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RESEARCH ARTICLE

Unprincipled adjudication

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Abstract
What is unprincipled adjudication and when, if ever, is it justified? In addressing those questions, this essay attempts to complete a project begun with Professor Fred Schauer.

Keywords: Adjudication; Principles; Formalism; Discretion; Legal Realism; Judicial Decision making

According to conventional wisdom, "unprincipled adjudication" is categorically bad. The target of opprobrium appears to be adjudication that is arbitrary, unforthcoming, or centered on the identities of parties, as opposed to being grounded in a generally applicable rule followed with integrity. This conventional view is overstated, overbroad, and just flat wrong. Or, at least, that was what Fred Schauer and I had planned to argue in a joint paper.[1]

I miss Fred for many reasons, and this unfinished collaboration is not the most important one. But I hope that I can help to remember Fred by completing the project we had planned – or more accurately, by completing a lesser version of our intended project, one lacking the elegant insights that Fred would have shared. Writing alone also loses out on a major intellectual benefit – namely, having Fred integrate his own foundational work on formalism with a cautious celebration of unprincipledness.[2]

I confess misgivings about the ethical position I confront. I have found myself trying to reconstruct the state of Fred's thinking, even as I inevitably push the argument in directions that he and I had not quite discussed. Recognizing that tension, I have chosen to mark Fred's central role in producing this paper while declining to write the piece in his name. I hope that this approach can be an effective way to honor Fred's legacy.

[1]Fred and I presented an early version of the project, sans paper, at an incubator lunch. Fred wrote up and circulated an abstract for the event, subject to my light editing, which I attach here as an appendix.

[2]These projects are compatible. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("I do not argue that formalism is always good … .").

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In all events, I am confident about the basic point that Fred and I had in mind – namely, that unprincipled adjudication is a more complex concept than many suggest and, in some areas, it is even good, all things considered.

1. Concepts

Legal culture is generally averse to "unprincipled adjudication," but one struggles to know what that term could mean. There is always *some* principle – that is, some describable decisional guide or precept – that can explain any adjudication or any series of adjudications. Even a host of random outputs can be reverse engineered to be the products of a (complex) algorithm. So if "unprincipled" means to suggest the literal absence of any explanatory principle, then unprincipled adjudication is simply impossible.

A more auspicious approach would recognize that some principles are, well, unprincipled. Perhaps, for instance, unprincipled adjudication arises when an adjudicator has not figured out what principle could explain his rulings – but continues to decide cases anyway. The resulting adjudications might seem tentative, chaotic, or confused. For adjudication to be unprincipled, on this view, would be for it to lack any known principle.

Yet this idea is both over- and under-inclusive. It is overinclusive because common law judges are often thought to decide pursuant to immanent principles that they themselves do not understand. A judge might reassure himself that factors x, y, and z suffice to justify today's judgment, but the judge might still be altogether unsure of what more broadly stated principle governs the relevant category of cases. The judge might even be open to the possibility of later embracing a principle that *refutes* the result reached in the adjudication at hand.[3]

Linking unprincipledness with unknowingness is also underinclusive, because it excludes paradigmatically unprincipled adjudicators. Think of a judge who has a secret practice of flipping a coin when deciding capital appeals. The strong impression that this judge is unprincipled persists if the adjudicator in question is widely suspected or even known to engage in coin flips, or if he announces as much from the bench.[4]

This line of thought suggests that unprincipled adjudication occurs when the best or only principle capable of explaining the adjudication is bad, immoral, or otherwise unjustified. In other words, unprincipled adjudication is not lacking principle so much as lacking in *right* principle. Unprincipled adjudication would then amount to "any adjudication that is bad." At that point, however, the idea of unprincipledness ceases to have any distinctive meaning, as it is tautologically true that bad adjudication is bad.

Yet the notion of unprincipledness does have distinctive meaning. Unprincipledness most saliently relates to a collection of adjudicatory qualities including arbitrariness, deception, and party favoritism. Paradigm cases of unprincipledness thus

[3] *See, e.g.*, Edward H. Levi, An Introduction to Legal Reasoning 21 (1948).

[4] *Cf.* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment) (discussing "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or … where the State arbitrarily denied a prisoner any access to its clemency process").

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mark out a family resemblance. These paradigms include the judge who flips a coin, who misleads, or who rules for preferred parties. Grounding unprincipledness in these particular varieties of adjudicatory badness allows us to explain the commonplace observation that a particular adjudication is both bad and principled. An adjudication's badness may not stem from its being unprincipled.

The paradigmatic instances of unprincipledness also point toward their mirror images which, when combined, describe a paradigm of principled adjudication. That ideal can be described in terms of adjudication in compliance with widely applicable, coherent sets of reasons that are well understood. From a positivist or formalist standpoint, we might imagine a jurist who resolutely ascertains and applies a legal rule, such as a speed limit, without fear or favor. From a more moralistic perspective, we can call to mind Ronald Dworkin's Hercules, who discerns, declares, and implements perfect principles of justice, after accounting for all relevant institutional facts and past practices.[5] Even the real Supreme Court, Dworkin argued, has offered a "forum of principle" capable of shaping public debate and society.[6]

We could stop there and have a meaningful, plausible understanding of the concept we seek to understand. To repeat, unprincipled adjudication would be taken as a shorthand for a particular collection of associated wrongs or vices – namely, arbitrariness, deceptiveness, and favoritism. But additional refinement renders the concept both more analytically useful and still truer to common usage. The qualities defined by these paradigm cases and family resemblances could be understood as warning flags or concerns, rather than as definitionally unjustified.[7] The fact that an adjudication is unprincipled might be *pro tanto* reason to view it as unjustified, but not conclusive proof of unjustifiability.

For if we have in mind certain generally undesirable qualities, then those qualities might sometimes be outweighed or negated by competing factors or considerations. Unprincipled adjudication would then be suspect but redeemable, at least in some circumstances. Similarly, if unprincipledness points toward particular vices in an adjudicator, then those vices might sometimes turn out to be virtuous in the sense of being justified. The question would then become, not if, but *when* unprincipled adjudication is good.

To answer this question, we need to introduce additional normative considerations apart from the Principled–Unprincipled axis or continuum. In one sense, each end of that axis is the opposite of the other. Stepping back, however, we can see that this entire first axis can be contrasted with alternatives. The most evident candidate is an axis running from expedient to inexpedient. Expedience refers to the opportune achievement of ends, regardless of means.[8] Whether an action is expedient has no

[5]*See* Ronald Dworkin, Law's Empire 238–40 (1986).

[6]*See* Ronald Dworkin, A Matter of Principle 70–71 (1985).

[7]*See* Merriam-Webster's Unabridged Dictionary (2026) (defining unprincipled as "lacking *or exhibiting a lack* of moral principles" (emphasis added)).

[8]*See* Merriam-Webster's, *supra* note 8 (defining expedience in part as "The quality of being suited to the end in view" and expedient in part as "characterized by concern with the opportune"). Expedience is thus different from, even if overlapping with, a principle of prudence. *Cf.* Philip Bobbitt, Constitutional Interpretation 13 (1991) (describing a "prudential" modality of argument as "seeking to balance the costs and benefits of a particular rule"). Expedience is sometimes defined as involving the pursuit of self-interest – which may encompass institutional self-promotion. *See* Merriam-Webster's, *supra* note 8; *see also* text accompanying *infra* note 73.

