

Seana Valentine Shiffrin, UCLA

Common and Constitutional Law: A Democratic Legal Perspective

Introduction

In the previous lecture, I argued that citizens have a moral need to convey and to receive certain moral messages from each other that affirm their mutual equality, basic rights, and their belonging in a moral community. Those particular messages must take the form of collective commitments. Democratic law plays an inspiring, unique role in satisfying that need by constituting a community of equal membership that can pursue collective moral ends for and in the name of the community by producing articulate, public commitments to mandatory and discretionary ends.

In this lecture, I want to illustrate that this conception of democratic law is not a mere overlay, so abstract as to be divorced from the considerations that shape law's content. Rather, a communicative conception of democratic law can and should make a difference to concrete legal issues. If mutual, ongoing communication and affirmation of our values and commitments is a foundational organizing end of democratic law, then we must *generate* coherent, morally legible law as an articulate representation of our values. By contrast, reductionist conceptions of democratic law that understand law merely as a procedurally fair method of managing discrete disputes between contesting interests will view the generation of articulate law as more dispensable. Should disputes be managed another way, the absence of law represents no loss. Moreover, reductionist views regard incoherence within law as the unremarkable byproduct of compromises reached by conflicting forces whose identity and power shift over time and circumstance. On such views, incoherence and inconsistency may be undesirable when they

impede predictions of legal outcomes, but they do not otherwise represent intrinsic normative shortcomings. Whereas, a communicative conception regards incoherence and moral illegibility as fundamental, self-defeating defects of a democratic legal system.

I will pursue two examples to illustrate how greater consciousness of a communicative conception of democratic law could influence the generation and content of law. The first example involves the common law of contract. The second concerns constitutional balancing. I focus on American examples because they are what I know, and because our system has *some* of the background architecture of democratic law. Although the United States is a deeply flawed and endangered exemplar of an aspiring democratic legal system, our Constitution makes firm commitments about the equality of all persons, however imperfectly those commitments are realized, and firm commitments to protect some of our essential rights and interests, however incomplete its lists. Further, our precedential, adversarial judiciary entertains arguments by the parties' own representatives, typically offers reasons for its decisions that guide future cases, and engages in an ongoing dialogue of reasons with the public and other reason-giving officials. Indeed, today I will highlight the judiciary's special role in a system of democratic law, a role that is neither secondary nor subordinate to the legislature's.

I appreciate the oddity of dwelling on a slow-acting disease afflicting some trees while a fire threatens the forest. By discussing contract and constitutional methodology, I leave aside the more obvious defects of our aspirant democracy, both persistent and fresh. I bracket them not to diminish them, but because there's little need for further *theoretical* wrestling to conclude that our democratic aspirations compel us to resist contemporary initiatives to renege on these (already imperfectly realized) commitments, and impel us better to realize them – by eradicating social and status inequalities, discriminatory policing, pointless and excessive incarceration, economic

stratification, and private campaign financing (to name only a few priorities). While we must counter attacks on our core principles and address shortcomings in their realization, we must also protect our still operative democratic institutions from decay. Conversations about their best functioning are part of their maintenance. We may teeter on the precipice of some cataclysmic changes, but some institutions and practices remain downstream from the earliest line of fire; their operation, on well-considered principles, may help to preserve some of the skeletal architecture of the republic or at least to slow the destructive momentum.

The examples I will discuss are theoretically interesting because their departures from a communicative model of democratic law are subtler than the blunt and shameless contemporary threats that now dominate the agenda of our daily anxieties. They do not involve egregious violations of human rights and the flirtation with dictatorship. Yet, in both cases, an implicit, if partial, reliance on reductionist impulses leaves our legal approach wanting. Our contemporary approach to federal preemption exemplifies insufficient sensitivity to democratic interests in articulating common law. With respect to constitutional balancing, our methodology seems indifferent to coherence in ways that render the methodology empty. By contrast, a communicative approach would take the methodology seriously. In doing so, it would elicit coherence and a more deliberative perspective on the interests advanced by state actors.

The Erosion of Common Law

I will start with a troubling indifference to the democratic importance of the generation of common law, exemplified by *Northwest v. Ginsberg*, a recent Supreme Court preemption case.¹ First, a little background on federal preemption and common law: Federal preemption is one of many legal doctrines that enforce the supremacy of the federal government over state

¹ *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014).

governments. The basic notions, with which I have no quarrel, are simple: within the range of its enumerated powers, the federal government may decide to occupy a field of legislation and displace state law, whether it substantively conflicts with federal legislation or not. This power to occupy complements the supremacy of federal law over state law, which resolves conflicts between valid federal legislation and state law in favor of federal law.² What counts as a conflict beyond explicit contradiction, which fields the federal government may occupy exclusively, whether the federal intent to displace state law must be clearly articulated, and how far the occupied field's boundaries extend, all pose interesting legal issues. Interesting political issues arise concerning *when* the federal government should exercise its preemption power to displace concurrent state law. Resolving these issues requires considering: when tensions between diverse state and federal means and purposes become untenable; whether we want dual sovereigns pursuing the same aims or a single agent of implementation; and how to interpret provisions and purposes that are not explicitly articulated. Should we interpret federal statutory provisions and pre-emptive intent narrowly to preserve a robust arena in which states may develop a distinctive form of law, or should we interpret federal provisions broadly to ensure the more successful pursuit of federal aims and a unified national approach?

From a communicative perspective on democratic law, these are interesting questions for two reasons. First, local and state governments may have a special significance for communicative approaches. Some democratic legal aims are better realized when the community is powerful enough to develop a distinctive voice and small enough to generate a

² Stephen Gardbaum distinguishes between supremacy (conflicts are to be resolved in favor of the federal government), an automatic federal power, from preemption, a discretionary federal power through which the federal government elects to displace state power. Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40–41 (2006). Although his distinction is sound and important, I use 'preemption' to refer to both for convenience.

distinctive identity and camaraderie between citizens. An overly aggressive preemption regime may foreclose some of the opportunities for developing distinctive communities that elicit strong affiliations. Second, the balance struck between federal and state power will also affect the scope of common law. As many of you know, judicially articulated common law is the primary source of general property, contract, and tort law. When courts act as common law courts, rather than interpreting and applying a statutory text, they apply and expand upon previously judicially articulated law to articulate the law further as cases present themselves. With some exceptions,³ since the landmark case of *Erie Railroad Company v. Tompkins*,⁴ common law jurisprudence is largely a state law matter, usually overseen by state courts.⁵ So, when a federal statute pre-empts state law, it may affect the development and articulation of common law and, in tandem, the local social-moral culture. This should trouble us from a democratic, communicative perspective.

Although it officially espouses a doctrine of narrow construction to preserve state autonomy,⁶ the Court has increasingly expanded the scope of federal preemption in recent years. For example, the Court has preempted states' common law unconscionability jurisprudence through its finding that the Federal Arbitration Act evinces strong support for clauses in standard

³ See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (finding that Congress "expected the courts to give shape to the [the Sherman Antitrust Act's] broad mandate by drawing on common-law tradition."); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1639–46 (2008) (discussing the forms federal common law has taken, as well as its origins).

⁴ 304 U.S. 64 (1938).

⁵ For example, there is no general federal common law of contracts, although there is federal common law for some specific situations, such as cases involving federal government contracts or those contracts governed by ERISA. See 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1 (4th ed.) (2017) & 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4514 (3d ed.) (2017).

⁶ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (presuming that an act of Congress does not preempt state action without Congress's express intent to the contrary and directing that Congress's express intent to preempt state law should be interpreted narrowly).

employment and consumer contracts that mandate individual arbitration.⁷ I share critics' reservations about the Act's interpretation and the hazards of facilitating corporate preferences for mandatory individual arbitration, especially when the arbitration process is too cumbersome and expensive for individuals to navigate on their own, when repeat arbitrators tilt corporate, and when a rigid, asymmetric bargaining dynamic precludes individual bargaining around these clauses.⁸ As enforceable arbitration clauses proliferate, in addition to depriving individual litigants of due process, the common law may languish because substantive, important disputes over commonplace contracts may never reach court.⁹

Triggering a common law vacuum is not only a potential side effect of the Court's arbitration decisions. It is also the direct, unacknowledged product of another, unanimously decided, preemption case, *Northwest v. Ginsberg*, that flew under the nation's radar. It is a somewhat obscure case, but its perceived unremarkability is itself telling, signaling an internalization and normalization of substantial defects in the Court's implicit view of law and its relation to markets.

Three years ago, *Ginsberg* held that the Airline Deregulation Act (ADA) preempts state common law with respect to the implied covenant of good faith and fair dealing in contractual

⁷ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁸ See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on A.T. & T. v. Concepcion, Wal-mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 114 (2011); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541 (2004). See also William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 142-43 (2013) (decriing the inconsistency between corporate insistence on individual arbitration and its conveyance through standard-form contracts of adhesion).

⁹ See also Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407 (2016) (discussing how enforceable remedial clauses may suppress the development of common law); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409-413 (2016); Resnik, *supra* note 8, at 114.

relations involving frequent flyer programs. Rabbi Ginsberg was a platinum-level frequent flyer with Northwest Airlines who regularly lodged complaints. Northwest Airlines abruptly terminated his membership in the program, citing this contractual provision: “[a]buse of the . . . program (including . . . improper conduct as determined by [Northwest] in its sole judgment[]) . . . may result in cancellation of the member’s account.”¹⁰ Northwest provided neither a description of Ginsberg’s alleged improper conduct nor any compensation for his accumulated miles. He sued, claiming inter alia, that Northwest violated an implicit, common law covenant of good faith and fair dealing by failing to give reasons for his termination.

Good faith requires that contractual parties exhibit “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”¹¹ It excludes ‘subterfuges and evasions....of the spirit of the bargain...[and] abuse of a power to specify terms....’¹² As one court put it, the duty of good faith demands that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”¹³ So Ginsberg alleged that while Northwest had substantial discretion to assess ‘improper conduct,’ it had to have a reason related to improper conduct to terminate Ginsberg, one consistent with the spirit of their bargain, and could not simply terminate him for reasons of convenience or profit.

Northwest countered that the ADA pre-empted the duty of good faith through its provision that “a State...may not enact or enforce a law, regulation, or other provision having the force

¹⁰ *Ginsberg*, 134 S. Ct. at 1426-27.

¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981).

¹² *Id.* at cmt. d.

¹³ *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. Sup. Ct. 1995) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 85 (1933)).

and effect of law related to a price, route, or service of an air carrier....”¹⁴ The Court operated under some pressure to remain true to an earlier preemption decision, *American Airlines, Inc. v. Wolens*,¹⁵ in which plaintiffs challenged retroactive changes to American Airlines’ frequent flyer program. The *Wolens* Court held that the ADA pre-empted a state statute regulating fraud but not breach of contract claims, including claims of improper modification of terms.¹⁶ If pre-emption did not reach breach of contract claims, then breach of the implied covenant of good faith would seem to fall under *Wolens*’ protective umbrella. After all, the default interpretative rule of good faith is both a constitutive portion of the parties’ “voluntary undertaking” and a rule of interpretation that makes sense of specific terms. Further, state court oversight of whether airlines administer frequent flyer programs in good faith is not a back-door way for states to reintroduce price controls into the airline market, so the covenant of good faith need not conflict with federal aims.

¹⁴ 49 U.S.C. § 41713(b)(1) (1994).

¹⁵ 513 U.S. 219 (1995).

¹⁶ *Id.* at 222. How *Wolens* understood the division between state-imposed regulation and contract law is questionable. In what follows, I advocate a distinction between statutory law and common law based on their different normative contributions to a legal system, but I do not think that division is well understood by checking to see if there is a statutory text. Some statutory texts, after all, are simply codifications of common law principles. See, e.g., Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 621 (1994); Cal. Civ. Code §5; Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435 (2000) (analyzing the codification movement in common-law societies, including the United States); see also *Wolens*, 513 U.S. at 236 (Stevens, J., concurring in part and dissenting in part) (analogizing state’s fraud statute to “a codification of common-law negligence rules”). Moreover, looking for a text only makes sense if you think the issue turns on whether the state has exerted extra effort or zeal as a marker of its agency in imposing an obligation. I think the issue is less the degree of state activity and more one of substance. Among the factors one might investigate include whether the statute attempted to move beyond or to reverse common law principles and whether the duty in question is part of an agreement elected by the parties, incident to one, or independent of one.

Nonetheless, Northwest prevailed. Justice Alito reasoned that the frequent flyer program related to price because Ginsberg used his miles for flights and upgrades.¹⁷ Further, the opinion offered the assurance that the free market and the Department of Transportation would adequately police bad faith.¹⁸ The decision ultimately turned on the fact that the implied covenant of good faith cannot be contracted around in Minnesota and so it was not a ‘voluntary undertaking,’ but instead was ‘state-imposed.’¹⁹

The division the Court drew between the state’s imposition of a duty of ‘good faith’ and the parties’ voluntary undertakings is strange,²⁰ because the duty of good faith (and cousin doctrines

¹⁷ *Ginsberg*, 134 S. Ct. at 1430–31. This rationale is rather strained, for surely the plaintiffs in *Wolens* who objected to an airline’s retroactive change of frequent flyer terms also sought to use miles for flights and upgrades.

