

Democratic Law

Law and democracy seem oddly estranged in academic philosophical discourse. Aside from some controversies about constitutionalism, there is very little mention of democracy in most contemporary jurisprudential treatments.<sup>2</sup> Likewise, one can leaf through extensive discussions of democracy that do not elaborate any distinctive, essential role that law plays in achieving democratic aims. Law tends to be treated as an instrumental afterthought.

This self-imposed relegation of law and democracy to different intellectual compartments of inquiry does us a disservice. It encourages simplistic instrumental views of law and democracy as institutional devices that control untrustworthy agents and manage sub-optimal circumstances, whether by managing conflict and temptation on the one hand or by refereeing between warring interest groups on the other. Certainly, law and democracy perform these functions but the blinkered emphasis on them deprives us of much articulate insight about why law and democracy are morally powerful and inspiring human achievements. When we lose sight of our aspirations

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<sup>1</sup> I am grateful to the Tanner Foundation for the occasion and the support for these lectures and to the three Tanner commentators, Richard Brooks, Niko Kolodny, and Anna Stilz for their advice and support. I am also thankful for help and criticism from other friends and colleagues, especially Christopher Essert, Stephen Gardbaum, Barbara Herman, Larry Sager, Richard Re, William Rubenstein, Steve Shiffrin, and Jennifer Whiting. I also received insightful feedback from audiences at University of California, Berkeley for these lectures and from audiences at University of Michigan Law School, University of Pittsburgh, and University of Southern California who heard earlier versions of these ideas. Alexander Cooper, Sarah Fisher, Haruka Hatori, Matthew Strawbridge, and Jordan Wolf provided excellent research assistance through the generosity of the Hugh & Hazel Darling Law Library at UCLA School of Law.

<sup>2</sup> Two important exceptions are Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2009) (exploring some distinctive features of law in a democracy within a positivist framework) and Jean Hampton, *Democracy and the Rule of Law*, 36 NOMOS 13 (1994) (enumerating a special sort of tertiary rule of recognition characteristic of democracies that plays an important role in managing conflict and disagreement without resorting to political coercion that expunges opposition).

for these institutions, we begin to ask and expect them to do less than they can. There lies a path to apathy, cynicism, and decline.

I suspect that this academic estrangement bears a complex relation to: positivist temptations to think that the most significant features of law must hold true within non-democratic states like Saudi Arabia;<sup>3</sup> a latent mistrust for law contained within some (often nonpositivist) conceptions of law as essentially coercive; outcome-oriented conceptions of morality that denigrate the significance of motive; and malaise about whether democracy's intrinsic value can be convincingly defended.<sup>4</sup> My mission today is more constructive than diagnostic or critical, however. It is to sketch a distinctive account of democracy's intrinsic value that, non-accidentally, highlights the virtues that law may uniquely display within democratic circumstances. I aim to vindicate my claim that law and democracy enjoy an intimate relationship by offering an account of democracy's intrinsic communicative value and law's special constitutive role in that communicative endeavor through which we represent our institutional, collective expression of justice and other forms of collective morality.

The view I will defend stresses that we must execute some of our collective moral duties through democratic laws generally as well as the democratic generation of some *particular* laws. Neither democracy nor law is well conceived primarily as a fungible, if highly effective, *means* of installing the proper egalitarian institutions which themselves are required by justice and that may be specified independently from their mode of generation. To the contrary, the generation

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<sup>3</sup> Cf. LIAM MURPHY, WHAT MAKES LAW 118 (2014) (“Most discussions of the obligation to obey the law...take for granted that law can have any content and be created by all kinds of regimes, democratic or despotic.”)

<sup>4</sup> See, e.g., Niko Kolodny, *Rule over None I: What Justifies Democracy?*, 42 PHIL. & PUB. AFF. 195, 196 (2014); Niko Kolodny, *Democracy for Idealists*, (2016) (manuscript) (on file with author).

of democratic law is an element of what justice requires and a constituent condition of other requirements of justice. If law's function is, in part, to execute our collective moral duties through collective, communicative means, then a full and proper legal system must be democratic.

My enterprise may be framed as a discussion about the content and value of law in ideal theory, motivated by my disappointment that many current jurisprudential discussions seem, perhaps unconsciously, to be squarely situated in the non-ideal theoretical capital of Riyadh. Some important democratic theories portray democracy's role as one in assisting or partly constituting the struggle to install material and intellectual forms of justice, to temper injustice, or to provide some 'at least we all had a say' style legitimacy to how we bumble along given inevitable failures in achieving just conditions.<sup>5</sup> These are partly insightful accounts but they are also incomplete – assembled midway, so to speak – and fail to capture the full aspirations of both law and democracy, aspirations that are part of the constitutive conditions of realized justice, not only the fair conditions of approximating justice in non-ideal conditions. Important progress can be made in understanding moral and political values by concentrating on what we may aspire to under favorable conditions, rather than tailoring our regulative ideals to a wide range of possible

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<sup>5</sup> Here, I signal some disagreement with the approach taken by THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS*, (2008). Christiano's theory is perhaps one of the more celebratory accounts, seeing democracy as a way to manifest publicly our recognition of each person's equal claim to advance her interests. But, his celebration often takes an indirect, non-ideal cast. First, Christiano's emphasis is on the implementation of a just scheme of equality, understood as ensuring our equal well being; but, he notes, no mechanism of direct implementation is at hand so we must construct a just scheme ourselves in a climate of disagreement. Second, a combination of factors of difference and distrust drive his commitment to publicity and democracy. Because we have such different judgments, fairness to each of us demands a system in which no one's biased judgment may exert unequal influence. He frames the need for democracy as responsive to non-ideality and not as, also, part of an ideal system of mutual constitution and mutual regard. *Id.* at 95-96. *See also* DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 6 (2008).

conditions of strife, division, hierarchy, apathy, and non-compliance.<sup>6</sup> So, I will investigate what role democracy and law would play in a state whose institutions otherwise manifest features of material and intellectual forms of justice and whose citizens largely endorse the principles of justice and their instantiation.

### *Terms*

By ‘democracy,’ I mean, roughly, a political system that treats all its members with equal concern and regards their lives as of equal importance. Further, it treats all competent members of the community (by which I mean those having reached the age of majority and without profound intellectual disabilities) as, by right and by conception, the equal and exclusive co-authors of and co-contributors to the system, its rules, its actions, its directives, its communications, and its other outputs. A healthy democracy is one in which the members have regular opportunities to exercise their rights and do so with some frequency.

It is worth highlighting two preliminary points about the institutions that constitute a democratic system. First, my rough characterization of democracy lends little support to the view that elections, in particular, are the defining characteristic of democracy. For one thing, it should be clear that a free speech regime including the legal right to petition government (and to expect consideration and a response) and a robust, vibrant free speech culture are *as* essential components of a democracy as elections are. Without the ability to discuss, debate, and understand issues and characters with others, elections have little purpose, whether as exercises of deliberate communication, self-determination, or efforts at meaningful preference or ideal

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<sup>6</sup>Think, for example, of the intellectual strides made by concentrating on the specific interrelations of the two principles of Rawls’ special conception of justice as fairness, rather than on the broader, inchoate general conception of justice – even though, arguably, many extant societies only enjoy the conditions suited to the general conception.

satisfaction. Indeed, because elections are framed with determinate boundaries, whereas a free speech culture is free-ranging with indeterminate boundaries, a free speech culture is arguably more foundational to democracy than any particular mechanism of decision formation, including elections. Moreover, elections of people as representatives inevitably consolidate many disparate issues into one decision at a particular time, whereas a free speech culture permits reasoned but focused discussion and feedback about singular issues and at no time in particular, thereby, et alia, permitting more targeted forms of discussion on specific issues as they arise and progress, as well as information and advice to representatives. I mention these points only as a corrective to the fixation on elections as the sine-qua-non of democracy. To be sure, there is no need to rank them; a free speech regime without elections and other methods for citizens to contribute to deliberations would also be severely impoverished.

Second, I will say more about non-legislative democratic institutions tomorrow. Moreover, although elections and referenda may serve as important anchoring mechanisms of influence and political formation by co-contributors, they are not the exclusive means by which a political system may make decisions compatible with a democratic structure. I will say more about this point in due course, but here, I will just register the point that a group of authors may reasonably divide labor and delegate one or more of their members to speak for them in certain fora without sacrificing or compromising their equal status. For the moment, I'll simply add that there is also little reason reflexively to regard other elements of a political system, including judicial, administrative, or custom-based authority, as, ipso facto, anti-democratic or, at least, 'lesser' from a democratic point of view. If, as I will urge, democracy is a system for the joint specification, communication, and implementation of mandatory and discretionary values, then whether we are communicating to deliberate, to report, or to commit, the appropriate mode of

communication may vary, depending upon what value is at issue, to whom we are communicating, and the requisite level of specificity. The ‘co-author’ characterization harbors no explicit or latent attitude of hostility or resignation to mechanisms of representation, including forms of administrative and judicial authority. Indeed, I’ll signal some of the shortcomings of direct democracy ideals shortly and I will discuss some forms of democratic judicial authority tomorrow. As many of us know from happy experience, an egalitarian co-author relation usually involves a division of labor in which each party brings their special talents and insights to bear on producing a joint message.<sup>7</sup> One co-author may take the lead and speak for the group, but the

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<sup>7</sup> A single-minded focus on academic co-authorship may mislead, for it has some distinctive constraints that do not hold of all egalitarian co-authorships. Academic co-authors writing an academic article represent their research findings as true, or, at least, they warrant it as representing their expert conclusions. The academic article represents the joint and unanimous consensus about a subject. (At least with egalitarian co-authorship. I leave aside hierarchical practices of co-authorship in the sciences.) The standards of accuracy are quite high and hence disagreement between co-authors may be a sufficient reason to suspend joint communication about that subject or to narrow the scope of the claims made about it to the areas of consensus. The special standards of academic co-authorship are in part tied to the other special norms and obligations of expertise. In part, they are also tied to the fact that what academics publish about and whom they publish with is importantly discretionary. There may be some professional urgency for academics to write *something* but an important aspect of academic freedom is that there is no requirement to speak about particular topics at a particular time; hence, there is reduced pressure for co-authors to compromise or forge a pragmatic consensus about a particular topic by a deadline.