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necessary connection to whether it is based on widely applicable, coherent, and disclosed sets of reasons. Oftentimes, expedience calls for unpredictable actions, deceptive proclamations, or self-serving alliances. Expedience is accordingly unconcerned with the strictures of principled decision-making.

Legal scholars have been drawn to the difference between Principled–Unprincipled and Expedient–Inexpedient. In the mid-twentieth century, figures like Herbert Wechsler were associated with principledness and Alexander Bickel with expedience.[9] Yet the relationship between these axes is not a simple opposition. Rather, each axis reflects a distinctive normative dimension for ascertaining goodness or rightness in adjudication. It is possible – indeed, commonplace – to defend an unprincipled action as expedient, or else impugn a principled action as inexpedient. And it is also not only possible but common for both principledness and expedience to point in the same direction, such as when rule-application is efficient or when unprincipledness triggers angry backlash. Principledness and expedience, while frequently at odds with one another, are also separable.

Moreover, certain institutions or people tend to associate with one or the other trait. In that sense, an institution or individual might have a normative "style" that is expedient but unprincipled, or else principled but inexpedient. Moreover, we can see and apply these stylistic types while remaining agnostic as to what is ultimately justified or good. That is, we might all agree that someone is principled (or unprincipled) in the course of being either an aristocrat or a democrat – even if we disagree about the appeal of those views. Likewise, someone may be expedient (or inexpedient) while advancing either libertarianism or socialism.

Another way to see that these styles are independent from goodness or rightness is to consider examples from ethical theory. Regardless of our moral views, we can see that Kantian ethics is highly principled, demanding absolute adherence to known, general maxims such as "do not lie."[10] We can likewise see, regardless of our ethical views, that act utilitarianism is highly unprincipled, as it allows for every manner of ad hoc exception or deception. Many ethicists reject both of these stark views, leading to adjustments (like contractualism or rule utilitarianism) that better balance principledness and expedience.[11]

Even if principledness and justification are distinct, one might think that unprincipledness might be justifiable only if it springs from a principled justification. One might then say that only *principled* unprincipledness can be justified. For example, a seemingly unprincipled decision to lie could be supported by a principled rule of avoiding hurt feelings. Put abstractly, first-order unprincipledness might depend on a principled second-order reason. Some important instances of unprincipledness do indeed exhibit this justificatory structure.[12]

[9]Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959); Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–27 (1962); *see also* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964). More recently, Mitch Berman has explored principledness as a feature of law's nature. *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1328–31 (2018).

[10]*See* Immanuel Kant, Groundwork of the Metaphysics of Morals 42 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

[11]*See, e.g.*, T.M. Scanlon, What We Owe to Each Other (1998); John Stuart Mill, Utilitarianism 38–42 (The Floating Press 2009) (1861).

[12]See, for example, the discussion of lotteries below and *infra* note 20.

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Yet even this nuanced view gives unprincipledness short shrift. Unprincipled actors may not be aware of any principled basis for action, and such a basis might not exist. Unprincipledness might spring from simple necessity. Or the only available principle could itself be unprincipled. For instance, adjudicators who muddle through their cases, generally trying to do their best, are not best understood as following any widely applicable, coherent, and disclosed principle. Yet their decisions and attitude may well be justified.[13]

In the Anglo-American tradition, the paradigmatically principled institution is the judiciary.[14] A legitimate court, according to conventional wisdom, is one that is principled. By contrast, the paradigmatically expedient institution is the legislature. Its members draw arbitrary lines, conceal their true reasons for action, and play to favorite constituents. An intuitive contrast, then, is between the high-minded, aloof jurist and the hard-bargaining, back-slapping legislator – both of whom are naturally viewed as excellent in their supposedly very different social roles.[15] But, of course, sometimes legislators receive praise for being inexpediently principled. And that observation paves the way for the central claim of this paper, namely, that judges may justifiably be expediently unprincipled.

2. Justifications

To figure out when unprincipled adjudication is justified, we must distinguish among different ways in which unprincipledness can arise. Here, I identify three aspects of unprincipledness: arbitrariness, concealment, and attention to party identity. Each aspect corresponds to a paradigm of unprincipled adjudication. Yet we must be careful. Teasing apart these aspects is tidy but also misleading, not only because the different aspects are interrelated but also because they are often connoted simultaneously. I therefore aim to identify points of intersection among the aspects of unprincipledness, as well as divergences.

2.1. Arbitrariness

Begin with arbitrariness, which is often defined as randomness or reasonlessness.[16] These two meanings are in tension, for there can be good reason for randomness. Lotteries and many other games function – and function well – through chance. The U.S. military draft, too, was once administered via lottery, and the most evident

[13] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1750 (1995) ("[F]ull coherence in principle is unlikely in the extreme"). While I frame these points in terms of adjudicators, most if not all of what I argue – especially in this paragraph – can be extended to persons generally.

[14] As Alexander Bickel suggested, "the Supreme Court and the political institutions" exhibit a kind of division of labor, in that "each institution" is "justifie[d] and encourage[d]" to act on a different basis: "on principle" in the judiciary and "on interest and expediency in the others." Bickel, *supra* note 10, at 95. *See also* Dworkin, *supra* note 6, at 217–20 (comparing "integrity in legislation" with "integrity in adjudication").

[15] *See* Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 644 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (quoting a manuscript by Lon Fuller); Archibald Cox, The Role of the Supreme Court in American Government 108–14 (1976). *Cf.* Dickerson v. United States, 530 U.S. 428 (2000) (Scalia, J., dissenting).

[16] *See, e.g.*, Merriam-Webster's Unabridged Dictionary (2026) (defining "arbitrary" in part as "based on random or convenient selection or choice rather than on reason or nature").

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problems with that system were the degree to which its practical implications ended up being non-random.[17] (We might add still other forms of justified arbitrariness, such as when scientists employ random chance to select research subjects, but I will focus here on the two lottery examples.) These disparate examples illustrate that randomness often has well-reasoned appeal.

The tension between randomness and reasonlessness resolves, however, if we understand reasonlessness as a lack of reason specifically for differentiating among similarly situated parties. Take Dworkin's image of the checkerboard law, which he takes as the paradigm of a regime lacking integrity, a quality that closely tracks or subsumes the idea of principledness.[18] Of course, it is possible (even if unlikely) that liable parties, as determined by a neutral rule, just so happen to be arranged in a checkerboard pattern. Yet the point of the checkerboard hypothetical is that there is nothing *about the parties* that justifies whether they are on a white or black square, other than the arbitrary pattern of a checkerboard itself.

In that important way, even a well-functioning lottery is arbitrary: no meaningful characteristic of Person A explains why that person wins, whereas Person B loses. In fact, that arbitrariness is the whole point of holding a lottery. If there were a principled basis for choosing among contestants, then the lottery would not take place. Just so with the draft. During the Vietnam War, people born on March 2, 1953, might be called to dangerous service abroad, whereas people born on March 3, 1953, were not. That arbitrariness could be viewed, unironically, as a testament to equality.[19] The lottery treated all persons and stations the same *ab initio*, even if (or because) outcomes were randomly disparate.