¹⁸ *Ginsberg*, 134 S. Ct. at 1433. The invocation of the Department of Transportation was odd in light of Wolen’s stress on the fact that the Department of Transportation “lack[s] contract dispute resolution resources.” *Wolens*, 513 U.S. at 234.

¹⁹ *Ginsberg*, 134 S.Ct. at 1432; *see also Wolens*, 513 U.S. at 228–29.

²⁰ It recalls the strange distinction the Minnesota Supreme Court drew in *Cohen v. Cowles Media Co.*, 457 N.W. 2d 199, 203-05 (1990) between contract claims based on promissory estoppel which, when involving promises by the press of confidentiality for a source, it represented as raising special state action and First Amendment concerns versus those contract claims based on consideration which it regarded as private action whose enforcement did not raise First Amendment concerns. On review, the U.S. Supreme Court found that enforcement would not violate the First Amendment and took no strong stand on the distinction between consideration contracts and promissory estoppel. Nonetheless, it affirmed that enforcement of the promise, under a theory of promissory estoppel, would constitute state action and cited without criticism the Minnesota Court’s holding that promissory estoppel “created obligations never explicitly assumed by the parties.” 501 U.S. 663, 668 (1991). Largely, most common law jurisdictions in the U.S. now regard these as different voluntary pathways through which contracts are formed – one by *voluntarily* making representations that reasonably invite and elicit reliance and the other by *voluntarily* exchanging consideration. All contractual interpretation and enforcement by courts involve state action, as Justice O’Connor has eloquently noted. *See Wolens*, 513 U.S. at 248–50 (O’Connor, J., dissenting); *see also Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially discriminatory housing covenant constitutes state action); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) (arguing that judicial enforcement of contracts involves public, not merely private, interests and “puts the machinery of the law in the service of one party against the other”). Courts do not treat estoppel-based claims as quasi-contract or otherwise *distinctively* a product of the state as opposed to those contracts created by the exchange of consideration. *See Susan M. Gilles, Promises Betrayed: Breach of Confidence as a*

like ‘best efforts’) is largely understood as a way to interpret the meaning of those voluntary undertakings²¹ -- a kind of secondary duty to ensure parties honor the agreement and its primary commitments. Whether the duty of good faith is understood to be robust or modest,²² both readings converge on this point: to understand the scope of the parties’ commitments and whether their actions honor them, one must ascertain the purpose of their transaction and judge whether the parties’ own interpretations and actions represent a good faith effort to redeem it.

That is, doctrines like ‘good faith’ and ‘unconscionability’ offer interpretive guidance to fill in those gaps arising between an agreement’s objective meaning and its explicit terms.²³ The

Remedy for Invasions of Privacy, 43 BUFF. L. REV. 1, 64 (1995) (“[T]he decision to enforce a contract is as much a policy decision as is a state court’s decision to enforce promissory estoppel . . .”). For criticism that the Court’s citation of ‘ordinary contract principles’ is not accompanied by sufficient grasp of them in the domain of interpretation, see Robert A. Hillman, *The Supreme Court’s Application of ‘Ordinary Contract Principles’ to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire*, forthcoming in ABA J. OF LAB. & EMP. L. (discussing *M & G Polymers USA v. Tackett*).

²¹ See, e.g., U.C.C. § 2-313(b); Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272, 284 (Gregory Klass, George Letsas & Prince Sapravi eds., 2014) (explaining that good faith is not a “separate undertaking” of contracting parties, but rather “recognize[s] the authority of the contract, and hence the authority . . . to insist on performance according to the contract’s terms”); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 371 (1980) (noting that the doctrine of good faith is a tool for interpreting contracts). Notably, the duty of good faith only applies after formation of a contract and not to pre-contractual negotiations. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (AM. LAW INST. 1981) (noting that contractual good faith protections generally do not apply to negotiations preceding contract formation); see also U.C.C. § 1-203 (AM. LAW INST. & UNIF. LAW COMM’N 2015) (imposing good faith protections in the “performance or enforcement” of contracts).

²² Some courts articulate the duty in spare terms, e.g., the duty bars “one party [from] ‘unjustifiably hinder[ing]’ the other party’s performance of the contract.” In re Hennepin Cty. 1986 Recycling Bond Litig., 540 N.W.2d 494, 502 (Minn. 1995).

²³ Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN’S L. REV. 559, 562 (2006). The ambition of interpretative canons may be to do the same for law, with famously mixed opinions about the results. For optimism, see John F. Manning, *Legal Realism & the Canons’ Revival*, 5 GREEN BAG 2d 283 (2002); for pessimism, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

interpolation of the duty of good faith is often necessary to save what was clearly meant to be a contract from what would otherwise fail for want of consideration given one of these gaps; for, if performance or termination is at one party's unbridled discretion, then he has made no commitment at all but if it is at that party's discretion *in good faith*, there can be a commitment and hence, consideration.²⁴

Why are there such gaps? Sometimes the absence of prior articulation is the simple product of reasonable efforts at efficiency and economy: we decline to detail every conceivable scenario because their disposition follows from the more general commitments we have made, whether in the contract or through implicit incorporation of the well-established boilerplate of state-supplied default terms. Sometimes we simply fail to anticipate some circumstances that arise. In other cases, we reasonably want to defer premature concretization. Incomplete articulation and specification of terms and the use of open-ended terms like 'reasonable,' 'good faith,' 'fair-dealing,' and 'unconscionable' have the virtue of affording contractors and the law the opportunity to proceed in a principled way while also allowing for more articulate understandings of our commitments to emerge and evolve over time as we observe them in action.²⁵

²⁴ See, e.g., *Cortale v. Educ. Testing Serv.*, 674 N.Y.S.2d 753 (N.Y. App. Div. 1998) (given Educational Testing Service's destruction of evidence and internal reviews suggesting bias, a genuine issue of fact remained over whether ETS canceled a score in good faith); *Dalton*, 663 N.E.2d at 293 (finding that ETS's reserved right to cancel any score it found questionable at its own discretion was limited by a duty of good faith to consider any relevant evidence submitted by the test-taker because the contract afforded the test-taker the right to submit that evidence); see also *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90-92 (1917) (finding an implied duty of an exclusive agent to make 'best efforts' to promote a client's sales).

²⁵ See generally Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222-29 (2010) (arguing that legal standards encourage moral deliberation by courts and citizens about the underlying moral purposes of law, deepening the

Thus, the Court’s fixation on the fact that Minnesota did not permit parties to contract around the covenant of good faith is peculiar. A failure of good faith is a way a contract may be breached but derogation of the duty of good faith does not underpin an independent cause of action.²⁶ The duty of good faith is not a state-imposed, distinctive, and discrete duty such as a requirement to post a bond or to self-insure in a specified way. Further, many rules of contract are fixed and not up to the parties, including some rules of interpretation, consideration, and damages, but that does not render the contracts made against that backdrop any less voluntary undertakings. The parties still must choose whether to contract in the first place and (unlike some other mandatory rules) the content of the duty of good faith closely tracks the content of the discretionary aspects of their voluntary undertaking.²⁷

Moreover, leaving the market to police bad faith as though that delegation naturally follows from a commitment to price-deregulation represents a confusion. Deregulation of ‘good faith’ is not on all fours with price-deregulation. To the contrary, the attraction of setting prices through

motivational foundations of compliance with law and promoting an evolving understanding of the law’s content)

²⁶ This is explicit in the U.C.C.’s comments about good faith. “This section does not support an independent cause of action for failure to perform or enforce in good faith. . . . [T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.” U.C.C. § 1-304 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015). *See also* Markovits, *supra* note 21, at 276. *See also* Cramer v. Ins. Exch. Agency, 675 N.E.2d 897, 903 (Ill. 1996) (noting that the “good-faith principle, however, is used only as a construction aid in determining the intent of contracting parties...” and does not ground an independent cause of action in tort).

²⁷ *See, e.g.,* Metcalf Const. Co. v. United States, 742 F.3d 984, 991 (Fed. Cir. 2014). The *Metcalf* court noted that some violations of good faith, like subterfuge, may be identified independent of the specific contractual terms, but “[i]n general, though, ‘what that duty entails depends in part on what that contract promises (or disclaims),’” quoting Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 830 (Fed. Cir. 2010). “That is evident from repeated formulations that capture the duty’s focus on “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party” (Restatement § 205 cmt. a), which obviously depend on the contract’s allocation of benefits and risks.” *Id.*

the free market's operation depends upon the background assumption that the state will enforce the contracts the parties arrive at with their agreed-upon prices. So understood, the Court's decision does not elaborate the deregulation commitment but is in tension with its presuppositions. Ginsberg and Northwest concluded many agreements about flight tickets, in a context including the enticements of a frequent flyer program and the implicit duty of good faith, but this decision declines to enable their enforcement.

If one sought a 'good faith' analogy to price deregulation, it would not involve the sheer elimination of the common law standard of good faith with nothing but the commentary of market watchdogs to replace it. Price deregulation does not involve the elimination of prices or judicial indifference to nonpayment of agreed-upon prices. The 'good faith' analogy to price deregulation would involve an instruction to the parties to devise for themselves interpretative standards as a prerequisite to contracting (just as an agreement about price is a prerequisite to contracting), coupled with a commitment to enforce that agreement.²⁸ It is difficult to imagine that the ADA implicitly contains that burdensome instruction. Further, it is unlikely that the putative advantages of price deregulation and price competition carry over to market-based (or predictably corporate-dictated) systems of legal interpretation, given the complexity of law relative to price, transaction costs, and asymmetries of knowledge and information.²⁹

²⁸ It would then be a nice question for many theorists of contract whether interpretation of the parties' interpretative standards would itself require judgments about good faith.

²⁹ Parties may usually grasp the significance of prices, at least simply structured ticket prices, whereas legal standards and their significance are harder to grasp quickly, especially by non-experts. Price is also relatively simple to bargain over, while bargaining over the complexities and precision of legal standards carries high transaction costs and is often unavailable where one party insists on standardized agreements. Further, comparison-shopping for standards also carries high transaction costs and may be unavailable where one party obscures its terms or practices.

The analogy between deregulating price and deregulating ‘good faith’ thus cannot survive careful scrutiny. An incomplete grasp of the public commitment to have a contract law fuels that defective analogy. Whether that commitment is understood as thinly as a mechanism to facilitate efficient markets and transactions between strangers or more robustly as a way to foster practices of reliance, to protect the vulnerable, to vindicate solicited expectations, or to structure and nurture a culture of trust, a coherent public commitment to upholding private commitments requires both that *we* uphold those private commitments and that *we* have publicly articulated and fairly administered standards by which we do so. In other words, treating price and law as interchangeable is a symptom of the Court’s implicit denigration of the significance and complexity of law.

Consider more closely the claim that there is no need for the common law regulation of good faith because the free market and Department of Transportation *could* adequately police bad faith.³⁰ Even assuming the best of the market and the DOT, the implicit suggestion that the question is just *which agent* will protect frequent flyers assumes that the issue is one of episodes of bad behavior, according to unspecified criteria, rather than the development of standards of interpretation that delineate what counts as compliance and what counts as non-compliance with the parties’ voluntarily assumed contractual duties. Contractual provisions do not interpret themselves and do not contain provisions for every circumstance or controversy. If the standards of interpretation are left to the free market, then, as with the side effect of the widespread invocation of arbitration clauses, we exit the realm of law and re-enter the Wild West, where the powerful dictate terms, their meaning, and abide by them only at their pleasure.

³⁰ See *Ginsberg*, 134 S. Ct. at 1433.

In this case, the Court’s elimination of governance by law is no side effect, but is explicit, direct, and intentional. Delegation to the Department of Transportation might seem better, but it is, in fact, a bait and switch. For, here is what the Aviation Consumer Protection division’s website reports about frequent flyer programs:

The Department of Transportation does not have rules applicable to the terms of airline frequent flyer program contracts. These are matters of individual company policy. If you are dissatisfied with the way a program is administered, changes which may take place, or the basic terms of the agreement, you should complain directly to the company. If such informal efforts to resolve the problem are unsuccessful, you may wish to consider legal action through the appropriate civil court.³¹

What if DOT did not merely collect complaints, but actually read and resolved them— by dismissing the unsupported ones and by issuing favorable rulings, backed by fines or what have you, for the legitimate ones? Even if the consumers’ complaints would each, episodically, be satisfactorily addressed, the idea that dispute resolution is the principal function of law overlooks the importance of the public articulation of legal standards – in this case, the standard of good faith that common law jurisprudence provides.³² The *Ginsberg* decision, through preemption, deprives the appropriate civil court of the relevant legal resources to apply. As a consequence,

³¹ *Frequent Flier Programs*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/airconsumer/frequent-flier-programs> (last updated Jan. 21, 2015). While the U.S. Department of Transportation (DOT) accepts consumer complaints, its reports themselves concede that the agency does not investigate the complaints’ validity. *See, e.g.*, AVIATION CONSUMER PROT. DIV., U.S. DEP’T OF TRANSP., AIR TRAVEL CONSUMER REPORT 35 (Nov. 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/2016NovemberATCR.pdf> (“DOT has not determined the validity of the complaints.”).