These features render academic co-authorship somewhat unusual. Consider, by contrast, the co-authored invitation, condolence card, or committee report. The aim of these communications is not primarily to warrant an account of the truth but to convey an offer, a message, or a joint version of events, recommendations, and commitments. In this way, they more closely resemble the aims of law. They often involve topics on which there is some time-sensitivity to communicate and by parties who have some obligations to communicate and to act collectively. No reasonable recipient of such communications would take each co-author to endorse fully each contribution of every other co-author. The same condolence card may be signed by an observant Jew and a devout evangelical, the latter of whom words his sympathies with a reference to Christ’s grace and the afterlife. The recipient of such a card would have no reason to think this was also a conversion notice of the Jewish colleague. More important, the Jewish colleague does not have reason to withdraw her signature in light of the evangelical’s sentiments. I think even the agnostic does not have reason to withdraw if the card’s printed text itself, and not only the individual signatures, adverts to God. Where the communicative aim is not

relation may remain egalitarian so long as each co-author retains the ability at some fundamental level to contribute and exercise decision making authority, each co-author retains equal

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something akin to an affidavit, the standards for unanimity relax, given the temporal pressures to communicate something as a group. Participants attempting to craft a joint message should understand that the production of a joint message by a group of distinctive individuals with distinctive points of view may defy efforts to craft a unanimously endorsed message, endorsed by each member for shared reasons. So long as they have the right to contribute their thoughts on the matter and contributions are considered in good faith, co-authors of missives like cards, invitations, and reports have reason to accept compromises and other decisions they do not individually endorse as theirs by virtue of the nature of their shared enterprise and by virtue of the nature of their diverse collective perspectives. Recipients of such messages have reason to interpret accordingly: the collective message is not necessarily the individual message of each co-author.

Still, each co-author has a reason to assume responsibility *as a member of the collective* for the joint message that was sent, even while she may disagree with it as an individual. Sometimes that responsibility may take the form of collective pride, e.g. for having participated in the process that lead to successful legislation even if one was a dissenting voice about it. And, sometimes, that form of responsibility may take the form of collective regret. If the religious card offended the mourner, even the agnostic may owe an apology qua member of the collective, even if the agnostic pointed out, at the time, that the mourner might be offended by the card.

Why are there these patterns of responsibility, even when a co-author does not endorse the message and did not fully control the process? Suppose we start with the idea that there are some projects that we must pursue but that we cannot pursue alone – they require a joint effort, whether because they are too cumbersome or difficult for people to perform individually, because their successful pursuit is incompatible with parallel and conflicting individual efforts, or because their meaning demands that they emanate from a collective and not a pool of individuals. Where group action or group communication is imperative, group members have diverse perspectives, expectations of and interpretations presupposing unanimity or complete control by each member seem unreasonable. Plentiful deliberative occasions, arguments, and time will contribute to the formation of a joint decision and will leave open the possibility of achieving worthy aspirations of unanimity. But, taking unanimity to represent a requirement on communication seems unwarranted. It seems either to reflect one or more of the following flawed ideas: that unanimity is more important than timely, if suboptimal, action or communication; that the correct view will emerge in time and be sufficiently evident to everyone; or, that a fair compromise will be identified and evidently acceptable to all parties in a timely way. One worries that insistence on unanimity will instead operate as an implicit demand that some parties insincerely represent that one view or one compromise is actually substantively warranted.

responsibility for the collective endeavor, and those co-authors who take the lead still attempt to speak for and reflect the contributions of all authors, not only or predominantly themselves.<sup>8</sup>

Having indicated what I mean by ‘democracy,’ parallelism would recommend that I do the same for ‘law.’ For the sake of getting on with the argument, though, I will allow my use of ‘law’ to emerge through discussing its democratic virtues and functions. Two brief points, though: (1) Although I conceive of law as public – as having a publicly accessible, even if incomplete and partly inchoate, account of its contents and as having temporal duration –, I do not privilege statutes over judicial or administrative decisions nor the textual ingredients of law over its other ingredients.<sup>9</sup> (2) I sometimes use ‘law’ to refer to discrete legal decisions that have general

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<sup>8</sup> This conception of egalitarian power-sharing and division of labor has much in common with Dworkin’s democracy-as-partnership conception articulated in RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 384 (2011) and RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 131 (2006), but Dworkin did not emphasize the *communicative* core of democracy. There are also significant affinities between this conception and deliberative models of democracy, especially as developed by Joshua Cohen. See, e.g., Joshua Cohen, *Reflections on Deliberative Democracy*, in JOSHUA COHEN, PHILOSOPHY, POLITICS, DEMOCRACY 326-347 (2009); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in Seyla Benhabib ed., DEMOCRACY AND DIFFERENCE: CHANGING BOUNDARIES OF THE POLITICAL 95-116 (1996). Along with deliberative democrats, I understand democracy as the egalitarian and free way we have to think together and thereby to justify to ourselves the actions we undertake together, especially those pursued under the rubric of justice. Through our mutual, deliberative participation, we pursue mutual understanding and a collective self-understanding – that we are doing something together and why. This idea represents a piece of the view that I affirm, but sometimes, and perhaps it is only a matter of emphasis, the ideal celebrated by many deliberative democrats hits more notes of reflection and insight about the procedures of respectful co-authorship, than on the *communicative* value to each other of our generating commitments together and the special significance of democratically generated *law* as the way we generate such commitments. (Many of the deliberative democrats’ points have no essential place for law but could be satisfied, were there time enough, through robust discussion about each discrete action we undertake.)

<sup>9</sup> Here, I agree with my colleague Mark Greenberg. See e.g., Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE LJ 1288, 1288-1342 (2014); Mark Greenberg, *Legislation as Communication?* *Legal Interpretation and the Study of Linguistic Communication*, in A. Marmor and S. Soames, eds., PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW (2011); Mark Greenberg, *How Facts Make Law* 10 LEGAL THEORY 157 (2008). Although Greenberg targets the so-called “communicative-content theory of law,” his attack is aimed at a theory of legal *meaning* on which



application and, where applicable, precedential effect or another form of presumptive duration (whether those decisions are judicial, executive or legislative). At other points, I refer to ‘law’ as a system composed of such public decisions that aims for (and substantially achieves) some justificatory cohesion. By ‘democratic law,’ I mean a system of such decisions whose content and generation justifies its characterization as democratic.

Let me now turn to my thesis: Some of our mandatory moral ends require democratic law, generally, for their realization as well as the democratic generation of some *particular* laws. The democratic generation of law is not, as many prominent theories would have it, a mere means to achieve just conditions that can be identified without reference to their provenance; nor is it merely the fairest method of identifying second-best outcomes. Democratic law, as I will defend it, is an element of what justice requires even within ideal theory. Moreover, it is not simply one item on a general list of necessities or desiderata. Democratic law is not merely a means to or a complement of independently specifiable just material, social, and intellectual conditions. It is a constituent condition of the full realization of such conditions and hence of the full realization of justice.

*The communicative significance of democratic law*

My defense starts with a problem for which democratic law is the solution. The problem I am interested in isn’t the familiar problem of how to justify coercion, a problem that unduly fascinates many democratic theorists. The problem I am interested in arises prior to disagreement, dissension, threats, and the prospect of disobedience. Even in a largely just society full of citizens of good will, each of us, in communal living, would face significant communicative

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legal interpretation hinges entirely on *linguistic considerations*. Such a theory is distinct from, indeed antithetical, to the theory I defend here.

challenges of a moral nature. Democracy may uniquely address these challenges, often, importantly, through democratic law. Understanding these challenges and democratic law's ability to meet them forms a basis for claiming that democracy is intrinsically valuable as a necessary endeavor of collective moral agency and that, at least in ideal theory, the moral functions of law and democracy are closely intertwined.

What sort of challenges? One concerns our status as equals which I take to be exemplary of the problems we face. The forthcoming argument that describes the challenge and the ingredients for a solution has four major steps, positing: (1) some moral requirements for citizens to communicate with and to each other; (2) the importance of direct and at least partially articulate communication for certain sorts of messages; (3) the role that actions and commitments play in effective and sincere communication of some morally important messages; (4) the unique role democratic law serves in communicating the morally important messages in question. My path through these steps will be circuitous, departing for a stretch from a political beeline to take an interpersonal detour.

I'll begin with the moral imperative of communication among citizens. Start with the assumptions that: we are all moral equals and that our status, our perception of our status, and our mutual recognition of our status (and the needs and interests that accompany it) influence our sense of self-respect. That is, I assume that Rawls is roughly correct that the social bases of self-respect are a crucial component of the conditions for maintaining one's self-respect. This maintenance, in turn, is an essential component of our mutual flourishing. As Rawls put it, self-

respect is, “perhaps the most important primary good.”<sup>10</sup> As a just citizen living in community with others, I should be interested in contributing to the social bases of self-respect.<sup>11</sup>

As an individual, I confront the difficulty that the social bases of self-respect are not merely material in nature but are communicative. It matters that we manifest our respect for one another and not merely that we co-exist in circumstances that give everyone access to the basic minimum, that no one sets fire to the central distribution depot, and that we pay our taxes. A just allocation of material resources is compatible with mutual indifference, grudging accommodation, or even mutual contempt, should the penalties for destructive behavior be severe enough to induce patterns of compliance from even Justice Holmes’ bad apple.

Why, it might be asked, should this matter so long as the conditions of material (and intellectual) justice obtain, whether through coercion, grudging compliance, or barely registered automation? How would such motivations diminish the social bases of self-respect? Is it simply a psychological liability that I care what you all think? Perhaps I ought to steel myself against this vulnerability rather than expect you to make ingratiating gestures. A related critic might worry that the need for demonstrations of respect may signal latent distrust of one’s peers, showing that this need is a symptom of political non-ideality. This latter objection is thematically related to a cluster of positions claiming that as Daniel Markovits puts it, “perfectly rational and reasonable

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<sup>10</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 396, 440 (1971).

