

## THE NECESSARY LANGUAGE OF EXCEPTIONS: A RESPONSE TO FREDERICK SCHAUER'S "EXCEPTIONS"

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Exceptions to legal rules often represent a step outside the bounds of existing law, specifically, outside the bounds of the rules and principles to which they are exceptions, and their creation is therefore often an exercise of true judicial power—the ability to act unfettered by preexisting legal constraint. Professor Frederick Schauer, in his paper *Exceptions*, largely ignores this intuition. He insists that exceptions are never more than the minor corrections that inevitably become necessary when we express nuanced legal principles using the often limited array of available linguistic tools, that is, when legal rules as written and applied diverge from the principles that underlie them. Such a sanitized, safe vision of exceptions breeds complacency in the face of potentially illegitimate exercises of power. The work of this paper, then, is to respond to Professor Schauer by showing that there is a real and useful distinction between purely linguistically based exceptions and those that are departures not only from the rule but also from the underlying principle of the rule. I show that both, as a matter of jurisprudential theory, as well as of undeniable empirical example, there are in fact exceptions to legal rules, in both the judicial and legislative contexts, that arise not as vestiges of linguistic limitations but as potentially harmful departures from underlying legal principles.

### I. INTRODUCTION

Carl Schmitt notoriously observed: “Sovereign is he who decides on the exception.”<sup>1</sup> In doing so, Schmitt captured the intuition that exceptions to legal rules are often a step outside the bounds of existing law, specifically outside the bounds of the rules

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1. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985) (1922).

and principles to which they are exceptions, and that their creation therefore is an exercise of true power—the ability to act unfettered by preexisting legal constraint. Of course then, as the case of Schmitt and his Nazi patrons painfully demonstrates, we need to watch the exceptions carefully; one of the most important obligations placed on the public in a functioning democracy is monitoring the exceptions. Indeed, with the challenges of the post-9/11 world, sorting out the exceptions from the principles has never been more important. However, in these debates, the definition and contours of principles and exceptions are all too often taken for granted. Taking this intuition about exceptions seriously, though, we must re-examine the notion of exceptions in the legislative and judicial contexts and craft criteria and indications for cases in which statutory and judicial directives cast as “exceptions” step outside established rules and principles.

Professor Frederick Schauer, in his paper *Exceptions*,<sup>2</sup> largely ignores this intuition. He insists that exceptions are never more than the minor corrections that inevitably become necessary in the effort to express nuanced legal principles using the often limited “array of linguistic tools” available<sup>3</sup> and arise therefore only as instances of “linguistic fortuity.”<sup>4</sup> He explains that legal principles or goals underlie legal rules. Legal rules in turn are written to reflect the underlying goals and principles. Sometimes, however, the language in which legal rules are written cannot succinctly capture the underlying principle.<sup>5</sup> A rule’s author then has no choice but to append an exception to fully and accurately capture the contours of the legal principle underlying the rule. Schauer concludes on this basis that exceptions are logically indistinct from the rules to which they are exceptions—both rule and exception, in tandem, reflect the underlying legal principle.<sup>6</sup> As such, exceptions are reflections of the contours of the principle underlying the rule, becoming necessary only when the underlying principle and the rule itself as applied, limited by the available language, diverge.

Applying his observations to the judicial context, Schauer concludes that to create an exception to an existing legal rule is to change the rule to more accurately reflect the principle underlying it.<sup>7</sup> Therefore when a judge creates an exception—for instance, to

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2. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

3. *Id.* at 874.

4. *Id.* at 875–76.

5. *Id.* at 874–75.

6. *Id.* at 873.

7. *Id.* at 874–75.

handle a previously unexplored factual scenario—he or she has directly applied the underlying principle to the case at hand, side-stepping the existing rule as written.<sup>8</sup> At the same time, Schauer asserts, we commonly but wrongly view exceptions as trivial, their creation as a lesser exercise of power than rule-making generally.<sup>9</sup> On this basis, Schauer urges a normative conclusion: we ought to avoid the language of exceptions<sup>10</sup> because it obscures what it is that judges are doing when they craft exceptions. Direct application of principles to cases implicates a debate about the authority of a judge to side-step existing rules and directly apply underlying principles to cases.<sup>11</sup> We ought not obstruct that debate.

As described above, Schauer's scheme satisfyingly accounts for some judicially created exceptions. However, as Schmitt's insight and our shared intuition reflect, there are other exceptions to legal rules that are more than simple linguistic fortuities but are rather departures from both the rule itself *and* the legal principle underlying the rule. Thus, Schauer's normative conclusion should be limited as well. The language of exceptions may in fact be unhelpful or even obstructive where there really is no logical distinction between the exception and the rule, that is, where they both act in tandem to fully relay the contours of the underlying legal principle. But, where the exception is a departure from both the written rule as well as the underlying legal principle, the language of exceptions can be a useful indicator—a watchdog over the exercise of power unfettered by any preexisting legal constraint.

An easy but worrisome example of this type of exception is one created by a court not in service of an underlying principle but rather as a response to the court's concern that a decision in line with the underlying principle would simply not be enforced. By definition, such an exception is a departure from the principle underlying the rule. These exceptions, and others like them, powerfully implicate the dangers inherent in Schmitt's insight: a court avoiding what it knows to be the "correct" legal conclusion for fear of a confrontation with those charged with enforcing the law. Thus, at the very least, we need to know when the courts have side-

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8. *Id.* at 894.

9. *Id.* at 895.

10. *Id.* I use the term "language of exceptions" to mean, as Schauer does, either the label "exception" or any other formulation indicating that the element of the rule or decision at issue is distinct from the base rule.

11. *See id.* at 895–96. In his conclusion, Schauer explicitly denies drawing any normative conclusions. *Id.* at 898–99. However, at the same time, he rails against the use of exceptions, noting that "little more than deception is served by employing the language of exceptions." *Id.* at 895.

stepped the principles, not just the rules, at the insistence of the sovereign, or indeed, the executive. The language of exceptions can be a useful and necessary means by which a court might mark its judgment as worthy of public scrutiny.

The work of this paper, then, is to respond to Professor Schauer by showing that there is a real and useful distinction between the purely linguistically based exceptions that Schauer identifies and those that he ignores, those which are departures not only from the rule but also from the underlying principle. While our shared intuition about exceptions and unfettered power already points to the usefulness of the distinction between the types of exceptions, the dimensions of the distinction become sharply apparent upon examination of the spectrum of theories of adjudication. Theories across the spectrum view a judge's creation of an exception in response to factors other than the underlying principle as implicating a potential divergence from the proper judicial role or at least impacting what later judges will or should do with these exceptions. Under each of these theories, it becomes necessary to know when a judge has created an exception reflecting something other than an underlying principle of a rule or area of law, either to inform our debates about proper judicial function and to protect from abuse or to aid judges themselves in the execution of their duties.

In the rest of this introductory Section, I outline Schauer's position more fully and my response to it. In Section II, I examine the common theories of adjudication and show that under theories across the spectrum, the distinction between the types of exceptions is real and useful. Finally, in Section III, I demonstrate that there are real exceptions in the law and in judicial decisions specifically that are usefully viewed as distinct from simple applications of an underlying principle.

A. *A Sketch of Schauer's Argument and My Challenge to It*

1. Schauer: Statutory Exceptions Are Not Real Exceptions

Schauer begins his argument in the statutory context. He establishes by simple example that exceptions are the product of often limited linguistic resources: Section 5 of the 1933 Securities Act prohibits sales of unregistered securities.<sup>12</sup> Section 3 of the Act states an exception to that rule: intra-state sales of unregistered securities are permitted.<sup>13</sup> Schauer, reading the intra-state sales ex-

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12. 15 U.S.C. § 77e(a) (2000).

13. § 77c(a)(11).

ception, notes that the goal underlying the rule already excludes intra-state sales.<sup>14</sup> Appending an exception for intra-state sales became necessary only because (1) the term “sale” in the section 5 rule formulation includes, failing an exception, intra-state sales (as opposed to, for example, lawn mowers—there is no need to except lawn mowers from the rule because “sale of *securities*” already excludes lawn mowers) and (2) the word to express “sales but not intra-state sales,” for example, “intersale,” does not exist.<sup>15</sup>

Schauer here explains that whether the right word, such as “intersale,” exists is entirely contingent on the categories we commonly use to “carve up the world.”<sup>16</sup> The word “security” includes certain things, such as stocks and bonds, but not other things, such as lawn mowers. This is so simply because as a general matter we do not group stocks with lawn mowers such that we find ourselves using one word to refer to them together, whereas we do group stocks and bonds together such that we find it convenient to use the one word, “securities,” to refer to them as a category. Similarly, we apparently treat inter- and intra-state sales as elements of the same category: sales. Thus, when using the word “sales,” but seeking to include only inter-state sales, we have to append an exception to make clear that we are referring to one element of the category but not others. In this way, Schauer insists, the need for exceptions is entirely contingent on the available language, which in turn is entirely dependent on the categorical backdrop upon which the language of the law operates.<sup>17</sup>

Schauer then draws a conclusion: because the necessity of exceptions always arises as a result of linguistic constraints imposed by the background categorical structure, we should not treat exceptions as any different than the rules to which they are attached.<sup>18</sup> In the case of the Securities Act, the rule in section 5 and the exception in section 3 together implement *one* principle: “only inter-state sales of securities need to be prohibited.” The exception’s necessity is entirely contingent on the background categorical structure that dictates the available language. Logically there is no reason to treat the exception of section 3 any differently than the rule of section 5. To trivialize section 3 as just an exception, as compared to the rule in section 5, would be nonsense.

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14. See Schauer, *supra* note 2, at 873–75.

15. *Id.*

16. *Id.* at 872.

17. *Id.* at 875.

18. *Id.* at 872–73.

## 2. Counter: Statutory Exceptions Can Be Real Exceptions

This last assertion—that because exceptions arise only as a product of linguistic fortuity they should be treated no differently than the rule itself—is over-inclusive. True, the need for an exception often arises from the fortuity of the available language, and the available language is a function of the categorical backdrop; however, that does not necessarily mean that the exception is indistinct from the rule. Schauer's discussion assumes that showing that exceptions are always functions of a linguistic/categorical limitation or quirk automatically implies that exceptions are on the "same plane" as the rule itself.<sup>19</sup> But what if there were another reason, other than language, to treat the exception differently than the rule? Then the linguistic origins of the need for an exception would not necessarily preclude the conclusion that a rule and its exceptions are somehow different from one another.

