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Citation: 58 U. Chi. L. Rev. 871 1991

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Exceptions

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It seems commonly supposed that exceptions are to law what electric windows are to automobiles—useful accessories but hardly central to the enterprise. Exceptions to statutes, regulations, common law rules, and constitutional tests are of course everywhere in the law, a few of the innumerable examples being the good faith exception to the Fourth Amendment exclusionary rule,¹ the collateral order exception to the final judgment rule,² the “capable of repetition, yet evading review” exception to the mootness doctrine,³ the market participant exception to the constitutional ban on state protectionism,⁴ the state action exemption in antitrust

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¹ See, for example, *United States v Leon*, 468 US 897 (1984).

² See, for example, *Firestone Tire & Rubber Co. v Risjord*, 449 US 368 (1981); *Cohen v Beneficial Industrial Loan Corp.*, 337 US 541 (1949).

³ See, for example, *Roe v Wade*, 410 US 113 (1973); *Dunn v Blumstein*, 405 US 330, 333 n 2 (1972); *Southern Pacific Terminal Co. v ICC*, 219 US 498, 515 (1911), overruled on other grounds by *Arkadelphia Milling Co. v St. Louis Southwestern Railway*, 249 US 134 (1919).

⁴ See, for example, *Reeves v Stake*, 447 US 429 (1980); *Hughes v Alexandria Scrap Co.*, 426 US 794 (1976).

law,⁵ and the numerous exceptions to the hearsay rule.⁶ But although exceptions are an omnipresent feature of the legal terrain, their very pervasiveness appears to prompt the view that exceptions are but adjuncts to what is really important. However useful it may be to consider specific exceptions in particular doctrinal realms, thinking about exceptions as such does not get us very far in thinking about law.

This view about the unimportance of the exception as a discrete jurisprudential phenomenon is never stated explicitly. Indeed, the exception is an invisible topic in legal theory, thus distinguishing it from such thoroughly analyzed concepts as precedent and legislative intent. Implicit in this lack of attention seems to be an understanding that no interesting generalizations are to be derived about the exceptions that surface almost everywhere throughout most legal systems.

I believe this understanding rests on a confused notion of the logical status of an exception. Probing that status prompts the realization that there is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further. As products of the relationship between legal goals and the language in which law happens to be written, exceptions show how the meaning of a legal rule is related to the meaning of the language that law employs. This relationship is an important subject in its own right, and I will say something about it.⁷ But the relationship is only one component of the even larger relationship between law and a background social landscape whose most important elements are the language a society uses and the categories it deploys to carve up the world. In important ways exceptions link law to its linguistic and categorial underpinnings, situating law in a world it both reflects and on which it is imposed.

The use (or not) of exceptions can thus tell us more than we have traditionally thought about how law is located in a linguistic and categorial world. But that location is contingent, and conse-

⁵ See *Parker v Brown*, 317 US 341 (1943).

⁶ See FRE 803, 804.

⁷ See H.L.A. Hart, *Definition and Theory in Jurisprudence*, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 21 (Oxford, 1983); Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 *Cleve St L Rev* 271 (1989). For further discussion see text at notes 39-47.

quently what is at some time or place a broad rule with an accompanying exception is at other times a narrow rule having no need for an exception to perform the same prescriptive task. Failure to understand the contingency of this relationship, however, often leads substantive debates of policy or principle to hide behind pseudo-logical claims that one side or the other has, by urging an exception, taken the low road of ad hoc expedience rather than the high road of principle. Once we see the fortuity of exceptions and the contingency of the circumstances in which they exist, however, arguments about who is upholding the principle and who is urging an exception become trivial, and so are less likely to obscure the substantive debate.

The lesson that comes from exposing the logical emptiness of exceptions is yet larger, because after that exposure it is no longer possible to believe that exceptions are epiphenomenal adjuncts to the rules they are exceptions to, such that the power to append an exception does not undercut the primary force of the rule itself.⁸ But if the phenomenon of the exception is not logically distinct, and rules and their exceptions occupy the same plane, then we cannot view the power to create exceptions as marginal. Rather, the relationship between the power to create exceptions and the basis for doing so becomes an essential element of the extent of rule-based constraint itself. Much of the picture of a legal system, and much that makes some legal systems different from others, therefore hinges on the power to create exceptions, for that power turns out to be the power both to change rules and to avoid their constraints.

In supporting these claims, I will start with an example from the Securities Act of 1933, turn to the obsolete criminal law prohibition on fornication, and then move to some questions about the definition of First Amendment principles in the context of flag desecration, Nazi speech, and pornography. Drawing on such diverse areas, I hope to show the pervasiveness of the phenomenon I set out to explore.

I. WHEN THE RIGHT WORDS DON'T EXIST

According to § 5 of the Securities Act of 1933, it is “unlawful for any person . . . to sell [an unregistered] security through the use or medium of any prospectus or otherwise.”⁹ Yet pursuant to

⁸ See H.L.A. Hart, *The Concept of Law* 136 (Oxford, 1961).

⁹ 15 USC § 77e(a)(1) (1988).

§ 3(a)(11) of the same act, sales of securities that would in all respects otherwise qualify for inclusion within the requirements (or prohibitions) of § 5 need not be registered if they are “offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.”¹⁰ When a pair of legal rules operates in the way that §§ 5 and 3(a)(11) do, we say that the latter constitutes an *exception* to the former.¹¹

Now imagine a different exception to the registration requirements of the Securities Act of 1933. Suppose that, in addition to the exemption for intrastate sales of securities, we were to find that the Act contained an exemption for sales of lawnmowers, both interstate and intrastate. Were that the case, we would think the statutory structure bizarre, in a way that we do not think the existing intrastate exemption bizarre, because the sale of lawnmowers, unlike the intrastate sale of securities, is not a subclass of the class of sales of securities.

The very definition of an exception, therefore, presupposes that what is excepted is otherwise within the scope of the broader rule. Because intrastate sales are within the scope of “sales of securities,” the intrastate exemption makes sense. The “exception” for lawnmower sales, on the other hand, is superfluous, or redundant, because the registration requirements of the Act already exclude lawnmower sales in the definition of the original scope-designating term, “sale of any security.”¹² Only where the primary designation of the scope of a legal rule *includes* rather than *excludes* some item that its creators wish not to include is it necessary to add an exception.

We can now see how the necessity of an exception (or lack thereof) to some legal rule is largely a function of the array of linguistic tools then available to the drafter of the rule. Where the language in which the rule is written contains a word or a familiar phrase that itself excludes what the drafters wish to exclude from the scope of the rule, no exception is necessary. All that is required is to employ the appropriate word or phrase, and that which is to be excluded is excluded without the necessity of an exception. But

¹⁰ 15 USC § 77c(a)(11) (1988).

¹¹ In this context, the exception is commonly referred to as the intrastate “exemption,” but nothing in this Article turns on any difference between an exception and an exemption.