What the lottery examples have in common is a perceived need to distribute a benefit or burden when that distribution cannot ultimately be equal. If a lottery prize were apportioned equally among contestants, then the prize would be a pittance and the perceived need to foster excitement would be sacrificed. And a lottery for the military draft simply cannot be equally distributed among the population, given the perceived need for a certain fraction, but only that fraction, of the eligible population to serve.

Adjudication lacks the lottery's essential goal. For instance, a tort action invites a distribution of both benefits and burdens in the form of damages liability, but many such adjudications should end without awarding damages. The plaintiff's case might be faulty, wrong, or unproven. And, if that eventuality arises, then no harm or benefit is distributed at all. The threshold purpose of adjudication – in sharp contrast with the lotteries discussed – is to identify *whether* to distribute benefits and burdens.

[17] *See, e.g.*, David E. Rosenbaum, *Statisticians Charge Draft Lottery Was Not Random*, N.Y. Times (Jan. 4, 1970).

[18] Dworkin, *supra* note 6, at 178–84.

[19] *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 20 n.57 (1984): "For example, one might argue that the fairest way to implement a military draft is to use a lottery. In cases like this, however, a considered decision is made to adopt an arbitrary procedure. The results are arbitrary as they affect specific individuals, but the original decision to adopt the procedure is reached after reflection and conscious choice. Moreover, the decision is justified by reasons that can be articulated (such as: 'This is the fairest way to distribute the calamity of military service'; 'This method generates the least controversy')." *See also* Neil Duxbury, Random Justice: On Lotteries and Legal Decision-Making 3 (1999) ("Lottery decisions may be economical, may generate positive incentives, and may promote a particular conception of equality.").

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Now, students of tort adjudication are familiar with situations in which it may seem that something akin to a lottery is appropriate. Imagine a case involving an indeterminate claim, a defendant who is the only possible tortfeasor responsible for the plaintiff's harm, and a legal rule permitting only two options: high statutory damages, or no damages at all. An adjudicator might then consider flipping a coin to resolve the case. And, why not?[20]

Or, more precisely, *how* not? By hypothesis the claim is indeterminate, meaning that liability can neither be shown nor discounted. We might imagine the case to turn on a key witness whose veracity cannot meaningfully be evaluated, or a legal rule with a linguistic ambiguity.[21] Perhaps a closure rule dictates placing a thumb on the scale in favor of the defendant – but even if so, the application of that rule might itself be indeterminate, or might be the very factor that moves the case from leaning-plaintiff to dead-on-tie. From this situation of decisional uncertainty, there is no principled escape.

Yet the adjudicator is unlikely to embrace the unprincipled nature of her decision. In effect, again, the adjudicator *must* decide arbitrarily. That course of action is the inevitable product of the judge's own uncertainty. But arbitrariness emerges as a last resort forced upon the adjudicator by practical necessity. Moreover, the adjudicator does not openly assert that she is acting arbitrarily. More likely, the adjudicator persuades herself that she has found some narrow basis for decision, or else makes a "black box" decision (most jury verdicts qualify) that elides the lack of any principled basis for decision.

In all these ways, unprincipledness is marked out as an aberration, and an embarrassing one at that. The norms that generate this pattern of minimization and denial are easily explained. Again, the purpose of the adjudicatory system is to figure out *whether* to distribute benefits and burdens. Adjudicators who give up on that task too readily undermine their institution's constitutive function. So the system works better when its participants are motivated to avoid unprincipled decision-making.

And, if *being* unprincipled is discouraged, then adjudicators will also be discouraged from *seeming* unprincipled, either in one's own eyes or in the eyes of others. Norms, incentives, and practices favoring principledness tend to stigmatize unprincipledness. When observing the work of the adjudicatory system, the adjudicators themselves, as well as litigants and lay observers, will look askance at actual, apparent, or self-proclaimed instances of unprincipled adjudication. However, these social sanctions are compatible with the fact that at least some deviations from the norm of non-arbitrariness are inevitable, desirable, or both.[22] The stigma associated with unprincipledness can be viewed as a rule that is justified on net, even though it sometimes leads to specific results that are ill-advised when viewed in isolation.[23]

We have so far focused on a relatively extreme and perhaps contrived case in which something like a coin flip becomes inevitable. Yet the pressure to avoid

[20]On the appeal of chance, coin flips, and lotteries in adjudication, *see generally* Duxbury, *supra* note 20; Adam M. Samaha, *Randomization in Adjudication*, 51 Wm. & Mary L. Rev. 1 (2009).

[21]I mean here to both raise and distinguish between epistemic and metaphysical indeterminacy.

[22]This conclusion comports with the view of many scholars that judges are inevitably legislators – a conclusion that manages to be subversive and jarring even though widely held among sophisticates. One goal of this essay is to explain why judicial legislation (or legislative judging) is stigmatized as unprincipled.

[23]*See generally* Frederick Schauer, Playing by the Rules (1991).

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unprincipled decision-making arises in many frequent if subtler situations. Imagine an appellate court that is constructing a precedential rule to guide other courts. No candidate rule involves coin flips, but the choice among the rules might effectively come down to one.[24] The appellate court might not be able to generate a non-arbitrary justification for its choice of a particular rule, or it might claim that its choice is the result of an amorphous balance of competing considerations. These sorts of problems can of course arise for functionalist thinkers and, relatedly, for those who view morality as part of the law. Sometimes, our pragmatic or moral powers are simply incapable of identifying a particular rule or holding as the best. Yet these problems are in some ways even more acute among formalists, since the indeterminacy of legal materials means that the law inevitably "runs out." What fills the resulting gap often appears to be, and perhaps has to be, a mode of legislation. H.L.A. Hart made that point within the framework of his positivism.[25] And some present-day formalists similarly distinguish between relatively principled "interpretation" and the more unprincipled, potentially legislative process of "construction."[26]

A noteworthy example arose in *Maryland v. Shatzer*,[27] which involved a question relating to the *Miranda* rule: how long after release from police custody does the coercive effect of arrest dissipate, rendering *Miranda* warnings unnecessary before a new interrogation? In a brief passage within a much longer opinion by Justice Scalia, the Court held: "It seems to us that period is 14 days."[28] The choice of 14 days, instead of seven, fifteen, or twenty, was arbitrary.[29] It resembled any number of legal lines drawn arbitrarily by legislatures and other rule-makers every day. But the Court's choice to be unprincipled was also justified. The Court's legislated rule carried the normal practical benefits attending rules. In addition, the Court's unprincipledness was interstitial: it related to an almost arcane issue nestled deep within *Miranda* law, one that few if any private individuals ever use to organize their affairs.

A more objectionable instance of unprincipledness arose in *Roe v. Wade*,[30] wherein the justices developed a much-criticized trimester framework for assessing abortion rights. The Court also adopted a viability line that later rulings maintained even as they jettisoned the overall trimester rubric.[31] As Laurence Tribe and other commentators observed, *Roe*'s selection of the viability line "mistakes 'a definition for a syllogism,' and offers no reason at all for what the Court has held."[32] At least as

[24]When judges have different views or approaches, the random assignment of certain jurists to a particular case may in effect control which legal principles apply or which outcomes will result.