Assume the Securities Act contained another exception: sales of securities from New York to New Jersey but no other *inter*-state sales. As in the case of excepting *intra*-state sales, if the statute's author sought to exclude this one *inter*-state sale, she would have to append an exception because (1) the term "sale" includes, failing an exception, sales between New York and New Jersey, and (2) the word or term meaning "*inter*-state sales but not those between New York and New Jersey" does not exist. The same linguistic/categorical constraints face the author trying to succinctly render in writing the principle "sales but not sales between New York and New Jersey" as faced the author rendering the principle "*inter*- but not *intra*-state sales." The exception is necessary for the same reason—prohibiting *inter*-state sales but not those between New York and New Jersey cannot be expressed without the use of an exception.

However, the key difference between the *intra*-state sales exception and the New York-New Jersey exception is that we cannot reasonably conceive of the exception for sales between New York and New Jersey as reflecting or implementing the principle underlying the rule. The rule in section 5 is that unregistered sales of securities are prohibited. The principle underlying the rule is along the lines of: the investing public needs protection. The rule in Section 5 itself reflects that principle: prohibiting the sale of unregistered securities ensures that the investing public always has the information it needs to protect itself. The New York-New Jersey exception, though, cannot reasonably be viewed as reflecting the principle. There is no reasonable alternative conception of the policy

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19. *Id.* at 873.

or principle behind the rule that would support such a construction; the investors in New York and New Jersey are presumably no different than investors in Massachusetts or Pennsylvania and require no less protection. So while the exception was necessary to express the full rule (including the exemption for New York-New Jersey sales) because the linguistic/categorical conditions ((1) and (2) above) were met, as in the “inter- but not intra-state” case, the rule that results does not reflect *one* principle, as in the “inter- but not intra-state” case, but contains a base rule—no inter-state sales—plus an entirely inconsistent appendage—the exception for New York-New Jersey sales. Whereas the linguistic origin of the section 3 intra-state exception seemed to imply that the exception was no different than the rule itself, the same is not true of the New York-New Jersey exception. The New York-New Jersey exception is inconsistent with the “no inter-state sales” principle and most definitely does not serve the same purpose as the “no intra-state sales” exception because it does not reflect the contours of the rule’s underlying principle. Therefore, we need not necessarily treat the exception the same way as the rule itself.

Why except New York-New Jersey sales then? The easiest answer is simple and common: political expedience. The legislature excepted these sales, even though such a provision would in no way accord with the purposes of the rule/statute, in service of one of a nearly infinite number of possible political motives. In this case, it would not matter if there were a term that succinctly expressed “sales, but not sales between New York and New Jersey” and the statute’s author had used that term. That would not change the fact that the rule could not reasonably be construed as implementing any unified, coherent principle. There still would be no way to account for the patently inconsistent element of the rule, the provision exempting New York-New Jersey sales. So while the existence of the exception might tell us something about the available language and the background categorical structure, it tells us nothing about whether the exception is consistent with the principle behind the rule or not, and therefore whether the exception is on “the same plane” as the rule or not.

### 3. Schauer: Judge-Made Exceptions Are Not Real Exceptions

Relying on his example of an exception in the statutory context as a paradigm, Schauer proceeds to extend his conclusion: the need for exceptions, in all contexts, is always a function of the categories available and the attendant linguistic limitations. Schauer argues that judicially created exceptions are therefore always

indistinct from the rules to which they are exceptions, thus gutting the concept of meaningful exceptions in the judicial context.<sup>20</sup>

Schauer points to the flag-burning case as an example. The majority in *Texas v. Johnson*<sup>21</sup> holds that flag burning is protected under the First Amendment as political speech. The dissents counter that the First Amendment's protection does not extend to flag burning.<sup>22</sup> Each side accuses the other of taking an unprincipled approach, of creating an ad hoc exception—the majority charges that the dissent created an exception to the Amendment's protection, excepting flag burning from the amendment's reach.<sup>23</sup> The dissent counters that the majority extended protection ad hoc to something that never has been protected before.<sup>24</sup> In reality, Schauer says, both sides took principled approaches in that neither side urged appending to the rule an element inconsistent with the principle they saw as underlying the Amendment, but rather they disagreed about what the original category of protected speech was and hence disagreed on what principle is properly interpreted as underlying the First Amendment's rule. "[I]t is plain that [the majority] was saying that the relevant category is 'political communication' and [the dissent] was saying that it is 'political communication other than flag desecration.'"<sup>25</sup>

The principle properly interpreted as underlying the First Amendment's protection of speech is determined by whatever the existing background category is, because the Amendment states only that "Congress shall make no law . . . abridging the freedom of speech."<sup>26</sup> To illustrate, consider this analysis as analogous to that in the case of the Securities Act. The Amendment's clause is analogous to the rule stated in section 5 of the Securities Act; the scope of section 5 alone, without the explicit exception in section 3, we determined to be contingent on the background category commonly called to mind by the term "sale," and we noted that the background category associated with "sale" made no distinction between inter-state and intra-state sales. The scope of the First Amendment likewise depends on what the background category of protected speech is, either "all political speech" or "all political

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20. *Id.* at 872.

21. 491 U.S. 397 (1989) (striking down state flag-burning statute as a violation of the First Amendment).

22. *Id.* at 422 (Rehnquist, C.J., dissenting); *id.* at 436 (Stevens, J., dissenting).

23. *See id.* at 414, 417–18.

24. *Id.* at 435 (Rehnquist, C.J., dissenting).

25. *See* Schauer, *supra* note 2, at 882.

26. *See id.* at 880–86. I do not intend these lines to address the many constitutional interpretation methodology questions this raises.



speech but not flag burning.” Hence, like the author of the Securities Act, the judge interpreting the First Amendment determines the scope the Amendment’s principle by looking at the common background category called to mind by “speech” or “protected speech.” Unlike the Securities Act example, though, flag burning is not explicitly excluded from protection, as are intra-state sales in section 3 of the Act. Therefore, the only possibility for exclusion is via the principle expressed in the few words of the Amendment, that is, if the language has already excluded it. The debate thus can be seen as a controversy over what the background category is, or possibly should be, and the very closely related question of what the underlying principle is. The majority asserts that “protected speech” never excluded flag burning, as “sale” never excluded intra-state sales, and the dissent counters that “protected speech” never included flag burning, just as “sale of securities” never included sales of lawn mowers.

Thus, Schauer argues, judges having debates akin to the one in *Johnson* are disguising their principled disagreement, that is, disagreements about what the underlying principle behind a rule is, by using the language of exceptions. Neither side is appending an inconsistent element to the rule; rather, each is urging their conception of what the underlying principle is and defending that interpretation by appeal to what they think the background categories are and hence what the language in which the rule is written in fact means.

Following the above analysis, Schauer then goes on to conclude that the exceptions judges make, analogous to the statutory exceptions of the form of section 3 of the Securities Act, are utterly indistinct from the rule itself.<sup>27</sup> The exceptions judges articulate serve only to supplement the written rule so that the sum of the written rule and exception will accurately reflect the contours of the unified principle, which the judge has interpreted as underlying the law in question.<sup>28</sup> The exceptions are entirely consistent with the principle and become necessary only when the principle understood by the judge as underlying the rule maps neatly onto neither the existing categorical backdrop nor, therefore, the existing language. As an illustration, take Nazi speech.<sup>29</sup> In the United States, where Nazi speech is not seen as distinct from any other type of offensive speech, to interpret a rule protecting offensive speech as excluding Nazi speech from its protection would re-

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27. *Id.* at 893.

28. *Id.* at 893–94.

29. This is a modification of an example Schauer uses. *Id.* at 886–91.

quire a judge to recognize an exception because “offensive speech” does not on its own exclude it. The judge would still be implementing a single consistent principle: “offensive speech other than Nazi speech should be protected” and the exception just makes implementing that principle possible. The principle would be consistent in that we could easily come up with a plausible explanation of why the purpose of the rule protecting offensive speech would not be well served by protecting Nazi speech. We could plausibly consider Nazi speech as qualitatively different from other offensive speech even if that qualitative difference has not yet changed the categorical backdrop, such that “offensive speech” as a linguistic matter already excludes it. In Germany though, where Nazi speech is seen as categorically different from other offensive speech, interpreting a rule protecting “offensive speech” as excluding it would not require the recognition of an exception. The principle “offensive speech other than Nazi speech should be protected” maps neatly onto the German categorical backdrop and hence the scope of the term “offensive speech” in Germany.

Schauer thus concludes: judges make exceptions when the rule, as interpreted against the categorical backdrop, diverges from its purpose. He notes two features of these exceptions. First, as an extension of his illustration in the statutory context that exceptions are logically indistinct from the rule, crafting exceptions is in no way different than changing the rule. He writes: “The corollary of recognizing that rule  $R$ , which internally excludes instance  $I$ , is no different from rule  $R(I)$ , which internally includes instance  $I$  but then contains an exception for  $I$ , is that there is also no difference between adding an exception  $I$  to rule  $R$  and *changing* rule  $R$ .”<sup>30</sup> Second, he notes that because judges create exceptions in order to apply the purpose behind the rule, doing so is “extensionally equivalent to applying the rule’s purpose directly to particular cases.”<sup>31</sup> It follows, then, that granting a judge the power to recognize an exception any time the rule and purpose diverge is to grant the judge the power to redefine the rule and apply the purpose underlying the rule directly. Further, as a corollary, allowing the

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30. *Id.* at 893. This is just a restatement of what we established using the Securities Act example: there is no logical difference between a version of section 5 that uses the hypothetical term “intersale” which itself excludes intra-state sales, and the version that uses the term “sale” which does not itself exclude intra-state sales but is accompanied by section 3, which makes the exception for intra-state sales. From this logical equality, it is clear that adding the exception in section 3 to a section 5 rule that uses only the term “sale” is the same as changing the section 5 rule to read “intersale.”