¹² The immediately preceding language is a slight modification of the exact statutory term, but the modification serves only stylistic purposes.

where language does not provide any word or phrase, the scope of some primary prescription or proscription will be defined in terms that are likely to be overinclusive, from the perspective of the goals of the legal rule. In order to tailor the rule to the legal goals, it then becomes necessary to create an exception.¹³ Thus, if the English language contained a word—say, “intersale”—to designate sales that were interstate but not intrastate in the § 3(a)(11) sense, then we might have expected to see the primary prohibition in § 5 of the Securities Act couched simply in terms of a prohibition on the “intersale” of unregistered securities, with no exemption for intrastate sales then being necessary.¹⁴

II. WHEN THE RIGHT WORDS CAN BE FOUND

The lesson that emerges is that the need for an exception is frequently not at all a matter of substance. Rather, exceptions often exist as a product of what is essentially a linguistic fortuity, the way in which a language may or may not happen to contain terms—such as “intersale”—excluding from coverage that which the regulatory apparatus seeks to exclude. Exceptions can be the product of linguistic circumstance, of the existing linguistic and categorial structure of society that precedes the use or non-use of an exception.

My claim that exceptions “often” result from linguistic fortuity is somewhat inaccurate. In fact exceptions always result from

¹³ I assume here that nothing turns on the grammatical-statutory *structure* within which the exception is placed. That is, I assume there is no difference between an exception that reads, “Public sales of securities other than intrastate sales must be registered,” and one in which one discrete section states the general rule and a subsequent section carves out an exception. The difference would be of greater moment if allocation of the burden of proof turned on the form of designation. It might be, for example, that placement of the exception within the original proscription would have the effect of placing the burden of proving the non-applicability of the exception on the state or on the plaintiff, but that placing it separately and subsequently would convert it into an affirmative defense. At times that placement may have constitutional ramifications. See, for example, *Martin v Ohio*, 480 US 228 (1987); *Patterson v New York*, 432 US 197 (1977); *Mullaney v Wilbur*, 421 US 684 (1975); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv L Rev 321 (1980); John Calvin Jeffries, Jr. and Paul B. Stephan, III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L J 1325 (1979); Charles R. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 Harv L Rev 1574 (1981).

¹⁴ Anyone familiar with the operation of § 5 and its accompanying definitions and exceptions would justifiably question my assumption that the drafters would have chosen the most linguistically or grammatically efficient course. Among the many cases on the exceptions to the exemptions from § 5, see, for example, *McDaniel v Compania Minera Mar de Cortes*, 528 F Supp 152 (D Ariz 1981); *Pawgan v Silverstein*, 265 F Supp 898 (S D NY 1967).

linguistic fortuity, but putting it in just that way is misleading because some seeming fortuities are explained by an available array of linguistic tools that is itself far from fortuitous. Rather, the fortuity of the existence of the appropriate term in a language will often reflect the categories and distinctions the language has previously found it necessary to employ. The way in which the preexisting language sometimes requires an exception and sometimes not thus tells us interesting things about the relation between legal rules and the language in which they are written.

In order to pursue this issue, let me step back to explore the relevance of the commonplace philosophical distinction between regulative and constitutive rules. According to the distinction, drawn by H.L.A. Hart,¹⁵ John Rawls,¹⁶ and Max Black,¹⁷ but most commonly associated with John Searle,¹⁸ certain rules regulate conduct defined without reference to that rule. "No killing" or "No driving in excess of 55 miles per hour" are good examples, because the activities of both killing and driving in excess of 55 miles per hour can exist and be described independent of any rule prohibiting them. In these cases, the description of the activity is one thing, and the regulatory posture toward that activity is something quite different.

Other rules, by contrast, do not regulate logically antecedent behavior, but create the very possibility of engaging in conduct of a certain kind. Such constitutive rules define activities that could not, absent the rule, even exist, or at least could not be described in those terms. The rules of games are archetypal, since rules create the very possibility of winning a *trick*, or scoring a *touchdown*, or hitting a *home run*, or *castling*. Without the rules of chess you cannot castle at all; without the traffic laws you can very well drive in excess of 55 miles per hour (although you cannot *speed*).¹⁹

¹⁵ Hart, *Definition and Theory in Jurisprudence*, in Hart, *Essays in Jurisprudence and Philosophy* 21 (cited in note 7).

¹⁶ John Rawls, *Two Concepts of Rules*, 64 *Phil Rev* 3, 19-29 (1955).

¹⁷ Max Black, *The Analysis of Rules*, in Max Black, *Models and Metaphors: Studies in Language and Philosophy* 95 (Cornell, 1962).

¹⁸ John Searle, *Speech Acts: An Essay in the Philosophy of Language* 33-42 (Cambridge, 1969).

¹⁹ The distinction between regulative and constitutive rules is not totally unproblematic, see Joseph Raz, *Practical Reason and Norms* 108-13 (Hutchinson, 1975), because there is a real question whether the distinction is one between different kinds of rules or rather just one between different ways of describing acts. Still, even the latter version is sufficient for my purposes here; my point turns only on a distinction none deny—between those descriptions that presuppose the existence of comparatively discrete norm systems and those that do not.

The idea of a constitutive rule is closely connected to the way in which legal rules or doctrinal tests sometimes employ technical language, often referred to as "terms of art." Here it is useful to identify two forms of technical language. One form consists of the technical term with no ordinary language meaning, such as quark, isotope, habeas corpus, or *assumpsit*. Another form consists of terms with both ordinary and technical meanings, such as "solid" to the physicist, "slice" to the golfer, or "contract" or "party" to the lawyer.²⁰ But whether the term has an ordinary meaning or not, we would normally expect the technical term to incorporate within its meaning those doctrinal nuances that determine the coverage of the term.²¹

In other words, we would ordinarily expect exceptions to be built into the meaning of a primary technical term. Because foul balls are not home runs in the first place, it is odd to say that foul balls are exceptions to the rule defining home runs. Similarly, we do not normally say that contracts are enforced except those not involving a meeting of the minds, or those not made with consideration, because such arrangements are not contracts at all. The answer to the question, "What is a corporation?" is much of (all of?) the law of corporations, including all the exceptions built into the concept itself.²²

²⁰ Or "speech" to the constitutionalist? Compare Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 Const Comm 69 (1989); Frederick Schauer, *Easy Cases*, 58 S Cal L Rev 399 (1985); and Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L Rev 797 (1982), with Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Georgetown L J 899 (1979). In defense of my own inconsistency in at times stressing technical meaning and at other times emphasizing ordinary language, I should note that the question of the relationship between technical and ordinary language, a question of recurring importance, is quite difficult, although it has received surprisingly little attention in the literature. A noteworthy exception is Charles E. Caton, *Introduction*, in Charles E. Caton, ed, *Philosophy and Ordinary Language* v (Illinois, 1963).

²¹ The interesting exception is where one part of the law, for its own purposes, uses terms found in other parts of the law having different purposes. In such cases, we best think of the two meanings as separate, and the meaning from the "other part of the law" as being equivalent for these purposes to ordinary language or at least pre-legal meaning. Consider in this connection *Ploof v Putnam*, 81 Vt 471, 71 A 188 (1908), in which the Supreme Court of Vermont held in essence that the ordinary rule against trespass contained a necessity exception. Had the court been starting anew, unconstrained by any definitions existing either in English or in legal understandings, it could have defined "trespass" in such a way that necessary dockings simply fell outside the coverage of the trespass rule. The fact that it did not do so is strong evidence of the entrenchment of the existing definition of trespass, such that stipulative redefinition was impossible, and appending an exception consequently necessary.

²² See Hart, *Definition and Theory in Jurisprudence*, in Hart, *Essays in Jurisprudence and Philosophy* 21 (cited in note 7).