[25]*See* H.L.A. Hart, The Concept of Law 153 (3d ed. 2012); *id.* at 272–75 (Postscript). In describing judicial legislation, Hart emphasized that it was "interstitial" and so "different from" the acts "of a legislature." *Id.* at 273.

[26]*See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 95 (2010).

[27]559 U.S. 98 (2010).

[28]*Id.* at 110.

[29]We might say that the Court's choice was arbitrary (because there was no particular or predictable reason for it) but not capricious (because it flowed from a considered realization of indeterminacy).

[30]410 U.S. 113 (1973).

[31]*Id.* at 163.

[32]*See* Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 4 (1973) (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924 (1973)).

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stated, the Court's choice was arbitrary.[33] As in *Shatzer*, the justices seemed openly to be operating in a legislative capacity. Unlike *Shatzer*, however, this arbitrarily drawn line was not interstitial but instead had direct implications for many private actors and, indeed, for the laws of nearly every state. So while *Roe*'s arbitrary line-drawing was not automatically improper, it did create a more acute legitimacy problem than many other unprincipled rulings. And, having abandoned principle, the *Roe* Court failed to identify an alternative source of legitimacy.

Adjudicators are also justified in employing another subtle form of arbitrariness familiar to legislatures: compromise.[34] Sometimes, one juror or judge will discern a rule or moral reason that counsels a principled result. But other jurors or judges might have conflicting views that, even if principled on their own, rule out a principled outcome overall. These conflicts may be resolved in principled ways, such as when a majority vote (itself a principled decisional procedure) selects one principled candidate. People may also be persuaded to join principled views by consensus, as eventually took place in *Brown v. Board of Education*.[35] Interestingly, the process of forming a principled consensus may itself be unprincipled. *Brown* was unanimous, it turns out, only because Chief Justice Warren and other justices carefully built momentum behind the Court's decision, with the final holdout relenting not because he had been persuaded on the merits but rather because a dissent would harm the Court and the nation.[36] Warren, fresh from his stint as a state governor, had brought legislative methods to the judiciary.

Yet even principled outcomes sometimes prove infeasible. Expedience then takes hold, and bargains are struck. Holdings are trimmed at the margins, fuzzed up, or counterbalanced by cryptic reservations and exceptions. Damages may be halved, or partial acquittals rendered. These split-the-difference compromises are unprincipled because they cause parties to be adjudged based on the contingent qualities of the adjudicators – not any generally applicable rule or moral reason. Everyone involved in the legal system knows that these sorts of arrangements take place, yet they are rarely if ever advertised.

Sometimes intra-case bargaining is acknowledged implicitly, such as when justices insist before public audiences that they do not bargain *across* cases – something they often associate with the pell-mell process of legislative horse-trading.[37] These statements may protest too much. But even if they are taken at face value, they assert a

[33]For a defense of judicial "line drawing" in *Roe* and other cases, see Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents in *Dobbs*, No. 19-1392 at 21–30 (2021); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992) ("Any judicial act of line drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care."). Critics sympathetic to *Roe*'s bottom-line conclusion have long argued that the justices should have ruled incrementally – an approach that mitigates arbitrariness. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198–209 (1992).

[34]*But see Casey*, 505 U.S. at 865 ("The Court must take care to speak and act in ways that allow people to accept its decisions … as grounded truly in principle, not as compromises … .").

[35]347 U.S. 483 (1954).

[36]*See* Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 301–02 (2004).

[37]*See, e.g.*, Joan Biskupic, *The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021) (Justice Breyer: "The second rule is no trading of votes. It's not like Congress."). *See generally* H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 165–66 (1991).

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contrast between judges and legislators that is easily exaggerated. Intra-case bargaining, too, has more in common with legislative processes than the justices may want to admit. Both, after all, are bargains. And they yield outcomes that may reflect nobody's genuine view of the law.

2.2. Concealment

Arbitrariness is related to concealment insofar as a decision that rests on unknown principles may lack any discernible principle at all. Judges who conceal their reasons for decision undermine values such as accountability and efficiency, as when interested parties are confused by court rulings that obscure the true direction of salient case law. Sometimes, concealment does still more, giving rise to deception. An otherwise principled decision is deceptive if it leads an audience to apprehend a different, false basis for decision.[38] Deception is in turn connected to various harms, as when parties rely on a seeming basis for decision and are then surprised when the true basis later becomes apparent.

Concealment relates back to the issue of stigma. As we have seen, arbitrary decisions are often justified or inevitable, even though they also prompt criticism from many quarters. Courts placed in the position of having or wanting to issue an arbitrary ruling are therefore encouraged to compound their unprincipledness by embracing a degree of covertness. A judge's effort at concealment might even reach their internal thought process, as they convince themselves that they have a sound, objective basis for decision even though they are really choosing arbitrarily. Like the narrator of Robert Frost's "The Road Not Taken,"[39] judges set down a path for no good reason and then rationalize that choice after the fact.

Yet concealment can bring an important benefit for the legal system: it maintains the generally helpful norm against unprincipled decision-making. If courts were more candid, then they would have to announce their own arbitrariness quite often. And that point is especially applicable to apex appellate courts like the Supreme Court, which tend to decide cases that feature indeterminate law and complicated judicial compromises. If the justices (or other appellate judges) owned up to the inevitable need for arbitrariness in their work, they would unduly encourage other courts to engage in unprincipledness, even if those courts more often deal with determinate law and less often engage in compromise.

In this way, concealment seemingly allows the judicial system to have its cake and eat it too. Judges at all levels of the judicial system remain encouraged to focus on principled decision-making, while criticizing unprincipled decision-making. Appellate judges accordingly remain in apparent compliance with that norm, thus fostering their own legitimacy, the lower courts' compliance with the norm, and the overall legitimacy of the legal system. Yet judges are often out of compliance with the norm. This line of thought calls to mind Martin Shapiro's claim that all judges are and must

[38]On judicial candor and the related virtue of sincerity, including limitations on the duty to be forthcoming, see Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 Colum. L. Rev. 2265 (2017); Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987 (2008). *Cf.* David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987).

[39]*See* Robert Frost, *The Road Not Taken* (1915), *reprinted in* Jay Parini, Robert Frost: Sixteen Poems to Learn by Heart 53 (2024) ("Then took the other, as just as fair, / And having perhaps the better claim, / Because it was grassy and wanted wear; / Though as for that the passing there / Had worn them really about the same … .").

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be "liars," not for cynical reasons but rather because a form of legalistic deception is key to judicial legitimacy.[40] As Shapiro explained, "judges must have something to tell the loser" in a contested case, and a legitimating solution is to say some version of "the law required that you should lose."[41]

Shapiro's claim can be viewed as a partially exculpatory gloss on legal realism, an intellectual movement whose members canonically assessed the widespread fact of adjudicatory concealment. A judge's stated rationale, leading realists maintained, was not always or typically the "real" basis for decision.[42] The true reasons for decision were discoverable only through more indirect methods than reading opinions, such as by considering widespread patterns in case outcomes. A judge might believe that organized labor is bad for the economy and so abide by a concealed principle that union claims usually ought to fail. For these realists, adjudications could be, and often were, non-arbitrary, even if concealed. Adjudication was principled in one sense but unprincipled in another.