³² *Cf.* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 5 (1957) (complaining that a brief per curiam opinion that stated the holding but no reasons to support it “does not make law in the sense which the term ‘law’ must have in a democratic society”).

there are no applicable legal standards, whether for the frustrated party or for an airline eager to comply with the law.³³ My point is not to insist that we must, finally, tackle frequent flyer reform or to drive home that the Court offered flyers a false panacea. The details illustrate a more theoretical point about the value of law. It is hard to explain why we bother to have a social institution of contract – a public commitment to commemorate, encourage, and facilitate private commitments – but we then fail to see our public commitment through.

Treating price and law as analogous is only one disturbing aspect of *Ginsberg*. So is the Court’s abrupt dismissal of the suggestion that preemption of a state statute and preemption of a common law claim may differ. In its reading of the ADA’s language that pre-empted state “law[s], regulation[s] or other provision[s] having the force and effect of law related to a price, route, or service of an air carrier,”³⁴ to encompass general principles of state common law, what the Court said was not exactly wrong: both statutes and common law have the status of law; both *could*, depending on content and effect, conflict with the ADA’s de-regulatory aim.³⁵ It just did not seem enough to equate them in this context and thereby to eliminate the application of common law in this domain. After all, the abstract possibility that the application of some common law rules *could* frustrate a statutory purpose does not show that purpose is frustrated in the specific case. A requirement that a program be administered in good faith does not amount to a regime of price controls. The Court’s larger, simplistic reasoning was that if there is state action with the force of law around which the parties cannot contract, then the state has imposed

³³ As the overturned appellate court predicted, “if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit—a result that Congress never intended.” *Ginsberg v. Nw., Inc.*, 695 F.3d 873, 879 (9th Cir. 2012), *rev’d*, 134 S. Ct. 1422 (2014).

³⁴ 49 U.S.C. § 41713(b)(1).

³⁵ *See Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429–30 (2014).

a legal duty. Hence its only (easy) question was whether common law has the force of law. As I have already suggested, this is unconvincing since the duty in question is embedded within a complex, voluntary undertaking peppered with elected terms.

By analyzing only their impact in the instant case (would they both have legal force?), the Court's result-oriented, reductionist approach to whether common law and statutory law differ for preemption purposes neglects some of the special strengths of common law as a form of collective moral articulation.³⁶ First, the process of generating common law has some distinctive democratic virtues. Although any piece of common law jurisprudence is generated by a single judge or a handful of judges at most, through explicit reasoning, practices of precedent, and taking notice of other jurisdictional approaches, common law judges are in conversation with litigants, amici, and other judges over the generations and throughout the states. The issues themselves arise from the grass roots, in a way, as problems occur. Any party who may allege a prima facie cause of action may present arguments, have them heard, and elicit a reasoned response. This contrasts favorably with the current state of legislative access which is highly and disproportionately responsive to organized lobbying and donors; even in its more ideal forms, given the cumbersomeness of legislating, legislative responsiveness is slower to come by and predictably more keyed to larger problems and the needs of large (or highly organized) groups.³⁷

³⁶ Indeed, I am tempted by an argument that either the *Ginsberg* decision is difficult to square with *Erie v. Tompkins* or, worse, it generates something approximating a lawless zone. If contracts are inherently incomplete, then their meanings will necessary demand interpretation (a traditionally common law endeavor) and that interpretation will rely on rules of interpretation (whose articulation is also, traditionally, a common law endeavor). If federal law pre-empts the state law rules of interpretation, but does not offer an explicit standard of interpretation in its place, then what takes the place of the state law of interpretation? The general federal common law of contract interpretation, which *Erie* did away with?

³⁷ Cf. Robert C. Hughes, *Responsive Government and Duties of Conscience*, 5 JURISPRUDENCE 244, 261 (2014) (making the related point that litigation permits access to democratic deliberation to minority groups who may lack the political power to garner legislative attention).

Thereby, the common law process embodies a judicial manifestation of the equal importance of each citizen, less sensitive to affiliation and social power.

Second, the scope is broader and more trans-substantive: common law jurisprudence articulates law as cases present themselves. Its mission is not confined to the agenda articulated, however broadly construed, by statutory text. For some problems, such evolution may reflect a more considered and measured expression of our joint moral commitments than is contained within pieces of legislation that attempt to anticipate and resolve all issues at once. Thus, some statutes may be more effective when they emerge downstream from the development of common law so they can benefit from the uncovering of the issues and legal developments first forged in common law. The common law's power to evolve, responsively, traces in part to a common law notion that a legal commitment's full scope may be difficult to articulate completely in any one explicit effort (just as it is a truism that no contract is complete and could, explicitly, provide for all possible contingencies of interpretation and performance).³⁸ For related reasons, whereas statutes tackle specific issues (airline safety and deregulation, fair housing, food quality) and often generate norms associated with those issues and the specific statutory approach dedicated to them, the common law ranges across issues and deploys the same concepts trans-substantively, facilitating the development of a topic-independent understanding of such concepts, as with the standard of good faith and a methodology of interpretation guided by the directive of good faith, forged as different cases arise, understood in terms of its underlying moral principle, and not reduced to a discrete list of actions. Because common law reasoning places greater pressure on

³⁸ Indeed, the Restatement is explicit about this feature of 'good faith,' explaining that "[a] complete catalogue of types of bad faith is impossible." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981); *see also* Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615 (1961) (arguing that fear of judge-made law, resulting in excessive deference to the legislature and to precedent, hinders the law from evolving to respond to changing circumstances and data).

courts to think comprehensively about how a concept's interpretation will fit into the legal system as a whole, there is some structural pressure for common law reasoning to generate greater trans-substantive unity than the more focused agenda enacted by statutes.

Third, because they are not bound as tightly by a statutory text and the limits associated with its administering agency, common law courts may enjoy greater versatility to articulate law that responds to the entirety of the circumstances presented. This versatility is particularly well suited for the sort of 'clean-up' duty that doctrines like 'good faith' can perform where a problem arises in the interstices of what drafters anticipate and specify.

Thus, while both common and statutory law have the force of law, common law jurisprudence serves a distinctive function in giving voice to a local understanding of our mutual moral relations, one that underpins the governing culture and expectations citizens form about each other, including whether they can expect that their agreements will be interpreted to have robust meaning or whether they should regard themselves as fully and warily at extended arms-length. A piecemeal preemption practice that carves out distinctive rules concerning unconscionability or good faith for particular industries leaves a hole in the moral fabric woven by the state common law, disrupting the generation of a general moral culture in which even non-specialists may develop the social-moral intuitions to navigate and rely. That problem is compounded in the instant case. Even were the free market and the Department of Transportation to handle some specific cases of bad faith well, their disposition would not be public and deliberate. They would not generate a public record, give reasons for decisions, or generate precedent. When preemption goes beyond the piecemeal, those holes may further fray the local legal mechanisms that build a purposive and distinctive legal culture that makes law morally comprehensible and responsive.

Taken together, the distinctive features of common law adjudication do not establish its general superiority. The different attributes of common law and statutory law complement each other well. Instead, these factors offer reasons to value that complementarity, to resist any easy equation of the preemption of common law and the preemption of state statutes, and, more generally, to pay greater attention to whether preemption might displace, disrupt, or render discontinuous the special contribution common law makes to generating a continuous, morally articulate body of law and to establishing a baseline moral culture and identity.

What sort of commitment?

I have been articulating a democratic case for preserving greater room for common law development, given the common law's role in articulating and concretizing a coherent web of collective moral norms. Given *Erie*, that aim is closely connected to the ability of states to exercise autonomy and develop distinctive forms of moral culture. I am not, however, delivering a states' rights manifesto. There are well-known hazards to over-investing confidence in local authority, including that local authorities may be prone to encroach upon foundational constitutional values, ones that underwrite our national identity. I want now to turn to pursue an under-discussed issue pertinent to striking an appropriate balance between local authority and constitutional values.

On the one hand, as just discussed, our jurisprudence can neglect the values of a more unified, local collective moral culture typically nurtured at the state level. In other respects, our constitutional jurisprudence seems overly deferential to its mere appearance and assertion but insufficiently demanding of its actual development. The predominant method of resolving constitutional challenges putatively 'balances' constitutional interests against asserted 'state interests.' When a court hears a challenge to a law or regulation, one that alleges that a law (or

other form of state action) violates a constitutional right, that challenge typically triggers the application of a test the structure of which involves balancing the constitutional interests at stake against the ‘state’ interests on the other side and indicates what level of strength is required for the state interest to tip the balance. Roughly speaking, the product of this balance produces the content and limitations of the right. The sort of balancing used depends on which constitutional interests may be threatened or affected. Alleged impingements on the freedom to speak one’s mind about politics invoke strict scrutiny, where we ask whether the law actually restricts the freedom to speak and, if so, whether the restriction uses the least restrictive means to serve a compelling state interest.³⁹ Alleged gender discrimination attracts lesser scrutiny: to determine if the guarantee of equal protection is violated, we ask whether there is discrimination by the state and if so, whether it substantially serves an important state interest.⁴⁰ Implicit in these tests is the idea that the content of an enforceable constitutional right involves a balance between constitutional interests and state interests.⁴¹ Yet, despite its status as a basic constitutional concept, we have dedicated insufficient attention to what it means to say in a constitutional

³⁹ Others understand balancing differently. For instance, Kathleen Sullivan reserves the label ‘balancing’ to cases subject to intermediate scrutiny because it is only in those cases that the outcome is not a *fait d’accompli*, already determined by the determination of the appropriate level of scrutiny. See Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. J. 605, 606-08, 610, 617 (1992).

⁴⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976) (applying intermediate scrutiny to gender-based age classifications for beer sales); *Reed v. Reed* 404 U.S. 71, 75 (1971) (applying intermediate scrutiny to gender-based executor scheme in probate).

⁴¹ Others use different language to describe the same process. For instance, Richard Fallon uses ‘triggering right’ to refer to the constitutional interest against which the state interest is balanced and ‘ultimate right’ to refer to the product of that balance. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1316-18 (2007). I use ‘constitutional interest’ rather than ‘triggering right,’ both to avoid semantically-induced concerns about balancing incommensurables and to use language more ecumenical in the debate about whether rights are absolute or near-absolute trumps or whether they are strong barriers to action that may nevertheless be overcome.

controversy, that a state (actor) *has* an interest, whether compelling, substantial, or rational, to be weighed against the constitutional interests at stake.

An extraordinary amount has been written about constitutional balancing, including what tests are appropriate, what evidence is required to show the state action actually promotes relevant state interest, and whether courts actually apply these tests in a meaningful way. Yet, at a theoretical level, we still have not fully confronted what balancing normatively requires. I will not address the important debates just mentioned but seek to introduce a distinct issue about what should qualify as a state interest for purposes of constitutional balancing. It often seems implicitly assumed, that that question can be resolved entirely through armchair, *a priori* reasoning. But, *a priori* reasoning could not settle which assertions of state interests should be taken as actual and sincere, as opposed to hypothetical, aspirational, fledgling, or ambivalent.⁴²

The academic literature and the courts have extensively considered what aims might be *disqualified* from serving as a legitimate state interest, emphasizing that the state cannot designate as an interest the frustration of citizens' rights, the diminution of the status of equal citizens, or those interests that essentially are cover for state (or private) motives of animus and exclusion.⁴³ A

⁴² Although in the preemption domain, the term 'state' refers to one of the fifty political units in our union, they are not the exclusive referents of the term 'state' when discussing the 'state' interest in constitutional balancing; rather, 'state interests' refer more broadly to the interests of any sort of governmental actor. Nevertheless, many of the examples of interest to me also concern state governments and they will be my primary focus in what follows, although much of what I contend should also apply to other state actors as well.