<sup>11</sup> By starting with the issue of how democratic law serves as a necessary mechanism through which moral agents may fulfill their duties, my approach dovetails with Anna Stilz’s observation that a beneficiary-oriented perspective on the state’s value and on democracy’s value is objectionably partial, viewing citizens only as ‘takers’ and not crucially as ‘makers.’ Anna Stilz, *The Value of Self-Determination*, 2 *OXFORD STUD. IN POL. PHIL.* 98, 100-01, 119-20 (2016).

creatures would not require politics or any political agreement...” or, for that matter, promises or contracts.<sup>12</sup>

I resist these ideas. In hostile circumstances, our mutual sensitivity to each other’s attitudes can certainly represent a vulnerability (and an asset). Generally, however, mutual sensitivity is not accurately understood as a mere psychological vulnerability or a symptom of otherwise defective relations or rationality. It flows from a proper sort of moral sensitivity. If I see you as a distinct individual, as a moral agent and as a moral equal capable of moral judgment whose life and thoughts matter, how could I not reasonably care what *you think* about all sorts of matters, including about me? (It is difficult for me not to view as gendered and hierarchical the critics’ equation of having interests in recognition and in the alleviation of potential feelings of vulnerability with signs of failure, weakness, imperfection and a lack of rationality.) Furthermore, both as an agent and as a subject of others’ agency, it is not sufficient that we live in materially just relations with each other and know indirectly, however incontestably, of each other’s good will. It is an aspect of our respect for each other as *individuals* that we afford special significance to agents’ efforts to make their thoughts public and thereby to affirm and endorse those thoughts. Our value as individual agents with control over what we reveal about our thoughts renders the distinction between what we intentionally convey and what we leave to be indirectly inferred about our wills normatively meaningful. When I make an intentional effort to convey my respect, other things equal, my action is more meaningful than my leaving my respect to be assumed or inferred by you, because I do not leave it to you to infer my attitudes from my actions

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<sup>12</sup> See, e.g., Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, 272, 286, 289 (Gregory Klass, George Letsas, and Prince Saprai, eds., 2014); see also Daniel Markovits, *Promise as an Arms Length Relation* in PROMISES AND AGREEMENTS, 295, 309-310 (Hanoach Sheinman, ed., 2011). For a rebuttal with respect to promises, see Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism* 117 PHIL. REV. 481, 498-508 (2008).

and omissions; rather, I assume responsibility as an individual to affiliate myself with that respectful content and I aim to ensure you know it matters enough to me that I exert my agency to convey it.<sup>13</sup>

Although we may reasonably care what we think of each other and whether and how we make it known, one may object that it doesn't follow that my sense of *self-respect* should hinge on others' explicit regard. Consider Justice Thomas' related objection in *Obergefell v. Hodges*, the same sex marriage case, against the majority's argument sounding in dignity.<sup>14</sup> Thomas argued that dignity may be recognized or ignored by the government, but it couldn't be bestowed or deprived by the government. One either has the qualities that confer dignity or one does not. So, too, one either has the qualities that make one a moral equal or one does not. If one does not, their proclamations of one's equality could not make it so. If one does, then one merits self-respect as an equal and that merit cannot be diminished by one's fellows' errors in judgment or ignorance.

Of course, the qualities that qualify one as a moral equal among others are ones that cannot be bestowed or deprived through their recognition or denial. Their unjust denial by other intelligent agents may, however, make it difficult to sustain one's confidence in oneself, given our general and important practices of epistemic interdependence and affiliative identification. Furthermore, it matters politically not only that I receive the reinforcing regard I am due as a moral equal, for, that regard is also due to visitors. It matters also that I am respected an equal *member* of the community – as one among her peers whose belonging is secure. When my peers do not acknowledge my standing as one of them, they successfully, if wrongfully, diminish my

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<sup>13</sup> There are hazards here, including that my conveyance should not raise the possibility that my respect is morally discretionary. How it is conveyed and with what spirit should dispel this risk.

<sup>14</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

security as a member. My need for membership somewhere is inherent in my status as a human being but my status *here, in this community* is not; it is conferred, even if, for the lucky some of us, our place of birth makes that conferral feel automatic.

So, it is important that we underwrite the social bases of self-respect both through what I am calling ‘material means’ – ensuring that people are afforded the opportunities, goods, rights, and services they are due – and through communicative means – conveying that these provisions stem from our non-grudging recognition of each other as equal co-members of our political society. As I have just argued, the communicative component is not conveyed convincingly simply by forbearing from resisting the material component.

Our communicative challenge is compounded by the fact that in our daily lives, it is nearly inevitable that we will send mixed signals about our commitments. As just agents, we may be committed to the equal moral value of our lives and our equal entitlement to secure membership in a society of equals, irrespective of our distinctive individual features – including our race, gender, ethnicity, beliefs and affiliations. But, these commitments do not regularly read off of the patterns of our daily behaviors, the content of which is often driven by partial commitments – to family, to smaller communities and affiliations, and to associations with strong substantive commitments. The personal value of each of our lives, in large part, derives from our immersion and dedication in these particular and partial activities. This immersion may create the understandable impression, however inchoate, that affiliations do matter for our social and political status; moreover, our immersion in them may create the hazard that we will start, however unconsciously, to associate substantive commonalities with the indices of moral status. To counteract these hazards, we need to convey our mutual recognition of each other’s moral status, and our intentional, deliberate implementation of the commitments that flow from it, to

ensure: that recognition is communicated; to counteract any inadvertent suggestions to the contrary; and, to remind ourselves of the limits of the significance of our substantive affiliations.

Acting as lone individuals, communicating respect to every other citizen is difficult. Time constraints alone prevent us from reading the essays, ads, or tweets of all fellow citizens.<sup>15</sup> Moreover, my words as a lone individual, absent a collective method of representation, will represent me as a private individual and not the collective. But part of my imperative is to belong to a collective that communicates to its members their inclusion as equal members. I need to communicate as a *citizen*, not only as a private individual.

Moreover, a mere discursive affirmation that one's fellows are moral equals deserving of just treatment would not suffice to convey this commitment convincingly. It is not simply that mere words may be received as rationalizing bromides given our more partial patterns of action. The reason why our partial actions may overshadow our discursive affirmations, rendering them mere platitudes, is that some moral beliefs, attitudes, and stances, if they are fully appreciated by those who hold them, dictate appropriately motivated action. Hence, to an observer and particularly to the putative object of those beliefs, attitudes, and stances, the absence of the relevant action *by me* (and *by us*) may reasonably suggest a failure of full and sincere affirmation. It's not enough that I endorse the pattern of installed justice, for discursive affirmation or endorsement of a system may be issued from a posture of remove that will not succeed as a communication of *respect*, an interpersonal relationship requiring more substantive participation by its members than mere

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<sup>15</sup> Orchestrating a nationwide, daily, digital affirmation would, to be feasible and digestible by its recipients, have to take the sort of bite-sized, standardized form that quickly devolves into empty words; this, arguably, is one of the defects of the Pledge of Allegiance. This and other issues with the Pledge of Allegiance are discussed in Vincent Blasi & Seana Shiffrin, *The Story of West Virginia v. Barnette*, in CONSTITUTIONAL LAW STORIES (Michael Dorf ed., 2d ed. 2009).

approval of one party's circumstances or another's action toward him. For example, I (a U.S. citizen) may endorse the general approach Sweden takes to economic production and distribution as a rough approximation of what economic justice demands. Yet, in doing so, I do not convey my part in a relation of mutual respect toward the denizens of Sweden because I am not a Swede and my endorsement plays no internal role in generating these relations.<sup>16</sup>

In other words, discursive affirmation of a moral proposition and appropriate, conforming action, when considered or rendered separately, may each be insufficient to communicate the appropriate level of commitment to that proposition. They must be rendered together as a legibly interconnected pair for either component to realize fully its role in the communicative expression of the moral proposition's endorsement. This idea is not unfamiliar to moral life. Action with a particular content and structure, motivated in a particular and transparent way, may be necessary for some beliefs and attitudes to be successfully communicated and to be received as sincere.<sup>17</sup> Let's dwell on an illustrative, quotidian case before returning to politics.

*An interpersonal interlude: gratitude*

Consider a case of gratitude for neighborly concern. Suppose, for two years worth of Tuesdays, you (my neighbor) have regularly knocked on my door to remind me that my car is, in danger of ticketing due to street cleaning, yet again. Occasionally, I succeed at remembering for myself, but I haven't entirely changed my behavior to make your help superfluous. Nor have I

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<sup>16</sup> See also Stilz, *supra* note 11, at 123. My position on democracy has commonalities with Stilz's associative view, although I contest her division of a democratic view and an associative view along with her related suggestion that the associative view's aspirations could be achieved in a non-democratic state with sufficient opportunities for dissent. *Id.* at 125. Although citizens in such a state could affirm their membership in it, their lack of opportunity to exert agency in jointly crafting the state's actions and commitments would strain the communicative meaning of the state's actions as communicative measures by the citizenry to itself.

<sup>17</sup> Similar points about apology are made in Jeffrey Helmreich, *The Apologetic Stance*, 43 PHIL. & PUB. AFF. 75 (2015).



gently rebuffed your efforts to help. For me, morally speaking, you are no officious intermeddler;<sup>18</sup> rather, I regularly, if implicitly, rely on you, relieved that you have my back. I could just voice my gratitude for your generosity. Sometimes a card suffices. It may depend upon what the gratitude is for –whether a trivial one-off or whether something ongoing or more substantial. It also depends on what I am positioned to do and whether you have a roughly comparable need. Where you have no roughly comparable needs, gratitude may effectively take a purely discursive form.

But, where the circumstances of reciprocity present, then action may be required to communicate gratitude successfully. Suppose you plan to travel this summer, but you care about your garden. It is a fitting expression of gratitude that, when I come to know of your need, I promise to water your plants while you are away and, then, that I keep the promise. Other things being equal, where you have a need that I could fulfill without unreasonable effort, but I do not, my gratitude could be called into question, even as I drop off my ornately lettered card. My ability and failure to reciprocate in the face of your apparent need would signal that I do not completely appreciate your efforts or that I somehow take them for granted as my entitlement.