Other forms of concealment are justifiable as part of an evolving decisional process. Imagine that members of an appellate court are unsure of how to resolve a broad issue because they are either perplexed or at odds and so are averse to setting a grand precedent. The actual principle of decision might then be something like: "We must resolve this case in a way that maximally preserves our decisional freedom." But that principle would be arbitrary in the sense described above: it would make the rights of the parties turn on something other than a generally applicable rule. Instead, the outcome would stem from the present confusion of the specific adjudicators, plus the coincidence of when the case arose.

Many important adjudications can be understood along those lines. *Brown* again offers an example. Faced with a narrow, unsure, and fractured majority to declare the separate-but-equal doctrine unconstitutional, the justices requested reargument and extra briefing on the Fourteenth Amendment's history, thereby postponing final consideration of the central merits issue for about a year.[43] This strategic delay not only yielded research capable of illuminating the historical issues in the case, but also allowed time for a change in court personnel and, eventually, a unanimous opinion by the newly installed Chief Justice Warren.

A more recent instance can be found in *NAMUDNO v. Holder*.[44] In a divisive and pivotal case about the constitutionality of the Voting Rights Act's preclearance formula, most justices were probably inclined to find the Act partly unconstitutional. But rather than leap to that result, the Court disposed of the case on a relatively narrow statutory ground that attracted supermajority support. As in *Brown*, the justices did not announce either a compromise or a desire to delay resolution of the

[40]Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994); *see also* DUXBURY, *supra* note 20, at 139 ("It may be good political strategy—a useful lie—to prefer the rituals, rather than to accept the limits, of legal decision-making." (citation omitted)).

[41]*Id.* at 156.

[42]*See* Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 750 (2013) (discussing Karl Llewellyn's and other realists' distinction between "'paper rules,' on the one hand, and 'real rules,' or 'working rules,' on the other"); *see also* KARL N. LLEWELLYN, THE THEORY OF RULES 63–76 (Frederick Schauer ed., 2011) (1938).

[43]*See* BRAD SNYDER, DEMOCRATIC JUSTICE 578–80 (2022). At the remedy stage, *Brown* was decidedly less principled, calling for "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

[44]557 U.S. 193 (2009).

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case. These maneuvers were both arbitrary and concealing, but they were also justifiable – as evidenced by their practical unanimity.

Principles of judicial decision-making are sometimes stated explicitly. Justice Brandeis famously collected prudential rules in his *Ashwander* concurrence.[45] And Chief Justice Roberts has generated maxims expressing similar minimalist ideas. For example, he has argued: "if it is not necessary to decide more, it is necessary not to decide more."[46] Yet these maxims tee up a deeper issue: *when* is it necessary to decide more? The calculus behind that issue is rarely articulated. These maxims accordingly acknowledge a degree of unprincipledness, even as they attempt to limit it. They corral expedience but cannot tame it.

In different ways, both legal realism and adjudicatory minimalism demonstrate that concealment might be imperfect or partial. Attentive lawyers or scholars may discern various principles that the justices covertly follow,[47] and those sophisticated actors may then either exploit or object to those covert principles, even as many other people remain deluded or mystified. In *Brown*, *NAMUDNO*, and many other cases, jurists sent signals that they were quite serious about reaching new holdings, even if they remained somewhat undecided.[48] While that expedient signal was ambiguous, the ambiguity was most of the point. It preserved some allegiance to the overall norm in favor of principle.

A loose comparison may be drawn with "white lies." We all know that our social interactions involve a healthy amount of well-intentioned but unprincipled behavior. And we may even suspect that a particular person is not entirely forthcoming. People stay quiet to avoid insulting candor. Or they say something nice but misleading or false, for the sake of collegiality and good manners. So we live in a world of uncertainty about just when, how much, or how often people fudge the truth. There are costs to that uncertainty but also benefits, as well as room for debate about how to strike the relevant balance more benignly. Unsurprisingly, the labels of principled and unprincipled admit of degrees.

Consideration of white lies also points toward the possibility of excessive principle. Just as unprincipled decisions can be justified, principled ones can be unjustified. And the source of unjustified principledness may be inadequate attention to expedience – a failure to strike the right balance, as it were. There is no need to imagine the arch scenarios of justified deception, such as a heroic lie aimed at saving someone pursued by a murderer. Just think of an upright person who is candid to a fault, causing pointless anger, hurt feelings, and conflict. It turns out that leading jurists have thoughts on these topics, too. Consider Justice Ginsburg's frequent suggestion that "it helps sometimes to be a little deaf" in a marriage, as well as her view that that approach works "in every workplace, including the Supreme Court."[49] These maxims resemble Brandeis's and Roberts's: they qualify principledness for the sake of expedience.

[45]Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

[46]*See* PDK Labs. Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

[47]*See, e.g.*, Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 Wm. & Mary Bill Rts. J. 105 (2014).

[48]*See also* Richard M. Re, *The Doctrine of One Last Chance*, 17 Green Bag 2d 173 (2014).

[49]*See* Ruth Bader Ginsburg, *Ruth Bader Ginsburg's Advice for Living*, N.Y. Times (Oct. 1, 2016).

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Justice Ginsburg's precepts for collegial living even exhibit much the same strategic content and purpose as Justice Brandeis's principles of expedience. When confronting a potentially unconstitutional statute, Brandeis counseled construing the law in favor of its constitutionality. The result may be to narrow or otherwise alter the statute, contrary to the enacting legislature's intention.[50] In a sense, Brandeis suggested that the Court choose not to "hear" what the legislature is trying to say. Principles of standing, which Brandeis also championed, arguably work similarly.[51] When parties litigate based on ideology alone, rather than any personal exigency, Brandeis counseled that courts turn a deaf ear to their complaints, thereby avoiding a mutually harmful and avoidable conflict with the political branches.[52] Of course, these techniques require not just deafness but deftness, lest they become inexpedient. Unprincipledness without expediency is unjustified twice over.

2.3. Considering Party Identity

The logic of concealment is often attuned to the anticipated reactions of various parties. Sometimes these parties are physically present before the court. Shapiro had that dispute-focused perspective in mind when he wrote about judges "lying" that the law made them rule one way or the other. In Shapiro's view, legalism's gentle lie spared the losing side the anger or injury that might spring from hearing the court instead explain, "You have lost … . because we think society would be better off if you lost."[53] An appellate court, by contrast, is more likely to be operating in a law-declaratory mode attuned to audiences far beyond the courtroom, including the public. And we have already seen how Shapiro's argument can support concealment for the sake of promoting overall judicial legitimacy.

But while these points reflect concern for parties, they do not focus on the identities of specific parties. Shapiro's argument works perfectly well when stated abstractly, without naming any flesh-and-blood human beings, precisely because the intuition motivating his analysis is so universal. So while Shapiro described a form of unprincipled adjudication, he was not focused on the third aspect of unprincipledness, namely, consideration of party identity. To place that distinctive mode of unprincipledness in view, imagine a judge whose friend, family member, or political ally appears in court. If the judge then considered those qualities when deciding the case, he would consider party identity and, more specifically, exhibit favoritism.