⁴³ See, e.g., *Romer v. Evans*, 517 U.S. 620, 632–35 (1996) (overturning Colorado's Amendment 2, which prohibited any government entity in the state from protecting lesbian, gay, or bisexual people, because the law singled out LGB people from "the right to seek specific protection from the law" and appeared to be animus-based); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985) (striking down a law requiring a special permit for the operation of a group home for the mentally disabled because the law seemed to enact private citizens' negative attitudes and irrational prejudices toward the mentally disabled); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect."); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982)

state actor cannot assert a legitimate interest in the violation of a constitutional right, conceived of as an end in itself.⁴⁴ Further, a state cannot assert an interest in a matter outside its jurisdiction, such as to discharge an exclusively federal mandate.⁴⁵ That *a priori* part yields a tolerably good understanding of what a legitimate state interest could not be, but little positive understanding of what it could be and whether a state possesses it.⁴⁶ Apart from a small handful of religious freedom cases, investigations into pretextual rationalizations to disguise illegitimate motives,⁴⁷

(finding the declared state interest in a same-sex nursing school to remediate past discrimination against women a pretext for stereotype-based discrimination against men). See also Justice O'Connor's quick dismissal of the proposal that Mississippi University for Women's interest in maintaining a same-sex college was to "provide opportunities for women which were not available to men." *Hogan*, 458 U.S. at 727 n.13.

⁴⁴ See, e.g., *Cleburne*, 437 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause...," (citing *Lucas v. Forty-Fourth Gen. Assemb. of Colo.*, 377 U.S. 713, 736-37)). Further, at least federal interests (even asserted 'compelling interests') must be formulated in ways consistent with other federal statutory commitments. See *Gonzales v. O Centro Esp. Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (rejecting federal government's asserted and generally framed interests in uniform compliance with narcotics laws given the regime of exceptions contemplated in the Religious Freedom Restoration Act).

⁴⁵ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) ("...States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.").

⁴⁶ Some related concerns surface when the Court discusses under-inclusivity. Usually, however, that complaint cashes out as a concern that the legislation would be ineffective at achieving its putatively justifying purpose, or that the under-inclusivity of the legislation suggests a pretextual motive or constitutes an impermissible pattern of regulation, or both. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320-21 (2016) (Ginsburg, J., concurring) (arguing that the under-inclusivity of surgical center requirements revealed purpose of regulations was to obstruct access to abortion); *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (under-inclusivity of restrictions on judicial speech challenge the credibility of the state's cited purpose for speech restrictions on judicial candidates); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that under-inclusiveness "diminish[es] the credibility of the government's rationale"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536-38, 544-46 (1993) (using examples of under-inclusivity to demonstrate legislation embodied a form of discriminatory treatment of religious practice); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) (decrying the ineffectiveness and therefore the unjustifiability of an under-inclusive speech regulation).

⁴⁷ See, e.g., *Church of the Lukumi Babalu Aye*, 508 U.S. at 534-43 (1993) (finding that a facially neutral ordinance regulating animal sacrifice was improperly motivated by a desire to suppress Santeria

and some of Justice Brennan's opinions,⁴⁸ our jurisprudence does not typically dwell on whether the particular state agent is really committed to an asserted interest in a way that would justify that interest's exerting weight in a balancing test.⁴⁹ This nonchalance is difficult to understand,

worship, despite the state's asserted interests in the maintenance of public health); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴⁸ Justice Brennan's opinions showed sensitivity to the issues I explore here, although he was often in the minority; my argument may be understood as offering a philosophical argument for the more regular application of his approach. A few examples: in *Michael H.*, Justice Brennan criticizes the majority for an approach that does not consider whether the asserted state interest in presumptive determinations of paternity bolstering the state's paternity rule "has changed too often or too recently to call the rule embodying that rationale a 'tradition.'" *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting). His dissent in *Cruzan* also noted that Missouri's own enactments did not support the conclusion that Missouri had an unqualified interest in life, given its absence of a health insurance scheme and its legislative support for living wills. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 314 n. 15 (1990) (Brennan, J., dissenting). In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984), Justice Brennan's majority opinion cited the "the selective approach Oklahoma has taken toward liquor advertising" as a reason to assess its state interest in regulating alcohol consumption as "modest." See also *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966) (Brennan, J.) (expressing doubt that New York's English literacy requirement for voting served the interest in incentivizing English literacy and informed voting given the exceptions to the requirement and the evidence of prejudiced motives). I do not mean to defend his insistence on actual legislative purpose, though, which I regard as a distinct issue. See *United States Retirement Bd. v. Fritz*, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting) and discussion *infra* note 90.

⁴⁹ How the state interest should be framed and at what level of generality is also a strangely neglected task. See Fallon, *supra* note 41, at 1271, 1324–25 (observing that the Court has not addressed how the level of generality at which a government interest should be framed); see also Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 275–78 (2014) (analyzing "interest creep," a phenomenon in which courts justify uncontroversial government actions by referencing a broad state interest, and subsequently justify more controversial government acts with reference to the same broad interest). Its neglect is particularly odd given the demands that the constitutional interest must be stated with particularity and supported with a historical pedigree. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 723 (1997) (noting that a constitutional right must be narrowly framed and historically defensible, and articulating the constitutional right at issue as a "right to commit suicide which itself includes a right to assistance in doing so"); *Reno v. Flores*, 507 U.S. 292, 302–03 (1993) (providing that an asserted right must have a "careful description" and be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); *Michael H.*, 491 U.S. at 122–23, 127 n.6 (emphasizing the importance of history and tradition in asserting a constitutional right, and providing that the relevant tradition should be framed with the specificity at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"). Yet, no such efforts are made with identifying the relevant state interest. Historical tests are not

particularly given all the careful attention paid to whether plaintiffs have standing and whether a real constitutional interest is under threat, and how to frame it. The way our constitutional tests are structured suggests that in characterizing the scope or extension of a constitutional right, we are balancing individual constitutional interests against state interests. If we are truly balancing, then a compromise of sorts is being brokered. But compromises carry legitimacy only when real, as opposed to hypothetical, potential, or aspirational, interests are at stake between the opposing positions.⁵⁰ So why don't we regularly investigate whether the state has real interests that merit compromise?

The issue of whether the state has a substantial investment meriting compromise arises most pointedly with what I will call 'discretionary interests,' as opposed to 'mandatory interests.'

Mandatory interests may be defined more or less broadly and in ways more or less associated with textual commitments. A narrow approach would identify mandatory interests as those

applied to identify whether an interest is constitutionally protected. Further, the Court has recently declared that historical precedent limits membership into the category of unprotected speech that falls *outside* the scope of First Amendment protection. *See United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (striking down a law banning depictions of animal cruelty based in part on a finding that such depictions do not fit into any historically defined categorical exception to the First Amendment, and declining to adopt a balancing test to create new exceptions, based on a general presumption in favor of speech protection). Only four justices, however, endorsed this approach in *United States v. Alvarez*, 567 U.S. 709 (2012); five justices adopted a different methodological approach to assessing whether a federal law prohibiting lies concerning one's military honors violated the First Amendment. See the discussion in Steven H. Shiffrin, *WHAT'S WRONG WITH THE FIRST AMENDMENT* 74-76 (2016).

⁵⁰ Many related, but distinct, issues have been better explored, including the question of what the nature of a constitutional interest is, what the nature of a constitutional right is, and whether either are the sorts of things that could be balanced at all, whether on a specific occasion of enforceability or at the more general level of determining the content of the right. Some attention is paid to whether there is credible evidence that a state interest would actually be under threat absent the state action under challenge. These are factual questions, often connected to normative issues about who should decide them and whether the court should adopt a posture of deference. Similarly, demands that the law be well tailored to fit the state interest will provoke some questions about legal design and whether the state action is a well-crafted means to the state end.

interests the Constitution requires state actors to have, such as an interest in equally protecting the rights of its citizens, protecting free exercise of religion, and providing for the common defense and would attempt to locate the specification of those interests in other explicit textual commitments elaborated in the Constitution. A wider approach would locate that specification in implicit, as well as explicit, textual commitments elaborated in the Constitution.⁵¹ Less textually centered approaches would ask what interests a state must have to fulfill its functions as a state or as a state dedicated to establishing and maintaining justice; this latter interpretation might categorize foreign humanitarian aims as mandatory, while the other approaches would cast them as discretionary.

Discretionary interests are those that would be permissible for a state actor to entertain or promote, but are not required by the Constitution or by the essential functions and commitments of the state. They could be disavowed. Examples include interests in protecting fetal life, in protecting life irrespective of its quality, or in maintaining the integrity of the legal *profession*. The range of potential discretionary interests may not be capable of being jointly affirmed by one state at once. Washington State's assertion, at one time, of an "unqualified" interest in preserving life, even against a patient's will, is incompatible with Oregon's interest in facilitating patients' choices regarding the timing of their deaths, betraying a more qualified interest in preserving life

⁵¹ One might object that cases like *DeShaney* put to shame the claim there are any mandatory interests within our constitutional framework because the decision when, how, whether, and how vigorously to pursue what I call mandatory interests is left entirely to the discretion of the state and the state is not judicially accountable to its citizens for its failures to pursue them. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (holding that the Due Process Clause of the Fourteenth Amendment did not impose an affirmative, judicially enforceable right on the state to protect a child against abuse). I join those who regard *DeShaney* as a monstrously bad decision. I would endorse a more robust theory of mandatory interests that articulated a more reasonable delineation of the state's discretion in implementation. Nonetheless, despite the shortcomings of *DeShaney* and its progeny, the inability of the state to deny explicitly a mandatory interest serves to underwrite the distinction between mandatory and discretionary interests. *See supra* note 44.

when disvalued by its bearer.⁵² Given their elective quality, the question arises whether the mere articulation and in-principle defense of a discretionary interest could establish that a state *has* that interest for balancing purposes.

As I argued in the first lecture, certain commitments and attitudes, such as respect or gratitude, may require certain forms of explicit action as a condition of their sincere conveyance. If it were only a matter of dispelling communicative ambiguity, inventing more finely calibrated conventions of communication to convey our attitudes with greater precision could serve as a solution. That sort of ambiguity is not the only driver behind the requirements of action. Rather, to have the relevant commitment or attitude in full, one that is worthy of the sort of moral response it appropriately invokes, involves perceiving what actions are to be done to respond to the judgments underlying the commitment or attitude and pursuing them, should the opportunity arise and one be able. Similar claims may be made about *having* the sort of interest that exerts moral force, for both individuals and the state. In the individual case, whether one has made and honored a commitment or formed and pursued an interest does not depend (only) on her subjective mental states, but also on whether her objective representations and behavior underwrite sufficient objective indices of sincerity. We may say the same about the state. Hence, countering calls for sincerity with a rehearsal of the challenges of assessing legislative motive given the panoply of diverse legislative actors and their multiplicity of individual motives seems

⁵² It need not be that for any discretionary interest, its contrary could be affirmed by another state. For example, a state could adopt an interest in protecting its citizens from private censorship (and might pursue that interest through laws preventing retaliatory discharge in employment based on employee speech). The adoption and pursuit of that interest are not required by the First Amendment, yet a state could not affirmatively adopt an interest in promoting private censorship without raising First Amendment concerns. *Cf. Reitman v. Mulkey*, 387 U.S. 369, 376–77, 380–81 (1967) (establishing that the state could adopt measures to prohibit private discrimination and it could repeal those measures, but it could not adopt measures explicitly authorizing or encouraging private discriminatory activity).

beside the point. The alleged futility of discerning legislative motive should not preclude inquiries into whether a state actor has evinced objective patterns of commitment to an interest. The coherence of balancing depends upon there being such objective indices of investment in an interest in addition to recitals of that interest and demonstrations of its *a priori* acceptability.

Individual interests

I will illustrate the importance of actual investment by starting with individual, discretionary interests. By ‘interest,’ I mean something more than desire or preference, something whose pursuit or success significantly contributes to the objective well-being of the agent who has it. A ‘discretionary’ interest is one that the agent chooses to develop, where neither prudence nor morality dictate that choice. For instance, an individual may reasonably and morally take an interest in musical theater, dance, community beautification, tutoring students in need, or learning a foreign language. Some such projects are predominantly self-regarding, while others have wider moral value. Should she dedicate substantial time and energy to it, the success of her endeavor or at least her access to participation would come, over time, to constitute an interest *of hers* in a robust sense; perhaps looming large enough to play a role in her characterological identity.⁵³ Her freedom, welfare, and even her life’s meaning may suffer should her success or access be thwarted – especially if by sources outside herself.