My promise and my practice of watering, by contrast, convey my gratitude. In the circumstances, these behaviors may be what are communicatively required. The entire episode of gratitude here involves a promise with a particular content, an explanation behind the proffer, a performance of the promise, the underlying motives that give rise to the promise and the performance, and their expression through the promise and the performance. All these elements,

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<sup>18</sup> Compare RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (AM. LAW INST. 2011) (evincing a legal preference for contracting and denying restitutionary compensation to officious intermeddlers, that is, to parties who voluntarily confer unrequested benefits).

intertwined, play an important role in the gesture's operation as a communication of gratitude. My watering would fail as gratitude if I did it *because* I was paid by a reality show to do so. Were I just to water your plants secretly, your needs might be met but even if your informant identified me as the waterer, the watering would not read, between us, as an intentional communication of gratitude from me to you. It matters that my offer be substantially and transparently motivated by a deliberately grounded sense of gratitude and that a similar motivation propels my ongoing performance (here, nestled within and buttressed by a sense of promissory duty). Further, it matters that these motives have recognizable deliberative roots – that they arose from my recognition of the magnanimousness of your efforts and not from some delusional story or gratitude-adducing pill – and that I convey them to you. Certainly, interpersonal delicacy may often require an indirect approach to returning a favor, yet whatever indirect methods are deployed must be sufficiently transparent that the observant recipient can infer the actions were intended as a gesture of thanks. Subtle maneuvers may be suited to fragile relations or very well established ones; still, explicit articulation is often an important way to convey gratitude and disambiguate it from other motives and objects of gratitude.<sup>19</sup>

Not only do the behavior, the motive, and its communication matter. So does the form the gratitude takes. Suppose you left town without a promise but I sent a weekly email reporting that it so happened this week that I watered your plants. In so doing, I would convey some gratitude but my method of expression would also convey its limits, namely that I regard fulfillment of your ongoing need as a matter of my discretion that I may elect not to fulfill, subject to my own

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<sup>19</sup> My interest in gratitude owes a great deal to Barbara Herman and Collin O'Neil. Other important moral dimensions of gratitude are discussed in Herman's *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 341(2012) and O'Neil's *Lying, Trust, and Gratitude*, 40 PHIL. & PUB. AFF. 301 (2012).

interests and weekly whims.<sup>20</sup>It would not convey that I acknowledged an obligation to respond appropriately to your reciprocal need.<sup>21</sup> Even where the recipient has reason to trust in your abiding gratitude or can infer it through observation, by communicating your gratitude, you thereby take responsibility for ensuring your attitudes are known and to contributing to the content and health of the relationship. Your articulate communication relieves the recipient of the burden of performing inferential and charitable work on her behalf.

In addition to its assurance value, the promise plays an important communicative role. Offering the promise expresses gratitude through the concrete action of altering my degrees of moral freedom. Performing on the promise not only delivers you a service responding to your need, but also conveys the strength and constancy of my gratitude which serves as an appropriate, fitting response to your constancy in alerting me each time I was at risk. The promise coupled with the performances are not only especially clear methods of expression. Other things being equal, they approach being uniquely appropriate methods of communication; doing less or only ‘saying’ something discursively may convey something limply that is lesser. Other things may be unequal. If I have a lethal touch with plants, a better concretization of my gratitude might be to clean your gutters before the winter rains if delaying roof work is your

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<sup>20</sup> Even were I to set an automatic timer that indefinitely guaranteed the watering, if I did not disclose it to you, I would not enact adequate gratitude because I would not convey the guarantee I put into action.

<sup>21</sup> Doesn’t it matter that your assistance to me is sporadic, prompted by your happening to be at home and to notice that my car is in danger? You’ve made me no promise. Doesn’t that make my sporadic response appropriate in return? One major difference here is that I am capable, at any time, of changing the facts that put me in need by parking more prudently. More importantly, you repeatedly see my need, arising again and again, and have apparently resolved to address it when you see it. Once you embark on a trip, you have an ongoing need; to address it satisfactorily requires an explicit commitment in response. There may be further things to be said here about whether expressions of gratitude may appropriately be expected to exceed the magnitude of the original beneficence, but they would take us further afield than necessary.

weakness. Still, at some juncture, a failure to act beyond only *voicing* gratitude signals an incomplete or insincere gratitude. More generally, in some cases, the circumstances and the content of a significant moral attitude demand action on that attitude and not merely its discursive expression. Similar points have been made about punishment and the idea that an appropriate educative condemnation of a criminal act may require a (rehabilitatively motivated) sanction, not simply a critical telegram.<sup>22</sup> For those inclined to contest either example, my quarry is neither neighborly relations or moral education, but the more philosophical points embedded in the example, namely that: an action may perform communicative work, in conjunction with speech and speech acts, and that a combination of circumstances – both my neighbor’s need and my ability to fulfill it—could work to render inadequate exclusively discursive efforts at communication, exclusively behavioral efforts at repayment, as well as disconnected discursive and behavioral gestures.<sup>23</sup>

My analogous claim is that the communication of our respect for others as moral equals within a political community may be imperative in the way that conveyance of gratitude may be imperative. Likewise, the gravity of the moral value at stake, coupled with our circumstances, require a form of communicative action with, but not limited to, discursive content.

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<sup>22</sup> See e.g., Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); Robert Nozick, PHILOSOPHICAL EXPLANATIONS 370-74 (1981). See also Joshua Kleinfeld, *Reconstructivism: the Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016) (portraying criminal law as well as criminal punishment as a partly expressive enterprise that aims to reconstruct a shared, concretized moral code that is threatened by criminal activity and its communicative content).

<sup>23</sup> There are, of course, other familiar examples of the further point that a promise may serve an essential communicative and performative function, as with efforts to convey concern in a way consistent with conveying recognition of the recipient’s dignity and independence. A promise may be necessary, not just ongoing beneficent deeds. See also Shiffrin, *Promising, Intimate Relationships, and Conventionalism* 117 PHIL. REV. 481, 498-508 (2008).

*Turning back to politics – the role of democratic law*

Before our foray into gratitude, I described four structural problems in satisfying this political imperative that might be summarized as follows:

1. We cannot convey our mutual respect to one another as equal members on an individual basis, given what, in this context, sincere and effective communication of a collective commitment would require.
2. Much of our behavior is communicatively ambiguous. Our valuable relations of partiality are often open to interpretations that are in tension with a stance of mutual respect. Further, mere compliance with just institutions is compatible with an absence of mutual respect and recognition.
3. Mere endorsement, whether vocal or mental, of a just distribution and of other elements of a just basic structure is insufficient to discharge this communicative obligation.
4. There is the risk that our valuable relations of partiality may become overly dominant and transgress their normative limits, if they are not tempered by activities that generate, convey, and reinforce our commitments to impartiality.

Democracy and democratic law play unique roles in addressing these problems. My argument follows fairly closely from the statement of the problem. Each of us needs to perform (and receive) a form of communicative action that enacts and thereby expresses our commitment to the respectful treatment that each of us merits as a moral equal and joint member of our social cooperative venture. Even if endorsed by each of us individually, in our hearts and in our editorials, a system of civil and economic rights that satisfied the substantive requirements of justice with respect to each member's just entitlements, claims, or needs, would fail to satisfy this

communicative need. The system must, therefore, not only be endorsed by us but also must be *our* product. Its production must have a communicative component to it, one that could be publicly grasped. So, other things equal, each of us must be involved in the generation and maintenance of this (otherwise) just system for its creation to be *our* product and for each of us to fulfill our communicative duties through it. The involvement must take a democratic form because each of us must have the opportunity to participate for the communication to be ours and publicly so. The terms of that participation must themselves be equal, under some salient description, or else, the message will not be *each* of ours and the participatory structure will belie at least part of the message of our mutual equality.

Law plays a special role in fulfilling this communicative mission. Recall how the promise played an important role in accomplishing what gratitude required. First, by limiting my degrees of moral freedom, the promise committed me to a course of action that justified normative expectations by the recipient and thereby facilitated reliance that made my actions of gratitude more valuable. Second, the intertemporal nature of the promise underscored the expression of gratitude. Finally, the promise itself created those expectations through communicative means and thereby transmitted both my recognition that I owed gratitude and that my actions were intended to be taken as such by the recipient. The promise was itself communicative and substantive at once. Likewise, law also has the capacity to communicate our collective stance, and at least one embodiment of our motive, while also achieving substantive normative results. Although the analogy is imperfect, the articulate generation<sup>24</sup> of a law with specific content is

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<sup>24</sup> I use the phrase “articulate generation” to underscore that my thesis encompasses not only legislatively generated law, but also other forms of the generation and articulation of law including through the development of common law, judicial interpretation, and executive interpretation.

analogous to the promise, its implementation and enforcement are akin to the performance of the commitment, and its democratic provenance is what makes the law and its implementation an expression of our voice.

Were we just to perform what justice (otherwise) requires of us without declaring our commitment through law, in a sense, we would perform the right actions and we might act from respect but we would fail to do so clearly, under the banner of a self-assumed, joint public commitment. Some actions, especially those implicating fundamental status, require deliberately communicated motivation of a particular kind from the proper recognition of the relevant reasons.<sup>25</sup> Of course, it can be better for the conforming action to be taken without an accompanying clear message of recognition and commitment, than for no action to be taken at all. Take the familiar friend who always denies error and who does you a wrong. When confronted, she may resist recognition of the error, but subtly begin to alter her conduct and engage in small kindnesses that work some compensatory repair. Sometimes such gestures are a sufficient form of communication themselves, but in other cases, something more articulate may be required – such as when the transgression is substantial or a repeat offense, the denial was outrageous, or the principle at stake is fundamental. The behavioral change matters, as do the material offerings, but the friendship may not be fully repaired without the more articulate recognition of the relevant principle, the shortcoming, and their articulation as part of a commonly understood history and commitment going forward. Similarly, even if we were to vote, day by day, to endorse and enable these performances in a thorough exercise of direct democracy, we would not be undertaking a commitment to which its recipients could point as

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<sup>25</sup> At the same time, other conforming actions embroider their motives on their sleeves but are more meaningful without further commentary. See the related point in SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 180-81 (2014).

publicly common ground. It would be akin to my repeated but still spontaneous decisions to water my neighbor's plants. True, certain overtures and some deliberate patterns of behavior directed at others may themselves generate reasonable forms of reliance that exert normative force akin to the force of a promise.<sup>26</sup> But, at best, such overtures only indirectly and ambiguously convey a commitment to a substantive expression of respect with longevity. They ambiguate between a commitment and a more temporary grant supplemented by a perpetual re-authorization process. Patterns of beneficence without the backing of a commitment render awkward, to put it mildly, appeals and references to the prospect of continued performance by their beneficiaries.

