistent factual position . . . . [The instant] legal conclusions are not 'inconsistent factual positions' as would ordinarily justify judicial estoppel."), *vacated on other grounds by* 123 S. Ct. 1572 (2003); *see* Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993) ("The doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding.").

76 *See, e.g.*, U.S. Fid. & Guar. Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 93 (S.D.N.Y. 1999) ("[S]uch an issue is one of law, not fact . . . , making judicial estoppel inapplicable.").

77 *See* Seneca Nation of Indians v. New York, 26 F. Supp. 2d 555, 565 (W.D.N.Y. 1998).

78 No. 97-Civ.8589 (MBM), 1999 WL 33454, at * 7 (S.D.N.Y. Jan. 27, 1999).

79 *Id.*

80 *Id.*

81 *See* Stella v. Graham-Paige Motors Co., 259 F.2d 476, 481–82 (2d Cir. 1958).

lar course of business."[82] No other case provides an explanation to account for the Second Circuit's refusal to permit estoppel to bar inconsistent legal positions.

Third Circuit

The Third Circuit has expressed its intention to allow judicial estoppel to prevent parties from adopting inconsistent positions of law applied to fact.[83] For instance, *Montrose Medical Group Participating Savings Plan v. Bulger* discussed the applicability of judicial estoppel after the plaintiffs contradicted their earlier position on whether a retirement plan was covered by ERISA.[84] The court recognized that "[t]hough the question whether a particular plan is covered by ERISA may not be one of pure law, it is also not a 'purely factual matter'. . . ."[85] While the court declined to apply judicial estoppel, it did so on the ground that the prior position had not been judicially accepted, and not because the position was a legal one.[86]

The Third Circuit may also allow estoppel on positions of pure law. In *EF Operating Corp. v. American Buildings*, counsel for EF presented a new position at oral arguments that contradicted his legal argument to the district court and his representations in the appellate brief.[87] The court described the earlier position as "the legal argument that consignees cannot assert equitable defenses such as prepayment to shipper when the carrier has not recovered its freight charges from the shipper-consignor."[88] Stated as such, detached from the facts of the case, this position appears to be one of pure law. The court then applied judicial estoppel, stating that "under the circumstances here, a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."[89]

An earlier decision by this circuit applied estoppel to legal positions, which were clearly pure law. In *Murray v. Silberstein*, a bail commissioner who had been discharged from his office initially asserted that, because the Eleventh Amendment's Immunity Clause would prevent him from recovering lost wages even if he won his claim for

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82 *Id.* at 482.

83 *See* Hardwick v. Cuomo, 891 F.2d 1097, 1105 n.14 (3d Cir. 1989) ("[T]his court has recognized the doctrine of judicial estoppel to bind parties to factual and legal positions taken in litigation . . . .").

84 Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 783 (3d Cir. 2001).

85 *Id.* (quoting Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802 (1999)).

86 *See Montrose Med.*, 243 F.3d at 783–84.

87 EF Operating Corp. v. Am. Bldgs., 993 F.2d 1046, 1049–50 (3d Cir. 1993).

88 *Id.* at 1050.

89 *Id.*

wrongful discharge, the court should grant a preliminary injunction to preserve his employment during the disposition of that claim.[90] The court granted the injunction, but the plaintiff ultimately lost his claim for wrongful discharge.[91] Nevertheless, the injunction had kept the plaintiff in office for all but five weeks during the original disposition.[92] On appeal, the court pointed to the Eleventh Amendment's Immunity Clause and indicated that the appeal might be moot.[93] In response, the plaintiff amended his original complaint to seek lost wages for these five weeks, and argued that the Immunity Clause did not prevent recovery of lost wages by a state officer.[94] And on this purely legal issue of whether the Eleventh Amendment bars a claim for lost wages by a state officer, the court applied judicial estoppel and refused to allow Murray to seek damages.[95]

Fourth Circuit

In earlier decisions, the Fourth Circuit was willing to apply judicial estoppel to contradictory positions of law applied to fact,[96] and perhaps even to contradictory positions of pure law.[97] In recent years, however, the court has indicated that judicial estoppel will apply only to factual positions. For instance, in *1000 Friends of Maryland v. Browner*, the court stated that "the position sought to be estopped must be one of fact rather than law or legal theory."[98] And in *Pittston Co. v. United States*, the court explained that "[j]udicial estoppel applies only to the making of inconsistent statements of fact, and therefore is of no relevance to [the litigant's] legal contention . . . ."[99] The Fourth Circuit has even reiterated the purpose of the doctrine to reflect this limitation, stating that "judicial estoppel exists to deter the use of facts from other litigation to manipulate a subsequent court that is unfamiliar with the prior factual positions assumed by the litigants."[100] However, as with the Second Circuit, no Fourth Circuit de-

90 Murray v. Silberstein, 882 F.2d 61, 63 (3d Cir. 1989).

91 *Id.* at 63–64.

92 *See id.* at 64–65.

93 *Id.* at 65–66.

94 *See id.* at 65.

95 *Id.* at 66.

96 *See* Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) (applying judicial estoppel to "a legal position respecting [the litigant's] employment relationship with another").

97 *See* Ragan v. Vosburgh, 110 F.2d 60, 65–66 (4th Cir. 1997) (applying judicial estoppel to a position taken regarding the constitutionality of a statewide election scheme for superior court judges).

98 265 F.3d 216, 226 (4th Cir. 2001); *accord* Folio v. City of Clarksburg, 134 F.3d 1211, 1217–18 (4th Cir. 1998).

99 Pittston Co. v. United States, 199 F.3d 694, 701 n.4 (4th Cir. 1999).

100 Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 274 (4th Cir. 2003).

cision explains why such a distinction exists, or even identifies a point of origination.

Fifth Circuit

The Fifth Circuit has acknowledged that some courts choose to apply judicial estoppel exclusively to factual positions,[101] but does not appear to require this itself. For instance, in *Jett v. Zink*, the court applied judicial estoppel to a party's contradictory position that a particular action initially characterized as in personam was quasi in rem.[102]

Sixth Circuit

The Sixth Circuit has not directly addressed the issue of whether judicial estoppel may be applied to inconsistent legal positions. However, several of its decisions indicate that the court will apply this doctrine to questions of law applied to fact. For example, the court has applied judicial estoppel to positions taken not only on the proper interpretation of a will,[103] but also as to which ex-spouse a capital gain should be attributed for tax purposes.[104] Both scenarios illustrate a position of law applied to the facts. However, because no decision confronts the issue, no rationale is given as to why estoppel was appropriate.

Seventh Circuit

The Seventh Circuit has squarely addressed this issue, and has decided to apply judicial estoppel to all legal positions. In the case of *In re Cassidy*, the court explained:

> It has been said that judicial estoppel applies only to positions on questions of fact. We disagree. We note first that it may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts. . . . We also observe a trend away from strict limitation of the doctrine to positions on matters of fact. . . . [I]n this case, we think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact.[105]

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101 *See In re* Coastal Plains, Inc., 179 F.3d 197, 206–07 (5th Cir. 1999).

102 *See* Jett v. Zink, 474 F.2d 149, 154–55 (5th Cir. 1973).

103 *See* Warda v. Comm'r, 15 F.3d 533, 539 (6th Cir. 1994).

104 *See* Reynolds v. Comm'r, 861 F.2d 469, 470 (6th Cir. 1988).

105 *In re* Cassidy, 892 F.2d 637, 641–42 (7th Cir. 1990) (citations omitted). *But see* Reynolds v. City of Chicago, 296 F.3d 524, 529 (7th Cir. 2002) ("[Judicial estoppel] bars a litigant who has obtained a judgment on the basis of proving one set of facts from obtaining a second judgment by turning around and proving that the facts were actually the opposite of what he had proved in the prior case.").