As fellow community members, we would have moral reasons to adjust our plans to avoid thwarting her interests, where possible. If the most convenient time for a weekly neighborhood watch meeting conflicted with her regular dance class and if the other times, while less convenient or even costly, did not thwart any of our *interests* in this particular sense, we should

⁵³ This concept differs from the philosophical notion of personal identity that tracks persistence over time as the same person.

adjust our meeting time to accommodate her interest. If adjusting the time affects others' interests, we would have reason to ask how great the imposition was on others, whether that imposition could be mitigated, and to search for some fair way to distribute the burden. Whichever form of accommodation is apt, the justification for our absorption of some costs on her behalf depends on her actually *having* that interest. That possession depends on a certain level of dedication and involvement. If she were merely considering or had only just begun attending class, the opportunity to continue would matter but would not be of a different caliber than the reasons why the time is more convenient for us; same if she is an occasional drop-in but often foregoes the class for dinner with friends, a good book, or to save money. Her assertion of her 'interest' in attending despite her only episodic participation might be sincere in the sense that she subjectively wants to dance more and dancing figures among the activities that matter to her. Such assertions matter and may represent an aspiration to make dancing her interest. Still, the moral significance of such aspirational, fledgling, or ambivalent discretionary interests differs from the case where she actually has substantially incorporated a commitment to dance into her life. The sincerity of the occasional dancer's assertion that dancing is an important interest of hers is partially compromised not by subjective ambivalence but by her failure to act consistently to realize these intentions in a morally significant way.

We may take a different view about mandatory interests. If the contested time is the only time our neighbor could go to needed physical therapy or to help her child with his homework, we may be obliged to ensure that time is free – even if our neighbor has neglected her health in the past or failed to make homework a priority and, even if, at present, our neighbor shows an inconsistent pattern of concern for her recovery or her child's academic success. We should not preclude the possibility of her fulfilling her duties to self or others, although we might reasonably

ask for evidence of a feasible plan to pursue the mandatory interest and perhaps a plan for the elimination of actions that would defeat its achievement. Still, in many cases at least, we should be willing to compromise our desires and interests to preserve the possibility of the fulfillment of her duty. With discretionary interests, however, our obligations to attempt to accommodate them depend on a person's actual, demonstrable, and developed investments in them.

The sustained pursuit involved in the substantial incorporation of a discretionary interest into a life demonstrates that the interest is actual, as opposed to aspirational, that it has duration, as opposed to its being impulsive or impetuous, and that the agent has considered what its execution involves – in terms of appropriate means and opportunity costs. Substantial incorporation not only speaks to a tight connection to her characterological identity and her life's meaning, it also provides stronger deliberative credentials about the worthiness of the choice in light of its actual, and not merely its imagined, features and costs. These credentials matter morally partly for reasons of reciprocity, asking others to bear costs only for things one is willing to bear costs for oneself, but also because shouldering those costs and forsaking other possibilities lends deliberative credibility to one's assertion of the interest's worthiness; tellingly, often shouldering them heralds revisions in the articulation of one's exact interest.

State interests

When an individual asserts theoretically legitimate discretionary interests that are predominantly only aspirational, fledgling, or ambivalent, their precarious status may diminish their moral force. Shouldn't these same considerations hold true when the state cites a discretionary interest as a reason for citizens to be afforded a narrower range of opportunities to pursue their constitutional interests? States also may assert legitimate interests that are only discretionary and that, for those actors, are predominantly aspirational, fledgling, or ambivalent.

Consider the state interest asserted in the right to die litigation in *Washington v. Glucksberg*,⁵⁴ a 1997 Supreme Court case that dismissed a constitutional claim mounted by suffering, terminally ill patients who alleged that a fundamental right to die invalidated Washington State's prohibition, as applied, on suicide and its assistance.⁵⁵ Justice Rehnquist's majority opinion emphasized that "Washington has an 'unqualified' interest in the preservation of human life."⁵⁶ Even assuming the theoretical legitimacy of such an interest,⁵⁷ its assertion by Washington might startle those familiar with the death-penalty map. Washington was not then and is not now an abolitionist state. Its penalty sentencing practice suggests, to the contrary, that Washington's interest in preserving life was entirely qualified and fledgling at best. Strangely, no effort was made to reconcile its asserted 'unqualified' interest in life with its willingness to declare some lives ineligible for preservation. Indeed, no evidence whatsoever was assembled showing that *Washington* embraced this unqualified interest. There was no survey of Washington's historical efforts in workplace and traffic safety, no descriptions of unstinting support for medical funding of the severely disabled and the elderly, and no description of a state educational curriculum dedicated to instilling equal respect for the lives of all of its citizens. The Court did not explicitly glean a commitment, beyond the assertions in briefs, from the preambulatory language of the statute, commitments voiced in prior cases, or the amicus practice of the state of Washington in other cases involving end of life issues, expressions that might have supported a distinction, however specious, between 'innocent' lives and the lives of criminals.

⁵⁴ 521 U.S. 702 (1997).

⁵⁵ *Id.* at 708.

⁵⁶ *Id.* at 728 (emphasis added) (quoting *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990)).

⁵⁷ I will assume for the purposes of this paper that the asserted interests I discuss are permissible ones for a state to assert. Objections may be raised to them, however. *See, e.g.*, RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 160-66 (1993) (exploring whether some articulations of the state interest in the preservation of human life may be inconsistent with First Amendment values).

Bizarrely, to support the assertion of Washington’s alleged interest, Justice Rehnquist cited his own prior opinion in *Cruzan*, a case affirming that *Missouri* could require ‘clear and convincing evidence’ that a patient in a permanent vegetative state had wished to refuse treatment.⁵⁸ Right topic, wrong state.⁵⁹ The *Cruzan* opinion had a similar *ipse dixit* quality, making assertions about Missouri without reference to its history, policies, or prior cases apart from the instant case, gliding from the claim that Missouri was *permitted to assert* an unqualified interest in life to concluding Missouri had that interest.⁶⁰ To be fair, in *Glucksberg*, there were citations to the very law at issue and to the defeat of a referendum that would have allowed physician-assisted suicide.⁶¹ Those citations only seem to prove, however, that Washington had the very law under challenge, not that that law was justified by a general pattern and commitment by Washington State to protecting lives, no matter what their quality.⁶²

We should be puzzled by a constitutional approach that affords much weight to Washington’s asserted interest given its exhibited ambivalence about the unqualified value of life, troubled by the Court’s failure to demand substantiating evidence of its commitment, and perplexed by its substitution of one state’s purported commitment to testify to the commitment of

⁵⁸ 497 U.S. 261 (1990).

⁵⁹ At least, you might think, the Court’s peculiar understanding of ‘unqualified’ was consistent across cases. Missouri also has (and had) the death penalty. *See, e.g.*, MO. REV. STAT. § 546.720 (1990) (describing procedures for administering death penalty); *id.* (2016); MO. REV. STAT. § 565.020 (1990) (imposing death or life without parole for conviction of first-degree murder); *id.* (2016).

⁶⁰ *Cruzan*, 497 U.S. at 281.

⁶¹ *Glucksberg*, 521 U.S. at 716–17.

⁶² *Glucksberg* did contain a more extensive history of New York State’s record of deliberating about issues concerning the end of life, as well as California’s. The relevance of California’s position to the case escapes me but at least it was appropriate to discuss New York, given the companion case, *Vacco v. Quill*, which dismissed an equal protection challenge to New York’s ban on assisted suicide. 521 U.S. 793, 797 (1997). California, like Washington, has since altered its position and permits assisted suicide for competent, terminally ill California residents. *See* End of Life Option Act, CAL. HEALTH & SAFETY CODE § 443 (2016).

another's. It is not as though the states are univocal on this matter. Not long before *Glucksberg* upheld the constitutionality of Washington's prohibition on assisted suicide, its neighbor, Oregon, passed a law acknowledging a right to die and creating an administrative system for regulating assisted suicide.⁶³ In the light of these competing discretionary interests, why was Missouri's interest taken as dispositive evidence of the seriousness of Washington's interest? If we are looking to the opinion of other states, why wasn't Oregon's rejection of an unqualified interest grappled with as a counterweight to Missouri's interest? Oregon's divergent path reveals a defect in *Gluckberg's* methodology; citing one state's interest as evidence of another's seemed a rather thin veneer for assuming that there was only one acceptable commitment a state could have. When there is an actual diversity of possible interests, establishing one particular state's interest requires more than *a priori* reasoning; it demands a more searching inquiry into the depth and breadth of the state's commitment.

Variation in the content and the level of commitment to discretionary interests is not restricted to the right to die and the divergent interests putatively embraced by Washington State and Oregon State in the late 90s. In other cases, some actual and others imaginable, the state

⁶³ Oregon Death with Dignity Act, OR. REV. STAT. § 127.800 (2015). It was enacted by ballot measure in November 1994 and went into effect that December. When Oregon's law was constitutionally challenged because plaintiffs alleged that the law had inadequate safeguards to protect the incompetent from involuntarily choosing suicide, Oregon's interests were specified as "(1) avoiding unnecessary pain and suffering; (2) preserving and enhancing the right of competent adults to make their own critical health care decisions; (3) avoiding tragic cases of attempted or successful suicides in a less humane and dignified manner; (4) protecting the terminally ill and their loved ones from financial hardships they wish to avoid; and (5) protecting the terminally ill and their loved ones from unwanted intrusions into their personal affairs by law enforcement officers and others." *Lee v. Oregon*, 891 F. Supp. 1429, 1434 (D. Or. 1995) (invalidating the law on equal protection grounds), *vacated*, 107 F.3d 1382 (9th Cir. 1997) (citing lack of standing), *cert. denied*, 522 U.S. 927 (1997).

may assert a non-pretextual,⁶⁴ legitimate, but not obligatory interest but the state's level of commitment to that interest is questionable – either predominantly aspirational (apart from the state action in question), fledgling, or ambivalent. For example, since *Roe*, the Court has taken the stance that the state may take an interest in the health of the embryo or fetus, but there is no suggestion that it must.⁶⁵ Importantly, no one other than the state has standing to assert the fetus' interest and the fetus has no standing to object should the state decline to regulate to protect the life or health of the fetus as such.⁶⁶ Where a state asserts a discretionary interest in fetal life *as a*

⁶⁴ Facts that raise concerns about the level of commitment may also raise independent, more foundational concerns about pretextuality, whether with respect to the interest asserted or the means the state asserts are necessary. For instance, in last term's abortion case, when the Court noted that Texas did not evince the same level of concern for health and safety for procedures such as colonoscopies and home births as it did for abortion. *See Whole Woman's Health*, 136 S. Ct. at 2315. That inconsistency could be interpreted in at least three ways: First, Texas' cited interest in women's health was pretextual, irrational, or both. The inconsistency dovetailed with other evidence that the regulations were unnecessary or counterproductive means of serving women's health. The inconsistency pointed toward either a cloaked effort to obstruct access to abortion or a rationally defective means of protection or both. Or, second, Texas just had not gotten around to a consistent method of regulating health, despite its firm commitment. Or, third, Texas had yet to form a thorough, committed interest in health, although such an interest would of course be appropriate. *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 449-50 (1985) (noting inconsistencies in policy with respect to asserted interests in safety and liability and concluding these were pretextual assertions to mask illegitimate prejudice against the disabled).

⁶⁵ I take those regulations justified by appeals to women's health as appeals to a mandatory interest. Despite all these areas of deference to the state's judgment about how and to what degree to pursue an interest in women's health (or children's protection) is discretionary, the interest itself is not. Were the state to declare that it did not care about protecting the health of women, or children, or all of its residents—I take it that there would be an equal protection violation in the former case and a due process violation in the latter. Although the interest is mandatory, its citation is often pretextual and the regulations unnecessary or deleterious to women's safety. *See, e.g., Whole Woman's Health*, 136 S.Ct. at 2315-16 I (2016) (discussing the lack of reasonable relationship between requirements for surgical centers for early term abortions and the interest in ensuring safe procedures); *see also id.* at 2320-21 (Ginsburg, J., concurring) (arguing surgical center requirements for abortion endanger women's safety).

⁶⁶ *See Diamond v. Charles*, 476 U.S. 54, 67 (1986) (holding that a pediatrician lacked standing to assert an unborn fetus's constitutional interests because only the State may assert such an interest). Failures to take measures to ensure the health of any future child may be a different matter.

reason to restrict the scope of exercise of women’s right to abort, it seems fair to ask whether the state’s assertion goes beyond the aspirational, the ambivalent, or the fledgling. It seems particularly reasonable since the constitutional interest at issue is one that the standing doctrine’s requirements demand be actual and not hypothetical on the part of the plaintiff.⁶⁷

There are often reasons to doubt the robustness of the state’s asserted interests in fetal life. Take, for example, the regulations considered in *Casey*.⁶⁸ Pennsylvania compelled women to attend an education session followed by a 24-hour waiting period before they could abort, justifying these restrictions by appeal to the state’s interest in the life and health of the embryo or fetus. Yet, it only required reporting on the preservation, protection, and disposal of embryos fabricated through IVF procedures, permitting their destruction at the election of either genetic parent without any waiting period or compulsory education.⁶⁹ The failure consistently to pursue measures reflecting an interest in the embryo may well substantiate charges that that cited interest is pretextual, meant to disguise the intent to bully or otherwise impose an undue burden on women.⁷⁰ Alternatively, it may simply show that the state’s commitment to the interest was

⁶⁷ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (requiring plaintiffs to demonstrate that they suffered ‘injury in fact’ for standing).