The difference between principled adjudication and consideration of party identity is somewhat difficult to specify. Judges who apply generally applicable principles often consider features of various parties, such as their past conduct, age, or citizenship status. But that particularized consideration is principled – indeed, paradigmatically so. An abstract principle typically predates a specific dispute and often predates the disputants themselves. By contrast, party identity, as used here, excludes qualities rendered pertinent by a known, coherent, and generally applicable

[50]*See Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring). *But see* Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74 (raising objections to avoidance practices).

[51]*See Ashwander*, 297 U.S. at 341 (Brandeis, J., concurring).

[52]*See also* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

[53]*See* Shapiro, *supra* note 41, at 155.

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principle. Take the "private bill," which awards a named person an entitlement,[54] or a precedent that declares itself operational only for the very date of its issuance. Both private bills and precedents "good for one day only" involve explicit principles,[55] but the principles operate at the level of a name or a date and so lack the form of generality associated with principled adjudication.

Attention to party identity, like other aspects of unprincipledness, admits of degrees. The famous footnote four of *Carolene Products*[56] (as elaborated by scholars such as John Hart Ely[57]) can be viewed as a grand, highly abstracted form of attending to party identity. Discrete and insular minorities, *Carolene Products* asserted, ought to be treated preferentially. But this theory falls closer to the principled side of the Principled–Unprincipled axis. To ascertain whether a group is discrete and insular is to apply a principle of discreteness and insularity. The set of protected groups is not predetermined and may change with context or over time. *Carolene Products* thus differs from an unprincipled practice of favoring a named group as such – even if the same group is advantaged in the same way under either approach.[58]

A more unprincipled form of preference involves refusals of jurisdiction that aim to placate political critics. Much like Shapiro's argument about judicial "lying," the argument for consideration of party identity can be limited to formal parties in court, as in a typical trial adjudication. But, also like Shapiro's argument, consideration of party identity can be expanded to include the identities of parties within broader society. Take the Court's refusal to hear the challenge to miscegenation laws in *Naim v. Naim*.[59] Though formally a dispute between private individuals, the real parties in interest included the state of Virginia, as well as anyone invested in supporting or opposing race equality. Once *Naim* was out of the way, the justices waited about a decade to declare miscegenation laws unconstitutional.[60] The Court essentially bided its time, thereby avoiding potential backlash. A more principled approach would have demanded (among other things) the immediate end of miscegenation laws in the wake of *Brown*, an approach that Alexander Bickel described as "an absolute rule of absolute principle."[61]

The Court's behavior in *Naim* can be criticized on the grounds that it represents a form of "appeasement," in the sense that a potentially hostile actor benefits precisely because of its potential hostility. That understanding of appeasement tries to avoid the extreme pejorative connotations that have surrounded the term since Western Europe's infamous and catastrophic attempts to appease Nazi Germany. By contrast, Micah Schwartzman and Nelson Tebbe have largely embraced that negative evaluation, defining appeasement "as a sustained strategy of offering unilateral

[54]"A private law is an anomaly. Although enacted by the legislature — by Congress, at the federal level — it lacks the generality of application normally thought to be an aspect of legislation." Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1684 (1966). Private laws can be viewed as an extreme instance of unprincipledness: not just the lawmaking process but also the resulting law are highly unprincipled.

[55]*See generally* Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 Green Bag 2d 155 (2013).

[56]*See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[57]*See* John Hart Ely, Democracy and Distrust (1980).

[58]*Cf.* Madhav Khosla & Pratap Bhanu Mehta, *Caste Formalism: The Law and Politics of Equality in India*, 87 L. & Contemp. Probs., no. 3, at 205–07 (2025).

[59]197 Va. 80, *remanded* 350 U.S. 891, *aff'd* 197 Va. 734, *appeal dismissed* 350 U.S. 985 (1956).

[60]Loving v. Virginia, 388 U.S. 1, 2 (1967).

[61]*See* Bickel, *supra* note 10, at 64, 71.

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concessions for the purpose of avoiding further conflict, but with the self-defeating effect of emboldening the other party to take more assertive actions."[62] Because this definition presupposes a "self-defeating effect," it casts appeasement as necessarily bad. From the standpoint of language practices, that choice is eminently reasonable. Yet, by defining the concept to be a bad version of itself, the authors push out of view the more favorable ways in which "unilateral concessions" might be employed.

Once we drop the built-in condemnation from our definition of appeasement, or switch to a less historically freighted term such as "placating," we have a concept that is still quite problematic but no longer automatically bad. When assessing whether placating is justifiable, some key variables include the means used, the actor's goals, and whether the effort is likely to succeed. In private life, one might placate a loved one by buying flowers or placate a boss by doing work ahead of time. Personal and social peace may be impossible without some deliberate efforts at placating disapprobation or hostility.

To return to an earlier example from the domain of adjudication, Bickel believed that the Court's processual decision to deny review in *Naim* was justified for several reasons, including because that maneuver: (i) could be accomplished without outright misstating the law, (ii) avoided the pitfall of affirmatively legitimating miscegenation laws, and (iii) would facilitate a future ruling holding miscegenation laws unconstitutional.[63] Bickel's complex judgment was at least partially vindicated by subsequent events, as *Loving v. Virginia* did eventually strike down miscegenation laws.[64] Whether the Court and Bickel were correct that delay was justified of course remains a disputable question. For present purposes, however, the key point is that the Court's adjudicatory choice, and others like it, *may* be justified, even though it was unprincipled.

Other forms of party identity amount to compensating adjustments.[65] In sports, umpires and referees are often thought to issue "makeup" calls after a botched call, or to give a team the benefit of the doubt after ruling against them several times in a row.[66] These practices are generally contrary to official rules and policies, yet they persist and have their defenders. The key intuition here is that individuals and groups have an identity that survives any single adjudicatory choice. An adjudicator who repeatedly sides with one team against another might claim the mantle of principle, since she would be impartially applying coherent, generally applicable rules to the facts as she discerns them – come what may. But she might also be concerned. She could be biased in ways she may not fully appreciate, or else appear biased. Especially when calls are disputable, the adjudicator might promote both fairness and her own legitimacy by considering the identities of the parties that she is adjudicating. When the disgruntled fans of a chronically losing team frequently allege that the match is rigged, besieged refs may understandably want some favorable calls to point to in their own defense.

[62]Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 Sup. Ct. Rev. 271, 272 (2020).

[63]*See* Bickel, *supra* note 10, at 71, 174.

[64]388 U.S. 1 (1967).

[65]*Cf.* Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. Chi. L. Rev. 421 (2003) (discussing "compensating adjustments" with "offsetting" effects that "ensure constitutional equilibrium").

[66]*See* Mitchell N. Berman and Richard D. Friedman, The Jurisprudence of Sport 387–98 (2021).