Cassidy had argued before the Seventh Circuit on an appeal from tax court to have his tax debt discharged in bankruptcy.[106] After the court ruled that the debt was not dischargeable, Cassidy returned to bankruptcy court and to argue that the tax court had no jurisdiction over the question of dischargeability, making the court of appeals's holding mere dicta.[107] The Seventh Circuit found that Cassidy was estopped from arguing that the court of appeals should not have considered dischargeability when he had argued in that very court to have the debt declared dischargeable.[108] Thus, the Seventh Circuit appears to recognize judicial estoppel even for inconsistent positions taken on questions of pure law, because Cassidy's arguments regarding the tax court's jurisdiction did not depend on the facts of that case.[109]

Eighth Circuit

The Eighth Circuit has not yet broached the issue of whether judicial estoppel should apply to inconsistent legal positions. Indeed, the court has been slow to adopt this doctrine at all; as late as 1998, the court still found it unnecessary to define the precise elements of the doctrine.[110]

Ninth Circuit

The Ninth Circuit will apply judicial estoppel to a contradictory position "whether it is an expression of intention, a statement of fact, or a legal assertion."[111] The court reasoned in *Helfand v. Gerson* that "[t]he integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal."[112] *Helfand* involved a litigant who first claimed that a will provided for a residence to be held in trust, then later argued that the will provided for the residence to be distributed outright.[113]

It is unclear whether the Ninth Circuit would allow judicial estoppel for an inconsistent issue of pure law. Only a single district court has thus far addressed the issue, declaring that "[j]udicial estoppel should not be invoked to freeze an opponent into a position on a

106 *In re* Cassidy, 892 F.2d at 641.

107 *Id.* at 639.

108 *Id.* at 641.

109 *See supra* Part I.B.

110 *See* Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1143 (8th Cir. 1998).

111 Helfand v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997).

112 *Id.*

113 *Id.* at 534–35.

pure issue of law."[114] The court made this statement, however, without any explanation as to why this should be the case.

Tenth Circuit

While the Tenth Circuit appears to be moving towards acceptance of judicial estoppel in general, it has not yet applied the doctrine in a circuit-level decision.[115] At this time, it is not clear whether the Tenth Circuit will apply the doctrine to positions of pure law or law applied to fact even if it does accept the doctrine in cases involving contradictory factual positions.

Eleventh Circuit

The Eleventh Circuit has not treated the question of whether judicial estoppel should apply to legal positions. For example, a recent decision states simply that "[j]udicial estoppel is applied to the calculated assertion of divergent sworn positions," but does not expound upon the types of positions included.[116]

District of Columbia Circuit

The District of Columbia Circuit has rejected the doctrine of judicial estoppel.[117]

Federal Circuit

The Federal Circuit will apply judicial estoppel to inconsistent legal positions,[118] but it is uncertain whether this includes positions taken with respect to questions of pure law.

III

SETTING OUT THE APPROPRIATE CONSIDERATIONS: UTILIZING JUSTIFICATIONS DRAWN FROM JUDICIAL ESTOPPEL AND ISSUE PRECLUSION

As previously mentioned, the application of judicial estoppel can yield harsh results as well as excessive rewards for litigants.[119] This Note thus attempts to resolve the question of whether the rationale behind judicial estoppel—to protect the integrity of courts—justifies

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114 County of Stanislaus v. Pac. Gas & Elec. Co., No. CV-F-93-5866-OWW, 1994 WL 706711, at *21 (E.D. Cal. Aug. 25, 1994).

115 *See supra* note 32 and accompanying text.

116 United Kingdom v. United States, 238 F.3d 1312, 1324 (11th Cir. 2001).

117 United Mine Workers of Am. 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir. 1993).

118 *See* Interactive Gift Express, Inc. v. Compuserve Inc., 256 F.3d 1323, 1345 (Fed. Cir. 2001); Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1565 (Fed. Cir. 1996).

119 *See supra* text accompanying notes 28–29.

such harshness when the inconsistent position being estopped is one of law applied to the facts or one of pure law, in light of countervailing policy considerations. The preceding Part established that the circuits have not adopted a uniform approach to estopping inconsistent legal positions, nor have they provided any significant explanation for taking any given stance. This Part, therefore, analyzes the policies for and against the use of issue preclusion for matters of law applied to fact or pure law as well as the rationale behind judicial estoppel. These considerations, not previously examined together—if at all—by the courts of appeals, form the basis of Part IV's resolution of this matter.

A. Examining the Rationale Behind Judicial Estoppel

It is generally considered the purpose of judicial estoppel to protect the integrity of the courts,[120] or more explicitly, "to protect the judiciary, as an institution, from the perversion of judicial machinery."[121] Although courts occasionally assert that judicial estoppel is designed "to preserve the sanctity of the oath,"[122] these same courts also cite the protection of judicial integrity,[123] which is considered the "universal" justification.[124] Because the purpose of the doctrine is to protect the courts, and not the litigants, judicial estoppel can even be raised sua sponte.[125] The harm to judicial integrity occurs when a litigant engages in "cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."[126] If a litigant is allowed to prevail on contradictory positions in different courts, it inescapably follows that one court was wrong, misled, or perhaps even defrauded.[127]

This rationale behind judicial estoppel can be seen in the requirements of the doctrine itself. A party cannot be estopped unless its second position is clearly inconsistent with its earlier position, which the court must have accepted;[128] otherwise there is no risk of

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120 *See, e.g.*, New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001); Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 779 n.3 (3d Cir. 2001).

121 Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

122 *See* Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999) (internal quotation marks omitted).

123 *See id.* For a discussion of the roots of judicial estoppel and the formation of both rationales, see Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1725–27 (1991).

124 *See New Hampshire*, 532 U.S. at 749.

125 *See* Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 530 (5th Cir. 2000).

126 Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990).

127 *See New Hampshire*, 532 U.S. at 750; Darland v. Fortis Benefits Ins. Co., 317 F.3d 516, 529–30 (6th Cir. 2003) ("[T]he purpose of the doctrine . . . is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant.")

128 *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted).

inconsistent judgments. It would logically follow that, because whenever a second position contradicts an earlier accepted position there is necessarily a risk of inconsistent results, the application of judicial estoppel would have no further requirements. However, many courts have explicitly held that judicial estoppel should not be applied when a litigant has taken contradictory positions due to mistake or inadvertence.[129] And the doctrine has long included language suggesting that before judicial estoppel will apply, the party switching positions must have some degree of culpability and there must not be a good reason for the switch.[130] The Third Circuit has established a requirement that "the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity."[131] The remaining circuits phrase the purpose of judicial estoppel in such a way as to clarify that they too require culpability. For example, the First Circuit allows judicial estoppel to be used "when a litigant is 'playing fast and loose with the courts,' and when 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'"[132] The Fourth Circuit seeks to prevent litigants from "blowing hot and cold as the occasion demands,"[133] while the Seventh Circuit seeks "to protect the judicial system from being whipsawed with inconsistent arguments."[134]

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129 *See, e.g.*, Browning v. Levy, 283 F.3d 761, 776 (6th Cir. 2002).

130 *See* Scarano v. Cent. R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953) ("[The] use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an evil the courts should not tolerate." (internal quotation marks omitted)).

131 Carrasca v. Pomeroy, 313 F.3d 828, 835 (3d Cir. 2002).

132 Patriot Cinemas, Inc. v. Gen. Cinema Corp. 834 F.2d 208, 212 (1st Cir. 1987) (quoting *Scarano*, 203 F.3d at 513).

133 Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3 (4th Cir. 1982).