Thus, were law written entirely in constitutive terms of art, we would expect to see few exceptions; the stipulative definition of those terms would most likely build in those exclusions that we would otherwise see in the form of exceptions. But because law is written substantially in English rather than in Lawish, and is partly beholden to ordinary understandings of language, all legal terms are not (nor could they be) constitutive terms of art. A legal rule regulating conduct defined in terms antecedent to that regulatory scheme is thus at the mercy of those antecedent terms. Just as the term "sale" draws no distinction between interstate and intrastate sales, many terms existing antecedent to their legal manifestation fail to draw the distinctions or create the exceptions that track the goal of some regulatory scheme. On occasion some antecedent terms already exclude that which the drafters of the legal rule wish to exclude, as with the exclusion of lawnmowers from the class of securities, and then it is unlikely that the rule need be crafted so as to incorporate an exception. But should the antecedent terms not exclude that which the drafters wish to exclude, as with intrastate sales of securities, then an exception will be necessary. The existence of an exception will therefore be a function not so much of total linguistic fortuity, but rather of the way in which legal goals intersect with the linguistic products and manifestations of the extra-legal and pre-legal human categorization that provides much of the foundation on which legal regulation is erected.

A good example of this phenomenon is the traditional legal prohibition of fornication. Fornication is defined in Webster's Third New International Dictionary as "sexual intercourse other than between a man and his wife."²³ Thus, a statutory or common law prohibition on fornication excludes sexual intercourse between married persons without the necessity of a separate exception.²⁴ Were the word "fornication" absent from the language, however, or were the category of "sexual intercourse other than between married persons" absent from the antecedent conceptual apparatus of the society, then we would expect to see the same prohibition couched in terms of a primary prohibition on sexual intercourse with an accompanying exception for sexual intercourse between married persons.

²³ The sole purpose of this footnote is to distance myself from the sexist way in which Webster's defines the act.

²⁴ See, for example, *State v Sharp*, 75 NJ L 201, 66 A 926, 927 (1907), *State v Dana*, 59 Vt 614, 10 A 727, 731 (1887).

The relationship between law and the antecedent linguistic and categorial apparatus in which and with which law is written can tell us something about the various goals of legal regulation. At times legal regulation seeks to change the social landscape. Not only Prohibition but also more modern statutory regulation with respect to discrimination, consumer protection, workplace safety, the environment, and the preservation of endangered species are examples of law pressing against existing social practices. Insofar as such practices are likely to have their linguistic manifestation, that is, insofar as a distinction or category recognized by social practice will also be recognized by that society's language (and here the Inuit's numerous words for different types of snow is the classic if hackneyed example), then laws designed to move society rather than reflect it will often encounter (and I make no more than this probabilistic claim) the absence of any preexisting language with which easily to do so. When that is the case, we can expect to see exceptions and related linguistic devices used to draw the distinctions not currently recognized by the language in which the law is written.

By contrast, law sometimes seeks only to reinforce social practices or norms against the possibility of individual deviation or widespread shift. Consider in this regard those laws prohibiting activities that few of us would contemplate even absent legal regulation, such as child molestation, indecent exposure, and cannibalism.²⁵ Where laws serve this reinforcing function, as with the traditional conception of the fornication laws, the linguistic and categorial apparatus is likely already to be in place, and it is then more probable that the scope of a legal rule will track the scope of a social category, making the exception device less likely to be necessary.²⁶ It is just because the goal of fornication laws was to reinforce an existing social distinction that those laws were able to find a seemingly exceptionless word that drew just the distinction that the drafters wished to draw.

Moreover, when a regulatory scheme tracks existing social practices, the drafters may be more confident that widespread agreement will be sufficient to allow interpreters to locate approxi-

²⁵ Of course, the very fact that the activities are prohibited says something about the drafters' perception of possible behavior. It is not without interest that in Massachusetts, but in few other states, large signs prohibit drivers who have missed their exit from backing up on a divided interstate highway.

²⁶ I do not deny the possibility of a causal relation between the two categories, such that social aversions to public nudity or eating fellow human beings are partly or even largely a function of a social conditioning that itself employs legal or other norms.

mately the same range of implicit exceptions, and explicit ones will be less necessary. The presence of an explicit exception, therefore, is once again a signal that the law is operating less to reflect and reinforce existing practice than to attempt to modify it.

III. EXCEPTIONS AND THE RHETORIC OF THE FIRST AMENDMENT

Both the Securities Act of 1933 and the statutory prohibitions on fornication involve specific statutes written in canonical language. Often, however, exceptions arise not in the context of canonically inscribed rules, but rather with respect to common law or constitutional rules. Such rules do not have a canonical inscription in the strict sense, yet it is still often the case that certain understandings of those rules become so crystallized or entrenched that those widely shared understandings operate in much the same way as canonically inscribed rules. As a result, much about the contingent relationship of rules and exceptions with respect to statutory rules applies outside the statutory context as well. In order to see this, let us look now at claims about exceptions in a wide variety of First Amendment debates. We can start with flag burning, and consider not only the Supreme Court decision in *Texas v Johnson*,²⁷ but also the surrounding political/legal/constitutional controversy. This controversy largely revolved around the appropriateness of creating an "exception" either to "the First Amendment" (the alleged danger of which turned out to carry great rhetorical force in debates about the wisdom of amending the Constitution to reverse the rulings in *Johnson* and *United States v Eichman*²⁸) or to the principle, now well-established in the doctrine, that all viewpoint-based restrictions on the expression of political opinions in the public forum are unconstitutional.²⁹

Now that we have explored the logic of exceptions, we can see that a great deal of the debate was not so much about the idea of an exception as it was about the appropriate definition of the relevant principle. Justice Brennan's majority opinion in *Johnson* was premised on the belief that Johnson's "political expression was restricted because of the content of the message he conveyed,"³⁰ and

²⁷ 491 US 397 (1989) (striking down state flag desecration statute under the First Amendment).

²⁸ 110 S Ct 2404 (1990) (invalidating federal statute purporting to reverse *Johnson*).

²⁹ See, for example, *Boos v Barry*, 485 US 312, 321-22 (1988); *American Booksellers Ass'n, Inc. v Hudnut*, 771 F2d 323 (7th Cir 1985), *aff'd* without opinion, 475 US 1001 (1986); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189 (1983).

³⁰ 491 US at 412.

that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³¹ The relevant principle for Justice Brennan, analogous here to the initial specification of coverage in § 5 of the Securities Act of 1933 or to the existing definition of the practice of fornication, is thus that (my words, not his) “all political communication in the public forum is protected against viewpoint-based restrictions on either the content or the style of the communication.” With that as the initial specification of the principle, it is no surprise that Justice Brennan would see Texas’s arguments in *Johnson* as pleas for an exception to that principle. Twice he makes the argument in exactly this form: “We have not recognized an exception to this principle even where our flag has been involved.”³² “There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. . . . We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.”³³ For Justice Brennan, the proponents of restrictions were seeking exceptions to an intrinsically exceptionless principle.

Chief Justice Rehnquist, by contrast, can now be seen as arguing that the relevant principle is that (my words) “all political communication in the public forum other than flag desecration is protected against viewpoint-based restrictions on either the content or the style of the communication.” He wrote:

For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning.

. . . .

[The flag] does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas.

. . . .

The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be toler-

³¹ Id at 414.

³² Id.