31. *Id.* at 894.

judge to recognize exceptions whenever equity or justice would require,<sup>32</sup> as opposed to a more specific principle behind a rule, would be to grant the judge the “power to do justice *simpliciter*,”<sup>33</sup> or in our terms, to apply principles of justice directly to the case at hand.

On the basis of this conclusion, Schauer finally makes his normative point. Judges ought not use the language of “exceptions” because whether or not to grant judges the power to apply principles directly to cases, changing existing rules, is at least a matter of debate.<sup>34</sup> To use the label “exception” then is to hide the reality of what judges do and to shield it from the scrutiny it deserves in light of this debate. We ought admit what exceptions are: direct applications of the underlying principles. Often, though, judges present their exceptions as “epiphenomenal adjuncts” to the rule, somehow of lesser importance, and therefore above the scrutiny of the debate or at least not important enough to draw our attention. But, since exceptions are not “epiphenomenal adjuncts” but rather pronouncements and applications of the principle itself, judges ought not shroud their decisions in the language of “exceptions.” Courts ought subject themselves to the appropriate scrutiny.

#### 4. Counter: Judge-Made Exceptions Can Be Real Exceptions.

I challenge Schauer’s sweeping assertion that all judicial exceptions are logically indistinct from the rules to which they are exceptions, and I consequently challenge his condemnation of the use of the “exception” label as deceptive in all cases. Granted, to create an exception is to change the rule, as Schauer says, but the exception is not always logically indistinct from the rule, and, therefore, the label “exception” or the like may in fact helpfully mark these logically distinct entities.

Consider an extreme variation of the Nazi speech scenario and analogize it to the Securities Act. Assume the exception the judge announced in the Nazi speech case was not about Nazi speech but rather offensive speech by one individual, the judge’s neighbor.<sup>35</sup> As above, if the judge wants to exclude offensive speech by the

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32. Allowing judges to recognize exceptions in these cases presumably relies on the theory that underlying all legal rules is justice/equity. Therefore, an exception based on justice/equity would be logically indistinct from the rule itself following the analysis in the diverging rule and purpose case.

33. Schauer, *supra* note 2, at 895.

34. *Id.* at 894–96.

35. I use this as a generic example of an individual a judge might treat differently than others but with no previously recognized legal justification.

judge's own neighbor from the rule's protection in a geographical place where the categorical backdrop makes no distinction between offensive speech by the judge's neighbor and other offensive speech, the judge would have to create an exception. This, of course, is true most everywhere. However, as opposed to the Nazi speech case, there appears to be no consistent formulation of the principle "offensive speech but not offensive speech by my neighbor." There is no plausible way, referring to some legal interest related to the principle of protected speech, to explain how the purpose of protecting offensive speech is served by excluding offensive speech spoken by the judge's neighbor. Analogously in the Securities Act case, there appears to be no reason to except New York and New Jersey from the rule, no consistent account of the principles "investors need protection" and "New York and New Jersey investors do not." Hence the judge, in recognizing offensive speech by his or her neighbor as an exception, has recognized a real exception, that is, the judge has attached an element to the rule that is inconsistent with the purpose underlying the rule. Why then would the judge except offensive speech by his or her neighbor? As in the case of the legislators excepting their own constituents from the Securities Act, the judge appears to be responding to something other than the force of any possible permutation of the principle underlying the rule, responding instead to something entirely personal.<sup>36</sup> In short, I differ with Schauer and argue that creating an exception, while changing the rule, is not necessarily extensionally equivalent to directly applying the principle underlying the rule, because the creation of the exception may be motivated by something other than that principle.<sup>37</sup> Rather, there are real exceptions to legal rules, exceptions that do not reflect the rule's underlying principle.

*B. The Distinction is Real and the Debate is Not Cosmetic.*

Initially, there are two obvious critiques of the distinction between the types of exceptions that I have proposed. First, by expanding the principle underlying the rule, Schauer might argue

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36. While the neighbor hypothetical might seem outlandish, it is relevantly similar to a prudential concern very commonly attributed to courts that make decisions that appear entirely at odds with previously recognized principles. The concern, mentioned above, is that the executive will not enforce the judicial decision. Both the judge's own preference for not hearing her neighbor and a judge's concern that the executive will not enforce the decision are entirely disconnected to the principle underlying the rule at issue.

37. See Schauer, *supra* note 2, at 872-73.

that the distinction between the two types of exceptions disappears. Schauer might respond to all of the above by noting that if we take a sufficiently broad view of a rule's underlying principle, we can cast any exception, including those apparently entirely inconsistent with the heretofore identified underlying principle, as consistent with the broader principle. For instance, the hypothetical New York-New Jersey exception to the Securities Act can be seen as a reflection of a much broader principle underlying the Act, such as some affirmation of majoritarian politics. That is, the exception for just two states indicates that the principle underlying the Act is "whatever outcome the legislative process yields, sensible or not, is the law." Thus, while we cannot explain the New York-New Jersey exception in terms of some principle related to investor protection, we can explain it in terms of the very broad principle of majoritarian politics. Second, Schauer might argue that the distinction is not real based on the obvious weakness of my neighbor example—that it will be impossible to find cases of judges' so brazenly creating exceptions unambiguously reflecting nothing more than their own personal preferences. I address these responses in particular and lay out the theory of both the validity and usefulness of my distinction in the following paragraphs.

In response to the first critique, the expanding principle critique, I note that often as we broaden a principle—for instance, in the New York-New Jersey securities case, from the narrower "investors need protection" to the broader "whatever the majoritarian process has wrought is the law"—the principle stops being *one* coherent principle in any useful sense. Seeing such broad principles as underlying rules is not useful in light of Schauer's very own normative conclusion: judges ought not use the language of "exceptions" or other such language that obscures their direct application of principles to cases. But confusion is exactly what would be accomplished if we were to simply broaden the principle so far as to label all exceptions to a rule as applications of the expanded principle. By obliterating the distinction between principles sufficiently narrow to match the heretofore recognized purposes of a rule, on the one hand, and broad principles that underlie the law as a whole, on the other, we obscure the difference between a judge directly applying his or her vision of a narrow principle to a case, by way of exception, on the one hand, and applying broad principles that underlie the law, on the other. If Schauer were to argue that in fact all exceptions were applications of underlying principles by simply expanding the principle, he would be ignoring the distinction between a judge applying a narrow principle such as "investors

need protection but not from inter-state sales” and for that purpose creating an exception such as section 3 of the Securities Act and applying a broad principle such as “whatever the majoritarian process yields is the law.” This conflating of narrow and broad principles obstructs constructive, focused debate on the authority of judges to do two very different things: to directly apply underlying principles to cases and to create exceptions entirely unconnected to any reasonably narrow statement of the principle underlying the rule.

The above argument, of course, assumes that in fact the propriety of a judge’s consideration of factors other than the underlying principle implicates some theory of adjudication, that the conduct is a matter of some debate. In the next Section, I show that under theories of adjudication across the spectrum, a judge’s consideration of factors other than the underlying principle is of some moment. Briefly,<sup>38</sup> under every theory of adjudication, reasoning from or deciding cases based upon precedent requires judges to distill something<sup>39</sup> from prior cases and then apply that to the case at bar. Under some theories of adjudication, one judge’s consideration of factors other than the heretofore recognized underlying principle will have substantial consequences for later judges deciding cases in related scenarios. Under other theories, the consideration itself of such factors may, as a normative matter, be a serious judicial misstep or, at least, be a divergence from the proscribed judicial function. In either case, indications, such as by use of the language of “exceptions,” of when judges have considered something other than the underlying principle will be useful.

Further, under these prevailing theories of adjudication, this line narrows as we examine the utility of the distinction for later judges applying precedent. Therefore in the following Section I identify some well-entrenched notions about what it is judges do when they decide cases in accord with precedent. In light of these notions, I draw the line between an application of the underlying principle, on the one hand, and consideration of other factors, on the other. I will also propose a means for identifying when a court’s decision is based on factors other than the heretofore recognized underlying principle.

However, while the nuts-and-bolts implications for jurisprudential theory might answer Schauer’s first potential critique, his second objection, that there are simply no cases as extreme as my

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38. *See infra* Section II.

39. Again deferring a fuller, theory-specific analysis to Section II.

preposterous neighbor hypothetical, remains. In answer to this challenge, I again invoke Schmitt's intuition. I point to an example of a judicial exception of a sort<sup>40</sup> that is not an application of the underlying principle but is rather a reflection of a prudential concern that is most decidedly unconnected to the underlying principle. The example is the notorious concern that the executive will refuse to enforce a judicial decision, that the court will create an exception in service not of the underlying principle but, quite to the contrary, in service of the sovereign's disregard for the settled principles of law. While the example is not as extreme as the neighbor hypothetical, it is certainly dangerous and, as explored in the last section, undeniably a part of our jurisprudential past; while examples as extreme as the neighbor hypothetical are hard to find, the real world examples of real exceptions are exactly the ones we must vigilantly monitor.

## II.

### SOME COMMON TRUTHS ABOUT ADJUDICATION

The purpose of this Section is to distill common notions about what judges do or possibly should do in deciding cases on the basis of precedent. I intend none of the following to smooth over or even to fully summarize the great legal theory debates of the past century and a half. I only want only to identify something of the most basic, common ground among legal theorists across the spectrum on the subject of how judges decide cases.<sup>41</sup> That common ground takes the form of a recognition of a distinction along the lines I drew in the previous section between principles underlying rules and other considerations upon which judges base their decisions.

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40. The analysis is the same whether the language the judge uses to identify the exception is the word "exception" or something else with the same effect of grafting an element onto the rule and thus changing the rule as per Schauer's rightful insistence "that rule  $R$ , which internally excludes instance  $I$ , is no different from rule  $R(I)$ , which internally includes instance  $I$  but then contains an exception for  $I$ , [and thus] there is . . . no difference between adding an exception  $I$  to rule  $R$  and *changing* rule  $R$ ." Schauer, *supra* note 2, at 893.

41. Even if I am unsuccessful in identifying *common* ground about precedential decision-making that sufficiently supports my contention that it would be useful to know when judges have departed from the underlying principle, I will at least have succeeded in identifying theories that, considered individually, support my contention.

