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COMMENTARY: INCOMPLETELY THEORIZED AGREEMENTS

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\* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. This essay is an expansion of certain sections of the first of my 1994 Tanner Lectures on Human Values, delivered at Harvard University in November 1994; the lectures themselves will appear under the title Political Conflict and Legal Agreement, in 17 The Tanner Lectures on Human Values (Grethe B. Peterson ed., forthcoming 1996). I am especially grateful to my audiences at Harvard for their extraordinary graciousness and for their probing comments and questions. Of the many people who offered help on that occasion, I single out for special thanks my commentators Jean Hampton and Jeremy Waldron, and also Joshua Cohen, Christine Korsgaard, Martha Minow, Martha Nussbaum, John Rawls, Tim Scanlon, and Amartya Sen. For extremely helpful comments on the manuscript, I am grateful to Bruce Ackerman, Ruth Chang, Joshua Cohen, Jon Elster, Charles Fried, Amy Gutmann, Don Herzog, Stephen Holmes, Elena Kagan, Dan Kahan, Larry Lessig, Saul Levmore, William Meadow, Frank Michelman, Martha Minow, Martha Nussbaum, Susan Moller Okin, Wiktor Osiatynski, Richard Posner, Joseph Raz, Frederick Schauer, Stephen Schulhofer, Anne-Marie Slaughter, Mark Tushnet, Candace Vogler, and Lloyd Weinreb. I am also indebted to participants in a work-in-progress lunch at the University of Chicago and to members of legal theory workshops at Oxford University and the University of California, Berkeley. I am also grateful to Sophie Clark for research assistance. Parts of this commentary will appear in a book, *Legal Reasoning and Political Conflict* (forthcoming 1996).

SUMMARY:

... Thus a sympathetic observer describes the liberal "hope that we can achieve social unity in a democracy through shared commitment to abstract principles." ... When the convergence on particular outcomes is incompletely theorized, it is because the relevant actors are clear on the result without being clear, either in their own minds or on paper, on the most general theory that accounts for it. ... Reasons are almost always offered, and in this sense something in the way of abstraction accompanies the outcome; reasons are by definition more abstract than the outcome for which they account. ... There is a second and quite different kind of incompletely theorized agreement. ... The Commission reached an incompletely theorized agreement on the value of starting (and usually ending) with past averages. ... All this should be sufficient to show that the virtues of incompletely theorized outcomes - and the virtues of decisions by rule and by analogy - are partial. ... The fact that precedents are fixed points helps to bring about incompletely theorized agreements as well, by constraining the areas of reasonable disagreement. ... Even more fundamentally, judges lack a democratic pedigree, and it is in the absence of such a pedigree that the system of precedent, analogy, and incompletely

theorized agreement has such an important place. ...

TEXT:  
[\*1733]

We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement among persons who differ in their ultimate standard; and about which there does in fact prevail a much greater unanimity among thinking persons, than might be supposed from their diametrical divergence on the great questions of moral metaphysics. As mankind are much more nearly of one nature, than of one opinion about their own nature, they are more easily brought to agree in their intermediate principles ... than in their first principles ....

John Stuart Mill n1Why didn't the [Sentencing] Commission sit down and really go and rationalize this thing and not just take history? The short answer to that is: we couldn't. We couldn't because there are such good arguments all over the place pointing in opposite directions.... Try listing all the crimes that there are in rank order of punishable merit.... Then collect results from your friends and see if they all match. I will tell you they won't.

-Footnotes-

n1. John S. Mill, Bentham, in Utilitarianism and Other Essays 132, 170 (Alan Ryan ed., 1987).

-End Footnotes-

Justice Stephen Breyer n2 [\*1734] I prefer not to [talk] ... like that; again, grand principles have to be applied in concrete cases. My job involves reasoning from the specific case ....

-Footnotes-

n2. Justice Breyer is quoted in Jeffrey Rosen, Breyer Restraint, New Republic, July 11, 1994, at 19, 25.

-End Footnotes-

Justice Ruth Bader Ginsburg n3

-Footnotes-

n3. Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Judiciary Comm., 103d Cong., 1st Sess. 180 (1993) (statement of then-Judge Ruth Bader Ginsburg).

-End Footnotes-

Introduction

There is a familiar image of justice. She is a single figure. She is a goddess, emphatically not a human being. She is blindfolded. And she holds a scale.

In the real world, the law cannot be represented by a single figure. Legal institutions are composed of many people. Our courts are run by human beings, not by a god or goddess. Judges need not be blindfolded; what they should be blind to is perhaps the key question for law. And judges have no scale. Far from having a scale, they must operate in the face of a particular kind of social heterogeneity: sharp and often intractable disagreements on basic principle.