³³ Id at 417, 418.

ated, but for which the most minimal public respect may not be enjoined.³⁴

Thus, it is plain that Justice Brennan was saying that the relevant category is “political communication” and Chief Justice Rehnquist was saying that it is “political communication other than flag desecration.” Although it is true that there is no single word for “political communication other than flag desecration,” one way of seeing the Chief Justice’s liberal use in his dissent of American history and patriotic poetry is as an attempt to support the argument that the category “political communication other than flag desecration” is an existing category in this culture. He is claiming that running through the history of the founding of the country, its battles to protect (and expand) its territory, and the songs and poetry that reflect this history is a consistent theme—that the flag and its preservation simply represent a category of understanding in this culture different from and lying outside any other category, including the category of political communication. Consequently, to the Chief Justice the pertinent and existing social category is not “political communication” but rather “political communication other than flag desecration.”

The relevance of the Chief Justice’s argument that “political communication other than flag desecration” is an existing category is that it can be seen as an attempt to rebut the claim that the dissent was in some way being ad hoc or unprincipled about its willingness to treat the flag as different or special. If we had a word for “political communication other than flag desecration”—“potation,” for example—then the dissent might have said that the basic principle is that “potation is protected against viewpoint-based restrictions on either the content or the style of the communication,” and that the majority was attempting to *engraft* ad hoc or unprincipled additions to that basic principle. Indeed, the Chief Justice specifically characterizes the majority’s conclusions as an “extension of constitutional protection to the burning of the flag.”³⁵ Implicit in this language is the view that “potation plus flag desecration” is no intrinsically neater than “political communication minus flag desecration.”³⁶

³⁴ Id at 422, 429, 435.

³⁵ Id at 435.

³⁶ See Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 Nw U L Rev 343, 345-48 (1991) (arguing in the context of sanctions on racist and therefore equality-denying speech that the current view of the First Amendment as limiting the principle of equality is no more inherently valid than a different view pursuant to which equality would limit the principle of freedom of speech).

So we now see that part of what transpired in *Johnson* was a potentially confusing rhetorical battle, with both sides claiming the high ground of the internally sound principle, and accusing the other of the aberrational attempt to pollute that principle. And we can see as well, from our beginnings with the Securities Act of 1933, that the battle was largely *just* rhetorical, for there is nothing more natural or intrinsically sound as a logical matter about Justice Brennan's category of political communication than there is about Chief Justice Rehnquist's of political communication other than flag desecration.³⁷

But is the logical equivalence between the two arguments sufficient? What are we to make of the fact that "polation" is *not* a word in the language, and of the fact that there appears to be no existing simple phrase for "political communication other than flag desecration" other than "political communication other than flag desecration"? One answer would be that the lack of a single word or simpler phrase is indicative of a lack of a principled distinction between political communication via flag desecration and political communication using other methods, at least if we assume that those other methods might include harsh criticism of government by use of a method that offends many unwilling listeners or viewers.³⁸ Presupposed in this answer is the claim that there is a relationship between the intrinsic plausibility of a distinction and its existing economical embodiment in the language. Where we must resort to language as cumbersome as "political communication other than flag desecration," it might be said, we have good evidence that there is something unsound about the principle.

This position appears to evaluate the soundness of a principle according to the existence of an easy and brief way to characterize or reflect it. Yet surely the very enterprises of argument, analysis, and careful thought presuppose that we might be able to draw distinctions whose soundness is not undercut by the unavailability of a word or short phrase to reflect them. Were the existence of a single word or simple phrase dispositive, the absence of such a word or phrase would end discussion. But it does not, and that is

³⁷ Indeed, although I focus on a debate that took place in a judicial decision, the rhetorical force of exceptions language is far more prevalent outside of judicial opinions, and plainly, as the ensuing flag desecration debate demonstrated, much that I argue here about the distorting nature of "exceptions" rhetoric is far more applicable to public than to judicial debate.

³⁸ See, for example, *Cohen v California*, 403 US 15 (1971) (wearing of jacket emblazoned with "Fuck the Draft" in corridor of county courthouse protected by First Amendment).

why the names we give principles, names like the principle of equality or Rawls' Difference Principle, are only names, telling us virtually nothing about the actual contours of the principles.³⁹ Accordingly, the lack of a culturally assimilated simpler phrase for "political communication other than flag desecration" is at best weak evidence of the inability to draw a sound distinction described by the more cumbersome phrase, although it might be quite good evidence of whether some culture has already drawn it.

This does not mean, of course, that all distinctions are sound. I have claimed only that the non-existence of a single word or short phrase reflecting an articulable distinction is at best little evidence of the soundness of the distinction. But to articulate a distinction or to make an argument is not to prove the soundness of the distinction or the tenability of the argument. In fact, for reasons not germane here, I am not persuaded that the distinction drawn by Chief Justice Rehnquist is normatively sound, given the language and underlying purposes of the First Amendment. Nevertheless, let us suppose that the dissent in *Johnson can* support a distinction. Let us suppose that, given such factors as the historical place of the flag, the degree of offense and hurt involved (and there is of course nothing unprincipled about drawing a distinction based on differences of degree⁴⁰), and the importance of a unifying national symbol, there is a plausible argument that the flag is different for First Amendment purposes.⁴¹ If this argument for the distinctiveness of the flag were taken to be sound, then the fact of the socially extant linguistic and categorial apparatus becomes relevant in a different way. For now Justice Brennan might be saying something quite different. Conceding for the sake of argument the theoretical tenability of the flag/no flag distinction, he could be read as arguing that the lack of a social consensus as to the distinctiveness of the flag, however unfortunate that lack of a social consensus might be, is indicative of the likely fragility of the "political communication other than flag desecration" category.⁴² Were there

³⁹ This is why we often use the words "concept" or "idea" to mark the fact that some word, like "law," is but the name of something far more complex. Consider why "the concept of law" or "the concept of equality" or "the concept of justice" do not sound as odd as "the concept of penguin" or "the concept of subway."

⁴⁰ See Frederick Schauer, *Slippery Slopes*, 99 Harv L Rev 361 (1989).

⁴¹ For an example of such an argument, see Douglas W. Kmiec, *In the Aftermath of Johnson and Eichman: The Constitution Need Not be Mutilated to Preserve the Government's Speech and Property Interests in the Flag*, 1990 BYU L Rev 577, 587-91 (1990).

⁴² Although Justice Brennan did not make this argument in this form in *Johnson*, there is a close parallel between my interpretation of what Justice Brennan might have said in a different *Johnson* and what he did say in *Paris Adult Theatre I v Slaton*, 413 US 49, 82

an entrenched term for that category, then our fears of further exceptions would have less basis. And, even without an entrenched term, were the distinction itself socially entrenched, then the social acceptance of the distinction would cast doubt on the fear that exceptions to "political communication other than flag desecration" would be just around the corner. And in response to this argument from the fragility in practice of a distinction that was sound in theory, the dissent could then be seen as attempting to demonstrate with its poetry and its history the in-place social entrenchment that provides the answer to the majority's fears. Although there is no one word for the category the Chief Justice seeks to defend, to him there exists a socially entrenched idea, much like "fornication," within which the relevant exception is already incorporated.