134 Bethesda Lutheran Homes & Servs., Inc. v. Born, 238 F.3d 853 (7th Cir. 2001). Similar language exists in the opinions of every circuit that has accepted the doctrine. *See, e.g.*, *Second Circuit*: Young v. United States Dep't of Justice, 882 F.2d 633, 639 (2d Cir. 1989) ("[Judicial estoppel] is supposed to protect judicial integrity by preventing litigants from playing fast and loose with courts, thereby avoiding unfair results and unseemliness." (internal quotation marks omitted)); *Fifth Circuit*: Texaco Inc. v. Duhé, 274 F.3d 911, 923 (5th Cir. 2001) ("Litigants undermine the integrity of the judicial process when they deliberately tailor contradictory (as opposed to alternate) positions to the exigencies of the moment." (internal quotation marks omitted)); *Sixth Circuit*: Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990) ("[Judicial estoppel] preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."); *Eighth Circuit*: Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n.6 (8th Cir. 1987) ("The purpose of judicial estoppel is to protect the integrity of the judicial process. As we read the caselaw, this is tantamount to a knowing misrepresentation to or even fraud on the court."); *Ninth Circuit*: Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996) ("Judicial estoppel . . . precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."); *Eleventh Circuit*: Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002) (observing that for judicial estoppel to apply, the "'inconsistencies must be shown to

Moreover, the Supreme Court has considered "whether the party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped."[135]

It therefore follows that the rationale behind judicial estoppel, to protect judicial integrity, manifests itself in two ways. First, and most importantly, it prevents inconsistent judgments, safeguarding from the impression that one of the two courts is wrong.[136] Second, it protects against the "evil" of litigants intentionally attempting to force such a result on the courts.[137]

B. Considering the Treatment of the Law/Fact Distinction Under the Doctrine of Issue Preclusion

1. *Preclusion for Situations in Which the Future Litigation Was Unforeseeable*

In discussing the doctrine of issue preclusion, courts have expressed concern that it is unfair to hold a party to an earlier decision that would bind that party in unforeseeable future litigation because the party will have had no incentive to litigate issues fully.[138] For example, suppose that a chemical plant has a $5000 nuisance action brought against it for allegedly emitting vapors that are foul smelling but harmless. If the plant is found to be emitting the vapors, would it be fair to hold the plant to that determination later if it turns out that the vapors cause cancer, from which hundreds of people are suffering? Assuming that there was no reason to know at the time of the first suit that the vapors caused cancer, the plant may have forgone a solid defense, such as pointing to a plant down the road, because the cost of litigation would have exceeded the $5000 at stake in the initial litigation. The Supreme Court has stated that if the amount at stake in the first suit is significantly less than in subsequent suits, estoppel may be unfair.[139] The *Restatement (Second) of Judgments* codifies a lim-

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have been calculated to make a mockery of the judicial system'") (quoting Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001)).

135 New Hampshire v. Maine, 532 U.S. 742, 751 (2001).

136 *See id.* at 750.

137 *See In re* Cassidy, 892 F.2d 637, 641 (7th Cir. 1990).

138 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 (1979); Remington Rand Corp. v. Amsterdam-Rotterdam Bank, 68 F.3d 1478, 1487 (2d Cir. 1995); ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA 139–41 (2001).

139 *See Parklane Hosiery*, 439 U.S. at 330 ("A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable."). The dollar figure attached to the first litigation can carry significant weight in an analysis of whether a litigant had an incentive to litigate fully. For example, in *Hardy v. Johns-Manville Sales Corp.*, the Fifth Circuit held that a judgment of $68,000 against manufacturers of asbestos-bearing insulation for a worker who developed asbestosis could have no preclusive effects in a multimillion dollar asbestos lawsuit. 681 F.2d 334, 346–47 (5th Cir. 1982).

ited version of this exception at section 8(5), although the drafters believed that this exception should apply only rarely.[140] According to the *Restatement*,

> relitigation of the issue in a subsequent action . . . is not precluded [when] . . . [t]here is a clear and convincing need for a new determination of the issue . . . because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or . . . because the party sought to be precluded, as a result of . . . special circumstances, did not have an adequate . . . incentive to obtain a full and fair adjudication in the initial action.[141]

The idea that it is unfair to hold a party to earlier litigation when future litigation was unforeseeable may also be applied to judicial estoppel, as at least one court has suggested.[142] Part of the purpose behind preclusion doctrines such as judicial estoppel and issue preclusion is to discourage future litigants from attempting to take positions that harm the court or waste resources; that purpose is in no way served when future litigation is unforeseeable.[143] Although judicial estoppel and issue preclusion do not have an identical purpose, they do have similarities. Like judicial estoppel, issue preclusion prevents inconsistent decisions and thus protects the integrity of the courts.[144] Issue preclusion can also promote judicial efficiency and the finality of judgments, neither of which involve the individual litigant.[145] For all these reasons, courts are troubled by the "inadequacy of the opportunity or incentive [for the litigant] to have fully litigated the issue in

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140 RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. i (1982); *see* CASAD & CLERMONT, *supra* note 138, at 140–41.

141 RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1982).

142 *See* United States v. Hussein, 178 F.3d 125, 130 (2d Cir. 1999) (holding that the application of judicial estoppel was inappropriate for a position taken on the expiration of a statute of limitations not only because the position was legal and not factual, but also because the defendant had no incentive to argue for a different expiration date in the first litigation).

143 *See* Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 906 (1992).

> Res judicata is a harsh doctrine, which deprives the precluded party of even an opportunity to be heard on the merits of the case. Consequently, preclusion is only justified when it advances important policies of the court system, such as lowering litigation costs or allowing successful litigants a sense of repose. These and other benefits of res judicata are based on the prospect of future preclusion affecting the behavior of both the parties and future litigants. When preclusion is unforeseeable, it cannot influence the actions of anyone and, worse, causes confusion that is counterproductive.

Id.

144 *See* Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 45–46 (1995).

145 *Id.*

the first action."[146] Therefore, these considerations, while raised in the context of issue preclusion, are equally applicable to judicial estoppel. The court can similarly inquire as to whether a litigant had reason to foresee future litigation in which his or her earlier position would be binding, or, if such litigation was foreseeable, whether the eventual costs of taking a particular position were not foreseeable, so that the litigant lacked incentive to litigate fully in the first lawsuit.

2. *Preclusion That Would Interfere with a Court's Administration or Development of the Law*

The doctrine of issue preclusion has also explicitly recognized an exception to its application for certain situations involving issues of pure law, referred to as "unmixed questions of law."[147] Issue preclusion will not apply "when the previously determined issue is one of law," and "'a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.'"[148] Courts have adopted this formulation from the *Restatement (Second) of Judgments*, an influential work in the field.[149] The drafters of the *Restatement* explained that "[a] rule of law declared in an action between two parties should not be binding on them for all time, when other litigants are free to urge that the rule should be rejected. Such a rule might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position."[150] Nor is this exclusion concerned solely with fairness to litigants; the interests of the courts are also at issue:

> "Especially . . . where pure questions of law are presented, courts and commentators both have recognized that the interests of finality and judicial economy may be outweighed by other substantive policies, for in this circumstance '[t]he interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis.'"[151]

As for nonmutual issue preclusion, courts have refused to give an issue preclusive effect when the issue "is 'one of law and treating it as

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146 Geoffrey C. Hazard, Jr., Symposium, *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 86 (1984).

147 *See* Montana v. United States, 440 U.S. 147, 162–63 (1979); Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1233 (3d Cir. 1995).

148 *Burlington N. R.R. Co.*, 63 F.3d at 1237 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982)).