Even back in what now seem like the halcyon days of the Obama Administration, the lack of presumptive longevity was the shortcoming of DACA and DAPA, the executive orders that refrained from enforcing immigration controls against undocumented residents who arrived here as children and their families. Even assuming their contested constitutional validity and, counterfactually, their perpetual and predictable renewal by successive Presidents,<sup>27</sup> an ongoing

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<sup>26</sup> This principle is encapsulated legally in the doctrine of promissory reliance. RESTATEMENT (SECOND) OF CONTRACTS, § 90 (AM. LAW INST. 1981).

<sup>27</sup> Under President Obama, the U.S. Department of Homeland Security (DHS) implemented a policy known as Deferred Action for Childhood Arrivals (DACA) in 2012, allowing certain undocumented immigrants who entered the United States as minors to apply for temporary relief from removal, and employment authorization. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. In 2014, DHS expanded eligibility for DACA and also implemented Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), allowing certain undocumented parents of U.S. citizens and lawful permanent residents to apply for the same benefits of the DACA program. See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014),



discretionary refusal to enforce an extant law authorizing deportation, rather than a long-term commitment to inclusion, conveys only a partial recognition of belonging and deprives such residents of security as well as the ability to demand recognition and the rights of members.

Whereas, by generating public commitments through law, we give evidence that the system of justice is endorsed by us, so much so that we choose it and we choose to commit to it in a public way that typically carries a substantial degree of longevity. As with promises, public commitments through law deliberately alter the normative status of recipients to provide them with a common reference point on which to base expectations and to form entitlements to call upon our adherence. Analogous to promises, by virtue of our collective, evinced willingness to enact the associated normative changes, they partly achieve their normative communicative aims simply through their generation and public declaration.

Other expressive theories of law have focused predominately on the negative expressive potential of law<sup>28</sup> – to oppress, to marginalize, to disparage, or to discriminate through expressive means – and neglect what I have been emphasizing, namely, the positive communicative

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[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf). Subsequently, some states challenged the 2014 DAPA program and a preliminary injunction went into effect soon after the program's creation. *See Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd* by an equally divided Court, 136 S. Ct. 2271 (2016). Before litigation about the program concluded, the Trump Administration rescinded the program. *See* Memorandum from John F. Kelly, Sec'y of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et. al., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

<sup>28</sup> One important exception is Marianne Constable who explores a range of specific ways that legal activities, through their use of language, function as forms of mutual communication and dialogue that invoke conceptions of justice and, as speech acts, contribute to the characterization and constitution of our political community. MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* (2014).

capacity of law.<sup>29</sup> I think this difference in emphasis may trace to the fact that many expressive theories work, often implicitly, with a nondemocratic model in which the government or state as speaker is treated as distinct and separate from its audience.<sup>30</sup> Whereas, a democratic legal approach understands government speech as, ultimately, ours. If law embodies our speech to ourselves, then when its expressive content subordinates or disparages a portion of our community, we are implicated and not only entitled to a horrified reaction from the sidelines. At the same time, because democratic law is ours, we are enabled to perform our communicative duties through it.

As with other forms of communication, the appropriate mode may vary depending on the subject matter. In some cases, a democratic provenance with longevity may not be enough, given the myriad forms of democratic action and the levels of commitment that the law may enact. The particular mode of democratic conveyance may matter. Consider, for example, the legal status of women vis-à-vis our government and our fellow citizens. Achieved through a

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<sup>29</sup> See e.g., CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 124-28 (2007); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 38-41 (2008); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 U. MINN. L. REV. 1, 2 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000). But see Richard Brooks' fascinating forthcoming work on titles and addresses, THE FIRST LAW OF ADDRESS (ms.), which explores both the positive and the negative expressive power of titles and addresses, whether privately or legally conferred. Some other accounts are also focused on what the government expresses and may be understood to mean, whereas I use the term 'communicative' to emphasize that what matters is not only what is said but successful conveyance and uptake by the audience. This marks a substantial departure from Anderson and Pildes who are interested predominantly in speaker meaning. Anderson & Pildes at 1508, but see *id.*, at 1571-72.

<sup>30</sup> This implicit assumption also operates in the literature on criminal punishment. In that literature, expressive theories have also highlighted the constructive communicative function of punishment but have not imagined the communication as bi- or multi-directional, but rather unidirectional, from state to criminal. See also *supra* note 22.

hodgepodge of statutes and constitutional decisions, roughly speaking, women enjoy an equal legal status with men in the sense that *governmental* gender discrimination is putatively illegal. (Some major forms of private discrimination against women are illegal but, notably, although private racial discrimination in all forms of contracting is recognized as illegal in theory, the same is not true in theory or in practice about gender discrimination in contracting.)<sup>31</sup> Putting aside the substantial shortcomings in enforcement, as a pure method of recognition, the achievement of this status seems wanting, primarily because the more straightforward and direct methods of acknowledging our equal status have been rebuffed. We were excluded in the original Constitutional declaration of equality; the most straightforward, direct acknowledgment of our equal status, the Equal Rights Amendment, was rebuffed; and the constitutional enshrinement of our equality affords intermediate but not strict scrutiny of gender discrimination. Our claim to equality is cobbled together does not take a direct and straightforward form, and must be reargued at every turn; we may win many of the intermediate scrutiny battles, but they have to be fought. Our equality is not a definite right we can claim and demand accountability for, but is in the continual process of being forged. The outcome may resemble equality, it's a lot better than the practice preceding it, but, in historical context, the message feels ambivalent.

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<sup>31</sup> See IAN AYRES, *PERVASIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001). While Ayres draws important attention to the problem and its financial ramifications with respect to car sales, he is mistakenly sanguine about California's efforts to address this discrimination. *Id.* at 3, 136. California's Gender Tax Repeal Act of 1995 prohibits gender discrimination in *service* contracts but not contracts for the sales of goods. Cal. Civ. Code § 51.6 (1999); see also Harold E. Kahn & Robert D. Links, *CALIFORNIA CIVIL PRACTICE: CIVIL RIGHTS LITIGATION* § 10.4 (2016); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting* 19 *CARDOZO J.L. & GENDER* 437 (2013); Whitney Brown, *The Illegality of Sex Discrimination in Contracting*, 32 *BERKELEY J. GENDER L. & JUST.* (forthcoming 2017) (arguing that, *contra* common interpretations, private gender discrimination in contract violates the Civil Rights Act of 1866.)

I mention this example not to pursue the specific complaint but to underscore two themes of my discussion: First, the installation of the ‘pattern’ justice requires is significant, but often insufficient as an adequate manifestation of mutual recognition. Second, what is insufficient about the governmental action qua recognition is neither that the entire country or the full legislature isn’t vocally supporting inclusion or equality nor that some citizens harbor ambivalence in their hearts. Rather, the expression is inadequate because the moral message, to be communicated properly, requires a communicative commitment of the right form and content. Democratic law embodies commitments on behalf of an entire collective. Where fundamental principles of equality and inclusion are at stake, an explicit, direct, and unequivocal commitment and an acceptance of accountability are required, advanced for the right reasons, from a collective that is correctly constituted and empowered.

As I earlier observed, the analogy between promise and law is inexact. The *form* of law provides two important points of contrast with the form of promise. First, in addition to grounding legitimate expectations in the recipient, laws often also empower the declarer to form substantial normative expectations of the recipient such as that residents will file taxes by April 15<sup>th</sup>, notify the state of a car accident causing substantial damage within ten days, and refrain from deceptive commercial advertising. Whereas, not all promises generate expectations about the promisee. Reciprocal promises where both parties make entangled commitments conditional on each other do so, of course. Arguably, at least some promises create normative expectations that the promisee will, where reasonable, waive the promissory commitment, but expectations of waiver are fairly dilute requirements compared to the more robust expectations law generates. Notably, when we are both co-authors and co-recipients of law’s address, this idea that a communicative declaration could empower declarers to expect something substantial of their

audience makes more sense than it does in non-democratic authority relations. Second, absent conditions of excuse, a promise, being irrevocable, is normatively resilient to the promisor's change of mind. A law has greater normative resilience than a mere stated intention (which can be revoked on the spot) because a change of law requires following procedures that usually take time. Especially with respect to democratic law, these procedures include the ability of the audience (and authors) of the law to comment on and deliberate together about the change of law. But, with the exception of some entrenched constitutional provisions, most laws are revocable through collective expressions of will, making laws less normatively resilient than promises. This feature is not a shortcoming but fits the requirements of a communicative agent whose composition alters over generations and with that compositional change, its deliberations and its message. Hence, the commitments made through law have normative force and for some duration but, normatively, the duration is more discretionary and subject to change than with a promise.<sup>32</sup> Still, these notable differences do not threaten my use of the analogy. Both types of commitment, law and promise, fulfill the need to communicate through public, normative achievements that have duration.<sup>33</sup> Making such commitments reinforces the social bases of self-respect by creating and communicating publicly common normative ground.

Of course, even absent public, official commitments, citizens can and must call upon each other to fulfill their duties of justice in extra-legal contexts. In part, they must do this in order to ensure that we generate more explicit and official forms of legal recognition. Still, the ability to

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<sup>32</sup> Depending on your theory of excuse, non-performance of a promise may be excused by a wider range of circumstances than failures to comply with or enforce the law.

<sup>33</sup> Unlike mere custom, for example, law, as a system, involves public, official commitments whose alteration and interpretation themselves involve public procedures; custom does not involve a *commitment* between citizens to honor their mutual equality. Further, the methods by which customs may change permits non-deliberate drift, change propelled by some without the input or agency of others.

refer to democratic law has some special moral force, even when its content is co-extensive with what justice already demands.<sup>34</sup> In myriad cases democratic law renders determinate how principles of justice are to apply in the instant context. Justice may clearly demand, for instance, fair equality of opportunity, but the law may, in response to the specific needs and threats encountered in the relevant environment, render significantly more concrete how that requirement will be implemented. Thereby, the law gives specific shape to the direction of our actions and the content of our expectations. Concretizing a partly indeterminate obligation figures among the standard functions of a democratic law and is crucial to the generation of a particular polity's distinctive identity.