⁶⁸ *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁹ Pennsylvania’s regulations governing the destruction of embryos created through IVF at present and at the time of the passage of the mandatory-education-for-abortion statute only require quarterly reports from staff who perform in vitro fertilizations of the number of fertilized eggs created, the number destroyed, and the number of implantations. 18 PA. CONST. STAT. 3213 §(e) (adopted 1988). In *Reber v. Reiss*, however, a Pennsylvania Superior Court held that in a divorce dispute over embryos in which one partner wanted to implant and the other wished to avoid further procreation, the wife could gain full custody over them with the purposes of implantation because they represented her best chance at biological parenthood. The interests in fetal health and life did not arise. *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

⁷⁰ My concern is related to, but distinct from, the concerns that drive charges of hypocrisy. Charges of hypocrisy often focus more on an agent’s pursuit of contrary aims; conflicting pursuits may sometimes represent evidence of insincerity or pretextualism (the first category). Charges of hypocrisy may also reflect an inchoate sense that the state’s ambivalence is a sign of an incomplete or partial commitment. That is my focus but my concern may arise even where an

not well considered and full-fledged, thereby depriving the state of the normative standing to burden the exercise of a recognized constitutional interest. Skepticism about the depth of the state's commitment and of its deliberation should not seem out of place here; after all, these regulations are predicated on skepticism that women seeking abortion have adequately deliberated, forcing deliberative measures on women to ensure the depth of their commitment to the procedure. It seems only fitting to make an analogous demand of the state. If it requires such indignities of women as a condition of their pursuing a constitutional interest, then it should offer a reciprocal showing of its commitment to the asserted state interest as a sign of its deliberative credentials.

Life and death issues challenge some people's confidence in their judgments, so consider a less taxing hypothetical example concerning lawyer licensing. In 1978 when upholding restrictions on lawyer solicitation, the Supreme Court in *Ohralik* cited Ohio's special interest in maintaining standards among members of the licensed professions.⁷¹ Suppose thereafter, Ohio were persuaded by market or free speech libertarians that the state has no business restricting the practice of law. It will no longer license lawyers or require licensing but will leave it to private accreditation associations to offer certifications and will leave it to the public to choose whether

agent does not pursue contrary aims, whereas the pursuit of contrary aims is more central to changes of hypocrisy. Unlike charges of hypocrisy, the concern about incomplete commitment need not be accompanied by connotations of venality or bad faith.

⁷¹ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). Perhaps the state has a mandatory interest in maintaining the quality of attorneys given the role attorneys play in the articulation of law, the state's primary mode of expression, and its fair administration. With respect to other licensed professions, though, that argument may be harder to make. Take the state's professed interest in maintaining high professional standards in the medical field and preserving the public's confidence in doctors. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (offering this interest as one reason to prohibit intact dilation and extraction procedures). If the state deregulated medical licensing but cited this interest to justify restrictions on abortion, it seems reasonable to question whether the state's dedication to this interest is serious enough to justify burden women's constitutional interest in access to abortion.

to hire accredited lawyers or not. Suppose further that Ohio does not repeal its solicitation restrictions. Now suppose that the solicitation restrictions are challenged anew. Would it be credible against a First Amendment challenge to rehearse the same arguments about Ohio's (or California's) special interest in maintaining the integrity of the legal profession? Although this is a credible state interest, shouldn't it matter that Ohio has abandoned a special commitment to this value? Although this last example is hypothetical, in the coming years, litigation about issues of this sort will likely continue.⁷² We may also see states pursue divergent stances on other issues such as privacy, narcotics use, and state cooperation with immigration control measures, where some states abandon their traditional commitments for more experimental stances, some at odds with federal policy and some in tension with acknowledged constitutional interests.

I have been arguing for two principles that should inform our approach to the constitutional balancing questions that will continue to arise about discretionary interests:

- (A) Mere assertion of a legitimate state interest should not always suffice to establish that a state [actor] *has* that interest in the sense that should be relevant to constitutional balancing.
- (B) At least for discretionary interests, a demonstrable commitment (that shows more investment than the assertion of a mainly aspirational, fledgling, or ambivalent interest) is necessary to establish that the state *has* that interest.⁷³

My argument has been that to make normative sense of the balancing tests that dominate our constitutional jurisprudence, we must inquire about the strength of a state's commitment to a

⁷² See, e.g., *Ahn v. Hestrin*, No. RIC1607135 (Cal. Sup. Ct. filed June 8, 2016) (litigation over the constitutionality of California's right to die statute).

⁷³ I bracket the question whether the degree of commitment might permissibly vary depending on the level of scrutiny appropriate to the constitutional interest at stake, whether rational basis, intermediate scrutiny, or strict scrutiny.

discretionary interest just as we undertake a similar inquiry in the interpersonal case. If a major function of democratic law is to express our joint moral commitments, our constitutional jurisprudence should do more to honor that connection by unearthing what actual, rather than hypothetical or aspirational, commitments our laws express and by demanding that a sufficiently developed and sincere expression of those interests be identified before acknowledging a permissible limitation on the scope of constitutional interests. In what follows, I elaborate on my claim that contemporary democratic activity should influence our understanding of constitutional rights.

The relevance of democratic expression: mandatory interests

My focus will soon return to the democratic treatment of discretionary state interests but I will first make some preliminary remarks about the democratic component of mandatory state interests. Mandatory ends will form the basis of many state interests whose pursuit may constrain the available range of opportunities to express and pursue individual constitutional interests. National security may come to mind. If we constitute a state to achieve mandatory moral purposes, our ability to maintain and continue this collective project against actual threats to its existence, seems like an essential, even compelling, state interest. Because that interest is not discretionary, asking for evidence of the state's prior demonstrable commitment to it may seem overly demanding; if it has not been committed, it should have been and we should extend the necessary deference to it to enable its pursuit once the state has so embarked. That idea seems straightforward. Its obviousness may explain why we might readily concede that national security is a compelling state interest, while turning our closer attention to the empirical questions of whether, on any particular occasion, allegations that the exercise of a constitutional interest would threaten it represent careful assessments or panic-fueled exaggerations, whether the state

action in question will actually further that interest, and the social engineering question of whether it is possible to accommodate both – provide room for the constitutional interest so that it does not threaten the state interest. Similar points may be made about individual security, public order, and the state interest in securing equality.

Still, even once we have a clear, compelling, mandatory interest in hand, further normative questions implicating the democratic process remain about whether the interest appropriately triggers the balancing test. Constitutional balancing is no simple balancing act, to be sure. Take a putative mandatory interest like (territorial) national security.⁷⁴ If empirically demonstrable, a threat to it might (as the balancing test would have it) justify some suppression of speech, a well-recognized constitutional interest, if that suppression would defuse the threat.⁷⁵ The boundary of the speech right ends where national security is threatened not because there is no free speech interest there but because of the compelling nature of national security ‘outweighs’ it. Even on this model, we still must ask *which* threats to national security count as relevant threats? Private speech that supplied security codes to enemies at war counts, but surely private speech that convinced the public to vote for open-source laws or that convinced the public to dismantle the military would not.⁷⁶ What counts as a threat cannot be assessed merely by considering the brute consequences of the speech; we must consider *how* the speech would bring about that outcome

⁷⁴ See Fox, *supra* note 49, at 275–76 for a short discussion of the frequent elision in invocations of ‘national security’ from notions of territorial security to vague conceptions of national interest.

⁷⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (forbidding restraints on incendiary political speech except where “such advocacy is directive to inciting or producing imminent lawless action and is likely to incite or produce such action”).

⁷⁶ To take another example, whether speech causes a *regulable* threat to individual safety may depend upon whether a private person takes it upon herself through her private speech to threaten or incite violence against another (regulable) or whether speech persuades the polity to divert funds to invest more in park maintenance than in police patrols (non-regulable). The effects may be the same but the way the speech brings about the outcome is normatively significant and independently makes a difference to its regulability.

and whether that pathway is normatively significant. Even if we embrace the basic idea behind the balancing framework, which pathways constitute threats to appropriately weighty state interests and which constitute protected, even if costly, mechanisms of individual and collective freedom are independent normative questions. What counts as a breach of national security will depend on what values and commitments are essential to us.⁷⁷ To get to the point where we might balance constitutional interests against state interests, we must show that the conflict is the relevant kind. Not all conflicts between their realization should trigger balancing but only those conflicts that, to lack a better term, do not represent the point of the constitutional interest and its core, proper exercise.⁷⁸ Our conceptions of what constitutes a threat and what constitutes a state interest cannot be so capacious as to eclipse a generous sphere of operation for constitutional interests. Calmly and rationally persuading the polity to cede land to another power cannot count as an actionable threat to national security. An autonomous, competent decision to refuse medical care cannot count as an actionable threat to a citizen's personal security.⁷⁹

⁷⁷ Some state interests (such as the fundamental commitment to equality and to roughly democratic means of governance) may be (implicitly and justifiably) entrenched and impervious to significant democratic alteration.

⁷⁸ This implicit limitation on what conflicts 'reach' the balancing test reflects a respect in which the balancing regime incorporates the notion that rights are trumps. Some core exercises of constitutional interests seem protected despite their consequences, when those same consequences if arrived at through less direct pursuits of the interest might be reasons to curtail such expressions of the interest. I discuss the relation of this idea to the secondary effects doctrine in *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135 (2003).

⁷⁹ See *Cruzan*, 497 U.S. at 269, 278-79; *Glucksberg*, 521 U.S. at 720. (The parallel position should have been arrived at in *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007), about whether consensual abortion constituted an actionable threat to the mandatory interest in women's health or to the more discretionary interest of preventing women from experiencing regret.) These are all cases in which to protect a constitutional value, its operation cannot be deemed an actionable threat to another constitutional interest even if its exercise affects the achievement of the latter. One could also see them as cases in which, although the interest may be adversely affected, to recognize some activity as a threat to a state interest would threaten a constitutional value. That latter frame may encompass *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984), which refused to recognize involuntary exposure to others' private racial discrimination as a legitimate rationale for

Thus, democratic actions such as persuading and being persuaded may have an influence on what counts as a state interest or a threat to a state interest. The protection of national security may be a mandatory end of a compelling nature, but at least some aspects of what constitutes the essential part of the nation (and hence what sort of attack to it would threaten national security) may be subject to democratic adjustments. What counts as a threat to a state interest, even a mandatory state end, may change, not just as empirical facts shift, but normatively, as the democratic community changes its mind about what matters. Even the scope of our realization of mandatory ends will have some give in their application and relation to other collective ends.

One example of this ‘give’ is often implicit in how courts apply these tests that probably should be more explicit. For the balancing idea to be plausible, it surely cannot be enough to warrant a constitutional interest’s restriction that its exercise poses a relevant threat to an eligible state interest of a sufficient importance. After all, the provision and protection of a wide sphere of exercise of constitutional freedoms is also a mandatory state end. We should ask not only how significant (and irreversible) the incursion by the exercise of the constitutional interest onto the hefty state interest is but also how significant (and irreversible) restrictions on the constitutional freedom would have to be. In some cases, for example, speech might verily pose a threat to national security, but the restriction necessary to avert that threat might be too sweeping or invasive to merit its restriction. That is one way to put some of the opposition to the NSA’s vast spying enterprise; our articulation of the relevant constitutional test should have a more obvious way to register the structure of this opposition.

depriving a parent of child custody to further the mandatory interest of a child’s best interests. The refusal to permit others’ bigotry to serve as a rationale for altering custody protecting both the constitutional interest associated with parenting but also that of equal protection by defusing bigotry of some of its effective force. *See also Cleburne*, 473 U.S. 432, 448 (1985) (disallowing the ‘mere negative attitudes, or fear, unsubstantiated...’ of neighbors to mentally disabled people to ground asserted state interest in assuaging neighbors’ fears).

These remarks about the relation between constitutional interests and mandatory state ends aim to highlight the often submerged dependence of some features of the constitutional balancing model on ongoing democratic activity. These points may be under-appreciated or under-emphasized in our constitutional discourse, but they are fairly straightforward and can be easily incorporated into the routine of applying constitutional balancing tests.

With respect to discretionary state ends, however, a coherent balancing model must involve a further form of attention to democratic activity, to what our actual commitments are. Indirectly, we sometimes pay attention to our actual commitments, when we try to smoke out pretextual justifications for illicit motives. But, partly because we have collapsed issues about actual interests with the issues about the discernibility of subjective legislative motive, we have neglected the attention that the matter of discretionary interests deserves.