149 *See id.*

150 RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. b (1982).

151 Seneca Nation of Indians v. New York, 26 F. Supp. 2d 555, 569 (W.D.N.Y. 1998) (quoting Haitian Ctrs. Council Inc. v. McNary, 969 F.2d 1350, 1356 (2d Cir. 1992)), *rev'd on other grounds*, 509 U.S. 155 (1993); *see also* Hiroshi Motomura, *Using Judgments As Evidence*, 70 MINN. L. REV. 979, 1018 (1986).

conclusively determined would inappropriately foreclose [opportunities] for obtaining reconsideration of the legal rule upon which it was based.'"[152] In describing this exception in the *Restatement (Second) of Judgments*, the drafters explained that when such an issue is precluded, "the court is foreclosed from an opportunity to reconsider the applicable rule, and thus perform its function of developing the law."[153] The drafters felt this consideration was particularly important when (1) there is a difference in the forums involved (i.e., when the earlier litigation was decided in a trial court and the subsequent litigation will probably be resolved in an appellate court); (2) when the first action was decided in an appellate court, and the appellate court of the second action has coordinate or subordinate jurisdiction with the first; or (3) "when the issue is of general interest and has not been resolved by the highest appellate court that can resolve it."[154]

The law of issue preclusion in this area is thus concerned with several problems. First, courts do not apply the law equally to similarly situated litigants when they hold a party to an interpretation of the law that they would reconsider for any other party.[155] Second, refusal to reconsider an earlier interpretation of the law detrimentally affects the interests of the court by halting the progress of the law. When a party, but for estoppel, could have argued for a change in the law, the court is deprived of this opportunity to advance the law.[156] Because issue preclusion recognizes these problems exclusively for issues of pure law, their applicability to positions of pure law in judicial estoppel is apparent. Further, these considerations are appropriate for the doctrine of judicial estoppel because of the rationale driving them. Issue preclusion recognizes exceptions for issues of pure law because this "reflects the broader institutional concerns of the legal system—equality and stability between the individual litigants may be sacrificed in order to preserve the equality and stability of the legal system as a whole."[157] As judicial estoppel also seeks to preserve the stability of the legal system by protecting it from abuses,[158] it should also be sensitive to the risk that careless application of estoppel will harm that system.

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152 Chi. Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526, 531 (7th Cir. 1991) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982)).

153 RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. i (1982).

154 *Id.*

155 *See, e.g.*, Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulation Comm'n, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (discussing the ramifications of disparate treatment of similarly situated parties).

156 *See* Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 899 (1987).

157 Hazard, *supra* note 146, at 87.

158 *See supra* Part III.A.

IV
APPLYING PRINCIPLES DRAWN FROM JUDICIAL ESTOPPEL AND ISSUE PRECLUSION

One may evaluate the desirability of estopping inconsistent positions of law applied to fact and of pure law by reference to both the rationale underlying the doctrine of judicial estoppel and the aforementioned considerations taken from the doctrine of issue preclusion. Although courts may indeed perform this balancing in individual cases,[159] this Note argues first that the policy considerations for and against the application of judicial estoppel to inconsistent positions of law applied to fact are such that the doctrine should be made available to courts in those circuits in which it is currently unavailable. Second, this Note argues that when the inconsistent position to be estopped is one of pure law, judicial estoppel will so rarely be appropriate that the doctrine should not be available at all to courts in these situations.

A. Judicial Estoppel Should Be Available for Inconsistent Positions of Law Applied to Fact

Judicial estoppel is appropriate for the general class of positions of law applied to fact. This section argues that the adoption of contradictory positions of law applied to fact threatens judicial integrity, and that, in many situations, litigants' behavior in attempting to foist such contradictory results on the courts rises to the level of culpable conduct. Because the facts in the second proceeding must be the same as in the first, courts need not worry that litigants as a class could not foresee the second claim and thus lacked incentive to litigate fully. Also, the court would remain free to use its discretion to refuse to estop a party. Finally, use of judicial estoppel when the issue is not purely legal does not cause inequitable administration of the law among similarly situated litigants, nor does it deprive courts of a chance to advance the law. Under this analysis, judicial estoppel should be made available for positions of law applied to fact.

1. *Examining the Potential Threat to Judicial Integrity*

In order for judicial estoppel to be appropriate for positions of law applied to fact, there must exist the possibility of harm to judicial integrity if the court accepts contradictory versions of such a position. As courts that permit judicial estoppel in this situation have recognized, "the change of position on [a] legal question is every bit as harmful to the administration of justice as a change on an issue of

159 *See* Eric A. Schreiber, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 355 (1996).

fact."[160] Cases in which a litigant attempted to directly contradict an earlier accepted legal position logically support this conclusion. For example, the litigant in *Warda v. Commissioner* sought to avoid paying taxes by claiming that she held a piece of property in trust when she had already been declared the titleholder in earlier litigation.[161] Because the law governing whether Warda held title was the same in both actions, her positions were clearly contradictory. To allow her to pursue such a contradictory path, the court stated, "represent[ed] a 'knowing assault on the integrity of the judicial system.'"[162]

Consider also *Lydon v. Boston Sand & Gravel Co.*, in which an employee, Lydon, attempted first to bring a claim against his employer, Boston Sand, through arbitration under a collective bargaining agreement. In this action, Boston Sand successfully argued that the agreement called for claims to be settled in court under state statutes.[163] When Lydon subsequently sued his employer in state court, Boston Sand removed to federal court by claiming federal law preemption.[164] In applying judicial estoppel, the First Circuit stated:

> Boston Sand's inconsistency is both patently unfair to Lydon and destructive to the integrity of the judicial system. . . . Not only does that strategy place Lydon at an unfair disadvantage and force him to embrace inconsistent arguments, but also it erodes the credibility of the court system and the efficacy of private arbitration agreements. If parties are allowed to argue one position to get out of arbitration and then to argue the exact opposite to avoid related court battles, the value of arbitrators as decisionmakers (a value that has repeatedly been stressed by the Supreme Court, particularly in the context of labor matters) will be vitiated.[165]

Thus, as both the First and Sixth Circuits have expressed, a change in positions of law applied to fact can be just as harmful to judicial integrity as a change in positions of fact.

However, as discussed in Part III.A, judicial estoppel serves a greater purpose than preserving judicial integrity merely by preventing inconsistent results.[166] Judicial estoppel is also concerned with the threat to judicial integrity that arises when litigants are allowed to knowingly manipulate the courts.[167] Again, however, this "evil"[168] of culpable litigants appears as frequently when litigants seek to contra-

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160 *In re Cassidy*, 892 F.2d 637, 642 (7th Cir. 1990).

161 *See* Warda v. Comm'r, 15 F.3d 533, 535 (6th Cir. 1994).

162 *Id.* at 539 (quoting Reynolds v. Comm'r, 861 F.2d 469, 474 (6th Cir. 1988)).

163 *See* Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 8–9 (1st Cir. 1999).

164 *Id.* at 9–10.

165 *Id.* at 13.

166 *See supra* Part III.A.

167 *See id.*

168 *See In re* Cassidy, 892 F.2d 637, 641 (7th Cir. 1990).

dict positions of law applied to fact as when litigants seek to contradict positions of fact. In *Lydon*, for example, the court suggested that Boston Sand had contradicted itself as part of a specific strategy to deny Lydon relief.[169] In fact, the type of "cynical gamesmanship"[170] decried by the courts in this field is more likely when the positions are legal rather than factual. A factual position is limited by what can actually be proved, whereas legal positions are only marginally limited by the facts of the situation and the imagination of the lawyers.[171]

Consider the case of *Wilfong v. Rent-A-Center, Inc.*, which dealt with the requirements for class certification in a gender discrimination suit.[172] Defendant Rent-A-Center had been sued by current and former female employees in two separate federal courts, the Western District of Missouri and the Southern District of Illinois. Rent-A-Center settled the claims in Missouri, but in doing so it stipulated that all the requirements of Federal Rule of Civil Procedure 23 had been met, because genuine compliance with this Rule is required even for settlement purposes.[173] Yet in the action in Illinois, Rent-A-Center not only disputed the commonality of the women's claims, it may also have tried to hide the fact of the stipulation by leaving out any mention of the Missouri actions in its response to the class certification motion.[174] Because the commonality of claims is determined by a legal test, Rent-A-Center's position is best described as one of law applied to fact. For whatever reason, Rent-A-Center decided that its interests were best served in the Illinois action by fighting class certification, and so it chose to hide its earlier position. This attempt to increase the chances that the Illinois district court would render a decision inconsistent with the settlement brokered in the Missouri district court is precisely the type of culpable behavior that judicial estoppel seeks to discourage.