Curiously, therefore, it is the so-called "conservative" dissent in *Johnson* that is being theoretically modernist, in the sense of relying on a perspective recognizing the social, cultural, and historical roots of our categories, and the consequent contingency of any society's categorial understandings.⁴³ It is, intriguingly, the dissent that wishes to resist the idea that there is something natural or neutral about the category "political speech," and about its intrinsic or logical priority over the category "political communication other than flag burning." To the dissent, but arguably not to the majority, the relevant categories are not rigid or abstract or natural, but must be examined in light of historical practices and current understandings.⁴⁴

(1973) (Brennan dissenting). In arguing that the obscenity laws were unconstitutional, Justice Brennan did not reject the principle of obscenity as "non-speech" that he had set forth in 1957 in *Roth v United States*, 354 US 476 (1957). He maintained that the principle had proved unworkable in practice, a function of the inability of some sound distinctions to be interpreted as such by those charged with applying them. See Schauer, 99 Harv L Rev at 373-83 (cited in note 40).

⁴³ What I call modernist, see also David Luhan, *Legal Modernism*, 84 Mich L Rev 1656 (1986), others might call post-modernist, but nothing here turns on that distinction, which in any event varies among disciplines (post-modernist architecture, for example, is characterized by its incorporation of traditional forms within contemporary design). All I maintain is that a range of perspectives stressing categorial malleability and categorial contingency is more evident in the dissent, and that a range of perspectives stressing the fixity and natural necessity of social categories is more evident in Justice Brennan's majority opinion.

⁴⁴ I put the issue in this way not (only) to be tendentious, but to suggest what I have recently urged at some length, that the idea of the categorial protection of freedom of *speech* is itself, to the core, dependent upon a rule-based and "formalistic" understanding of the relevance of the category "speech." See Frederick Schauer, *The Second-Best First Amendment*, 31 Wm & Mary L Rev 1 (1989).

Chief Justice Rehnquist may be historically inaccurate in his claim about the place of the flag in American history or in his assessment of the categorial import of that history. And even if he is historically correct, that category may be normatively undesirable, in the same way that many other existing distinctions are normatively undesirable. Yet implicit in the Chief Justice's historical and cultural analysis is a recognition of the way in which the categories of the law, including the categories of the First Amendment, are not natural and fixed but are reflective of the kinds of distinctions that a society has drawn and is capable of defending. Insofar as it is "conservative" to urge the (at least presumptive) workability of socially extant categories, then explaining the historical pedigree of the "political communication other than flag desecration" category is part of an argument for taking that category as a given.⁴⁵ But insofar as it is "conservative" to take existing phrases such as "political speech" as more natural and unchangeable than contingent and movable, then it is the majority rather than the dissent that seems conservative.

We now see that, given the ability to draw a theoretical distinction, any doctrinal rule reflecting that distinction would have to be considered principled, for there is nothing to the idea of a principled decision other than the willingness to adhere to the previously drawn distinction.⁴⁶ Some distinctions, however, will build on and employ a culture's existing linguistic and categorial structure, and in such cases we have reason to suppose that the distinction will resist efforts to defeat it. Others, however, will challenge rather than build on the society's in-place linguistic and categorial apparatus, and in those cases there is cause for less confidence that the distinction will have the strength necessary to resist efforts to destroy it.

IV. THE CONTINGENCY OF FIRST AMENDMENT CATEGORIES: RACIAL HATRED AND PORNOGRAPHY

Consider in this regard the contrast between the Skokie decisions in this country⁴⁷ and the existence of anti-Nazi legislation

⁴⁵ See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1047-68 (1990).

⁴⁶ See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum L Rev 982 (1978); M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 Colum L Rev 35, 40-42 (1963).

⁴⁷ *Collin v Smith*, 578 F2d 1197 (7th Cir), stay denied, 436 US 953, cert denied, 439 US 916 (1978); *National Socialist Party of America v Village of Skokie*, 434 US 1327 (1977) (Stevens denying stay); *National Socialist Party of America v Village of Skokie*, 432 US 43

and governmental practice in Germany. A recent German law, aimed at those who would deny the existence of the Holocaust, permits prosecution for insult "if the insulted person was persecuted as a member of a group under the National Socialist or another violent or arbitrary dominance."⁴⁸ Other laws, also commonly understood to be aimed primarily at Nazis, and enforced primarily against neo-Nazis, prohibit incitement to hatred against segments of the population and prohibit the instigation of race hatred.⁴⁹ And in 1986 the Administrative Court of Braunschweig upheld revocation of a doctorate on the sole grounds that the recipient, a former judge, had subsequently written a book questioning whether six million Jews had died in the Holocaust.⁵⁰

Implicit in the German racial hatred laws is thus a constitutionally permissible intention to deal specially and specifically with Nazi speech, and to restrict inciters of racial hatred although not other offensive or harmful speakers. In this regard the German law plainly diverges from the American, as the Skokie cases make clear. But one way of explaining why both may be correct (even assuming otherwise equivalent understandings of and commitments to freedom of speech) is in terms of the divergent experiences of the two countries with respect to the relevant category.⁵¹ Part of most arguments for restricting Nazi speech is the supposition that there exist principled categories (and again remember that arguments from differences in degree can still be principled⁵²) such as "offensive political communication other than by Nazis" or

(1977) (per curiam). See generally David Goldberger, *Skokie: The First Amendment Under Attack By Its Friends*, 29 Mercer L Rev 761 (1978).

⁴⁸ Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies"*, 85 Mich L Rev 277, 323 (1986) (quoting the West German Criminal Code, Art 194, 1985 BGB 1965).

⁴⁹ Id at 322-23. See also Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S Cal L Rev 657 (1980).

⁵⁰ Stein, 85 Mich L Rev at 280 & n 11 (cited in note 48).

⁵¹ It is possible that the German tolerance for a Nazi or racial hatred exception simply reflects a constitutional document more tolerant of exceptions generally, for the German Basic Law, just like Article 10 of the European Convention on Human Rights, explicitly allows for exceptions to the principle of freedom of speech. See generally Ulrich Karpen, *Freedom of Expression*, in Ulrich Karpen, ed, *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* 97 (Nomos Verlagsgesellschaft, 1988). Still, there seems no basis for supposing that the resultant doctrinal structure is in general more complex or exception-laden in Germany than in the United States, although in the United States that structure comes only from the case law and not from the text. See generally Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 S Ct Rev 285. As a result, the difference seems explainable more by cultural differences in viewing the Nazi experience than by different broad-based constitutional methodologies.

⁵² See Schauer, 99 Harv L Rev 361 (cited in note 40).

“offensive political communication other than that involving racial hatred.” Where such categories exist, free speech protection for the communications falling within them can theoretically as well as practically coexist with restrictions on the speech lying outside them.

When arguments in this form are made in this country they are commonly rejected, as is implicit in the Skokie decisions, in part because this country and its legal/constitutional culture have arguably not seen Nazis as dramatically different from other morally reprehensible and offensive groups, of which the Ku Klux Klan and those who would urge the physical degradation of women are perhaps the most obvious examples. In this country Nazis are less *sui generis*, and are instead part of a larger category, or at least less distinct from other members of a potentially larger class. Consequently, the First Amendment operates against the background of an antecedent linguistic and categorial structure in which an “exception” for Nazis would amount to a legal confrontation with the society’s underlying conceptual apparatus, a confrontation that might cause us to predict the possibility that acceptance of the “offensive political communication other than by Nazis” category would lead to the creation of other exceptions.