Still, it would be worth considering the (possibly hypothetical) case where the law is fully redundant of the requirement of justice, adding no detail or specific content. For instance, some (though not I) might think this characterization holds of the First Amendment's commitment that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Even if redundant, its *articulation* has distinctive communicative moral resonance because it conveys to everyone that we know we have this duty, we know it is relevant to our situation, and we aim to convey our knowledge of this duty to each other as fellow duty holders and claimants. Putting it into words, and putting it into our own words, conveys sincerity and a sense that this moral commitment is sufficiently important to make salient. This acknowledgment is a central moral good for the recipient, and may also assure the recipients and induce reliance. This point is a familiar one in criminal procedure circles. Officers should recite the Miranda warnings to their arrested peers, to lawyers, and to repeat offenders even when their

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<sup>34</sup> See Seana Valentine Shiffrin, *Immoral, Conflicting and Redundant Promises*, in *REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON* (R. Jay Wallace, Rahul Kumar, and Samuel Freeman, eds., 2011).

recipients obviously already know their rights. Recitation of the warnings to the knowledgeable conveys that the reciting officer knows the applicable rights, is acknowledging them to the party those rights protect, and therefore conveys a commitment to respect them.<sup>35</sup> Articulation is not only important to the recipient but to the duty-holder who articulates it. Public articulation forges a personal connection to the duty in a way that silent acknowledgment does not, reinforcing the duty's role as an organizing principle for the speaker.

Finally, articulation alters the moral dynamics between speaker and listener. When a duty-holder conveys her acknowledgement and affirmation to the person to whom it is owed, she also acknowledges that the beneficiary has a stake in her performance and in being assured. By establishing the duty as common ground between them, she invites the beneficiary's perspective on the performance.<sup>36</sup> This invitation enhances the meaningfulness of the communication and alters the moral posture of the claimant. When I ask you to perform your unacknowledged duty, the dynamic is likely to be one of demand or moral education. Our mutual posture structurally tends toward the hierarchical or the adversarial. By contrast, when I ask you to perform a duty you have publicly affirmed, the dynamic is more one in which I supply a reminder. Because of your public acknowledgment of the duty and my stake in it, my reminder could fit more into a cooperative model. I am reminding you of something you have affiliated yourself with and that, to some extent, is publicly connected to your identity and your integrity. We could understand

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<sup>35</sup> See Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 6-7 (1986). Of course, mere recitation of rights (even when sincere) may fall short of effective communication and in some circumstances, may induce a false complacency by suspects that the police protect and respect their other rights and interests. Adequate communication in many circumstances may require ensuring accurate understanding (as well as good faith implementation of the voiced commitment).

<sup>36</sup> See also Shiffrin, *Immoral Promises*, *supra* note 34, at 156; Jorah Dannenberg, *Promising Ourselves, Promising Others*, 19 J. ETHICS 159, 178 (2015).

my reminder as a partial effort at joint collaboration in working out how and when to advance something of mutual, shared concern.

Of course, that's the ideal case. If you are recalcitrant, things may take a turn for the testy. But, in simpler cases where I need to call on you to plan your own performance so I can coordinate and plan, or where you forget or procrastinate, your acknowledgement of your duty facilitates, more naturally, a cooperative dynamic given the voiced mutual understanding. Even when we have conflicting interpretations, our discussion will tend to center more on what we mean and value about dis-establishmentarianism, for example, rather than whether religion or atheism are bunk.

I suggest the same thing is true in politics. To take just one example, this may sometimes characterize the posture of parties in litigation about cases of first impression. Both sides have a strong view about what justice requires, but they also regard the process as a necessary one of working out, with greater articulation, the implications of our prior voiced commitments. That we need to work it out does not always reveal the other side as evil or recalcitrant. Even in an adversarial context, there can be an underlying cooperative spirit.

I began by arguing that even were our material relations already just, each individual would have a need for an organized social forum that affords each person the opportunity to participate in a communicative endeavor, alongside others, directed at all her fellow citizens. Equally, she has a need to receive that forum's communicative output. The assumption of realized justice was not meant to be plausible, but to highlight that the value of democratic law is not fully captured by its role in obtaining the results of material justice, whether in circumstances amenable to social consensus or social conflict. But, of course, the material components of justice do not come to us pre-packaged and pre-installed. Consequently, our individual obligations of justice are not



confined merely to taking ownership of an otherwise extant system of justice in a communicatively resonant way, but to ensuring that the material components of justice are crafted and realized in a communicatively resonant way as *ours*.

As with the communicative burdens with which I began, these individual obligations could not be discharged through individual, uncoordinated action. But, they can be achieved collectively through an organization to which we all belong and contribute that manifests equality in its explicit structure, its processes of creation and implementation, and the consequences of its output. While each of us cannot *show* our recognition of each other's mutual equal status and belonging through our everyday interpersonal conduct, our legal system can do this. It can adopt explicit laws that declare and support our equal status and needs. Its laws can aim to create environments in which individuals interact with one another on an equal basis, including the avenues of access to power. Further, its own internal procedures of generation, implementation and enforcement can reflect this fundamental recognition. These processes and outputs themselves may serve as our collective expression to ourselves, when their generation arises from processes that pay tribute to our mutual equality.

The state is the crucial organizational structure to achieve these communicative aims. Families and voluntary associations cannot achieve their values while paying full tribute to the value of inclusion. Families cannot achieve intimacy while embracing a stance of terrific inclusiveness. To achieve the substantive affiliative values and purposes of voluntary associations, they must have the ability to exclude on the basis of perceived fit and congeniality as well as on the basis of substantive dissonance.<sup>37</sup> They cannot even be achieved by a group that includes

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<sup>37</sup> See Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839-88 (2005).

everyone in virtue of some common substantive feature or aim, such as our each being a child of God. For, while the all-inclusive association may insist on our common possession of the feature, the individual may disavow its possession or importance. The association will thus fail to convey the appropriate message of inclusion, one that must be capable of being received and endorsed by the included. To convey our endorsement of the value of belonging, we need an organization that has the qualities and resources necessary to be a site of unselective inclusion, namely one that has some control over a geographical space and sufficient resources to ensure that its members can be afforded access to them that will allow them to function effectively within its space as an equal member. The democratic state has a unique ability to convey this mutual recognition that is connected to its unique ability to respect and address a related, fundamental moral fact, namely that we each, as social beings, have a legitimate need to have a home among others – a place to which we belong and in which our other needs have standing, just in light of our status as a human being. (This desideratum places pressure on citizenship and immigration policies to be, in some respect, automatic, random or, at least, not qualification-based.) Fulfilling these two interconnected missions – expressing through action the recognition of our mutual equality and our legitimate claim of inclusion and membership in a collective moral body– are the fundamental charges of the state, achieved in their most meaningful form through laws crafted within a democratic setting in which we each have participatory powers in the construction of law and the mode and direction of implementation.<sup>38</sup> Those powers allow the

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<sup>38</sup> Contrast Kolodny, *Rule over None I*, *supra* note 4, at 221-22 who highlights the insulting message conveyed by an unequal distribution of power, but identifies nothing positive about democratic schemes to recommend them. Thus, his theory, as he concedes, lacks the resources to object to a system of universal, disempowered, but equal subjection imposed by a benevolent dictator from afar who imposed a basic structure (otherwise) compliant with justice. On Kolodny's view, a commitment to democracy only clearly yields a commitment to substantive levels of power equally shared because no benevolent distant dictator, who could equally subordinate ourselves to a just structure without power, happens to be on the horizon as an equally palatable

state's expressive actions to be reasonably attributed to its citizens. Two features of law do work here: (1) law effects a persistent institutional commitment applicable to all and (2) in a democratic structure, law has a communicative dimension whose content may be attributed to all of us together, even if not to each of us as individuals.

### *Participation and Interpretation*

This account offers answers to puzzles that dog other democratic theories: it offers reasons why one has reason to participate in democratic processes even when, predictably, one's preferred position would win without one's support or lose even with one's support; it offers reasons to follow and respect laws; and, it supplies a connection between the two endeavors. My reason to vote is not exhausted by my interest in influencing the election's outcome, but is provided by the imperatives that I should express my affiliation with the joint collective body that has the function of embodying our commitment to our equal status, and that I, as a co-author, should contribute to the joint deliberation about and determination of the particular form that commitment should take (whether directly as with a referendum or indirectly when we elect agents who themselves offer a concrete vision of how to make our joint commitment more determinate). Even when I believe that my substantive policy positions or representative choices are doomed or over-determined, there are independent grounds to contribute my voice to the

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alternative. Whereas, my view identifies the positive contribution of democratic schemes that schemes of equal subordination lack; democratic schemes enable us to meet our communicative duties to one another. Daniel Viehoff's account of political authority, which emphasizes the importance of 'coordination without subjection' or of avoiding political authority emanating from unequal relations of power, is also vulnerable to a similar complaint; as he acknowledges, his argument for the special connection between political authority and democracy does not rest on any special positive feature of *democracy*, but only the absence of subordination – an omission that holds just as well of decision making by coin-flipping. See Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFF. 337, 374-75 (2014).

public communicative affirmation of the process as itself part of the substantive embodiment of our commitment to equality.

Adherence to law may be given a similar treatment.<sup>39</sup> My reasons to adhere include the communicative recognition that democratic law is an ongoing effort to express our joint mutual respect.<sup>40</sup> By adhering to it, I express my affiliation with and ongoing effort in that joint affirmation, even when I might have urged us to express our joint mutual respect in quite different terms.<sup>41</sup> Protest and other visible, vocal means of dissent work alongside voting and

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<sup>39</sup> This argument is not intended to be exclusive, but is compatible with other accounts of the reasons to vote and of reasons to respect the law. With respect to the latter, my argument may be a version or specification of Scheffler's recent argument in which he argues that when membership in a group is non-instrumentally valuable, there are prima facie obligations to abide by its norms. See Samuel Scheffler, *Membership and Political Obligation*, 25 J. POL. PHIL. (forthcoming 2017) <http://onlinelibrary.wiley.com/doi/10.1111/jopp.12125/full>. I find his argument intriguing, but I am more confident that it is persuasive when there is a close substantive connection between the group's system of norms (or conformance with them) and the reasons why membership in the group is non-instrumentally valuable. That connection need not always hold but it does in the case of democratic law where the norms themselves, the system of their generation, and the effort to abide by them aim in conception to express respect for our mutual equality and the achievement of a concrete realization of our equality is, partly, why membership is valuable.