State interests and the balancing model

One may object that the inattention to the state's investment in a discretionary interest is neither surprising nor objectionable. When we entertain a constitutional challenge to a law or other form of state action, we begin with the direct or indirect product of a democratic process. It is natural to infer that a statute represents a state interest substantial enough to warrant passage; asking for a historical pedigree of commitment would belie the dynamic nature of democracy. The only interesting issue, one might then think, is whether the pursuit and expression of that interest infringes a constitutional right inadequately represented in the instant democratic process. Hence, the jurisprudence centrally focuses on whether the relevant state action

unjustifiably infringes upon a sufficiently important constitutional interest, taking for granted the bona fide possession of the state interest.⁸⁰

If you took a positive political scientist along for an excursion, you two might have a field day questioning the idea that a law's passage supports an inference that a sufficient number of legislators judged that the state had an interest in its methods or its effects rather than that passage apparently fulfilled the personal ambitions of a majority of legislators. Lesser cynics might simply observe that because a range of interests might justify a law, its passage serves as poor evidence of adherence to any particular cited interest. It might also be replied that constitutional review does not merely consider the unexamined point of view; a constitutional challenge does not wither just because the legislature considered the constitutional interests that might be affected by the law's passage.⁸¹

Further, the structure of the relevant tests belies the notion that constitutional review seeks to ensure that constitutional interests were considered. If our position was that an enacted law, a vetted regulation, or a police officer's activity deserved deference by virtue of being the product of a democratic process and that our only question was whether it misstepped onto the protected territory of individual rights, then we would only inquire into what the alleged constitutional interest was to see whether it was threatened and whether it is in fact a right. Sometimes, that seems to be the procedure – think of Justice Kennedy's opinion in *Obergefell*⁸² in which he devoted his complete attention to adumbrating the constitutional interest and its importance without any overt glance at any putative state interest. I attribute this to the fact that the right at stake was a

⁸⁰ Note, though, that this explanation still leaves mysterious why the constitutional interest must be framed at a low level of abstraction but not the state interest.

⁸¹ *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997) (stating that, although it is incumbent that Congress consider the constitutionality of legislation, the Court is authoritative in constitutional interpretation).

⁸² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

core expression of the relevant constitutional interest. There was no call to balance because we were not settling a question of the boundaries of the right beyond its core expression.⁸³ More often, the relevant constitutional test and asserted state interest are recited and inquiries ensue about the weightiness of the adverse state interest and whether the state action bore a sufficiently tight connection to its promotion. What is missing, to my perplexion, is an inquiry into whether the asserted state interest is actual or aspirational.

Of course, some think that the constitutional interest of the individual should always render the state interest irrelevant. Every case should read like *Obergefell*.⁸⁴ It does not matter what the state's interest is – either the decisions are the individual's to make or they are not; if the former, then either the state interest is irrelevant or it could never be weighty enough to surmount it.⁸⁵ I sympathize, at least with respect to the core cases representing individual constitutional interests

⁸³ Although which test applies is, in part, a reflection of which constitutional interest is threatened, the very existence of these tests and the prevalence of the use of the rational basis test already incorporates deference to the outputs of an aspirationally democratic process. And, having done so, it then asks what the state interest is. I do not take this to be asking for a compulsive restatement of other given facts and principles – that there is actual state action and that the provenance of the state action already provides strong reasons for the judiciary to hesitate before engaging in judicial review. Charitably understood, we might interpret the relevant tests as conveying that where state action impinges on a cognizable constitutional interest, it is not enough to verify that the state took that action and that the state is stipulated to be legitimately governed and reflective of some configuration of the will of the people. Where constitutional values are at stake, we demand a further level of depth of justification: an identification of the relevant state interest, an investigation of its strength, and some verification that the state interest and the constitutional interest are in conflict.

⁸⁴ Others, including many First Amendment cases, do. *See, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011) (after finding that protestors' speech concerned public issues voiced in a public forum, offering no inquiry into the state interests driving the state's tort actions for defamation, 'publicity given to private life, or the intentional infliction of emotional distress').

⁸⁵ This is one version of the 'rights as trumps' position, but despite its familiarity, I regard it as one of its more and unnecessarily controversial articulations. Other versions are compatible with balancing by granting a limited role to balancing for cases at the (metaphysical or epistemological) margins of the right, by using balancing to determine the content of the right that, post-determination, then serves as trump, or both. I develop a model with both features in the text.

that definitively fall into the scope of the right. But, part of the challenge of constitutional jurisprudence is that we do not fully understand *ex ante* and *a priori* what falls into the larger scope or extension of a right. Different political configurations might each represent if not equally good, at least equally good faith efforts to respect universal constitutional values. To take one example, as some have argued, Europe arguably realizes a free speech regime, even as many of its member states place greater weight on privacy interests over freedom of speech interests when the two conflict than we do.⁸⁶ Perhaps Europe gets it wrong; perhaps we get it wrong; it seems more likely that we have similar core commitments but at the margins, our expressions differ in part because of our various discretionary interests. Our own commitment to federalism may encapsulate an idea somewhere in this arena. (Indeed, I think it has to if we think that the state interests that can be asserted in constitutional litigation are the interests of states as opposed to just those of the federal government.) Either way, we might be understood as settling the boundaries of the extension of a right by considering what state interests might be affected by a more or less generous conception of that right.

To elaborate with respect to individual rights: Interests of constitutional import represent an essential arena of human activity that each individual must be guaranteed a right to exercise. Some activities, such as declaring disagreement with the powerful, fall clearly in the core of this arena. Other activities are, arguably, on the periphery. They may further the relevant interest of

⁸⁶ *See, e.g.*, *PJS v. News Group Newspapers Ltd* [2016] UKSC 26, [2016] 1 AC 1081 (appeal taken from Eng.) (upholding an injunction against press disclosures of the names and details of a celebrity's sexual affairs); *Campbell v. MGN Limited* [2004] UKHL 22, [2004] 2 AC 457 (appeal taken from Eng.) (finding liability for wrongful disclosure of private information when a newspaper published photographs and a truthful report about a famous model based on observation). *See generally* STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* (2016) (comparing the American, European, and Canadian approaches to freedom of speech across a number of domains including privacy, hate speech, and campaign finance).

the individual but that interest might also be sufficiently satisfied elsewhere were this activity made unavailable; its unavailability would be a cost or a sacrifice to the individual, but would not deny her her basic freedom or dignity. In attempting to fix the boundaries of the right at the periphery,⁸⁷ we may reasonably ask what other interests are at stake in one boundary determination versus another. Where substantial community interests are compromised by the extension of the boundary in one direction versus another, it may be reasonable to expect citizens to exercise their constitutional interests within a boundary that is compatible with the pursuit of substantial community interests. But, the reasonability of expecting citizens to compromise a fuller realization of their constitutional interests on the grounds that substantial community interests weigh in the counter-balance, should turn, at least for discretionary interests, on the actuality of the state's commitment to that interest as demonstrated through a coherent pattern of state action, one that bears out that the asserted interest is more than fledgling or aspirational and that the state's stance is not ambivalent, but consistent. To 'ask' citizens to compromise constitutional interests for state interests seems reasonable only where the state actor has itself invested, thereby absorbing the deliberative lessons such investments provoke.

The concept of a discretionary state interest, I admit, is not commonplace in constitutional jurisprudence. In part, this may be because a major motivation to attend to mandatory interests has been to attempt to force the state to pursue and fund them, an attempt that has been largely stymied, resulting in a jurisprudence that gives a wide berth to state actors to exercise judgment about the appropriate degree of state investment, the places of emphasis, the best methods of pursuing mandatory interests, and how to weigh various state priorities against each other.

⁸⁷ Different models of rights may regard this determination as metaphysical or epistemic; I will stay neutral on that question here.

Accountability measures are largely subject to good will, the free press, and the electorate.⁸⁸ The discretion associated with how to pursue mandatory interests may have been unthinkingly extended to the *assertion* of discretionary interests. Inattention to discretionary interests may also derive, in part, from the claim advanced by an influential branch of liberals, that the state's interests must be limited to those required by justice; to pursue discretionary ends would be infringe on citizens' liberty to devise their own ends.

I reject those interpretations of liberalism. In brief, there may not always be singular paths to prosecute justice, but divergent paths, involving distinctive ends along the way, may be pursued to give people their due within a flourishing polity. Further, the position that discretionary collective moral ends may not be pursued, because their pursuit intrinsically infringes upon citizens' liberty, depends upon a highly individualist, crypto-libertarian, and ultimately implausible conception of the state and of property. Although it is a contested matter, some theorists believe that concern for the environment, in itself, or for animals, in themselves, is not a matter of justice, which concerns fair relations between people; for those who think justice is a matter of relations between citizens, concern for the welfare of foreign denizens might be considered discretionary. Even if environmental preservation or foreign welfare were discretionary ends, their pursuit would not intrinsically infringe on citizens' autonomy rights unless we presuppose an implausible maximalist theory of individual property giving each citizen a proportionate right to all the collective property not required to implement justice.⁸⁹ Whatever

⁸⁸ See, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (holding that the Due Process Clause of the Fourteenth Amendment did not impose an affirmative, judicially enforceable right on the state to protect a child against abuse).

⁸⁹ See, e.g., JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* 106-7 (2010). I see no reason to take this view, rather than the position that individuals' liberty rights may be defined substantively in terms of what opportunities are available to them and what state motives are antithetical to them and that their individual property entitlements may be determined by virtue

the source of the neglect of discretionary interests, the conditions for their sincere assertion on behalf of a democratic polity merit further attention.

Implications

My contention has been that aspirational, fledgling, or ambivalent interests should not influence the outcome of constitutional balancing in the same way that consistent, realized, and entrenched interests should. Balancing discretionary interests against recognized constitutional interests is only normatively plausible where the state demonstrates an actual commitment to that interest beyond its mere articulation. I am not arguing here for any specific test or inquiry to gauge whether a state has the relevant interest. My agenda is more philosophical than pragmatic, so my contention is abstract: greater sensitivity to the question of whether a state actor *has* the interest it asserts should be shown by both judges and nonjudicial state actors as part of the process for constitutional balancing to make sense, at least considering discretionary interests.

With that caveat in mind, the abstract lesson points in some concrete directions and not in others. Despite some protestations to the contrary,⁹⁰ in litigation, that demonstration must

of what is required to ensure that they receive the rights and opportunities afforded by principles of justice.

⁹⁰ To be sure, proof of actual legislative motive (or, to be precise, a legislative identification of a state interest as a justification) is not a necessary condition of constitutionality. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); neither, in many circumstances, is a poor legislative motive sufficient to doom an argument that a statute is constitutional. *United States v. O'Brien*, 391 U.S. 367, 383-86 (1968). The issue about actual legislative motive is related to but distinct from the one concerning me. The issue about motive concerns whether we can discover and say illuminating things about the motive of a legislature composed of dozens or hundreds of distinct people with differing agendas and often opaque minds. Skepticism about that endeavor drives the idea that we should adopt an objective point of view, where that is understood as assessing the arguments offered to defend the statute, without digging deeper to see whether those arguments motivated a sufficient number of legislators. I am not disputing the move to the objective point of view but taking the objective perspective does not entail that what interest a state actor has should be determined by that actor's assertion alone rather than by a more comprehensive combination of that actor's behaviors, assertions, and other commitments.

involve more than the assertion of the interest in briefs. I doubt that we should presume that attorneys charged with defending the state engage in thoroughly principled decisions about what interests to assert, rather than throwing the pasta at the wall to see if it sticks. Why would a state's assertion of an interest in a brief be more telling than its enacted policies? To be sure, my objection is not to the concept of a belated explicit realization of an abiding, but perhaps inchoate, interest but to the idea that its assertion, on its own, is sufficient evidence of its possession. So what would suffice? Preambulatory language may be *some* evidence, but it isn't much and only partly for the reasons cynical political scientists crow about. Putting aside the possibility of loner grandstanding, the assertion in question requires more than episodic attestation.

Requiring evidence of the strength and sincerity of the state's commitment to an interest need not call for the sorts of divinations of legislative purpose that some commentators find problematic.⁹¹ Rather, the requisite inquiry would assess the strength of the state's commitment by reference to whether its actions signified a strong commitment to the interest its representatives articulate. A pro tanto case that a state possesses an interest might involve a showing that it has adopted a moderately comprehensive and serious approach to tackling the interest, whether within the legislation or state action at issue or through the combined effect of extant legislation and regulations.⁹² An all-things-considered conclusion that it has the interest

⁹¹ Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011); Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 63, 71-74 (1994).

⁹² An approach of this kind may be compatible with the explicit assertion of that interest occurring for the first time post hoc in response to litigation. What interest we have been pursuing all along may be only evident upon the pressure exerted by litigation. I suggest that our approach to discerning the genuineness of the state's interest should not turn on the *timing* of the interest's assertion but on whether the state's actions and commitments support that assertion,

would have to answer any serious charges that the state simultaneously neglects important measures necessary for undertaking and expressing those interests (e.g. the IVF example) or that the state pursues measures contrary to the asserted interest (e.g., the death penalty).