The problem of social pluralism pervades the legal system. Some of the relevant disagreements are explicitly religious in character. Others might be described as quasi-religious in the sense that they involve people's deepest and most defining commitments. What is the appropriate conception of liberty and equality? How should people educate their children? Should government punish people on the basis of deterrence only or should it consider retribution as well? Is the free speech principle about democracy or instead individual autonomy?

There is much dispute about whether well-functioning democracies should try to resolve such disagreements, and about how they should do so if they do try. n4 Perhaps government should seek an "overlapping consensus" n5 among reasonable people, thus allowing agreements to be made among Kantians, utilitarians, Aristotelians, and others. Perhaps participants in a liberal democracy can agree on the right even if they disagree on the good. n6 Thus a sympathetic observer describes the liberal "hope that we can achieve social unity in a democracy through shared commitment to abstract principles." n7

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n4. Of course I am referring here to John Rawls, Political Liberalism (1993) and the surrounding debate. For instructive discussion, see Joshua Cohen, Moral Pluralism and Political Consensus, in The Idea of Democracy 270 (David Copp, Jean Hampton & John Roemer eds., 1993); Jean Hampton, The Moral Commitments of Liberalism, in The Idea of Democracy, cited above, at 292; and Joseph Raz, Facing Diversity: The Case of Epistemic Abstinence, in Ethics in the Public Domain 45 (1994).

n5. Rawls, supra note 4, at 133.

n6. See id. at 133-72.

n7. Joshua Cohen, A More Democratic Liberalism, 92 Mich. L. Rev. 1503, 1546 (1994) (summarizing Rawls, cited above in note 4).

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[\*1735]

This is a promising approach, and in some settings, it may work. But an investigation of actual democracy, and of law in actual democracies, raises questions about this view. Democracies - and law in democracies - must deal with people who very much disagree on the right as well as the good. Democracies - and law in democracies - must deal with people who tend to distrust

abstractions altogether. Participants in law are no exception. Judges are certainly not ordinary citizens. But neither are they philosophers. Indeed, participants in law may be unwilling to commit themselves to large-scale theories of any kind, and they will likely disagree with one another if they seek to agree on such theories.

Judges also have to decide many cases, and they have to decide them quickly. Decisions must be made rapidly in the face of apparently intractable social disagreements on a wide range of first principles. These disagreements will be reflected within the judiciary and other adjudicative institutions as well as within the citizenry at large. At least this is so if adjudicative institutions include, as they should, some of the range of views that are included in society generally.

In addition to facing the pressures of time, these diverse people must find a way to continue to live with one another. They should also show each other a high degree of mutual respect and reciprocity. Mutual respect may well entail a reluctance to attack one another's most basic or defining commitments, at least if it is not necessary to do so in order to decide particular controversies. Participants in law, even more than in democratic debate generally, do well to follow this counsel.

My suggestion in this Commentary is that well-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. n8 They agree [\*1736] on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. n9 They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions. This is an important source of social stability and an important way for diverse people to demonstrate mutual respect, n10 in law especially but also in liberal democracy as a whole.

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n8. Consider the notion of overlapping consensus as set out in Rawls, cited above in note 4, at 133-72. The idea of an incompletely theorized convergence on particulars is related. Both ideas attempt to bring about stability and social agreement in the face of diverse "comprehensive views." But the two ideas are far from the same. I am most interested in the problem of producing agreement on particular outcomes and low-level principles (defined below at p. 1740) to justify them, with the thought that people who disagree on general principles can often agree on individual cases. Rawls is interested in a related but different possibility - that people who disagree on comprehensive views can agree on certain political abstractions and use that agreement for political purposes. See id. at 43-46. Of course this is also true.

What I am suggesting here shares with Rawls's project the goal of producing social stability and a degree of mutuality among people who differ on fundamental matters. But a goal of the incompletely theorized agreement is to obtain consensus on a judgment among people who do not want to decide questions in political philosophy and who (for example) are uncertain as between political liberalism and perfectionist liberalism, or as between liberalism and certain

alternatives. Such people may want to decide a case involving tort law, or free speech, or equality, by reference to principles that can be accepted by political and perfectionist liberals, and others as well (if this is possible). In this way, we might conclude that judgments in law and politics sometimes bear something like the same relation to political philosophy as do judgments in political philosophy to questions in metaphysics. (On Rawls' view, see Rawls, cited above in note 4, at xix-xx.) Just as the political philosopher may attempt not to take a stand on metaphysical questions, so the lawyer, the judge, or the political participant may urge outcomes that make it unnecessary to solve large questions in political philosophy. In a liberal society committed to allowing people of different fundamental views to live together with mutual respect, the Rawlsian strategy may sometimes founder on confusion, limitations of time and capacity, and fears that political liberalism is itself too sectarian to serve as a defining political creed. I do not mean to suggest that the Rawlsian project is unable to surmount these concerns. Certainly there must be constraints on the content of incompletely theorized agreements, and those constraints take the form of abstractions. But I do mean to suggest that participants in liberal political culture often seek agreement on what to do rather than exactly how to think. When they reach these agreements from diverse starting points, they can promote liberal goals in a way that has some distinctive advantages. I do not attempt here to sort out all of the relations between the idea of an overlapping consensus and the notions I have in mind; more detailed discussion will appear in Sunstein, *Legal Reasoning and Political Conflict*, cited above in note \*.