I split the field in two: the realists, on one side, and Hart and Dworkin on the other.<sup>42</sup> Very generally, Hart and Dworkin share a concept of law in that they both recognize a concept of law. Specifically relevant here, they both see precedent as an element of the law. The realists, on the other hand, mostly reject any concept of law<sup>43</sup> and consequently see precedent not as part of law but only as a predictor of what judges may do in the future; they reject any formulation along the lines of “the outcome *must* be X because it is the law as dictated by precedent.” Therefore, I split the field because the arguments as to what carries forth in the guise of precedent take different forms on each of the two accounts of the concept, or non-concept, of law. However, for both the realists and Hart and Dworkin, although in very different ways, the language of exceptions will be helpful.

#### A. *The Realists*

Justice Holmes wrote: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>44</sup> Prophecies based on what? The study of prediction means “the study [of] a body of reports, of treatises, and of statutes . . . . In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall.”<sup>45</sup> While the extreme realists see these predictions as based on nothing more than “what the judge had for breakfast,”<sup>46</sup> Holmes himself saw the case reports as the “oracles of the law.”<sup>47</sup> Even though Holmes’ aspirational vision of judging “look[ed] forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them,”<sup>48</sup> he knew as a descriptive matter that “[e]verywhere the basis of princi-

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42. Professor Dworkin himself nods to this split in the field. See RONALD DWORIN, *LAW’S EMPIRE* 36 (1986).

43. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 14–15 (1977) (“Certain lawyers (we may call them ‘nominalists’) urge that . . . the concepts of ‘legal obligation’ and ‘the law’ are myths, invented and sustained by lawyers . . .”).

44. Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897).

45. *Id.* at 457.

46. DWORIN, *supra* note 42, at 36.

47. See *id.* (applying Holmes’ view to what it is judges do when making decisions, noting that the predictions judges make are based on “the general course or path the law is most likely to take”).

48. Holmes, *supra* note 44, at 474.



ple is tradition.”<sup>49</sup> Even on his excruciatingly stripped down, possibly non-existent version of the concept of law, past decisions have if not a force, a predictive value. They have that value only because, as a matter of fact, judges look to their predecessors for “the path of the law.” For our purposes here we need extract from Holmes only that something of prior decisions will predict subsequent outcomes. Although Justice Holmes starts us down the path, he leaves unanswered what of prior decisions carries forth, and what of prior decisions will predict subsequent outcomes. Does the judge’s operation outside an underlying principle affect the prediction for the next case?

Like Justice Holmes, Karl Llewellyn, the next standard bearer of the realist school, treats precedent not as a component of an abstract concept of law such that its force or likelihood of predicting the outcome of a case could be phrased as “the outcome must be X because it is the law as dictated by precedent.” Rather, he attributes the canon “that cases must be decided according to a general rule” to ancient theories of natural law, explaining that “[a]s long as law was felt as something ordained of God . . . the judge was to be regarded as a mouthpiece, not as a creator . . .”<sup>50</sup> As a realist, he rejects a concept of law that treats precedent as the part of this concept of law in the manner described above, because upon observation he notes that courts, indeed the same courts, use multiple methods for dealing with their own precedent.<sup>51</sup> The panoply of options and the seemingly unconstrained ease with which judges choose one over the other lead Llewellyn to the conclusion that “the felt sense of the situation and the case affect the court’s choice of techniques for reading or interpreting and then applying the authorities . . .”<sup>52</sup> It is the “felt sense of the situation and the case” that in fact dictate the court’s decision. But still, even though

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49. *Id.* at 472.

50. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 43 (2d ed. 1951) [hereinafter LLEWELLYN, *BRAMBLE BUSH*]; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 *VAND. L. REV.* 395, 396 (1949) [hereinafter Llewellyn, *Theory of Appellate Decision*] (“The major defect in that system is a mistaken idea . . . that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law.”); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 615 n.40 (1958) (noting that perhaps Llewellyn moved between the 1930 and 1951 editions of the *THE BRAMBLE BUSH* away from the harsher position that the law is nothing other than predictions).

51. Llewellyn, *Theory of Appellate Decision*, *supra* note 50, at 396–99.

52. *Id.* at 397.

Llewellyn appears to have gutted the entire precedential enterprise, making us think that nothing necessarily carries forth from prior decisions, he insists that the court pursues its sense “but always within the limits severely set . . . by the precedent.”<sup>53</sup> Why and how so? After all, it is the current court’s current sense that dictates the case. Llewellyn answers that, as an ethical matter, courts should constrain themselves to some degree for the benefit of litigants.<sup>54</sup> Judges should give litigants “a basis from which [they] may predict the action of the courts[,] a basis to which they can adjust their expectations and their affairs in advance.”<sup>55</sup>

The imperative to provide people with a means to conform their conduct *ex ante* in line with the standards the courts are likely to impose *ex post*, acting as a constraint on judges, suggests an argument about what might carry forth from prior decisions. If “justice demands . . . that like men be treated alike in like conditions[,]”<sup>56</sup> what must carry forth is the rule of a prior case but only as applied to the facts of the previous case. In other words, like people in like conditions (read: same facts) deserve like treatment (read: the same rule). It is true that in the extreme, what Llewellyn labels the “strict view,”<sup>57</sup> this account of precedent “confine[s] the case to its particular facts,” but not just to the relevant facts, to all facts—hair color, names, and the like.<sup>58</sup> He notes that judges in fact employ this strict method to distinguish away precedent when they are “unwelcome,” by identifying only the bare minimum constraint of precedent, literally the identical case appearing a second time in court.<sup>59</sup> But reading Llewellyn as a whole, he limits judges’ freedom to distinguish away cases, forcing them to bear their ethical burden to allow people to plan their affairs. Therefore, it is the contours of the ethical burden that determines what beyond the absolute bare minimum carries forth in the form of binding precedent.

A brief look at analogical reasoning in the law, the method by which precedent is carried forward on the realist account of the courts, in light of the ethical burden makes clear what it is that

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53. *Id.* at 399.

54. LLEWELLYN, BRAMBLE BUSH, *supra* note 50, at 65–66.

55. *Id.* at 66.

56. *Id.* at 43.

57. *Id.* at 67–68.

58. *Id.* at 66–67.

59. *Id.*

carries forward on the realist account. Cass Sunstein outlines the form of analogical reasoning in the law.<sup>60</sup>

The process appears to work in four simple steps: (1) Some fact pattern *A* has a certain characteristic *X*, or characteristics *X*, *Y*, and *Z*; (2) Fact pattern *B* differs from *A* in some respects but shares characteristics *X*, or characteristics *X*, *Y*, and *Z*; (3) The law treats *A* in a certain way; (4) Because *B* shares certain characteristics with *A*, the law should treat *B* the same way.<sup>61</sup>

Sunstein then notes that the real work of analogical reasoning is to make an argument that *A* and *B* are “relevantly similar,” that is, that the work of analogical reasoning is to give content to the word “because” in step four.<sup>62</sup> Llewellyn does this exactly by appeal to the ethical burden. *A* and *B* are relevantly similar if a person planning his future conduct will read previous case *A* as furnishing a good prediction that his future case *B* regarding the conduct he is now planning will be judged the same as the conduct of the litigant in case *A*. Thus, on Llewellyn’s account, the judge in case *B* will/should look at the array of facts in case *A* and determine what in the array of facts in case *A* litigants will have identified as potentially predictive of future outcomes.<sup>63</sup> Recall that on the realist account we are looking at the predictive value of a precedent, not its legal force.

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60. See Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993). Sunstein does not take a realist position at all. Further, I am not implying that seeing analogical reasoning as the only or primary method of the courts is unique to realists. However, analogical reasoning appears on the face of the realist position taken by Llewellyn. To wit, precedent is predictive of future outcomes only to the extent judges fulfill their ethical duty to treat like cases alike, that is, to reason analogically. Thus, my argument as to what carries forth in the form of precedent and consequently what, if anything, of the judge’s actual reasoning is useful information for later judges and litigants turns on the form of analogical reasoning employed by the courts. Hart and Dworkin, on the other hand, see precedent, along with other elements of law, as having a legal force unto itself; thus for Hart and Dworkin, precedent is not just predictive of outcomes but may determine them as a matter of law. My argument in this context turns on what of precedent carries the force of law, the mechanics of analogical reasoning notwithstanding. As Sunstein himself notes, “Dworkin says little about the role of analogical reasoning . . .” *Id.* at 784.

61. *Id.* at 745.

62. *Id.*

63. Here I am describing the operation of the ethical constraint on judges. See Llewellyn, *Theory of Appellate Decision*, *supra* note 50, at 399, for his primary directive to judges on judging. “But a court must strive to make sense *as a whole* out of our law *as a whole*. It must . . . take the music of [precedent and statutes alike and] play it well, and in harmony with the other music of the legal system.” *Id.*