Compare, however, the likely understanding of the same category within Germany. In light of the history of that country, and in light of the continuing effect of the Nazi experience on that society’s self-understanding, the existence of a durable and entrenched distinction between Nazis and all other groups (or, more precisely, between inciters of racial hatred and other harmful and offensive speakers), no matter how offensive, harmful, and reprehensible those other groups may be, seems much more plausible.⁵³ And if that is the case, then it is possible that the categories “offensive political communication other than by Nazis” or “political communications other than those urging racial hatred” are already well-established categories in Germany even if they are not here. Should that be so, then a range of (contingently) valid-in-this-country arguments about the potential future implications of an

⁵³ Implicit in the foregoing argument is the claim that neither this country’s war with Nazi Germany nor its legacy of slavery has, as a matter of social fact, influenced the self-understanding and national identity of the 1991 United States in the way that Germany’s Nazi past has influenced the self-understanding of the 1991 Germany. My claim here is descriptive rather than normative, attempting only to explain the prevalence of “dangerous precedent” and “slippery slope” arguments that are made in the United States when restrictions on Nazi or racist speech are urged, but which are not made when such restrictions are urged, enacted, and enforced in Germany.

“offensive political communication other than by Nazis” category would be far less valid in Germany.

Indeed, the divergence between the two countries may be explained simply by a difference between what counts as “political.” Decisions in this country relating to Nazis and other inciters of racial hatred are premised on the inclusion of such groups within the category of the political. Their exclusion would consequently represent an exception to an otherwise inclusive category of political speech, with the accompanying concerns about the possibility of further exceptions. But if it is the case that in some societies the very concept or category of “political” already excludes those who would incite racial hatred or who would overthrow the constitutional order,⁵⁴ and that the ideas of “political speech by Nazis” or “political speech urging racial hatred” are internally contradictory, then even a principle prohibiting content-based discrimination against political advocacy would not cover the communications of those whose advocacy of genocide or racial hatred would simply not count as “political” at all.

Even if it is correct that there now exists in this country neither a well-entrenched definition of the political that internally excludes urgings to racial hatred, nor a well-entrenched category of “political speech other than that urging racial hatred,” it is possible that some day there might be such distinctions, and it is possible to argue that such distinctions are defensible and *ought* to be embodied in this society’s linguistic and conceptual apparatus. Indeed, this seems an illuminating way of understanding contemporary arguments about anti-pornography regulation. The First Amendment-based invalidation of the Indianapolis anti-pornography ordinance embodied the view that the ordinance constituted a viewpoint-based restriction, as to which there existed no doctrinal basis for an exception.⁵⁵ I will concede the doctrinal plausibility of that conclusion (which is not to deny the plausibility, perhaps even the doctrinal plausibility, of the opposite conclusion⁵⁶), but we can now appreciate that the non-existence of an exception to a prohibi-

⁵⁴ On the exclusion of those who would overthrow the constitutional order from political participation, see the Basic Law of the Federal Republic of Germany, Art 18 (forfeiture of basic rights), translated in Gisbert H. Flanz, *Federal Republic of Germany* 49, in Albert P. Blaustein and Gisbert H. Flanz, eds, 6 *Constitutions of the Countries of the World* (Oceana, 1985).

⁵⁵ *Hudnut*, 771 F2d at 328. The same argument undergirded the mayor’s veto of a similar ordinance in Minneapolis in 1985, and the unreported invalidation of essentially the same ordinance in Bellingham, Washington in 1989.

⁵⁶ See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589.

tion on viewpoint-based restrictions and the non-existence of a category of "viewpoints other than the viewpoint that women are appropriate objects for sexual violence," as to which no exception would be necessary, are neither natural nor neutral. They merely reflect the contingent linguistic and categorial apparatus with which we view these ordinances.

From this perspective, proponents of anti-pornography legislation can be seen to urge the recognition and entrenchment of the "viewpoints other than . . ." category, the category that could form the basis for a First Amendment principle that would be without exceptions. Taken in the light most consistent with the existing doctrinal structure of the First Amendment, those arguments could still be viewed as acknowledgments that this category does not now exist, but as attempts, structurally analogous to Chief Justice Rehnquist's in *Texas v Johnson*, to create a world in which this category did exist. In this case, the assimilation of the category within the doctrinal structure of the First Amendment would cause no worry about exceptions. The category would simply exclude that lying without it, just as the category of sales of securities excludes the sale of lawnmowers. Once we recognize the oddness of the very idea of an exception, we recognize as well the contingent conditions under which an argument from the undesirability of exceptions has rhetorical and doctrinal appeal.

Thus, contemporary anti-pornography proposals can be seen to ask three closely related questions: Why is the relevant juridical category "viewpoints" rather than "viewpoints other than the viewpoint that women are appropriate objects of sexual violence"? Why does the category "viewpoint" include articulation of the position that women are appropriate objects of sexual violence? Finally, why does the category of "politics" or "political argument" include those who would urge sexual violence against women? The point is that the existing category, including sexual violence and therefore necessitating a potentially fragile exception in order to permit the restriction, is only contingent, and it is hardly inconceivable that there could be a world in which the initial category would exclude advocates of sexual violence just as there is a Nazi-excluding category in Germany. From this perspective the proposed anti-pornography legislation is more than just an attack on a certain variety of communication. It is an attack on a conceptual

structure that puts that communication in the same class with communications of a dramatically different sort.⁵⁷

V. THE FOUNDATIONS OF A CATEGORIAL STRUCTURE

Nothing in the foregoing denies the existence of natural kinds like tigers and titanium. Context may be a lot, but it is not everything. Although this is hardly the place for a discourse on metaphysics, even were I qualified to give one, I want to grant the arguments of metaphysical realists, who maintain that there are natural kinds whose physical delineation precedes the act of human categorization. Where the law operates on such natural kinds, as when for example it prohibits killing bald eagles, it operates on a world in which the antecedent linguistic and categorial structure frequently reflects the underlying physical reality of the world. In such cases the linguistic and social categories upon which the law operates are likely to be least contingent, and least likely to change. As a result, the need for an exception will often be the result not of linguistic or cultural fortuity, but of the natural terrain upon which the law operates and by which it is constrained.

At the other extreme, law sometimes operates on categories entirely of its own making, as we saw in the examination of constitutive rules and technical terms. In such cases the presence or absence of an exception is likely to be a function either of mere stylistic felicity or of procedural concerns such as those involving allocation of the burden of proof. Where law is the master of its categorial underpinnings, it can work in a world in which little of substance turns on whether a legal rule employs the logically empty device of an exception.

In most cases, however, law operates between these extremes, confronting and using antecedent social and linguistic categories that are neither natural nor of the legal system's own making. Then the distinction between what looks like a principle and what looks like an exception is likely to be deceiving. The distinction is now seen to be contingent and not fixed, empirical and not inexorable. To say this, of course, is not to commit the Realist and neo-

⁵⁷ I believe that all I have said in this section applies to contemporary debates about controls on racist speech on campus or in the public forum. Compare Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L J 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320 (1989); and Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 Case W Res L Rev 733 (1989-90), with Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm & Mary L Rev 267 (1991); and Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L J 484, 523-48.