<sup>40</sup> I believe an account of this kind may evade the criticisms Liam Murphy lodges against other efforts to connect democratic law with reasons to respect the law, criticisms noting a gap between arguments for democracy *as an institution* and arguments for *individual* compliance. See LIAM MURPHY, *supra* note 3, 123-126 (2014). The argument I have pursued for democratic law foundationally connects the institution of democratic law to individual duties to show respect for others and so avoids the gap. Moreover, the communicative grounds for respecting democratic law does not appeal to the disrespect that disobedience may show to others who comply or vote, whether because of concerns about free-riding or unfairly substituting one's own will for the general will. Rather, the reason to vote and to respect democratic law that I identify is grounded in the *positive* communicative respect such actions distinctively convey because they are distinctive ways of endorsing a system whose structure and content is designed to embody respect for others as equals.

<sup>41</sup> See also MEIR DAN-COHEN, NORMATIVE SUBJECTS 221-224 (2016). Dan-Cohen argues that because "communal communication expresses an aspect of the members' identity defined by their collective affiliation," communal speech may represent community members, even as there

compliance. Separate from any hope of sparking repeal or future reform, these activities add nuance, complexify, and even meaningfully ambiguate the message conveyed by an election or the passage of a law. They render vivid, where necessary, that a particular law's claim to represent *us* may be especially precarious (and not only dis-preferred by a large minority) and that it certainly does not represent the judgments of many of us as individuals. This symbiotic complementarity of participations in elections, following the law, *and* vocal protest underscores a point I made at the outset that a free speech culture is as essential to democracy as elections and other representative devices.

A communicative account also offers reasons of a different kind for a Dworkinian, morally-tethered approach to legal interpretation. Very roughly speaking, the drive to legitimize law's intrinsic coercive power drives Dworkin's argument for a morally infused justificatory element of interpretation.<sup>42</sup> A conception of law as coercive, however, evokes some of the estrangement and resignation toward law and democracy I gestured towards at the outset – starting with the idea that law fundamentally envisions reluctant compliers toward whom we must imagine how, morally, we could threaten them. When one keeps foremost the idea that law is *ours*, coercion might not figure among the ur-qualities to recite about law unless one conceived of oneself as weak-willed or perhaps into bondage. For these and other reasons, I have never been persuaded that coercion is an essential feature of law. But on a communicative view, moral readings do not

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is internal disagreement between members about the content of the appropriate message. When an authorized member speaks for the collective, even if other members would have said something different had they been called upon to speak, all the members may bear responsibility for what is said.

<sup>42</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE*, 108-12 (1986). The emphasis on legitimating state coercion also drives David Estlund's defense of democracy and elections. Estlund, *supra* note 5, at 65-66, 99. See also HANS Kelsen, *THE ESSENCE AND VALUE OF DEMOCRACY* 27-34 (Nadia Urbinati & Carlos Invernizzi Accetti eds., Brian Graf trans., 2013).

arise from a need to legitimate otherwise suspect or regrettable threats; thus, a communicative view of democratic law should be positioned more naturally to explain why a morally-tethered interpretative approach is also apt for the governing rules of voluntary associations – even those that forswear coercive methods of enforcement. Legal materials should be interpreted, insofar as possible, to be sensitive to the demands of justice for two reasons other than the justification of coercion: First, if an essential function of democracy is to convey jointly to each other our commitment to justice and our other moral aims, then the principle of interpretative charity recommends that democratic legal materials should be interpreted in light of this aim. Second, a judge herself, as a citizen representing the collective, has reason to contribute to the moral communicative process of which law is a component by infusing its legal decisions with appropriate moral content. A judge would be sensitive to precedent and continuity with the past (what Dworkin labels ‘fit’) in order to realize our interest in expressing ourselves, when called for, with the constancy that contributes to the depth and steadiness of our commitments. Attending to fit also preserves and extends the coherence of our distinctive voice as a community over time. Finally, to the extent that fit roughly serves the values of horizontal equity, albeit intertemporally, sensitivity to fit also institutionally manifests our commitment to equality.

### *Bread and butter laws*

Suppose laws forged and maintained in democratic circumstances do play a role in the articulation of our moral status and our joint moral values. Why not view this communicative function as an important anomaly true only of a handful of legal materials dedicated to high values, such as the Constitution and quasi-constitutional statutes like the Civil Rights Acts and the once, aspiring to be great, Affordable Care Act? My theory may seem a poor characterization of bread-and-butter law, by which I mean not only agricultural laws like those that regulate the

purity of the food supply but also the laws and regulations enforced by the department of weights and measures or the regulation establishing the fee per hour at a parking meter. Most laws do not sport the high values of a constitution. Most laws are crafted by officials, rather than a gathering and simultaneous expression of the electorate. In other words, what significant value and relation do *we* convey to one another through the DMV's setting a \$2/hour parking rate?

In response, I deny the premise that there is a substantial qualitative distinction between everyday law and high constitutional and statutory law. First, bread and butter laws, when justified, serve to promote our moral ends together. Often, they enable us to pursue our own robust ends as individuals, allowing for meaningfully autonomous lives compatible with our simultaneous participation in collective life. Bread and butter laws often do so at a material level, aiming to ensure that food production is done safely, that transport routes and other elements of infrastructure are maintained, etc. When they operate well, everyday laws support a structure that frees us from addressing daily and directly the safe provision of each of our material needs; the legal structure supports a social division of labor that we may rely on as safe, fair, and adequate to the task. Everyday law also preserves public spaces, which in turn serve public values, including that of free social interchange, which, itself, is a constituent of democratic culture. Even parking regulations serve an important moral end by enabling a variety of people to flow through public space, rather than permitting access points to be monopolized by a few. When it operates well, private law likewise shoulders some burdens to facilitate individuals' concentration on their own projects permitting strangers and intimates alike to arrange their lives together on just terms with some security and direction for the range of unforeseen or suboptimal circumstances that may arise. Further, private law, like public law, encodes other commitments and facilitates other forms of healthy moral relationships. Contract law, for instance, may be

considered as a legal structure dedicated to upholding the public values of promissory honesty and fidelity and to supporting a culture of trust. Once we consider the underlying moral purposes of quotidian law, it seems difficult to sustain a sharp contrast between its normative communicative functions and the more express aspects of the Constitution.

### *Conclusion*

I have been arguing that a system of democratic law is an essential mechanism through which the community's members express to each other their joint recognition of each other's membership – their belonging by right and their equal status, substantively understood. This argument might serve as a counterpoint to the widespread sense of many that democracy has no intrinsic value or that it serves mainly as a mechanism of fair conflict-management among disputants. It might also revive some interest in the law by democratic theorists and perhaps encourage the idea that the role and function of law (or legal materials) in a democracy differs substantially from its role in unjust systems.

Such a theory lends itself to a more positive, inspirational view of law, democracy, and their aspirations, than many extant views that cast law and democracy as methods of controlled skirmish between opposed interest groups. There is a puzzling mismatch between the dedication and zeal people have for democracy and the resigned air of many desultory accounts of democracy. Having the resources to describe democratic law as aspirational would have the virtue of befitting the urgency of democratic movements worldwide and the courage and sacrifices made by their members. Effective communication of a deliberate and sincere motive of inclusion in a society of equals through articulate and practical means is a cause; its achievement is a moral accomplishment.



On some views, successful efforts at moral agency represent the realization or at least the pinnacle of freedom. Certainly, the public affirmation, in discourse and action, has substantial meaning to its recipients that goes beyond the pattern of action it produces. One lives in a substantially superior community when one knows that one is treated as an equal because the community knows and values one's equality, and has gone to the effort to make this palpable, rather than because the community will suffer economic sanctions if international observers perceive a pattern of discrimination. Successful communication of a deliberate motive of inclusion is a rather substantial achievement, of great importance and one that has the personal, expressive dimension that makes something an end and a deliberate destination, rather than merely the site upon which one is deposited if one has avoided important dangers and catastrophes. Moreover, given the palpable challenges of moral understanding and communication, and the elements of creativity and expression in moral performance, the process of articulating our moral commitments together may contribute to a climate of trust and cohesion, and the pursuit of a collective political identity. These accomplishments in turn may allow us to proceed to embark on modes of moral expression that represent us as a distinctive moral community. The moral and expressive collective opportunities that democracies afford, not their status and function as lesser evils, are what make sense of the passion for democracy.

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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.<sup>43</sup> First, a little background on federal preemption and common law: Federal preemption is one of

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<sup>43</sup> *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014).

many legal doctrines that enforce the supremacy of the federal government over state 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.<sup>44</sup> 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

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<sup>44</sup> 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.

community is powerful enough to develop a distinctive voice and small enough to generate a 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,<sup>45</sup> since the landmark case of *Erie Railroad Company v. Tompkins*,<sup>46</sup> common law jurisprudence is largely a state law matter, usually overseen by state courts.<sup>47</sup> 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,<sup>48</sup> the Court has increasingly expanded the scope of federal preemption in recent years. For example, the Court has preempted states' common law unconscionability

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<sup>45</sup> 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).

<sup>46</sup> 304 U.S. 64 (1938).

<sup>47</sup> 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).

<sup>48</sup> 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).

jurisprudence through its finding that the Federal Arbitration Act evinces strong support for clauses in standard employment and consumer contracts that mandate individual arbitration.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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

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<sup>49</sup> 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).

<sup>50</sup> 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 UCLAL. REV. DISCOURSE 136, 142-43 (2013) (decrying the inconsistency between corporate insistence on individual arbitration and its conveyance through standard-form contracts of adhesion).

<sup>51</sup> See also Seana Valentine Shiffirin, *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.”<sup>52</sup> 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.”<sup>53</sup> It excludes ‘subterfuges and evasions....of the spirit of the bargain...[and] abuse of a power to specify terms....’<sup>54</sup> 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.”<sup>55</sup> 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

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<sup>52</sup> *Ginsberg*, 134 S. Ct. at 1426-27.