Turn to our specific problem: how does this ethical duty impact how the judge in case *A* might more usefully write her decision, or at least how might Llewellyn want her to write her decision? Consider a closed universe of cases *A''*, *A'*, and *A* in that chronological order and cases *B* and *B'* following. Case *A''* consists of an array of facts and an outcome 1. Case *A'* consists of another array of facts upon which litigants correctly predicted that case *A'* would result in outcome 1, the same as case *A''*. The "rule" then is the formula: the array of facts common to cases *A''* and *A'* leads to outcome 1. Case *A*, however, consists of yet another array of facts somehow different but mostly identical to the array of facts common to cases *A''* and *A'*, upon which litigants correctly predicted the outcome in case *A'*. When the outcome in case *A* diverges from that in *A''* and *A'* and produces outcome 2, has the predictive value of the array of facts in cases *A''* and *A'* changed? This is a critical question for the judge seeking to fulfill her ethical obligation in cases following *A''*, *A'*, and *A*. The answer clearly depends upon what readers of case *A* think about the distinction between *A''* and *A'*, on the one hand, and *A*, on the other and consequently what they will predict, based on the sum of *A''*, *A'*, and *A*. If the factual distinction is such that readers of *A* now predict that case *B* will yield outcome 2, then the judge in case *B* must ethically consider that case *A* predicts outcome 2 in case *B*. Why will litigants see case *A* as predicting outcome 2 in case *B*? Here we can identify types of distinguishing facts. On the one hand, there are those factual distinctions that appear to fine-tune the "rule" as defined above, and, on the other hand, there are factual distinctions that appear to dictate the outcome of a specific case, here *A*, the "rule" notwithstanding. Distinctions of the former type will have a significant effect on the predictive value of previous case law, while distinctions of the latter type will likely leave the predictive value of previous cases untouched. For instance, take my extreme example from Section I. Say cases *A''*, *A'*, *A*, and *B* were First Amendment cases and in cases *A''* and *A'* the court protected the party's right to *say* something offensive. Then consider two different versions of case *A*: In *A*(1), the court refused to protect the party's right to *write* something offensive and in *A*(2), the court denied a party's right to say something offensive, but the party was the judge's neighbor. Next come cases *B* and *B'*. In *B*, the party seeking protection wrote something offensive. In *B'*, the party seeking protection, not the judge's neighbor, said something even more offensive than in cases *A''* and *A'*. Assuming *A*(1), parties will predict that the court in *B* will not protect the writing because the court in *A* has clarified the rule as

excluding protection of writing. Assuming *A*(2), parties will predict that the court in *B*' will still protect the *speech* and will assume that the judge in *A* refused to protect the speech because of the unique circumstance of the offending party's being the judge's neighbor. But how will the judge in *B*' know that this will be the party's predictions based on *A*(2)—maybe the parties reading *A*(2) will think that the decision in *A*(2) clarified the rule in the same way as the court in *A*(1) did, drawing a line as to the degree of offensiveness that will be protected? Such a prediction is unlikely because the factual distinction between *A*' and *A*(2) is so specific that it appears that the judge in *A*(2) is responding to the unique circumstance of his neighbor's speech, not changing anything substantive about the "rule." But beyond such a prediction being unlikely, the judge's job in *B*' will be substantially easier if the decision in *A*(2) made clear, using the language of exceptions or the like, that the circumstances were so unique as to strip the decision here of any significant effect on the general operation of the rules already laid down.

Sound familiar? This distinction between types of factual distinctions is the same as my distinction in the previous section between a judge applying an underlying principle directly to a case and responding to some factor other than the underlying principle. In our example, deciding not to protect the writing in *A*(1) is a direct application of some vision of the principle of protected speech while refusing protection of the neighbor's speech is obviously a response to the unique, uncommon circumstance. Note that synthesizing the analysis from Section I and the language of "underlying principles" with the language of "predictive value" of the world of the realists' analogical reasoning is difficult. Realists do not recognize the possibility of distilling the "underlying principle" of a rule or even the rule itself from prior cases. The facts of the case plus the outcome and resulting predictive value is all there is. Nonetheless, as demonstrated above, the insistence that judges constrain themselves in line with an ethical obligation to decide like cases alike highlights the usefulness of judges' indicating when they are deciding cases based on one type of factual distinction or another and supports my normative suggestion that judges use the language of exceptions or the like when deciding cases based on factors other than the underlying principle. Thus, a close look at the predictive value of cases in the realists' adjudicatory scheme sheds some light on when it is useful for judges to indicate that they have appealed to something other than the "underlying principle." Cases decided on the basis of factors so unique that they appear to have no effect on the general, that is, common and frequent, opera-

tion of the “rule” have a different predictive value than cases decided on the basis of more common factual variations. A judge’s indication of such a basis for decision can be useful to later judges gauging the predictive value of the case law.

### B. *Hart and Dworkin*

Working with the realist account of adjudication, we found the distinction between the application of the underlying principle and the consideration of other factors to be “useful” in a very practical sense. The job of the later judge, as described by the realists, is made substantially easier. The predictive value of a case turns in part on whether the judge decided the case on the basis of one type of factual variation or another. She will more easily fulfill her ethical duties when the previous judge indicated what the basis for the decision was and consequently what the predictive value of the previous case would be. On the Hart and Dworkin accounts of adjudication, however, the usefulness of the distinction and judges’ indications comes in the form of better informing debates regarding the propriety of judges considering factors other than the principle underlying the rule.<sup>64</sup> The propriety of how judges make their decisions is in dispute because both Hart and Dworkin recognize a concept of law. The law is something more than predictions. There is content to law. Thus the question necessarily and repeatedly arises: is the judge acting within or without the law in relying on this factor or that? This question is most frequent and becomes most acute when the rule does not neatly fit the facts of the case.<sup>65</sup> Hart and Dworkin split over how to account for judges acting within the law, or at least within some judicious limit, when deciding these hard cases—how they may properly exercise their discre-

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64. As a result of this difference, the analysis in the realist section necessarily focused on interpretations of precedents. In the Hart/Dworkin section, the debates implicated concern a judge’s duty any time a general, precedential, statutory, or constitutional rule does not quite fit the facts of the case. The distinction becomes useful both in cases interpreting precedent as well as in those interpreting statutes and constitutions.

65. See DWORKIN, *supra* note 43, at 15; Hart, *supra* note 50, at 606–08. Hart notes that cases of this sort pushed the realists over the edge into the conceptual void where there is no law. Hart, *supra* note 50, at 607. The realists reasoned: judges are doing something other than applying the rules in hard cases. Law cannot mean anything if not the application of the rules. Hard cases are everywhere. Thus, there is no law. See *id.* at 612 (“[T]he recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives . . .”).

tion to expand the rule to apply to the case while not stepping outside the proper judicial role. However, for both Hart and Dworkin, some exercise of discretion is beyond the law. Some factors are outside the proper scope of judicial consideration. Like Schauer, then, I want to lay bare what it is that judges do when they recognize exceptions. Are they acting within the law or without? The answer will in part turn on whether the judge in hard cases is applying the principle underlying the rule or deciding the case on other factors. We will thus be able to narrow the line between the type of exceptions by considering these two leading theories of adjudication.

#### 1. Hart: Positivism

At the center of Hart's theory of law is the proposition that the law is limited to a set of valid rules, the validity of which is determined by "pedigree," the manner in which they are adopted.<sup>66</sup> Judges deciding cases apply these rules. However, in cases where the properly pedigreed rule does not quite fit the facts, where someone tries bringing an airplane into the park, judges face "the problems of the penumbra" and must decide the case using some discretion.<sup>67</sup> In exercising this discretion, judges *make* law, filling in the gaps where the pedigreed legal material incompletely regulates.<sup>68</sup> This discretion is constrained, though.<sup>69</sup> Hart calls this dis-

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66. See generally H.L.A. HART, *THE CONCEPT OF LAW* 82–110, 238–76 (2d ed. 1994) (pages 238–76 of the second edition comprise Hart's "Postscript," [hereinafter HART Postscript] an additional commentary by the author appended to the second edition); DWORKIN, *supra* note 43, at 17. The etiology of Hart's concept of law, that is, his rescue of positivism from the pitfalls of the command theory of Bentham and Austin, is not important here. A discussion of the details of the theory, the distinction between primary and secondary rules, and the existence and operation of the rule of recognition is unnecessary for my argument. What is important is the consequence of Hart's theory for adjudication. See HART Postscript, *supra* at 263–68, for Hart's amendment to the theory, recognizing the potential for valid, pedigreed legal principles in addition to valid, pedigreed legal rules. Although Hart, in *The Concept of Law*, does focus on the manner in which a rule has been adopted when determining its legal validity, the term "pedigree" is Dworkin's. See *id.*; DWORKIN, *supra* note 43, at 17.

67. See Hart, *supra* note 50, at 606–08; HART, *supra* note 66, at 124–32.

68. See HART Postscript, *supra* note 66, at 272 (explicitly recognizing that judges exercising discretion in the interstices *make* law); *cf. id.* at 124–32 (observing the inherent indeterminacy of both legislative and precedential directives and the necessarily attendant judicial discretion in their application, but stopping short of explicitly acknowledging that judges *make* law in these hard cases).

Here I do not take the route of soft positivism to explain what it is Hart sees judges as doing when deciding cases in the "penumbra of uncertainty." Consider the following argument.

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Very briefly, Dworkin criticizes Hart's theory of law on the ground that it does not account for the consideration of legal principles in addition to legal rules in adjudication. Hart's pedigree theory of legal validity, Dworkin claims, allows only for legally valid "all or nothing rules" but not valid principles. Thus, in uncertain cases where the valid rules do not clearly dictate an answer, judges use their discretion to make law, not uncover or interpret existing law. This, Dworkin says, is bad and is therefore a flaw in the positivist theory. The soft positivists reply to Dworkin, arguing that principles as well as rules may be found valid under Hart's theory, and that Hart's rule of recognition is not as narrow as Dworkin characterizes it. Whereas Dworkin casts Hart's rules of recognition as rules of pedigree, that is, that propositions of law are valid only by virtue of the means by which they were created thereby excluding all un-enacted legal principles from the valid legal materials, the soft positivists expand the possible set of rules of recognition to include tests for morality in determining legal validity. Thus, when judges appeal to general legal principles as opposed to rules in deciding hard cases, they are in fact deciding the case within the law, that is, based on valid legal principles.

I could potentially liken judges appealing to the soft positivists' principles to Schauer's "application of underlying principles" and then note that underlying principles are included within the valid legal materials while factors other than the underlying principle are not, and therefore argue that their consideration is possibly extra-legal and therefore of some moment. Of course, then it would be helpful if judges indicated via the language of exceptions when they were applying the underlying principle and when they were doing something else. I do not take this route because the story I told above does not end here.