Realist fallacy of supposing that the social contingency of the categories with which law deals is strong or even much evidence of the ability of legal actors to change them.⁵⁸ But recognition of those categorial contingencies enables us to see in a different light the continuing interplay between legal and social change. At times, more rarely than many suppose, legal change might produce social change, and thus alter the categorial structure that reflects a society's understandings.⁵⁹ For example, the pervasiveness within much of current social consciousness of the concept of sexual harassment owes its origins to a movement for legal reform.⁶⁰ More commonly, legal change is parasitic on social change. That is why it is possible to accept simultaneously the plausibility both of the Skokie decisions and of the German anti-Nazi laws, even with an assumption of otherwise identical free speech principles in the two countries; why it is possible simultaneously to acknowledge the doctrinal basis of the result in the pornography ordinance cases while envisaging a world in which the opposite result would be considered sound; and why we can see the opinions in *Texas v Johnson* as reflecting not so much differing views about the First Amendment as different understandings of the American experience. The use of an exception is a signal that the law and the society on which it presses are not in harmony. Whether this is a good or bad thing depends mostly on the particular substantive context, but it is likely that those who employ or urge what is *now* seen to be an exception are the ones who are urging change in the status

⁵⁸ And this is why the "dangerous precedent" argument surrounding the Skokie cases was a real argument. If law's ability to remake its categories were complete, then the concern that an extra-legal world might fail to appreciate the distinction drawn by the courts would be of no significance.

⁵⁹ I do not deny the phenomenon. I do, however, question the suggestion (see Anders Vilhelm Lundstedt, *Legal Thinking Revised: My Views on Law* (Almqvist & Wiksell, 1956); Robert W. Gordon, *Critical Legal Histories*, 36 *Stan L Rev* 57 (1984)) that this is the prevalent direction of law/culture interaction or that culture is so law-soaked as to make the law/culture distinction itself problematic. Although legal concepts and categories do often provide the conceptual apparatus with which people outside of the legal system think and talk (see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv L Rev* 1497 (1983)), the prevalence of that phenomenon is likely to be overestimated by lawyers inclined to see the world through a legal lens, and to see the world in a way that overstates the law's importance in it. (Nor are lawyers any different in this regard from others, all of whom are likely to see a world in which they and those like them occupy a more prominent place than would be seen by others differently situated.) Ultimately these questions are empirical, and assessing the prevalence of a phenomenon that all acknowledge (or should acknowledge) requires resort to empirical techniques all too rare in legal scholarship.

⁶⁰ See especially Catharine MacKinnon, *Sexual Harassment of Women: A Case of Sex Discrimination* (Yale, 1979).

quo, while those who argue against exceptions are those for whom the society's existing linguistic and conceptual structure reflects the world as they wish it to be.

VI. EXCEPTIONS AND THE FORCE OF RULES

Taking these cases together demonstrates that there is nothing special or inexorable about the line between an exception and what it is an exception to. In the First Amendment context, the lesson of this is that arguments couched in the language of exceptions are usefully viewed as arguments over competing conceptions of the central principle itself. But if arguments about exceptions are in reality arguments about the rule itself, then in many other contexts it is important to resist the idea that exceptions exist apart from rules, and, consequently, that adding an exception is anything other than changing the rule. 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*. Now that we know that exceptions are continuous with the rules they are exceptions to, however contingent that continuity may be, we can see that there is no difference between adding an exception to a rule and simply changing it. Consequently, a significant benefit of understanding the logical emptiness of the idea of an exception as an analytically distinct concept is that we can now understand the power to create an exception in a much less epiphenomenal light.

A legal rule instantiates some background goal, purpose, or justification. Thus "Speed Limit 55" and "No Vehicles in the Park" might reflect the purpose of promoting safety (or conserving fuel), "No Dogs Allowed" might reflect the background purpose of preventing disturbance of the patrons in a restaurant, and the specific language of Rule 11 of the Federal Rules of Civil Procedure might further the purpose of preventing the filing of frivolous pleadings. None of these rules contains an exception, but cases might arise in which some form of conduct literally within the language of the rule-formulation seems not to serve the rule's background purpose or justification, as with Fuller's statue of a vehicle and the "No Vehicles in the Park" rule,⁶¹ or with a seeing-eye dog and the "No Dogs Allowed" rule.

⁶¹ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv L Rev 630, 663 (1958), responding to H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593, 607 (1958).

The prevailing American view of such cases is that the literal language of the rule should yield to the purpose, especially where the language is overinclusive rather than underinclusive.⁶² Where the literal language is overinclusive, a common view is that courts (or other interpreters) should recognize *exceptions* where application of the literal language would not serve the rule's purpose.⁶³

What is going on here? Assuming the putative exception does not already exist in the law, in which case nothing interesting is going on at all, the interpreter is being asked to *create* an exception to a rule not literally already recognizing that exception, or to *recognize* a supposedly immanent exception not previously explicitly recognized. But where is the normative purchase for the recognition or creation (which may or may not be the same thing), for saying that this exception is necessary and that one is not? Presumably it comes from consulting the rule's purpose, and the recent American tradition can be described in terms of a principle that would allow (or require) the interpreter to create or recognize an exception to a literally exceptionless rule if not to do so would yield a result inconsistent with the rule's purpose.

But if the ground for creating or recognizing an exception and applying it to the very case that prompted creating it is that failure to do so would frustrate the rule's purpose, then applying the rule and reserving the power to fashion an exception whenever exceptionless application would not serve the rule's purpose is extensionally equivalent to simply applying the rule's purpose directly to particular cases. If inconsistency with purpose is a sufficient condition for modifying what was previously thought to be the rule in the instant case, then no case will exist in which application of the rule will differ from application of the purpose, and thus it is the purpose rather than the rule-formulation that in fact *is* the

⁶² "Curing" an underinclusive rule by holding it applicable to a party not literally within the rule's terms involves problems of notice and assertion of judicial authority that are less serious with respect to curing an overinclusive rule by refusing to apply it. For examples of refusal to cure literal underinclusiveness, see *Pavelic & LeFlore v Marvel Entertainment Group*, 110 S Ct 456 (1990) (refusing to extend FRCP Rule 11 liability to law firms); *McBoyle v United States*, 283 US 25 (1931) (Holmes) (refusing to extend National Motor Vehicle Theft Act to airplanes).

⁶³ *California Federal Savings & Loan Ass'n v Guerra*, 479 US 272 (1987); *Steelworkers v Weber*, 443 US 193, 200-08 (1979); Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge tent ed 1957); William Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1537-54 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 419-20 (1989).

rule.⁶⁴ It thus turns out that in a quite different context the language of exceptions is more misleading than helpful. There is something seemingly benign about the ability to create exceptions, for something about an exception looks comparatively trivial. But if there is power to create exceptions in the name of purpose, and to apply those exceptions immediately, then the exception-creating power is identical to the power to apply the purpose rather than the rule, or to take the purpose as in fact being the rule. Now this too may be benign,⁶⁵ but my point here is that little more than deception is served by employing the language of exceptions. We already have the linguistic tools to talk about the ability to apply purpose directly to cases, and we already have the linguistic tools to talk about the ability of judges to modify rules as they go along. Given that in American legal culture neither of these is considered anathema,⁶⁶ little is served by the use of a term that suggests that something else is transpiring.

The risk of confusion is even greater if the reason for creating an exception is equity or justice rather than the single purpose behind a single rule.⁶⁷ For if a rule will be applied only when it is consistent with justice, then it turns out once again that talk of exceptions, or of the power to create them, is largely distracting. The power to create an exception to a rule when required by justice is equivalent to the power to do justice *simpliciter*. Again, to describe the role of the courts in such terms is hardly abhorrent these days,⁶⁸ but if that is so there is even less reason to disguise in

⁶⁴ I am intentionally collapsing the distinction among creation, modification, and recognition of the previously unrecognized, for the seemingly less intrusive practice of recognition is no different from the seemingly more intrusive practices of creation or modification if what is "recognized" has not been recognized before. None of this is to say that intrusiveness in this sense is necessarily or acontextually undesirable, but here again we may be witnessing a conflict between the desire to promote interpretive authority and the desire to mask its existence.