<sup>53</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981).

<sup>54</sup> *Id.* at cmt. d.

<sup>55</sup> *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....”<sup>56</sup> The Court operated under some pressure to remain true to an earlier preemption decision, *American Airlines, Inc. v. Wolens*,<sup>57</sup> 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.<sup>58</sup> 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.

Nonetheless, Northwest prevailed. Justice Alito reasoned that the frequent flyer program related to price because Ginsberg used his miles for flights and upgrades.<sup>59</sup> Further, the opinion offered the assurance that the free market and the Department of Transportation would

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<sup>56</sup> 49 U.S.C. § 41713(b)(1) (1994).

<sup>57</sup> 513 U.S. 219 (1995).

<sup>58</sup> *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.

<sup>59</sup> *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.

adequately police bad faith.<sup>60</sup> 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.’<sup>61</sup>

The division the Court drew between the state’s imposition of a duty of ‘good faith’ and the parties’ voluntary undertakings is strange,<sup>62</sup> because the duty of good faith (and cousin doctrines like ‘best efforts’) is largely understood as a way to interpret the meaning of those voluntary undertakings<sup>63</sup> -- a kind of secondary duty to ensure parties honor the agreement and its primary

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<sup>60</sup> *Ginsberg*, 134 S. Ct. at 1433. The invocation of the Department of Transportation was odd in light of Wolens’s stress on the fact that the Department of Transportation “lack[s] contract dispute resolution resources.” *Wolens*, 513 U.S. at 234.

<sup>61</sup> *Ginsberg*, 134 S.Ct. at 1432; *see also Wolens*, 513 U.S. at 228–29.

<sup>62</sup> 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 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*).

<sup>63</sup> *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 Saprai 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

commitments. Whether the duty of good faith is understood to be robust or modest,<sup>64</sup> 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.<sup>65</sup> The 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.<sup>66</sup>

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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).

<sup>64</sup> 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).

<sup>65</sup> 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).

<sup>66</sup> *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).

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.<sup>67</sup>

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.<sup>68</sup> The duty of good faith is not a state-imposed, distinctive, and discrete duty such as a

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<sup>67</sup> 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 motivational foundations of compliance with law and promoting an evolving understanding of the law’s content)

<sup>68</sup> 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).

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.<sup>69</sup>

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 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

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<sup>69</sup> 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.*

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.<sup>70</sup> 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.<sup>71</sup>

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.

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<sup>70</sup> 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.

<sup>71</sup> 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.

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.<sup>72</sup> 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.

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

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<sup>72</sup> See *Ginsberg*, 134 S. Ct. at 1433.

informal efforts to resolve the problem are unsuccessful, you may wish to consider legal action through the appropriate civil court.<sup>73</sup>

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.<sup>74</sup> The *Ginsberg* decision, through preemption, deprives the appropriate civil court of the relevant legal resources to apply. As a consequence, there are no applicable legal standards, whether for the frustrated party or for an airline eager to comply with the law.<sup>75</sup> 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.

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<sup>73</sup> *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.”).

<sup>74</sup> 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”).

<sup>75</sup> 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).



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,"<sup>76</sup> 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.<sup>77</sup> 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 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.<sup>78</sup> First, the process of generating common law has some distinctive

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<sup>76</sup> 49 U.S.C. § 41713(b)(1).

<sup>77</sup> *See* *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429–30 (2014).

<sup>78</sup> 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-

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.<sup>79</sup> 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

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empties 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?

<sup>79</sup> 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).

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).<sup>80</sup> 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 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

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<sup>80</sup> 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).

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.<sup>81</sup> 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.<sup>82</sup> Implicit in these tests is the idea that the content of an enforceable constitutional right involves a balance between constitutional interests and state interests.<sup>83</sup> Yet, despite its status as a basic constitutional concept, we have dedicated insufficient attention to what it means to say in a constitutional 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*

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<sup>81</sup> 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).

<sup>82</sup> 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).

<sup>83</sup> 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.

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.<sup>84</sup>

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.<sup>85</sup> A state actor cannot assert a legitimate interest in the violation of a constitutional right, conceived of as an end in itself.<sup>86</sup> Further, a state cannot assert an interest in a matter outside its jurisdiction, such as to discharge an exclusively federal mandate.<sup>87</sup> That *a priori* part yields a tolerably good understanding of what a legitimate state interest could not be, but little positive understanding of

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<sup>84</sup> 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.

<sup>85</sup> 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) (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.

<sup>86</sup> See, e.g., *Cleburne*, 473 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).

<sup>87</sup> 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.").

what it could be and whether a state possesses it.<sup>88</sup> Apart from a small handful of religious freedom cases, investigations into pretextual rationalizations to disguise illegitimate motives,<sup>89</sup> and some of Justice Brennan's opinions,<sup>90</sup> 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.<sup>91</sup> This nonchalance is difficult to understand,

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<sup>88</sup> 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).

<sup>89</sup> *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 worship, despite the state's asserted interests in the maintenance of public health); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>90</sup> 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 132.

<sup>91</sup> 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



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.<sup>92</sup> 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.'

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(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 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. Shiffirin, *WHAT'S WRONG WITH THE FIRST AMENDMENT* 74-76 (2016).

<sup>92</sup> 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.

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 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.<sup>93</sup> 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'

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<sup>93</sup> 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 86.

choices regarding the timing of their deaths, betraying a more qualified interest in preserving life when disvalued by its bearer.<sup>94</sup> 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

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<sup>94</sup> 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.<sup>95</sup> 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

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<sup>95</sup> 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*,<sup>96</sup> 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.<sup>97</sup> Justice Rehnquist's majority opinion emphasized that "Washington has an 'unqualified' interest in the preservation of human life."<sup>98</sup> Even assuming the theoretical legitimacy of such an interest,<sup>99</sup> 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.

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<sup>96</sup> 521 U.S. 702 (1997).

<sup>97</sup> *Id.* at 708.

<sup>98</sup> *Id.* at 728 (emphasis added) (quoting *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990)).

<sup>99</sup> 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.<sup>100</sup> Right topic, wrong state.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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 another’s. It is not as though the states are univocal on this matter. Not long before *Glucksberg*

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<sup>100</sup> 497 U.S. 261 (1990).

<sup>101</sup> 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).

<sup>102</sup> *Cruzan*, 497 U.S. at 281.

<sup>103</sup> *Glucksberg*, 521 U.S. at 716–17.

<sup>104</sup> *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).



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.<sup>105</sup> 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 may assert a non-pretextual,<sup>106</sup> legitimate, but not obligatory interest but the state’s level of

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<sup>105</sup> 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).

<sup>106</sup> 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

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.<sup>107</sup> 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.<sup>108</sup> Where a state asserts a discretionary interest in fetal life *as a 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.<sup>109</sup>

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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).

<sup>107</sup> 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).

<sup>108</sup> *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.

<sup>109</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (requiring plaintiffs to demonstrate that they suffered ‘injury in fact’ for standing).

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*.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> Alternatively, it may simply show that the state's commitment to the interest was 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

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<sup>110</sup> *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>111</sup> 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).

<sup>112</sup> 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 agent does not pursue contrary aims, whereas the pursuit of contrary aims is more central to charges of hypocrisy. Unlike charges of hypocrisy, the concern about incomplete commitment need not be accompanied by connotations of venality or bad faith.

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.<sup>113</sup> 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 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.<sup>114</sup> We may also see states pursue divergent stances on other issues such as privacy, narcotics use, and state cooperation with immigration control measures, where

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<sup>113</sup> *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.

<sup>114</sup> *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).

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.<sup>115</sup>

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 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.

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<sup>115</sup> 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.

*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.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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 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.<sup>119</sup> 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

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<sup>116</sup> 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.

<sup>117</sup> 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”).

<sup>118</sup> 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.

<sup>119</sup> 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.

interest and its core, proper exercise.<sup>120</sup> 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.<sup>121</sup>

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.

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<sup>120</sup> 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).

<sup>121</sup> 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 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).



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.

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.<sup>122</sup>

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.<sup>123</sup>

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<sup>122</sup> 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.

<sup>123</sup> 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).

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*<sup>124</sup> 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 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.<sup>125</sup> 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.

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<sup>124</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>125</sup> 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.

Of course, some think that the constitutional interest of the individual should always render the state interest irrelevant. Every case should read like *Obergefell*.<sup>126</sup> 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.<sup>127</sup> I sympathize, at least with respect to the core cases representing individual constitutional interests 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.<sup>128</sup> 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

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<sup>126</sup> 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').

<sup>127</sup> 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.

<sup>128</sup> *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).

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 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,<sup>129</sup> 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

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<sup>129</sup> Different models of rights may regard this determination as metaphysical or epistemic; I will stay neutral on that question here.

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. Accountability measures are largely subject to good will, the free press, and the electorate.<sup>130</sup> 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

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<sup>130</sup> 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).

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.<sup>131</sup> Whatever 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.

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<sup>131</sup> 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 of what is required to ensure that they receive the rights and opportunities afforded by principles of justice.

With that caveat in mind, the abstract lesson points in some concrete directions and not in others. Despite some protestations to the contrary,<sup>132</sup> in litigation, that demonstration must 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.<sup>133</sup> 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

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<sup>132</sup> 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.

<sup>133</sup> 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).



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.<sup>134</sup> An all-things-considered conclusion that it has the interest 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

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<sup>134</sup> 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, 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.")

autonomy), the wise course may be a gradualist course.<sup>135</sup> 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 matched its neighbor.<sup>136</sup> 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.<sup>137</sup>

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<sup>135</sup> 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.”)

<sup>136</sup> 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.

<sup>137</sup> 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

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*

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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 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](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](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](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](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).

*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 a facial challenge on the basis of a merely hypothetical interest might yield something like a stay, akin to Judge Calabresi's 'constitutional remand,'<sup>138</sup> 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.<sup>139</sup> In the alternative, where the

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<sup>138</sup> 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 74, at 34-35 (defending the 'remanding function' and advocating the denial of jurisdiction to effect a constitutional remand).

<sup>139</sup> 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*

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

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*Political Power of 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.<sup>140</sup> 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

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<sup>140</sup> 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.