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Judges are often in positions akin to the worried referee. A trial judge might hear case after case involving a particular kind of party, such as prosecutors and criminal defendants. A judge who realizes that he has ruled for the prosecution dozens of times in a row might stop to think about why that has taken place. Perhaps there is a good answer, such as that prosecutors only bring strong cases. Even so, the judge should seriously consider the possibility that something objectionable is afoot. And, in future adjudications, the judge might consider erring on the side of the defense, at least in toss-up cases. The result would be a contextual or adaptive version of the rule of lenity: as long as criminal defendants tend to lose before a particular adjudicator, they would receive a thumb on their side of the scales.

Today, the most salient example of this dynamic arises at the Supreme Court, where the real parties in interest are often aligned with the two competing political parties. In dissent, Justice Jackson has recently alleged judicial bias in favor of the wealthy or the Trump administration.[67] In response, members of the Court's conservative supermajority have explicitly pointed to instances in which they defied partisan stereotypes.[68] This party-based awareness of one's own decisions is a mild form of unprincipled adjudication; but it also promotes the values that typically support principled adjudication, including fairness and accuracy.

One last set of examples might be filed under the heading of institutional realism. Because principled adjudication rests on abstract principles, it is oblivious to many distinctive features of various entities or institutions. One might say, for instance, that a presumption of regularity and constitutionality ought to attach to the fruits of the federal legislative process as well as to implementation by the executive branch. In fact, many courts have stated just that.[69] But while that precept might be sound in general, courts may know of exceptional instances, contexts, or eras in which it is unsound. Should a judge afford greater respect to a trusted prosecutorial office, and less to an office with a history of missteps? Should an administrative agency with an awful track record not quite receive the presumption of regularity afforded to exemplary governmental departments? And might even an entire presidential administration lose the judiciary's regular confidence? Answering "yes" to these questions could be exceedingly expedient and may justifiably promote values like fairness. But that answer would also represent a form of party favoritism and so be unprincipled. Courts are accordingly reluctant to abandon their normal presumptions, even when they seem unfounded.[70]

[67] *See* Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2675 (2025) (Jackson, J., concurring in part and dissenting in part); Diamond Alternative Energy, LLC v. Env't Prot. Agency, 145 S. Ct. 2121, 2151 (2025) (Jackson, J., dissenting).

[68] *See Diamond*, 145 S. Ct. at 2141; *see also* Richard M. Re, *The Supreme Court, 2024 Term—Foreword: To a Conservative Warren Court*, 139 Harv. L. Rev. 1, 47 (2024) (discussing an anti-partisanship principle).

[69] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 n.9 (1983) (distinguishing presumptions of regularity for Congress and for agencies). Presumptions of regularity could themselves be cast as a form of party favoritism. When enshrined in generally applicable rules, however, these presumptions set a principled baseline for treatment of the government.

[70] *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 Sup. Ct. Rev. 1, 12 ("In the absence of institutional formalism, principles and precedents come and go as judicial perceptions shift of how other institutions function. Institutional realism might be desirable, or irresistible to some extent, but it challenges many of our conceptions of how law functions."); *see also* Thomas P. Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 Harv. L. Rev. 1834, 1854-55 (2026) (discussing the presumption of regularity and growing judicial skepticism toward it).

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3. Implications

As we have seen, the conventional resistance to unprincipled adjudication is both understandable and largely warranted. When faced with a choice between principledness and expediency, adjudicators should more readily, more often, and more extensively opt for the former. At least in our legal system, the distinctive role of courts is to ascertain and apply widely applicable, coherent sets of reasons to specific sets of granular fact patterns. That social role facilitates political decision-making, manages social coordination, and promotes individual fairness. And when courts fulfill that role, their adjudications take on a substantial degree of legitimacy. The conventional wisdom is also correct insofar as it recognizes a diminished role for principledness in less adjudicatory areas of governance. Legislatures, for instance, are more properly venues for expedience, including arbitrariness.

Yet we have also seen that the conventional resistance to unprincipled adjudication reflects a simplification that is sometimes incorrect. Unless it is defined to be bad, unprincipled adjudication is not automatically or always wrong. Indeed, it is often inevitable or justified. A judge might have to pluck an arbitrary rule from the air or else hammer out a compromise, much in the style of a legislator. A judge might also have good reason to account for the identities of various parties, such as to placate them or to avoid the fact and appearance of bias. And, having engaged any of these modes of unprincipled decision-making, the adjudicator would have both self-serving and other-regarding reasons for concealing her reasoning, which itself represents another form of unprincipledness.

Fortunately, adjudicators have ways of diluting their commitment to principledness without wholly abandoning it. To be sure, any dilution carries the risk of destabilizing the important norm in favor of principle. After all, it is psychologically and socially easier to paint unprincipled decision-making as categorically bad. Partly for that reason, judges who respect the generally beneficial aversion to unprincipledness may try to conceal their unprincipled decision-making, even when it is either necessary or good. This complex set of behaviors may be justifiable, since it helps to keep unprincipledness in check while also allowing some room for salutary expedience. Yet a strategy of denial also creates risks.

In a deeply principled legal culture, some judges may behave in an excessively principled way, such as by following an unyielding principle even when that approach is insensitive to unique facts or harmful in practical effect. At the same time, a culture that absolutely demands principled decision-making will prevent candid discussion of instances in which unprincipled decision-making is happening, or ought to occur. That state of affairs would favor adjudicators who falsely claim to be principled while actually being not only unprincipled but unjustifiably unprincipled. We might imagine – if we try – a judge who claims to be a principled originalist or living constitutionalist but is really engaged in hackish subservience to the whims of a political party. This problem is especially severe when the court's justified course of action is unprincipled: the judges who falsely claim to be principled would then have a rhetorical advantage over jurists who openly advocate for justifiably unprincipled rulings. A too-unyielding commitment to principledness can be its own undoing.

Legal culture can do better by somewhat loosening its insistence on principle. We have already seen aspects of legal culture that foster just this, such as amorphous justiciability doctrines and expedient precepts of avoidance. Equity too sometimes offers a source of unprincipled expedience – not when it gives voice to implicit but

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broadly applicable moral principles, but rather when it permits jurists to soften the law based on unique or ineffable factual nuances.[71] Drawing greater attention to these soft forms of unprincipledness can better calibrate the legal system's balance between presumptive adherence to principledness and exceptional-but-justified deployment of unprincipled expedience. For instance, legal culture might become more accepting of valuable forms of mild unprincipledness, such as concealed compromise.[72] These practices can also help to maintain familiarity with sources of legitimacy other than principled decision-making. When forced by necessity or persuaded by common sense to surrender the high ground of principle, judges need some other basis of legitimation. They must then know where to look, and that knowledge springs from experience.

A different kind of problem arises when unprincipled adjudication becomes more the norm than the exception. To a great degree, unprincipledness is outside the control of the adjudicator. To be sure, a thoroughly unprincipled adjudicator can undermine principledness almost at will. What is more interesting is that even the most principled of adjudicators might not be able to avoid being unprincipled. A dearth of law, an absence of facts, or the force of an impinging crisis can all give rise to a need for unprincipled adjudication. Moreover, the norm in favor of principledness may encourage judges to make use of abstract, generally applicable principles – but the norm in itself cannot generate principles to apply.