Dworkin responds to the soft positivist defense of Hart. He notes that expanding the set of rules of recognition to include moral tests of legal validity is inconsistent with one of the aims of positivist theory, namely, to make the validity of "propositions of law independent of any commitment to any controversial philosophical theory of the status of moral judgments." *Id.* at 253. In other words, if positivist theory aims to make the criteria for legal validity independent of controversial determinations of right and wrong and other such generalities, then a rule of recognition must exclude general principles from the valid legal materials. Hart finally replies that he indeed does think that "legal theory should avoid commitment to controversial theories of the general status of moral judgments and should leave open . . . the general question of whether they have . . . objective standing." *Id.* at 253–54. He then concludes that "[i]t will not matter for any practical purpose whether in . . . deciding cases the judge is *making* law in accordance with morality . . . or alternatively is guided by his moral judgment as to what already *existing* law is revealed by a moral test for law." *Id.* at 254 (emphasis in original). Hart does not think the line between making law and interpreting law does or should impact what judges do in hard cases. Even when he recognizes that he erroneously omitted the role of principles in his account of adjudication, he does not specify whether they exist within the valid legal realm or without, whether their consideration is strictly dictated by the law or an act of extra-legal judicial discretion. *See id.* at 259–63. Further, in responding to Dworkin's criticism that the principles to which judges appeal in hard cases are in fact law themselves, and thus judges do not exercise discretion in hard cases, Hart defends his vision of judges' discretionary decision making and does not opt to simply include those principles within the valid legal materials, even though he recognizes the possibility that they potentially might even be included under a strict pedigree version of the rule of recognition, even failing the soft positivist expansion. *See id.* at 263–68, 272–76.



cretionary power interstitial.<sup>70</sup> Giving content to “interstitial,” Hart highlights

the importance characteristically attached by courts when deciding unregulated cases to proceeding by analogy so as to ensure that the new law they make . . . is in accordance with principles or underpinning reasons recognized as already having a footing in the existing law . . . . Very often . . . they cite some general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case.<sup>71</sup>

Hart’s vision of what judges do in the hard cases is identical to what Schauer describes judges doing when they apply a rule’s underlying purpose directly to a case. Hart argues that in hard cases the rule as phrased incompletely reflects the contours of the underlying principle the rule is meant to execute. Judges use their discretionary power to ensure an outcome in line with the underlying principle, side-stepping the linguistically constrained rule.<sup>72</sup> In other words, they apply the underlying principle directly to the case. However, consideration of factors other than that underlying principle would appear to be outside the proper discretion of

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Thus, there are two reasons for me not to take the soft positivist route. First, Hart does not think the line between making law and interpreting law does or should impact what judges do in hard cases. Thus, indications of when judges are applying the underlying principle may be irrelevant under this theory. Second, the soft positivists do not limit the range of principles that might be found valid under their theory. There is no necessary distinction relevant to the range of potentially valid legal principles or considerations between what Schauer calls underlying principles and what I call other factors. Thus, I turn my attention to Hart’s position on the constraint imposed on judges even when exercising their discretion to *make* law in the penumbral cases.

69. *See id.* at 272–73. I do not reference either Hart’s *Positivism and the Separation of Law and Morals* or *Concept of Law* because in neither of them does Hart detail the constraint on a judge’s discretion in the hard cases beyond noting that first, in the normal run of things, clear rules reign and second, judges exercise their discretion in line with “social aims.” *See id.* at 132 (“The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance . . . [n]one the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules . . . .”); Hart, *supra* note 50, at 614 (“We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims.”).

70. HART Postscript, *supra* note 66, at 273.

71. *Id.* at 274.

72. *See* Hart, *supra* note 50, at 610 (describing the proper realm of discretion as that “uncontrolled by linguistic conventions”).

judges on Hart's account. To say otherwise would be to obliterate the only constraint Hart places on this discretion.<sup>73</sup> Of course then, we would want to know when a judge was acting outside the bounds of his rightful discretion and the language of exceptions may be helpful in identifying judicial decisions that implicate Hart's theory.

Further, Schauer himself recognizes that exceptions that are applications of underlying principles directly to cases will come up more frequently in hard cases, in which the rule as written or passed down as precedent does not quite fit the facts of the case.<sup>74</sup> Exceptions created to address factors other than the underlying principle, on the other hand, will come up even in easy cases where the rule-to-facts application is straightforward and determinate. Neither Hart nor Schauer sees judges in easy cases exercising discretion and applying the underlying principle because, by definition under Hart's theory, in easy cases the rule as written accurately reflects the underlying principle. Thus, applying the underlying principle and applying the rule as written in easy cases are one and the same. The only remaining potential departure from the proper judicial role, then, is consideration of factors unrelated to the underlying principle, which obviously would implicate a judicial misstep under Hart's theory. Hart sees these easy cases as ubiquitous and as allowing absolutely no room for judicial discretion.<sup>75</sup> Thus, the language of exceptions will be helpful even in easy cases.

How does this analysis narrow the line between underlying principles and other considerations? Hart does this for us by limiting the scope of judicial discretion to the interstices. In allowing for the direct application of principle, he allows only "principles or

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73. Keeping this constraint intact is of supreme importance to Hart's theory. First, it keeps him out of the realist camp by avoiding the conclusion that judge's free hand in deciding penumbral cases makes "law" nothing more than predictions. Second, it defends against Dworkin's criticism that Hart has failed to account for the place of legal principles in adjudication and therefore has allowed for extra-legal *and* unconstrained decision making, anathema to the content-laden concept of law Hart and Dworkin share. Last, it allows Hart to account for judicial consideration of legal principles while maintaining that there is still a sharp distinction between law and morals. See HART Postscript, *supra* note 66, at 273–76.

74. Schauer, *supra* note 2, at 873–75.

75. See HART, *supra* note 66, at 132. It is true that Hart admitted in the Postscript that even in easy cases where the rule easily and completely fits the facts the rule may be overridden by a competing principle. See *id.* at 262 (picking up on Dworkin's example of *Riggs v. Palmer* in which the law of wills clearly granted the inheritance to the murderous grandson but nonetheless the court refused to order the executor to pay him, applying instead the principle that "a man may not be permitted to profit from his own wrongdoing"). However we might say cases in which a competing principle trumps a clearly applicable rule are not *easy* cases.

underpinning reasons recognized as already having a footing in the existing law” and identifies those as “some general principle[s] or some general aim[s] or purpose[s] which some considerable relevant area of the existing law can be understood as exemplifying or advancing.” First, as we found under the realist analysis, this would preclude the rightful consideration of factors unique to the case at hand, unlikely to be found commonly. Here again I refer to factors such as the “neighbor” factor that are truly unique to the case and can have no effect on the general operation of the rule, as opposed to factors that are simply extreme variations of the fact pattern that the rule and underlying principle are meant to address, which may rightfully be considered under Hart’s theory, because even extreme variations may be addressed by the underlying principle. Note, this may not be true on the realists’ account, because decision outcomes in cases of extreme variation might not be predicted, and thus a violation of the ethical duty of judges to treat like cases alike.

Second, Hart’s interstices constraint sets to one side considerations of factors or principles that do not appear to underlie any preexisting area of law. Allowing judges to consider concerns unconnected to a preexisting area of law would essentially free their hands from the binds Hart has placed on them. The constraint is meaningful only if the principle applied actually is recognized as “exemplifying and advancing” some area of law. I do not here refer to overriding principles such as broad constitutional principles that apply across the legal landscape. Such principles are in fact recognized and Hart might very well not object to their application in hard cases. Rather I refer here to prudential concerns that are connected neither to the purpose of the law in question nor to any overriding broad principles of law. A good example of such a prudential concern, examined below in the next section, is the concern that the executive will not enforce the court’s decision. Even if we were to cast this as a general principle, it certainly is not one that, in Hart’s words, “can be understood as exemplifying or advancing” an area of law. Essentially, it is the court recognizing what the law is but deciding the case otherwise for some, albeit possibly necessary, prudential reason. Such a concern stands in contrast to the principle applied in *Riggs v. Palmer*<sup>76</sup> which Hart admits as properly considered by a judge.<sup>77</sup> The principle there, that “a man may not be permitted to profit from his own wrongdoing,”<sup>78</sup> Hart sees as underlying some area of the law, and therefore the principle

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76. 22 N.E. 188 (N.Y. 1889).

77. HART Postscript, *supra* note 66, at 262.

78. *Id.*

itself already exists in the law in some form, although not necessarily with the proper pedigree. Prudential concerns of the sort I point to as underlying some exceptions do not preexist in the law in this form.

## 2. Dworkin I: Constructive Interpretation

Dworkin departs from Hart's positivism and extends the concept of law to include "principles, policies, and other sorts of standards" that do not necessarily meet Hart's test for validity of legal rules.<sup>79</sup> His position hinges on the observation "that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases . . . they make use of standards that do not function as rules . . . ."<sup>80</sup> Thus Dworkin places the consideration of underlying principles at the center of his theory of adjudication. Unlike Hart though, Dworkin includes principles within the concept of law and therefore holds that judges are not *making* law when they consider legal principles in deciding cases.<sup>81</sup> Further separating Dworkin and Hart, Dworkin sees judges neither making law nor finding existing law but rather interpreting law.<sup>82</sup> Therefore, whereas in Hart's case we looked at the constraint Hart placed on a judge's exercise of discretion in making law and identified therein the distinction between underlying principles and other considerations, in Dworkin's case we will look at his criteria for identifying valid law, or more precisely, his description and prescription<sup>83</sup> of a judge's interpretation of law. These criteria in turn serve as the constraint on the judge's authority to decide cases *within* the law. Here too we will find the distinction between underlying principles and other considerations, and we will thus be able to further narrow the line between the two.

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79. See DWORKIN, *supra* note 43, at 22. The full details of Dworkin's criticism of Hart, for example, the observation that the law consists of both "all or nothing" rules as well as principles that only lend weight but do not determine outcomes etc, are not relevant here. What is relevant is Dworkin's theory of adjudication, specifically the constraints Dworkin places on judges and the guidance he provides them in identifying legal principles as appropriate for consideration in a given case.

80. *Id.*

81. See *id.* at 31–39.

82. See generally DWORKIN, *supra* note 42; Keith Culver, *Editor's Introduction to Chapter 3*, in READINGS IN THE PHILOSOPHY OF LAW 182 (Keith Culver ed., 1999).