⁶⁵ But sometimes not. See Frederick Schauer, *Formalism*, 97 Yale L J 509, 538-44 (1988).

⁶⁶ See generally Guido Calabresi, *A Common Law for the Age of Statutes* 163-66 (Harvard, 1982); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich L Rev 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Construction in the Supreme Court*, 95 Harv L Rev 892, 912-15 (1982).

⁶⁷ See generally Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 Duke L J 277.

⁶⁸ But see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

the trivializing language of exceptions what is in reality a quite different mode of decisionmaking.

Consider in this light the following from H.L.A. Hart, as quoted and endorsed by Judge Posner:

We promise to visit a friend the next day. When the day comes it turns out that keeping the promise would involve neglecting someone dangerously ill. The fact that this is accepted as an adequate reason for not keeping the promise surely does not mean that there is no rule requiring promises to be kept, only a certain regularity in keeping them. It does not follow from the fact that such rules have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word "unless . . ." is still a rule.⁶⁹

Hart's claim, which at other times he characterizes in terms of the *defeasibility* of a legal rule,⁷⁰ is that legal rules are always subject to the addition of what Posner calls "ad hoc exceptions."⁷¹ But if the basis for creating or adding that ad hoc exception is the judicial determination that it would be best, all things considered, to add it, then the result again turns out to be extensionally equivalent to a procedure pursuant to which the judge simply makes the best all things considered decision directly.⁷²

Yet this is exactly what Hart denies in claiming that ad hoc exceptions can be added at the moment of application while still not being "left to our discretion." Hart is able to make this claim, however, because he confuses and conflates two distinct phenomena—creating an exception to a rule and overriding a rule. The phenomenon Hart describes, certainly common enough to the American constitutionalist familiar with "compelling interests" and "clear and present dangers," is that some rules or principles are not absolute, but rather are capable of being overridden in particularly exigent circumstances. Just as racial classifications may

⁶⁹ H.L.A. Hart, *The Concept of Law* 136 (Oxford, 1961), quoted in Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich L Rev 827, 834-35 (1988).

⁷⁰ H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 Proc Aristotelian Soc 171, 175 (1949). See generally G.P. Baker, *Defeasibility and Meaning*, in P.M.S. Hacker and J. Raz, eds, *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* 26 (Clarendon, 1977).

⁷¹ Posner, 86 Mich L Rev at 834 (cited in note 69).

⁷² The point I make here is similar to David Lyons's argument that act- and rule-utilitarianism are extensionally equivalent as long as rules are allowed to be of unlimited specificity and continuous malleability. David Lyons, *Forms and Limits of Utilitarianism* 115-18 (Oxford, 1965).

be employed if they are held to serve a compelling interest,⁷³ or constitutionally covered speech may be restricted in order to prevent the realization of a clear and present danger,⁷⁴ so too might the rule requiring the keeping of promises be overridden by the force of the principle, as applied in some case, that one should attend to those in distress.

Thus, the phenomenon that Hart describes is not that of the continuously malleable rule subject to modification in the service of the best judgment for the case at hand, all things considered, nor that of the rule subject to the adding of exceptions whenever it seems best (all things considered) to add them. Both of these methodologies are indeed equivalent to the simple grant of discretion that Hart wants to distinguish. Rather, Hart wants to capture the way in which rules can be overridden in particularly exigent circumstances and still be rules, even if it is impossible to predict or to specify in advance what those exigent circumstances will be. But what can and must be specified in advance to preserve the rulelessness of the rule is the very standard of exigency, or its equivalent, for, if the reasons for overriding a rule need be no greater than the reasons that support the rule, there will be no case in which the existence of the rule makes a difference. If we clarify Hart's point, therefore, we cast doubt on his whole notion of defeasibility (as something different from overrideability). We can still, however, maintain that unless the reasons for creating an ad hoc exception are stronger than the mere divergence between rule and purpose, or stronger than the mere existence of a better all things considered decision if the exception is added, there is no difference between the power to create an ad hoc exception and the power to change the rule. Moreover, unless there exists this divergence in the strength of the relevant reasons, there is no difference between the power to make an ad hoc change in a rule based on *X* and the power to make decisions based on *X*. This, to repeat, is not necessarily to be condemned, but little other than deception seems served by describing the process in ways that oc-

⁷³ See, for example, *Loving v Virginia*, 388 US 1, 11 (1967); *Korematsu v United States*, 323 US 214, 216 (1944).

⁷⁴ *Schenck v United States*, 249 US 47 (1919). On the distinction between coverage and protection, a distinction that makes it possible to describe the way in which conduct may simultaneously be within the scope of a right yet be properly restricted under exigent circumstances, see Frederick Schauer, *Can Rights Be Abused?*, 31 Phil Q 225 (1981); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand L Rev 265 (1981).

clude appreciating the central connection between issues of rule change and issues of authority to make those changes.

CONCLUSION

The results of this analysis seem thus to trivialize the idea of an exception, but this is not to trivialize exceptions. On the contrary, we can now see that in a number of seemingly quite different domains much of import is taking place beneath the language of exceptions. When talking about the power of a judicial interpreter to append exceptions to rules in the service of purpose, policy, or equity, the language of exceptions is often used to disguise what is no different from a modification or repeal of the previously existing rule. Here the language of exceptions is used to diminish the import of the phenomenon. By contrast, the language of exceptions is commonly used in the First Amendment context not to diminish but to exaggerate the import of the phenomenon. The archetypal First Amendment libertarian, recognizing that the power to make exceptions is the power to change the rule, is wary of exceptions, although commonly unaware of the contingency of the linguistic and categorial underpinnings upon which this suspicion rests. Hart and his followers recognize this contingency, but use the exceptions language as a way of disguising the assertion of judicial authority to change the rule.

What these uses of the language of exceptions share, for all their differences, is a use of that language to mask issues that are seemingly more basic. When we are talking about statutory design, the idea of an exception is sometimes a linguistic fortuity, and sometimes only a reflection of the different roles that law serves vis-a-vis the pre-legal social and categorial structure on which it operates. When we are talking about common-law or constitutional principles, the idea of an exception is much the same, because the language with which we speak of some principles tracks a less canonically inscribed but equally contingent categorial structure. And when we are talking about the ability of judges to create exceptions, we are really talking more about the central question of common-law methodology, the ability of judges to modify rules in the process of application.⁷⁵ That question, as with all of these others, is an important one, but as with the others we must be wary of the distracting effect of the trivializing phrase.

Exceptions are everywhere in law, but everywhere they are part and parcel of the rules they are exceptions to. To say this is

⁷⁵ See Frederick Schauer, *Is the Common Law Law?*, 77 Cal L Rev 455 (1989).

not to make normative recommendations about whether exceptions should be employed more or less than they are now, nor about when and where they should be used. Nothing of the kind emerges from what I have said here. The lesson is only that the use or non-use of an exception is likely to reflect a substantive choice of some import, and so too with the use or non-use of the language of exceptions in legal debate. Once we see this, we have the tools available to pierce the rhetoric and fortuity of exceptions, and consider directly these questions of substantive principle and interpretive authority that the language of exceptions so often obscures.