Such sensitivity could conceivably take different forms and further specification would require confronting a number of issues beyond the scope of this project, including whether different constitutional interests should trigger different standards of adequate possession, just as different constitutional interests trigger different standards with respect to the requisite tailoring and weight of the interest. Although I will not attempt further specification, I will make a few remarks to dispel objections that this sort of sensitivity is infeasible or in tension with long standing commitments of another sort.

It may be objected that a test demanding particularized evidence of commitment would render it difficult for states to experiment and take initiatives that might have constitutional implications. To launch such an initiative, they would have to enact comprehensive legislation, rather than testing the waters and taking a first step. Particularly with respect to the adoption of controversial interests (here I have in mind the Oregon legislation and the commitment to patient autonomy), the wise course may be a gradualist course.⁹³ Further, this approach would make it difficult for a state to ‘change its mind,’ so to speak. For instance, in 2008, Washington State reversed its position and passed a right to die law that seemed to indicate that its priorities now

whenever it is made. That said, when the initial assertion appears only in response to litigation, that timing may legitimately highlight the need for deeper demonstrations of genuineness. *See* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“the [state] justification [for a gender discriminatory policy] must be genuine, not hypothesized or invented post hoc in response to litigation.”)

⁹³ *See also* *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (underscoring that the legislature may have good reason to tackle one aspect of a larger problem); *Williamson v. Lee Optical Co.* 348 U.S. 483, 489 (1955) (“reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”)

matched its neighbor.⁹⁴ Should that law be challenged, perhaps by a patient in a state hospital who wished to live, even with medical conditions compromising her life quality, contending that the assisted suicide system violated her right to substantive due process by creating the potential for coercion, would Washington state's claim that its law served its substantial interest in facilitating patient control over the means and timing of death be refuted by reference to its prior attestations of a substantial and unqualified interest in the value of life? The Washington reversal highlights a third objection about variability, whether jurisdictional or temporal. On the approach I am defending, it would seem that the same legal regulations might be constitutional in Oregon, while failing to pass constitutional muster in Washington given its more conflicted history. The problem of constitutional variability would not arise only in cases of state reversal of course, but more generally, as states might pass virtually the same legislation but within contexts that manifested quite different levels of historical commitment and other forms of demonstrated devotion to an interest. Temporal variability is also conceivable, especially should the constitutional inquiry not be fixed exclusively upon investigations of the state practice and commitment at the time of passage, but also (or instead) take into account the state's ongoing record of commitment to the interest.⁹⁵

⁹⁴ Washington Death with Dignity Act, WASH. REV. CODE § 70.245.010 (2015). The Act was passed by ballot initiative in 2008 and largely went into effect in 2009.

⁹⁵ For instance, a state's invocation of its interest in the 'sanctity of life' to defend a twentieth century abortion statute or statute banning assisted suicide might be called into question should it have failed to adopt a 'sanctity of life' approach to policing or to encourage its municipalities to do so after recommendations adopting this approach were first suggested by the Department of Justice in 1999 and further developed and publicized in 2016 by PERF, a non-profit organization that develops model practices for police departments and advises many departments. This approach aims to reduce excessive force in policing by stressing the sanctity of life in police mission statements, training manuals, de-escalation training, and other efforts to minimize the use of lethal force. *See* CMTY. RELATIONS SERV., DEP'T OF JUSTICE, POLICE USE OF EXCESSIVE FORCE: A CONCILIATION HANDBOOK FOR THE POLICE AND THE COMMUNITY (1999); POLICE

Much of the force of these objections rely on imagining a particularly stark doomsday remedy to finding that an asserted state interest is more aspirational than actual, namely invalidation of the state action. There are other approaches. We need not assume a harsh, non-dynamic, model of constitutional scrutiny, one in which the only remedy is permanent invalidation. One might think by analogy to facial and as applied challenges, a locale where we are familiar with the idea that the same statutory text may be constitutional in one jurisdiction but unconstitutional in another, but with a twist. When a state actor defends with a ‘hypothetical’ interest that, if realized, would suffice to tip the balance in its favor, a judicial judgment to that effect might be thought as showing that the statute was valid on its face, *in the sense that there is nothing wrong with it intrinsically*. But, my point, in a way, is that we should demand some evidence *as applied* that the state’s level of commitment to a discretionary interest demonstrably ranges beyond the hypothetical. While we normally think that a statute that survives a facial challenge is enforceable until it is shown, as applied, to generate constitutional harm, in this case, surviving

EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE (2016), <http://www.policeforum.org/assets/guidingprinciples1.pdf>. Many municipalities have followed suit: Sacramento, Baltimore, Chicago, Minneapolis, and San Francisco. *See* SACRAMENTO POLICE DEP’T, USE OF FORCE (2017), <https://www.cityofsacramento.org/-/media/Corporate/Files/Police/Transparency/GO-58002--Use-of-Force.pdf?la=en>; BALTIMORE POLICE DEP’T, USE OF FORCE (2016), https://www.baltimorepolice.org/sites/default/files/Policies/1115_Use_Of_Force.pdf; CHICAGO POLICE DEP’T, USE OF FORCE (2017), https://home.chicagopolice.org/wp-content/uploads/2017/05/G03-02_Use-of-Force_TBD.pdf; MINNEAPOLIS POLICE DEP’T, USE OF FORCE (2016), http://www.minneapolismn.gov/police/policy/mpdpolicy_5-300_5-300; SAN FRANCISCO POLICE DEP’T, GENERAL ORDER: USE OF FORCE (2016), http://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/sfpd-dgo-5.01-101316-commission%202_0.pdf. *See also* discussion in Ingrid Eagly & Joanna Schwartz, *Lexipol: The Privatization of Police Policymaking* 1-44 (May 25, 2017) (unpublished manuscript) (on file with author).

a facial challenge on the basis of a merely hypothetical interest might yield something like a stay, akin to Judge Calabresi's 'constitutional remand,'⁹⁶ until that further evidence is provided.

Suppose a state, like Washington, were confronted with what appears to be an ambivalent stance toward its purported 'unqualified' interest in the value of life or Pennsylvania's state interest in fetal life was questioned based on its failure to legislate comprehensively, to address both those embryos inside and outside of a woman's body in a coherent way. A court sensitive to the question of whether a state *had* the relevant interest it asserts might stay the state regulation until the legislature did more to demonstrate its interest—such as legislating more comprehensively, repealing the laws that demonstrate a commitment to an interest to the contrary, evincing concrete plans to do so, or offering a reasoned account of the distinction it is making after holding hearings and inviting notice and comment.⁹⁷ In the alternative, where the

⁹⁶ See Judge Calabresi's concurring opinion in *Quill v. Vacco*, 80 F.3d 716, 738-43 (2d Cir. 1996). The concerns that propelled his advocacy of a constitutional remand are related to but distinct from mine. His worries are more exclusively temporal and concern the potential obsolescence of the ban on assisted suicide given the distance of contemporary legal circumstances from the circumstances that gave rise to the ban. Those worries seem valid, but I am less convinced they can be ameliorated solely by contemporary legislative validation should there be little else to demonstrate commitment to the relevant state interest. *See also* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (rev. ed. 1985) (advocating judicial power to amend obsolete statutes with an eye to prompting a legislative response); Bickel & Wellington, *supra* note 32, at 34-35 (defending the 'remanding function' and advocating the denial of jurisdiction to effect a constitutional remand).

⁹⁷ *Compare* *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that same-sex couples have a right under Vermont's constitution's common benefits clause to the benefits of marriage but remanding to the legislature to craft a remedy consistent with its holding), *with* *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (staying entry of a declaratory judgment that the state's limitation of marriage to opposite sex couples violated state constitutional guarantees of equal protection and construing marriage as the voluntary union of two persons, while giving the legislature six months to take appropriate action). The technique of a legislative remand is interesting and worth using, whether or not its application in these cases was appropriate. *Contrast* *Baker*, 744 A.2d at 898-904 (Johnson, J., concurring in part and dissenting in part) (complaining that deferring the construction of a remedy to the legislature is abdicates judicial responsibility to redress rights violations), *with* Tonja Jacobi, *Sharing the Love: The Political Power of*

state alleges that it is engaged in gradualist experimentation and convincingly alleges that this route is the appropriate first pass at the interest in question, a court might suspend proceedings, permit its implementation for a few years, but revisit the challenge in a few years to assess whether the state has made steps to evaluate and expand its experimentation or whether it offers a convincing reason why this first step alone should suffice.

Or, a court might ask the state for further explanations. Even while upholding a law on the basis of the asserted interest, it could make clear its dissatisfaction with the flimsiness of the support for the state's asserted interest: such a recording might expose the inconsistency which could have later political ramifications or might work to set the bar higher with respect to the necessary showings by the state in the future. Whatever procedure and remedy are appropriate, the importance of the inquiry is my focus here. Whatever the appropriate venue, having to mount a pro tanto case that the state has an actual interest may prompt the sorts of public deliberation that yield greater collective self-understanding of the commitments we have undertaken, what their full prosecution and expression would involve, and where our demonstrated resolve is wanting.

These questions should not occur only to a court. In deliberating about whether and how to defend state action, the state's legal representatives may initiate inquiries of its own – attempting to ascertain whether, in good faith, they are in the position to represent a potential state interest as actual and to explain any apparent inconsistencies or hesitations in the pursuit of the interest. Those inquiries, like those made by a court, need not conclude in a binary determination that the state either has or lacks the interest. Having to advance a justification might itself be salutary for

Remedial Delay in Same-Sex Marriage Cases, 15 L. & SEXUALITY 1 (2006) (articulating political advantages of wielding remedial delays to elicit legislative responsibility).

a state office, forcing questions to be faced that have been avoided and generating greater levels of accountability via justification.

Conclusion

The two examples I have explored in this lecture, one about common law and the other about constitutional reasoning, highlight a characteristic emphasis of the communicative approach to democratic law, namely an interest in how legal actions structure, facilitate, or preclude other forms of collective communication and public moral reasoning through law. Both bodies of jurisprudence, as I have argued, currently exhibit a troubling indifference to disjointed bodies of law and should instead be more attentive to the importance of communicating (and not merely episodically) implementing our (potential) joint commitments. In the preemption case, the legal system seems to flirt excessively with the view that democratic law's main function is to resolve individual disputes – in which case the question would naturally be whether there are faster, cheaper substitutes that still preserve fairness toward the disputants. If dispute resolution is merely one important aim of a legal system but democratic law also attempts to articulate our joint moral commitments, then displacing the articulation and development of common law should strike us as undemocratic, whether that displacement happens through unreflective forms of pre-emption to a market devoid of law or through active encouragement of mandatory arbitration clauses given that private arbiters do not represent *us* or generate public principles. A communicative, democratic approach would pay more heed to the consequences for the resultant legal landscape, including development of a collective, unified, if local, perspective about important areas of law.

Constitutional balancing should also be more responsive to whether state interests reflect a coherent (public) moral vision. When the boundaries of constitutional rights are being scored,

state actors should demonstrate an articulate commitment to the interests they cite to defend their directives, rather than presupposing that their commitments may be read off of isolated actions, motivated assertions, and hypothetical justifications. The idea is not simply the rationalist one that checkerboard, scattered approaches to law are objectionable because no sensible justification could cohere them. That defect is truly problematic, making it difficult to see the law as a rational system of directives.⁹⁸ My further, more positive point is that legal decisions should themselves be more sensitive to protecting, promoting, and pushing for the realization of the positive potential of democratic law, namely its potential to communicate, through speech and action, our joint commitment to and a distinctive perspective on our collective moral ends. If democratic law is important, in part, because it affords *us*, as a collective body, the possibility of communicating with each other and pursuing our public moral ends in distinctive ways, then a more prominent factor in the jurisprudence in both areas should consider how a decision will affect the deliberative depth and the unity of the resultant structure of law.

Our failures so to proceed may trace to a widespread preoccupation with outcomes and insufficient concern with the objective reasons and motives that produce them. But these reasons and motives are crucial elements of our moral communications and relations as well as essential components of what make our moral communities distinctive. Contemporary legal and moral theories are also over-influenced, I suspect, by pronounced anti-perfectionist allergies to governmental articulations of morality that in turn reflect exaggerated interpretations and understandings of liberal commitments. The important and defining liberal tradition of preserving substantial room for individual judgment and control over the values and ends each citizen pursues should not be confused with collective indifference to the development of moral

⁹⁸ RONALD DWORKIN, *LAW'S EMPIRE*, 180-87 (1986).

agency amongst citizens or with the idea that our only collective moral concerns are those that can be specified through completely determinate directives of justice. Communities depend on their members being moral agents and the development of moral agency and moral character is partly, but not wholly, a filial affair. How we develop and express our moral commitments is part of how we pursue justice and how we render our communities distinctive. Doing so deliberately and publicly is the mission of democratic law.