83. See Culver, *supra* note 82, at 182.

Briefly,<sup>84</sup> Dworkin sees judges engaged in the process of constructive interpretation and having adopted “law as integrity” as the concept of law.<sup>85</sup> “According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>86</sup> The process of constructive interpretation, assuming law as integrity as the concept of law, requires judges to perform two steps in interpreting and thus extending and applying the law to new cases. First, they must identify the possible interpretations of the existing law at the time that *fit* “some coherent theory about legal rights such that a single political official with that theory could have reached most of the results the precedents report.”<sup>87</sup> Second, they must choose among these possible interpretations the one that best *justifies* the law as consistently principled, as best pursuing the principles of integrity and political morality, that is, justice, fairness, and procedural due process, “so that each person’s situation is [judged] fair[ly] and just[ly] according to the same standards.”<sup>88</sup>

Identifying one of the great many implications of the above on the world of adjudication, note that Dworkin’s requirements would preclude a judge’s considerations of the types we identified as possible judicial missteps on both the realist and Hart accounts of adjudication. First, considering factors unique and uncommon that are not simply extreme variations of the basic case the rule and underlying principle was meant to address, and which are offensive to the realist’s vision of judicial decisions as reliable predictions, will likewise generally not fit the practice Dworkin’s constructively interpretive judge examines in his first interpretive step. Uncommon, unique factors are just that; their consideration does not cohere with what judges have done in the past. Interpreting the law as

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84. Here I summarize and apply Dworkin’s sweeping theory of law in *LAW’S EMPIRE*. His theory combines in grand fashion political philosophy and legal philosophy as well as a complex theory of interpretation. I apologize for my short and possibly glib treatment and use of it here. I include Dworkin in this section even though I can sufficiently narrow the line between application of underlying principles and consideration of other factors and thereby give content to “other factors” without appeal to *LAW’S EMPIRE*, because I suspect that of the legal theorists, Dworkin would be the one most troubled by a judge’s appeal to the other factors I have in mind (an archetypal example being the consideration of prudential concerns) when deciding cases.

85. See DWORKIN, *supra* note 42, at 225–58.

86. *Id.* at 225.

87. *Id.* at 240.

88. *Id.* at 243.

requiring the silence of the judge's neighbor could not possibly cohere with any consistent theory of legal rights that might explain the existing First Amendment jurisprudence.

Second, consideration of principles unconnected specifically and uniquely to the area of law at issue will by definition not fit the same coherent theory about the specific area of law. Dworkin recognizes the compartmentalization of law.<sup>89</sup> Interpretations of law that do not fit the "local" area of law at issue in the case are worse candidate interpretations of the law even if those interpretations may fit some other area of law.<sup>90</sup> Dworkin calls this "local priority."<sup>91</sup> Factors unconnected specifically and uniquely to the area of law at issue then are likely poor fits and their consideration as a matter of interpretation is at least of some moment for Dworkin. But turning to the justification stage of interpretation, Dworkin more radically precludes consideration of the prudential concerns that I see as exemplifying factors that are unconnected specifically and uniquely to the area of law at issue and in fact do not advance or underpin any area of existing law. Prudential concerns such as "the executive will not enforce" cannot possibly justify an interpretation of law in light of the political morality commitments to fairness, justice, and procedural due process that are at the center of law as integrity. For instance, consideration of factors such as these cannot possibly cohere with a commitment to see "that each person's situation is [judged] fair[ly] and just[ly] according to the same standards."<sup>92</sup>

In sum, Dworkin's theory precludes consideration of factors so unique and uncommon that are not simply extreme variations of the fact pattern the local law is meant to address. It further precludes considerations that do not cohere with any rights-based theory of the law under interpretation. In the language of Section I, then, principles both commonly and properly seen as underlying rules may, indeed must, be considered. Other factors, such as the judge's personal tastes as well as broad prudential concerns must not.

### 3. Dworkin II: Principle and Policy

Another paradigmatic distinction that I might model my own on is Dworkin's distinction between principle and policy. "Arguments of policy justify a political decision by showing that the deci-

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89. *Id.* at 250–54.

90. *Id.*

91. *Id.*

92. *Id.* at 243.

sion advances or protects some collective goal of the community as a whole . . . . Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.”<sup>93</sup> Dworkin then claims that courts characteristically do and should decide cases as a matter of principle and not policy.<sup>94</sup> He makes two arguments.<sup>95</sup> First, he asserts that adjudication should be as unoriginal as possible because of the undemocratic implications of an unelected judge’s making new law and the inherent unfairness of newly created judicial rules applied retroactively.<sup>96</sup> But judges deciding cases based on policy are making new law while judges deciding cases based on principle are not. Decisions based on policy are new in that they require a balancing of communal welfare and goals made anew in each case that implicates such policy concerns. Decisions based on principle rely upon rights already recognized and therefore avoid both the democracy and retroactivity pitfalls. Second, Dworkin observes that lawyers expect “articulate consistency” in judicial decisions.<sup>97</sup> Whereas nothing about policy decisions requires any consistency, principled decisions require consistency with a comprehensive theory of individual or group rights. Thus principles, not policies, dominate or should dominate, adjudication.

Note, Dworkin and I use “principle” differently. Dworkin uses it in a specific sense, as rationales based on theories of rights. I use it much more generally to refer to underlying reasons, be they rights based or not, consistent with anything preceding or not. Both Dworkin’s “principle” and “policy” fall within my “principle.”

My distinction between types of exceptions maps nicely onto Dworkin’s distinction between principle and policy. What Schauer calls underlying principles fall into Dworkin’s definition of principle. What I call factors other than the underlying principle fall within Dworkin’s definition of policy. Although my category “factors other than the underlying principle” as defined in the subsection immediately below, drawn from the realist, Hart, and Dworkin theories of adjudication above, may be broader than Dworkin’s policy category, my example of prudential concerns certainly fits squarely within the policy camp. A judge’s concern for the fate of

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93. See DWORKIN, *supra* note 43, at 81–82 (defending his rights thesis of adjudication).

94. *Id.* at 84.

95. See Kent Greenawalt, *Policy, Rights, and Judicial Decision*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 88 (Marshall Cohen ed., 1983).

96. See DWORKIN, *supra* note 43, at 84.

97. See *id.* at 86–88.

the entire judicial enterprise in light of the possibility that the executive might refuse to enforce the court's decisions is a policy concern, weighing the need for the very existence of the judicial institution against its prospects for potency. The concern, however, does not cohere with any existing legal principles or with any theory of rights embedded within the law.

Our debates about the propriety and place of policy in adjudication would be well served then if judges indicated their consideration of policy, possibly by use of the language of "exceptions."

*C. Hart, Dworkin, and the Realists All on the Same Page*

We can discern from these three paradigmatic positions where we might locate the line between the two types of exceptions. The line falls in exactly the same place as the line between a realist judge's ethically constrained decisions, Hart's conceptually constrained exercise of discretion, and Dworkin's constructive interpretation, on the one side, and anything else, on the other. Wherever that line may fall on any of the accounts of the adjudication, consideration of factors other than the underlying purpose of the rule is out of bounds, or at the very least a matter of debate. Narrowing the line, we identified factors that are "other than the principle underlying the rule": (1) factors whose consideration is not likely to be repeated, uncommon but not simply as an extreme variation of the case the underlying principle usually addresses, so unique and circumstance specific that they offend our most basic extreme sense that law is reproducible, (2) factors, concerns, or principles that are not specific to the conduct governed by the rule and in fact do not advance or underpin any area of existing law, and, similarly, (3) factors that cannot cohere with any theory of fairness, justice, or procedural due process that is justifiably seen as underlying some area of the law. Exceptions that are responses to factors such as these are most distinctly not applications of the principle underlying the rule. It would be useful, on accounts of adjudication across the spectrum, to know when judges are making exceptions such as these.

In the next section, we will see that such exceptions do exist in law generally as well as in judicial decisions specifically.

### III. REAL EXCEPTIONS EXIST

In this section, I show that real exceptions exist in the law and in judicial decisions specifically. I start by looking at the nature of



statutes as seen through recent literature on statutory interpretation and the legislative process. I note the principal factual basis of the textualists' position that the sum of a statute's provisions can very well be incoherent as a whole when measured against a proposed underlying purpose, an assertion that is not rejected as a matter of *fact* by purposivists. Further, textualists observe, the inconsistent elements can come about as the result of the legislative process and, specifically, the centrality of compromise to the eventual passage of most legislation. This compromise can and often does yield simply arbitrary statutory provisions that obviously do not reflect any coherent underlying purpose or even competing purposes. These arbitrary provisions, which can easily come in the form of exceptions, will often fall into at least one of the three categories of "factors other than the underlying principle" we identified in the previous section. Thus factors other than the underlying principle exist in the law and can underlie exceptions.

Having established the existence of real exceptions in the statutory context, I suggest that they exist as well in judicial decisions. Schauer will counter that no inference from the statutory context may be drawn because legislators are allowed to be arbitrary, are allowed to make law and legislate such that the governed will not be able to predict the next law, to superimpose concerns that appear not to exist anywhere else in the pre-existing law, and to legislate under no coherent theory of political morality. Judges, Schauer will continue, cannot and do not act as arbitrarily. I counter simply that, arbitrary or not, judges in fact do sometimes consider factors that fit into one or more of the three categories described above—behavior which powerfully implicates the theories of adjudication in the previous section just as immediately as if judges were acting arbitrarily. Schauer is right that judges are not supposed to act this way, neither as a normative matter nor according to the leading descriptions of adjudication. But it happens and maybe for good, unavoidable reasons. It would be useful to know when it is happening.

#### A. *Real Exceptions in the Statutory Context*

Until recently, the enterprise of statutory interpretation was dominated by Hart and Sacks' sweeping directive to "treat legislators as 'reasonable persons pursuing reasonable purposes reasonably.'"<sup>98</sup> Hart and Sacks' legal process materials served as the

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98. John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 34 (2006) (quoting HENRY M. HART & ALBERT M. SACKS, THE

canonical account of modern purposivism.<sup>99</sup> Judges, acting pursuant to this directive, freely smoothed the edges of jagged and incongruous legislation, identified the reasonable legislator's legislative intent, and reigned in facially errant provisions bringing them in line with the perceived purpose of the legislation.<sup>100</sup> Under Hart and Sacks' rule, all legislation, every provision, had a purpose and had to be interpreted in light of the underlying aim.<sup>101</sup>

The textualist movement exposed a key fallacy underlying the purposivist scheme. Purposivists reason: legislators are faced with the normal run of linguistic difficulties and constraints when trying to make their intentions known,<sup>102</sup> but we know they aimed to legislate in line with a coherent purpose. Therefore we naturally look to interpret their statutes in line with the purpose we're sure they intended to pursue. Textualists respond in part<sup>103</sup> that this picture completely ignores the overwhelming role compromise plays in the complex and grueling legislative process.<sup>104</sup> What otherwise may look like abject incoherence when measured against an underlying purpose may in fact be the product of carefully deliberated legislative deal-making.<sup>105</sup> Specifically, the choice between unqualified

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LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) and noting the material's decades-long domination of the field).

99. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006); Jonathan T. Molot, *The Rise And Fall of Textualism*, 106 COLUM. L. REV. 1, 23–24 (2006).

100. See generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); Manning, *supra* note 98; Manning, *supra* note 99.

101. See Manning, *supra* note 98, at 35 n.11 (“The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”) (quoting HART & SACKS, *supra* note 98, at 1124).

102. See *id.* at 36 nn.15 & 16 (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989) (detailing the difficulties of conversational communication); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182 (1990) (extending Grice's analysis to statutory interpretation)).

103. Neither the other elements of the Textualist objection, for example, the meaninglessness of congressional intent in the abstract and the concerns for the constitutional legitimacy of the words presented to and passed by both houses of Congress and signed by the President, nor the precise contours of the Purposivist-Textualist debate as it stands today, see Manning, *supra* note 98, are important for my argument. What is important is the factual basis of the Textualist position, that is, the primacy of compromise in the legislative process and its effect on a statute's coherence.

104. See Manning, *supra* note 100, at 2408–12.

105. See *id.*; see also Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1346–47 (1994) (noting that compromises in law-making challenges the Hart and Sacks vision of legislation and its interpretation).

statutory language and a complex set of exceptions and limitations may bear no relation whatsoever to any policy aim but rather may reflect the costs of navigating the complex legislative course, including the presentment and bicameral requirements as well as interest group leverage and back-room negotiations.<sup>106</sup>

What is crucial to note is that the modern Purposivist response does not deny the factual basis of Textualism but rather adopts a differently emphasized interpretive method in light of the teachings of Textualism.<sup>107</sup> For instance, Textualists have banned the use of certain types of extrinsic evidence in statutory interpretation while Purposivists, recognizing that statutes do in general instantiate a purpose, are willing to consider a broader range of evidence.<sup>108</sup> However, the fact that at least some statutory provisions in no way reflect a coherent underlying purpose is no longer contested.

In short, it is a tenet of the Textualist faith that the law includes, or at least has the capacity to include, elements that are entirely unconnected to an underlying purpose. This conclusion has gained wide acceptance in the legal world.

Now turn to our problem. The elements of statutes that are wrought by the compromise process and appear not to cohere with any underlying legislative purpose or even a competing purpose not reflected in the statute's main thrust in fact do not cohere with any legislative purpose. They are nothing more than the price paid for passing legislation. By definition, then, an exception to a statutory rule that comes as the result of a legislative compromise, that itself serves no purpose other than facilitating the safe passage through the thicket of Capitol Hill, is unconnected to the purpose underlying the rule. Now compare such exceptions to the categories of factors we identified as usefully distinct from underlying principles in the previous section. These legislative-compromise exceptions are obviously unique to the statute at hand, are in no way related to the area of the law regulated by the statute or any other area of recognized law, and they certainly do not cohere with any rights-based theory of law. While these categories are relevant only to the world of adjudication, as explained in the previous section, we do see that exceptions that fall into these categories in fact exist in law. Thus exceptions in law may in fact be something other than applications of underlying principles, curing linguistic fortuities.

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106. See Manning, *supra* note 100, at 2437–38 (noting the supermajority requirement that arises as a result of the presentment and bicameral requirement).

107. See generally Molot, *supra* note 99.

108. See *id.*

B. *Real Exceptions in the Judicial Context*

What we learn from the statutory context is that the existence of exceptions that are not applications of underlying principles is not anathema to law. Now let us extend the analysis to the judicial context. I argue, by way of example, that exceptions of the same sort exist here too.

First, consider what Schauer's threshold objections might be. Schauer will say that whatever might be true of the statutory context is not likely to be true of the judicial context, because whereas legislators are allowed to be arbitrary in their decision-making and may create unprincipled exceptions, judges, as per the theories explored in the previous Section, are not. If in fact, as I argued in the previous Section, a judge's consideration of such unprincipled factors implicates a possible judicial misstep under the prevailing theories of adjudication, then we are unlikely to find such conduct. Next Schauer will note that the Purposivist-Textualist debate highlights the ubiquity of exactly the type of judicial conduct he bases his conclusions on, the behavior purposivists laud and textualists loathe, that is, judges' grafting exceptions onto clearly formulated statutes so as to apply the underlying principle directly to the case.

I respond simply on the strength of my primary example, below, and note that Schauer *should* be right; we should not be able to find examples in the judicial context. But of course, that is why it is important to know when it happens.

Before looking at my primary example of prudential concerns, consider equity as an example. For the purposes of this analysis I define equity as the degree of sympathy a particular litigant evokes in a particular judge. Thus defined, equity stands as distinct from what Schauer calls the power to do "justice *simpliciter*."<sup>109</sup> Schauer, likening justice *simpliciter* to the application of underlying principles, distinguishes the two only as a matter of degree of abstraction; underlying principles are more specific in their scope while justice *simpliciter* is more general but nonetheless something that underlies the law generally.<sup>110</sup> Thus, on his account of justice, his observation that exceptions only reflect and apply the broader principles of equity and his consequent normative conclusions about exceptions generally remain intact. But consider my definition of equity and observe that perhaps courts doing justice directly sometimes do not have in mind any preexisting notion of justice. Then a judge's decisions, swayed by his sympathy for a particular litigant, implicate the

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109. Schauer, *supra* note 2, at 895.

110. *See id.*

themes of the theories of adjudication. A particular judge's sympathies, both judge and litigant specific, are not predictable; they are not constrained by principles underlying the law, and they do not necessarily cohere with any articulated, consistent theory of rights. Exceptions that Schauer sees as applications of broad principles of equity in the law, may in fact not reflect anything other than a judge's stomach for the harsh realities of the law. However, I do not rely on this example because, more so than my primary example below, it requires evidence of how judges *feel* when they decide cases. I have no such evidence.

My primary example is this: a court's prudential concern for the possibility that the executive branch will not enforce the decision that the court thinks is dictated by proper judicial analysis. No student graduates law school without hearing a hint of this concern at least once. It is widely accepted that Chief Justice Marshall in *Marbury v. Madison*,<sup>111</sup> while seizing the power of judicial review for the federal judiciary, abstained from finding that the Court had jurisdiction to direct Madison to deliver Marbury's commission for fear that Madison, the Secretary of State at the time, would not comply and the newly created enterprise of judicial review would not survive its first day.<sup>112</sup> Such a concern easily falls into the three categories of factors that we identified as implicating the prevailing theories of adjudication. For the realists, responding to such a concern leaves later judges and litigants with no chance of reliably predicting future outcomes. Was the threat of non-enforcement a one-time event? Was the particular judge overly concerned about it? For Hart, the principle of ensuring the enforcement of the judiciary's rulings is not one that underlies any area of existing substantive law. On the contrary, the existing law calls for one conclusion, and the judge comes to another because the proper outcome simply will not come to pass. For Dworkin, no substantive theory of rights coheres with judicial silence or abdication. Likewise, no theory of justice and fairness acknowledges the pragmatic reality that the executive will not enforce an individual's rights.

True, Marshall does not use the language of "exceptions" in *Marbury*. However it is now clear that judges do in fact respond on occasion to considerations that are usefully seen as separate from the underlying principle.

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111. 5 U.S. (1 Cranch) 137 (1803).

112. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 63-64 & n.2 (5th ed. 2003) (suggesting that Madison would not have delivered the commission if ordered by the Court and noting that Marshall was facing possible impeachment).

Consider a more explicit example: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>113</sup> Following in *Marbury*'s footsteps, the Court here recognized an individual's private right of action against federal government actors for violations of constitutional rights.<sup>114</sup> The comparison to *Marbury* continues though. The Court also recognized that "special factors" might "counsel[ ] hesitation" in vindicating constitutional rights when quoting *Marbury*'s directive: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>115</sup> "Special factors" (a.k.a. "exceptions") can counsel "hesitation" even when an individual seeks to vindicate her rights under the most basic theory of rights: where there is a right, there is a remedy. In fact the Court did *hesitate* in two subsequent cases, *Chappell v. Wallace*<sup>116</sup> and *United States v. Stanley*,<sup>117</sup> noting that the military structure involved in the cases and Congress's activity in the area constituted a "special factor" that precluded the protection of individual rights.<sup>118</sup> Here we have a judicially created exception based on a *hesitation* that Congress and the Executive will no longer countenance the Court's vindication of constitutional rights through private rights of action when they interfere too much.

*Hesitations* about Congress and the President's reaction to the Court's vindication of properly settled rights are most distinctly not underlying principles. Exceptions then sometimes reflect something other than the underlying principle, distinguished as falling into one or more of the three categories of factors that implicate the prevailing theories of adjudication.

#### IV. CONCLUSION

Schauer is right. Exceptions are often applications of underlying principles and judges should not make us think otherwise by use of the term "exception." However, there are other exceptions

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113. 403 U.S. 388 (1971).

114. *Id.* at 396.

115. *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

116. 462 U.S. 296, 304 (1983).

117. 483 U.S. 669 (1987).

118. It is possible to interpret *Chappell* as barring the *Bivens* action because the available military justice procedures were sufficient to vindicate the plaintiff's rights. However, the Court made no mention of the sufficiency of the available remedy. See FALLON ET AL., *supra* note 112, at 818. Further, as the dissent points out, there was no military justice remedy provided for the plaintiff's complaint in *Stanley*. See *Stanley*, 483 U.S. at 706.

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that are created to reflect something other than underlying principles, and in fact diverge sharply from these underlying principles. Their creation implicates the themes behind theories of adjudication across the spectrum: reproducibility, predictability, consistency, and coherence, as well as the dangers of unchecked power. This does not necessarily mean that they are unreasonable violations of some code of judicial conduct. As in the case of the prudential concern for the continued survival of the judiciary, sometimes not creating these exceptions would be a more serious threat to the enterprise of adjudication than creating them. The sole normative conclusion here is that we need to know when such exceptions are made, and that the language of “exceptions” might indicate as much.