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169 *See Lydon*, 175 F.3d at 13 (stating that "Boston Sand should not be allowed to argue successfully in each of two potential forums that Lydon's claims should be heard in the other, thereby depriving Lydon of any tribunal in which to bring his action" because "[n]ot only does that strategy place Lydon at an unfair disadvantage and force him to embrace inconsistent arguments, but also it erodes the credibility of the court system . . ." (footnote omitted)).

170 Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990).

171 *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1471–72 (2000); *see also* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1331–40 (1995) (discussing lawyer misrepresentations).

172 No. 00-CV-680-DRH, 2001 WL 1795093 (S.D. Ill. Dec. 27, 2001).

173 *Id.* at *6 n.7.

174 *Id.* at *1 n.1 ("The Court finds it interesting and significant that in responding to the motion for class certification, Rent-A-Center did not distinguish this case from . . . [the] class actions filed in the Western District of Missouri, let alone mention the existence of these cases.").

2. *Examining the Potential for Unfairness to Litigants and Harm to the Courts*

The previous section established that the integrity of the courts can be harmed both by inconsistent outcomes based on contradictory positions of law applied to fact and by the intentional gamesmanship of litigants seeking to impose such contradictions on the courts. The next question, therefore, is whether the countervailing considerations drawn from issue preclusion nonetheless weigh against the use of judicial estoppel in such situations. These considerations include (1) whether it is unfair to apply estoppel to a litigant who previously lacked the incentive to litigate; (2) whether courts will be treating similarly situated litigants unequally if estoppel is applied; and (3) whether the courts themselves will be harmed if they apply estoppel.

First, would the application of judicial estoppel be inappropriate due to the "inadequacy of the opportunity or incentive to have fully litigated the issue in the first action?"[175] It is true that differences in the law between jurisdictions and the ambiguities inherent in any body of law can decrease the likelihood that two positions of law applied to fact will directly contradict each other.[176] And to the extent that a litigant cannot know when in the future he will contradict an earlier position, concerns regarding the incentive to litigate are legitimate. However, because judicial estoppel is an equitable doctrine, the courts retain discretion to allow contradictions if the future litigation was truly unforeseen.[177] In addition, this problem is not unique to legal positions. Facts alone can be so complicated as to create a foreseeability problem.[178] The potential ramifications of any position taken on law applied to fact are limited by those facts—positions taken later without regard to the original facts cannot be "clearly contradictory."[179]

Furthermore, lack of foreseeability (and thus incentive to fully litigate) is generally not a concern for the position of law applied to fact because the subsequent lawsuit is frequently closely related to the

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175 Hazard, *supra* note 146, at 86.

176 *See* Maiz v. Virani, 311 F.3d 334, 339 (5th Cir. 2002); *see also* Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Allied Textile Cos., 235 F. Supp. 2d 8, 21 (D. Me. 2002) ("'Application of judicial estoppel to the law elements of prior positions must . . . recognize that seeming inconsistencies may be explained by the different legal standards that may masquerade under similar legal expressions. Positions taken under one body of law may not be inconsistent with positions taken under [another].'" (quoting 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477, at 596–97 (2d ed. 2002))).

177 *See* New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

178 *See id.*

179 *See, e.g.*, Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002) (noting that "[t]he application of a legal rule or standard to the particular facts of particular cases will yield different outcomes . . . depending on th[ose] facts"); *supra* Part I.B.

first lawsuit. For example, in *Reynolds v. Commissioner*, the court used judicial estoppel to bar the Internal Revenue Service (IRS) from trying to attribute a capital gain to a husband when the IRS had succeeded in having his ex-wife claim the gain in her bankruptcy proceeding.[180] The IRS should certainly foresee that it may later be in its best interest to pursue the other, wealthier ex-spouse. Therefore, it cannot be said that lack of incentive to litigate prompted the IRS to attribute the gain to the ex-wife.

As another example, consider a Ninth Circuit decision in which a parent company first claimed, in order to avoid mandatory arbitration, that only its subsidiary could be held as a party to an agreement.[181] After a jury returned a verdict of $15 million against the company for breach of an oral contract, the company tried to claim the benefit of the just-repudiated agreement, which precluded oral contracts.[182] Because it is almost per se foreseeable that when a litigant disowns an agreement, he must forgo other defenses based on being party to that agreement, the application of judicial estoppel in a case like this presents no greater chance of unfairness to a litigant than would its application for factual contradictions.

The case of *Moriarty v. Svec* further supports the proposition that concerns underlying the doctrine of issue preclusion regarding the incentive to litigate should not prevent the use of judicial estoppel for positions of law applied to fact.[183] Moriarty, as a representative of a pension, health, and welfare fund, sued Svec for allegedly delinquent contributions from two businesses owned by Svec. Because only one of the two businesses had signed the collective bargaining agreement that mandated contributions, Moriarty argued for the application of the "single employer doctrine," and successfully forced both businesses to contribute.[184] Moriarty then claimed that because Svec worked as a funeral director in one of the businesses, he owed contributions for his self-employment. When Svec asserted that the single employer doctrine should govern whether an owner could be considered an employee, Moriarty claimed it was inapplicable.[185] The court agreed with Svec that because Moriarty had prevailed in his assertion that the single employer doctrine applied to Svec and his two businesses, he was estopped from arguing against its subsequent application.[186] Although this case presents perhaps the least obvious example of foreseeable consequences in later litigation, it neverthe-

180 *See* Reynolds v. Comm'r, 861 F.2d 469, 471, 474 (6th Cir. 1988).
181 Humetrix, Inc., v. Gemplus S.C.A., 268 F.3d 910, 914, 917–18 (9th Cir. 2001).
182 *See id.*
183 *See* Moriarty v. Svec, 233 F.3d 955, 962–63 (7th Cir. 2000).
184 *See id.* at 960 (internal quotation marks omitted).
185 *Id.* at 961–62.
186 *Id.* at 962.

less supports the application of judicial estoppel. Moriarty asserted that a legal doctrine should govern the question of whether Svec's businesses should pay contributions. It is foreseeable that this doctrine should also govern a specific contribution; thus, it cannot be said that Moriarty had no incentive to argue a different position because he could not foresee the potential ramifications of his position.

As a class, therefore, inconsistent positions of law applied to fact do not involve unforeseeable circumstances that would render the application of judicial estoppel unfair due to a lack of incentive to litigate. Moreover, when a specific application would present such a problem, the court can, at its discretion, refuse to apply estoppel.[187] Thus far, it appears that judicial estoppel is appropriately applied to these positions of mixed law and fact.

Other policy considerations drawn from issue preclusion do not change this analysis. Because positions of law applied to fact are not purely legal, concerns about courts applying the law unequally to similarly situated litigants are misplaced.[188] Positions of law applied to fact are inextricably tied to the unique facts of each case, making it nearly impossible to treat another litigant differently.[189] Even those positions that are closer to questions of pure law on the law/fact continuum do not present a problem. As recognized by the drafters of the *Restatement (Second) of Judgments* in the section on issue preclusion, when the subject matter of the two actions is the same and they are thus closely related, estoppel can be applied safely even though the issues are close to being issues of pure law.[190] Nor does the application of judicial estoppel overly deprive a court of the opportunity to advance the law—the litigants in these situations are not arguing for changes in the law in general, but changes in how the law is applied to a particular set of facts. In these circumstances, "'the historical facts are admitted or established, the rule of law is undisputed, and the

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187 *See* New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

188 *Cf.* Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulation Comm'n, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (discussing, in the context of issue preclusion, the inappropriateness of estopping a party on an issue of pure law because similarly situated litigants would be allowed to challenge the law, thus creating inequity in its administration).