Courts manage this problem in different ways. The certiorari docket of the Supreme Court offers an institutional means of mitigating the difficulty. Chief Justice Burger once proposed that, each year, the justices hear only select cases of great moment; the remainder of the Court's current docket would then be heard by a new, more workmanlike body.[73] That sort of reform would have cast the justices as quasi-legislators. In fact, however, the justices still mostly hear relatively lawyerly cases, and even a fair number of easy ones. As a result, the justices' understanding of their work and role remains oriented toward principle.[74] And the rest of society is likewise encouraged to think of even the highest echelon of the court system as hewing to an ideal of principled adjudication. Even so, the justices' discretionary power to construct their own docket has long sat uneasily with the traditional view of a lawyerly court.[75] And recent changes in the Court's mode of selecting cases have led to salient charges that the justices have constructed an unprincipled "shadow docket."[76]

[71] *See* Schauer, *supra* note 24, at 77–78; Samuel L. Bray, *A Student's Guide to the Meanings of "Equity,"* 1–2 (Apr. 7, 2021) (unpublished manuscript) (noting Aristotle's conception of equity as "a correction of law where it is defective owing to its universality" (quoting Nicomachean Ethics, in 2 The Complete Works of Aristotle bk V, ch 10, p 1795–1796 (J. O. Urmson rev., W. D. Ross transl., Jonathan Barnes ed., 1984) (emphasis removed)).

[72] *Cf.* Rachel Bayefsky, *Judicial Institutionalism*, 109 Corn. L. Rev. 1297, 1377 (2024) (noting that "the public may not expect full transparency"). The judiciary sometimes promotes its own institutional interests, and that practice can be viewed – or criticized – as self-serving unprincipledness.

[73] *See* Warren Burger, *The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J. 86, 91 (1985).

[74] *See* Stuart Banner, The Most Powerful Court in the World 568 (2024); Michael D. Gilbert & Mauricio A. Guim, *Active Virtues*, 98 Wash. U. L. Rev. 857, 861 (2021) (defending a docket of both "divisive and unity cases").

[75] *See* Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, Notre Dame L. Rev. (forthcoming 2026).

[76] *See generally* Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023).

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Another possibility is that courts can generate their own principles for future, principled application. The fact that a principle's creation might be unprincipled would then be at most a transitory problem. The common law process offers a guide, in that judges muddle through *ad hoc* rulings for some time before boldly declaring a new synthesis. A strong doctrine of *stare decisis* is key to this story.[77] In effect, the process of creating case law launders principle from unprincipledness. The history of *Roe* is relevant here: even figures who viewed *Roe* as problematically unprincipled nonetheless saw deep principle in adherence to the viability rule, once it had become entrenched in precedent.[78] The appeal of principled adherence to case law probably influenced the pivotal jurists in *Planned Parenthood v. Casey*, thereby extending *Roe*'s legacy by another few decades.[79] The viability line's unprincipled origins, however, remained unforgotten, weakening *Roe*'s claim to allegiance.[80]

A more formalist solution would focus not so much on gaps that have to be filled but rather on preserving the areas of adjudication that are already filled in by principle. Textualism offers an example. When judges aspire to ascertain and enforce on-point, clear statutory text, they effectively disclaim the power to identify unprincipled exceptions. A more purposive or pragmatic approach, by contrast, would at least potentially create exceptions to existing statutory principles, thereby jeopardizing principled adjudication.[81] Textualist argumentation and rhetoric thus offer a useful way for judges to close off some pathways to unprincipledness and thereby calibrate in favor of greater principle.

Alas, however, this solution creates new problems. Because textualism threatens excessive principle, textualists must – and almost all do – preserve wiggle-room for justified unprincipledness.[82] In addition, textualism cannot make principled texts out of thin air, so its gears grind in areas of legal indeterminacy. When statutes are imprecise or scant, textualists and other devotees of rigid principle may end up bluffing – that is, trying to convince their readers and themselves that they have somehow uncovered textual clarity buried deep within statute books, dictionaries, and grammar treatises. The result: unprincipled decision-making that also lacks any sound foundation in expedience.[83]

[77] *Cf.* Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107, 1109 (1995) (defending a "*prudential conception of stare decisis*, in which the Court treats the effect of a decision on the esteem in which the Court is held as a significant factor to be weighed in the analysis").

[78] *See* John Hart Ely, On Constitutional Ground 304–06 (1996) (noting agreement with *Casey*'s decision not to overrule *Roe*, despite the author's past castigation of *Roe*).

[79] Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

[80] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2268 (2022) ("The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.").

[81] *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 Harv. L. Rev. 2387, 2404 (2006) (book review) (criticizing Justice Breyer's non-textual approach in part because it would enable a court "to depart from the text" or "create exceptions to the text").

[82] *See* Anita S. Krishnakumar, *Textualism in Practice*, 74 Duke L.J. 573, 575–79 (2024).

[83] *See, e.g.*, Ryan D. Doerfler, *Late-Stage Textualism*, 2021 Sup. Ct. Rev. 267 (2022).

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Conclusion

In his well-known indictment of unprincipled adjudication, Gerald Gunther jibed that Bickel supported "100% insistence on principle, 20% of the time."[84] Adjudication according to those ratios would indeed be unjustified, or else would spell the end of the legal system as we know it. But if the ratios were changed – perhaps to "90% insistence on principle, 80% of the time" – then unprincipled adjudication might not be so bad after all.

In all events, principledness should not always be praised, nor unprincipledness condemned. To decide whether or when unprincipled adjudication is justified, we must push beyond that concept and consider deeper values.

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Appendix

Unprincipled adjudication
Richard Re and Fred Schauer

Ronald Dworkin famously distinguished policy from principle, arguing that courts both do and should decide solely on the basis of principle, leaving policy decisions to legislative and administrative bodies. On this picture, judges decide cases based on widely applicable, coherent sets of reasons; they generally do not rely on coincidences of timing, features of litigant identity, or the judge's own uncertainty. As a descriptive matter, Dworkin was plainly mistaken, as every law student learns from even the earliest sessions of any course in contracts and torts. But from a prescriptive or normative perspective, Dworkin's arguments resonate with the longstanding belief that there are at least some things that legislative and administrative bodies do almost without notice that are considered inappropriate when done by courts. Courts should not, it is assumed, decide for some interest group because the opposing interest group has prevailed on previous three occasions. Courts, believing that there is something to be said for both sides, should not, at least explicitly, split the difference. A judge, believing that one party or one interest is 60% likely to be correct, should not award that party 60% of its desired remedy. Perhaps somewhat more controversially, judges in reviewing the decisions of lower courts or administrative bodies should ignore what they know about the competence and political proclivities of the bodies they are reviewing, and in setting forth rules for prospective application should similarly ignore what they know about the ideological inclinations of the institutions that will apply and enforce those rules. And so on.

Our goal here is to explore this traditional aversion to unprincipled adjudication, even with respect to public law issues of profound moral and constitutional import. When so many of these issues engender deep disagreement, why would we think that courts are or should be disabled from dealing with disagreement in many of the ways we think routine and desirable for non-judicial decision-makers?

[84]Gunther, *supra* note 10, at 3.

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