189 *See* Chi. Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526, 532 (7th Cir. 1997).

190 RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. b (1982). The *Restatement* drafters state:

> The distinction between issues of fact and issues of law is often an elusive one. . . . When the claims in two separate actions between the same parties are the same or are closely related—for example, when they involve asserted obligations arising out of the same subject matter—it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. If the [requirements of issue preclusion have been met], preclusion will apply.

Id.

issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard.'"[191]

B. Judicial Estoppel Should Not Be Available for Inconsistent Positions of Pure Law

Because the circuits have largely avoided any detailed discussion of judicial estoppel for positions of pure law, there are few examples of the actual application of the doctrine in that context. Nonetheless, the few existing cases, in addition to hypothetical scenarios drawn from similar legal fields involving positions of pure law, can be evaluated by reference to the same criterion as positions of law applied to fact. Although contradictory positions of pure law have the potential to threaten judicial integrity, the high costs of allowing estoppel cannot be justified. First, actual contradictions will be rare. And where contradictions exist, future litigation or the magnitude of future liability will likely have been unpredictable because there need not be any factor in common between two opposite positions of pure law. Furthermore, without the involvement of common facts, a large number of litigants could bring the same purely legal claim. If estoppel is applied to only one litigant, courts will be treating similarly situated litigants differently, resulting in an inequitable administration of the law. Finally, the advancement and resolution of the law itself is slowed by estoppel of positions of pure law, because the court is deprived of the opportunity to reconsider the question.

1. *Examining the Potential Threat to Judicial Integrity*

As with positions of law applied to fact, the first salient question is whether contradictory positions of pure law can pose the type of threat to judicial integrity that warrants application of judicial estoppel. In 1997, in an unpublished decision, the Fourth Circuit applied judicial estoppel to the question of the constitutionality of North Carolina's scheme for electing superior court judges.[192] The Republican party had successfully challenged the old statewide scheme of electing judges, on the basis that unconstitutional political gerrymandering had deprived Republicans of their equal protection rights.[193] The district court imposed a system of election by district pending further legislation. At the next election, two Republican candidates, Vosburgh and Tilghman, lost the election even though they would have

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191 Ornelas v. United States, 517 U.S. 690, 696 (1996) (alterations in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

192 Ragan v. Vosburgh, CA-88-263-5-F, 1997 WL 168292 at **5–6 (4th Cir. Apr. 10, 1997). The Fourth Circuit has subsequently taken the position that judicial estoppel applies only to factual positions, and thus this opinion, even if it were reported, would have little precedential value. *See supra* text accompanying notes 96–100.

193 *See id.*

won under the traditional statewide system. When the North Carolina General Assembly enacted legislation confirming the result achieved under the new district voting system, Vosburgh and Tilghman challenged the constitutionality of this retroactive application, and claimed that because the original statewide system was constitutional, they should be seated as judges.[194]

The Fourth Circuit found judicial estoppel an appropriate means by which to dismiss the action of the two Republican candidates because they had affirmatively joined in the effort to have the statewide electoral system declared unconstitutional. Among other acts, the two had submitted affidavits stating that, "'the statewide system of electing Superior Court judges has been designed and maintained for the purpose of diluting Republican votes for candidates for the office of Superior Court judge,'" and "'[t]he statewide election system definitely has the effect of diluting Republican votes for candidates for the office of Superior Court Judge. I believe that it has been maintained for the same reason.'"[195]

At first glance, the *Vosburgh* scenario could be a poster child for allowing judicial estoppel on positions of pure law. The constitutionality of a state system for the election of judges certainly qualifies as pure law; it involves a "'legal issue[ ] unrelated to the facts of the case.'"[196] And there is no question that Vosburgh and Tilghman affirmatively chose to challenge the original statute; the two even went so far as to testify before the court that they chose to run only because the district court had granted preliminary relief changing the election format.[197] Their subsequent assertion that this very system was constitutional, and that they had therefore been deprived of their lawful judgeships, is clearly contradictory. Their change in position reeks of "blowing hot and cold as the occasion demands,"[198] or "wanting to 'have [their] cake and eat it too.'"[199] And if this behavior alone did not threaten judicial integrity, the fact that these two were attempting to become judges themselves by using these tactics should suffice.

However, such threats to judicial integrity should nevertheless be rare with regard to purely legal positions. First, as discussed for positions of law applied to fact, the presence of ambiguities in a single body of law and differences between jurisdictions decreases the

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194 *Id.* at **1–4.

195 *Id.* at *6.

196 O'Brien v. Int'l Bhd. of Elec. Workers, 443 F. Supp. 1182, 1187 (N.D. Ga. 1977) (quoting FED. R. CIV. P. 33(b) advisory committee note to 1970 amend.); *see supra* Part I.B.

197 *Ragan*, 1997 WL 168292 at *6.

198 Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3 (4th Cir. 1982).

199 Lowery v. Stovall, 92 F.3d 219, 225 (4th Cir. 1996) (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1974)).

chance of direct contradiction for legal positions.[200] Every body of law contains ambiguities, great or small.[201] Moreover, because purely legal arguments deal almost exclusively with such ambiguities and differences, the chance of a direct contradiction is even less.[202] However, because cases in which contradictory positions of pure law threaten judicial integrity do exist, rarity alone cannot be dispositive of the issue.

2. *Examining the Potential for Unfairness to Litigants and Harm to the Courts*

Because the *Vosburgh* court, and courts like it, justify judicial estoppel for inconsistent positions of pure law by invoking a need to protect judicial integrity, the second question is whether the countervailing considerations borrowed from issue preclusion nonetheless weigh against its application. The first consideration—the unfairness of estopping a party when she lacked the incentive to litigate fully in the first action—demands an affirmative answer to this second question. As just discussed, ambiguities exist in every body of law to a greater or lesser extent,[203] leaving litigants who espouse positions of pure law less able to predict whether their future situations might create a contradiction. And while privity or mutuality is often present, it is not required for the application of judicial estoppel.[204] If a litigant cannot know to which group of future litigants she will be bound, it is doubtful that any particular future action will be foreseeable. As discussed in Part IV.A, for positions of law applied to fact the two actions will almost always be closely related; otherwise differences in the facts would prevent a contradiction. By definition, however, a position of pure law is not tied to any set of facts.[205] These positions therefore lack any inherent safeguard to ensure that future actions, if not involving a party meeting the mutuality requirements, nonetheless involve litigants that are somehow related.

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200 *See supra* note 176 and accompanying text.

201 *See* Ziff, *supra* note 143, at 923–24 ("[In] almost every area of the law, there is a strong tension between clarity and flexibility. This results from the inevitable 'gray area' on the fringes of even the most straightforward area of law.").

202 *Cf.* Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 292 (4th Cir. 1998) (finding no contradiction between two purely legal positions regarding whether a parent company and its wholly owned subsidiary can conduct business with each other).

203 *See supra* notes 200–01 and accompanying text.

204 *See, e.g.*, Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002) ("The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded, and we agree, that '[w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required.'" (alteration in original) (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir. 1996))).

205 *See supra* note 57 and accompanying text.

As an example, consider a scenario in which company *A* seeks to sue out-of-state individual *B*, and argues that personal jurisdiction should exist because *B* had an Internet site. In particular, *A* argues that personal jurisdiction is consistent with due process requirements when "the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state."[206] If *A* later obtains its own Web site, advertising for the company, and a third party, *C*, then sues *A* in a jurisdiction allowing personal jurisdiction up to the limits of due process, should *A* be precluded from arguing that satisfying due process requires more than express targeting?[207] Although arguing such a position would be contradictory, *A* did not seem to have an incentive in its suit against *B* to seek another method of satisfying personal jurisdiction. Because there is no factual connection between the suits, the second suit was not obviously foreseeable. Nor is *C v. A* necessarily the end of the story; there could also be *D v. A*, *E v. A*, and so on. If *A v. B* involved considerably less money than that at stake in *C v. A*, a more serious problem arises. As discussed in Part III.B.1, when significantly more money is at stake in the second action, estoppel may be unfair due to the lack of incentive to litigate.[208] Because the future suits against *A* were not foreseeable, judicial estoppel is doubly inappropriate.

For those few situations in which a litigant advances a contradictory position of pure law and judicial estoppel is not unfair due to a lack of incentive to litigate, problems remain. Application of judicial estoppel to these "unmixed questions of law"[209] poses the same concerns that arise when issue preclusion is applied in this context. In creating an exception for questions of pure law to the doctrine of issue preclusion, courts have identified two main concerns. First, when a litigant is held to an interpretation of the law that the court would reconsider for any other person, the courts are not applying the law equally to similarly situated litigants.[210] Second, the interests of the judicial system itself are detrimentally affected when a party, but for

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206 Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002). The Fourth Circuit ultimately adopted a more stringent test for Internet activity. *See id.* at 263.

207 Judicial estoppel has been raised in the context of personal jurisdiction. For example, in *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990), a litigant argued unsuccessfully that judicial estoppel should prevent an opponent from contesting personal jurisdiction. *See id.* at 87–88.

208 *See supra* note 139 and accompanying text.

209 Montana v. United States, 440 U.S. 147, 162–63 (1979) (internal quotation marks omitted); Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1233 (3d Cir. 1995) (internal quotation marks omitted).

210 *See, e.g.*, Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulation Comm'n, 826 F.2d 1074, 1081 (D.C. Cir. 1987).

estoppel, could have argued for a change in the law, because the court is deprived of a chance to advance the law.[211]

A court that refuses to reconsider the law for one litigant on estoppel grounds but would do so for any other litigant is administering the law inequitably.[212] This principle of equality among litigants has been widely recognized as vital to the fairness of the courts.[213] When a litigant has adopted a position of law applied to fact, that litigant is not estopped from arguing that the law in general should be changed; rather, the litigant is estopped only from arguing that the law, as applied to a very particular set of facts, should be changed.[214] Therefore, there is no danger that the court will treat these litigants differently than others similarly situated because an identical factual situation probably does not exist. But when a litigant is estopped from arguing for or against the constitutionality of a law, or from challenging a statute or common law doctrine,[215] a large number of other potential litigants could bring the identical claim. If a court were to find a statute unconstitutional for one litigant and thus not require compliance, but force another litigant to obey without question, that second litigant would be deprived of a right the court would otherwise recognize. "[A]mong '[t]he reasons most commonly advanced [against estoppel] . . . [is] that it is particularly unjust to preclude reargument of questions of law that would be open to challenge by other litigants.'"[216]

In *Ragan v. Vosburgh*, discussed earlier as the perfect example of contradictory positions of pure law threatening judicial integrity, the retroactive application of a statute that in essence determined the results of an election after the fact arguably violated the Constitution.[217]

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211 *See* Buckley, *supra* note 156, at 899.

212 *See Burlington N. R.R. Co.*, 63 F.3d at 1237–38; *supra* Part III.B.2.

213 *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); Griffith v. Kentucky, 479 U.S. 314, 323 (1987); Chi. Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526, 532 (7th Cir. 1997). Whether courts are philosophically justified in considering equality among similarly situated litigants to be of paramount importance is a matter of much dispute and beyond the scope of this Note. For a sample of the literature, see the dispute between professors Peters and Greenawalt: Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV L. REV. 1265 (1997); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

214 *See supra* Part IV.A.1.

215 *See supra* Part I.B.

216 *Century Motor Freight*, 125 F.3d at 532 (alterations in original) (quoting 18 WRIGHT ET AL., *supra* note 176, § 4416, at 136 (1981 & Supp. 1997)).

217 Ragan v. Vosburgh, No. CA-88-263-5-F, 1997 WL 168292, at *4 (4th Cir. Apr. 10, 1997).

Had there been a third judge[218] who would have been elected under the old system but was not under the new, and who had not participated in the original Republican attempt to invalidate the voting system, this case would present a situation where estoppel was inappropriate. If the court found the North Carolina statute unconstitutional in the third judge's case, it would presumably also be unconstitutional insofar as it deprived Vosburgh and Tilghman of their seats. And yet, if the court applied judicial estoppel in this situation, Vosburgh and Tilghman would be required to obey an unconstitutional statute. Certainly, this result is problematic. And it is not only the parties that are injured; by behaving inequitably, the very integrity that courts strive so hard to protect by use of judicial estoppel is impaired.

Finally, the application of judicial estoppel is problematic when the issue "is 'one of law and treating it as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based.'"[219] As described in the *Restatement (Second) of Judgments* for issue preclusion, the concern is over purely legal issues raised in situations in which estoppel might force a higher court to accept the lower court's legal analysis, force the court of one jurisdiction to accept the analysis of another jurisdiction, or impose consistency among lower courts even though the highest court has not yet spoken.[220] In general, any court that has not had the opportunity to consider a legal doctrine may have room for concern. As stated by the Seventh Circuit, "[w]e think estoppel is less appropriate where a new plaintiff invokes the doctrine to preclude litigation over a purely legal question, at least where the question is of general interest and some complexity, [and] has not been decided by this court."[221]

As with issue preclusion, judicial estoppel applied in these situations will inappropriately prevent courts from considering and advancing the law. Initially, there is a problem when the two fora in question are in different jurisdictions: it is difficult to take contradictory positions on an issue of pure law due to differences in the jurisdictions' governing law as well as ambiguities within the same body of law.[222]

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218 There actually was a third judge, but he failed to comply with a residency requirement and thus could not properly be a candidate. As such, only Vosburgh and Tilghman could protest. *Id.* at *5 n.3.

219 *Century Motor Freight*, 125 F.3d at 531 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982)).

220 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. i (1982).

221 *Century Motor Freight*, 125 F.3d at 532; *see* Boomer v. AT&T Corp., 309 F.3d 404, 422 n.10 (7th Cir. 2002).

222 *See supra* notes 200–02 and accompanying text.

Denying estoppel frees courts in different jurisdictions to develop the law.

When a litigant does manage to assert two contradictory positions of pure law, foreclosing consideration of the law is nevertheless inappropriate. In *Divine v. Commissioner*, a case dealing with issue preclusion, the Second Circuit laid out several reasons supporting this conclusion.[223] The Commissioner had brought actions against stockholders in the same corporation in both the Second and Seventh Circuits for deficiencies in their personal taxes due to the characterization of certain shareholder distributions as dividends rather than distributions of capital. The Seventh Circuit reached its decision first, and the litigants in the Second Circuit attempted to bind the Commissioner to his position in the Seventh Circuit litigation regarding whether "a corporation's earnings and profits can[ ] be reduced by the spread between the fair market value of its stock and the prices paid for the stock by employees who purchased it by exercising restricted stock options the corporations had granted" for dividend purposes.[224] The court refused to apply estoppel on policy grounds relating specifically to the need to develop the law in this area.[225]

Although the *Divine* court focused on the particular complexity of tax law, its statements regarding the difference between issues of pure law and law applied to fact remain relevant even outside the tax context. The court stated that arguments relating to "differences over what the governing principles of law mean," and not arguments in which the law is undisputed and the facts are at issue, precipitate conflict between different courts.[226] Only through such conflicts can an issue be resolved by a higher court, particularly when that must be the Supreme Court, which often will grant certiorari only upon development of a split in authorities.[227] Because estoppel prevents such conflicts, it slows the development and resolution of the law, and therefore is inappropriate.[228] And in the interim, estoppel prevents the rule within a lower court from developing fully.

The importance of a court deciding legal issues on the merits, not technicalities, can also be seen in a related area—the question of whether an appellate court may hear an issue not raised in the lower court. In general, an appellate court will refuse to hear such issues for

223 *See* Divine v. Comm'r, 500 F.2d 1041 (2d Cir. 1974).

224 *Id.* at 1045.

225 *See id.* at 1043, 1046–49.

226 *See id.* at 1049.

227 *See id.*

228 *See id.*

the first time on appeal.[229] However, when the issue is one of pure law, appellate courts may nevertheless hear the issue.[230] Thus, although "[t]he smooth, efficient working of the judicial process depends heavily upon the assumption that [arguments presented by counsel] will be made after careful, deliberate evaluation by skilled attorneys who must ultimately accept responsibility for the consequences of their decisions,"[231] courts nevertheless will ignore the harm to an efficient judicial process in order to address the law.[232]

In this context, judicial estoppel functions in the same way as issue preclusion to retard the growth of the law. For example, in *Murray v. Silberstein*, the Third Circuit applied judicial estoppel to prevent Murray, a bail commissioner, from changing his position on whether the immunity granted by the Eleventh Amendment precludes a claim for lost wages for being discharged by a judge.[233] The court was worried about other legal matters raised in the case that it could not reach because it decided to dismiss on judicial estoppel, such as First Amendment concerns stemming from the fact that Murray was discharged due to the political activities of his wife. The court nonetheless felt its action was acceptable because the rules regarding bail commissioners had been made more explicit, and thus the exact problem would not resurface.[234] However, the court neglected to note the impact of its failure to decide[235] the Eleventh Amendment issue. As a result, future litigants attempting to challenge the discharge provisions in the Third Circuit will not know whether they have to claim irreparable injury because they cannot receive or seek lost wages. In addition, litigants outside of the Third Circuit may also suffer, because the Third Circuit's avoidance of deciding the issue on the law slows the development of either a split sufficient to gain Supreme Court resolution or a consensus among all circuits. Therefore, the chance of having a litigant situated to raise the First Amendment challenge who will lose on the Eleventh Amendment issue is greatly diminished. Thus, two bodies of important constitutional law suffered from this decision. The benefit of protecting the court's integrity is thus seriously outweighed by the costs to the advancement of the law in this situation.

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229 *See* Daikin Miami Overseas, Inc. v. Lee, Schulte, Murphy & Coe, P.A. (*In re* Daikin Miami Overseas, Inc.), 868 F.2d 1201, 1207 (11th Cir. 1989).

230 *See, e.g., id.*; Novack v. Gardner (*In re* Novack), 639 F.2d 1274, 1276 (5th Cir. 1981).

231 EF Operating Corp. v. Am. Bldgs., 993 F.2d 1046, 1050 (3d Cir. 1993)

232 *Cf. id.* (discussing changes of position between appellate brief and oral argument).

233 *See* Murray v. Silberstein, 882 F.2d 61 (3d Cir. 1989); *see also supra* text accompanying notes 90–95 (discussing *Murray*).

234 *Murray*, 882 F.2d at 67.

235 *Id.* at 66 n.5.

The above discussions detailed a number of reasons to refrain from applying judicial estoppel to positions of pure law. Given that judicial estoppel presents so many concerns for positions of pure law, it is apparent that the doctrine can rarely be used appropriately. But the question remains, in those few specific situations where none of the above problems are present, should the doctrine nonetheless be available? That is, do even such serious problems justify removing judicial estoppel from the possible actions a court may take when faced with contradictory positions of pure law?

Despite the possibility of such a situation in which judicial estoppel would be appropriate, courts should still be denied its use. First, because the doctrine will rarely be appropriate, there is a serious danger of courts applying it when they should not. For example, in *Murray v. Silberstein*, the court apparently applied judicial estoppel because it felt it had no choice in the matter. The court stated that "troubled as we are, unless we are prepared to jettison the law of judicial estoppel, which we are not and in any event cannot do, we cannot adjudicate this case on the merits."[236] The fact that the court reached its result only because it believed that it must either embrace or reject the doctrine of judicial estoppel justifies making a concrete distinction between estoppel for positions of pure law and of law applied to fact. Although purely legal issues will arise in the context of the same factual situation, and thus avoid many of the problems discussed, another consideration militates against giving courts the option to apply judicial estoppel for positions of pure law. Because there is no privity requirement, there can be "no apparent rational distinction"[237] between applying judicial estoppel for purely legal positions in cases where the facts are similar and cases where they are wholly dissimilar.[238] And with no such rational distinction, there is very little to prevent the next court from extending such a decision slightly, until judicial estoppel applies in situations where indeed the facts are wholly dissimilar.[239]

Furthermore, removing the ability of the courts to use judicial estoppel for positions of pure law does not leave the courts defenseless. In these situations, "the more flexible principle of stare decisis is sufficient to protect . . . the court."[240] Using stare decisis rather than a form of estoppel

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236 *Id.* at 67.

237 Divine v. Comm'r, 500 F.2d 1041, 1050 (2d Cir. 1974).

238 *Cf. id.* (analyzing nonmutual issue preclusion, but reaching the same conclusion).

239 *Cf. id.*

240 RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. b (1982) (discussing issue preclusion); *see id.* § 29 cmt. i ("When any of [the factors militating against preclusion for issues of pure law] is present, the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*.").

> permit[s] flexibility and growth in the law, [as] . . . estoppel should not "freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." Stare decisis . . . is the appropriate mechanism for giving effect to a prior judgment when the issues are legal, abstract, and unrelated to the facts of particular cases.[241]

Because those few situations in which judicial estoppel would have been appropriate to protect the court's integrity can be solved through the use of stare decisis, there is no reason to allow courts to use judicial estoppel for positions of pure law.

CONCLUSION

Judicial estoppel prevents a party from asserting a position in one legal proceeding that directly contradicts a position the party took in an earlier proceeding. It does so to protect the integrity of the courts, not the litigants, by preventing inconsistent decisions and stopping those parties who would attempt to manipulate the court into making such decisions. However, even though courts apply this doctrine to protect themselves, they cannot be blind to judicial estoppel's negative effects on both litigants and the courts. This Note has focused on those countervailing considerations tied to whether the inconsistent positions asserted are not just factual, but are, instead, either law applied to fact or pure law.

With both types, it is apparent that contradictory positions can threaten judicial integrity. For inconsistent positions of law applied to fact, there are generally no negative effects on litigants or the court other than preventing a party from manipulating the courts to suit the exigencies of the moment. Therefore, there is no reason to prevent the use of judicial estoppel for such inconsistent positions. Those circuits that currently do impose a limitation should permit application of the doctrine, relying on the discretion of the courts to reject estoppel that unfairly disadvantages a litigant. For inconsistent positions of pure law, however, judicial estoppel will rarely be appropriate. The costs imposed on litigants and courts alike are high, and are not justified by those few cases in which estoppel could be applied without undue harm. Therefore, judicial estoppel should not be available for inconsistent positions of pure law.

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241 Motomura, *supra* note 151, at 1018 (discussing issue preclusion) (quoting Montana v. United States, 440 U.S. 147, 163 (1979)).