n9. I am thus emphasizing relative rather than absolute particularity. See *infra* pp. 173941. It is also possible that people may agree on abstraction while disagreeing on particulars, a kind of incompletely theorized agreement that also has legal uses. See *infra* p. 1739.

n10. There is an exception, having to do with certain kinds of invidious or palpably confused abstractions. See *infra* p. 1747.

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Consider some examples. People may believe that it is important to protect endangered species, while having quite diverse theories of why this is so. Some may stress obligations to species or nature as such; others may point to the role of endangered species in producing ecological stability; still others may point to the possibility that obscure species will provide medicines for human beings. When (and if) people who agree on the same course of action are able to do so from different foundations, they need not choose among foundations. So too, people may favor a rule of strict liability for certain torts from diverse starting points, with some people rooting their judgments in economic efficiency, others in distributive goals, and still others in conceptions of basic rights. Similarly, people may invoke many different foundations for their belief that the law should protect labor unions against certain kinds of employer coercion. Some may emphasize the potentially democratic character of unions; others may think that unions are necessary for industrial peace; others may believe that unions protect basic rights.

Of course particular issues, in these as in other areas, are disputed as well. Complete agreement is unlikely in matters of this sort. Dis [\*1737] agreement on foundations may produce disagreement on particulars. What I am emphasizing is that, when closure cannot be based on relative abstractions,

the legal system is often able to reach a degree of closure by focusing on relative particulars. Examples of this kind are exceptionally common. They are the day-to-day stuff of law.

When the convergence on particular outcomes is incompletely theorized, it is because the relevant actors are clear on the result without being clear, either in their own minds or on paper, on the most general theory that accounts for it. n11 Some people may not have decided on the best general theory; in their individual capacities, they may think that it is unnecessary to choose among competing general theories, because whatever theory is best, the same result follows. It is common for a judge to believe that a certain outcome is right because all possible theoretical positions lead to it. Alternatively, a particular judge may believe that he knows which theory is best, but may not be able to say so in an opinion, for fear of being outvoted, or because other judges on his court are uncertain whether he is right and would prefer to leave the more abstract issues for another day.

-Footnotes-

n11. Interesting issues of collective choice lurk in the background here. Important problems of cycling, strategic behavior, and path dependence may arise in multimember bodies containing people with divergent rationales, each of whom wants to make his rationale part of law. See generally Kenneth J. Arrow, *Social Choice and Individual Values* passim (2d ed. 1963) (analyzing problems of public choice). There may also be complex bargaining issues as some officials or judges seek to implement a broad theory as part of the outcome, while others seek a narrow theory, and still others are undecided between the two. These important issues are beyond the scope of the present discussion, though it would be most illuminating to have a better grasp, theoretically and empirically, of the sorts of bargaining games that occur when officials and judges decide on the scope of the theory to accompany an outcome. Cf. Douglas G. Baird, Robert H. Gertner & Randal C. Picker, *Game Theory and the Law* 6-49 (1994) (applying game theory models to analyze how players choose among different legal regimes).

-End Footnotes-

Often judges can agree on an opinion or rationale offering low-level or mid-level principles and taking a relatively narrow line. They may agree that a particular rule is binding and makes sense - a sixty-five mile-per-hour speed limit, a requirement that people be provided a hearing before losing their homes - without agreeing on or entirely understanding any set of purported foundations for their belief. They may accept an outcome - reaffirming *Roe v. Wade*, n12 protecting sexually explicit art - without knowing or converging on an ultimate ground for that acceptance. Reasons are almost always offered, n13 and in this sense something in the way of abstraction accompanies the outcome; reasons are by definition more abstract than the outcome for which they account. But the relevant actors seek to stay at the lowest level of abstraction necessary for the decision of the case. They hope that the reasons that have been offered are compatible with an array of deeper possible reasons, and they refuse to make a choice [\*1738] among those deeper reasons if it is not necessary to do so. This phenomenon raises questions about many prominent accounts of judging, particularly that of Ronald Dworkin, which I discuss below. n14

-Footnotes-

n12. 410 U.S. 113 (1973).

n13. For exceptions, see the discussion below at pp. 175460.

n14. See infra pp. 175760.

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By emphasizing incompletely theorized agreements, I intend partly to describe existing practice. These agreements are a pervasive phenomenon in Anglo-American law and, in particular, in judge-made law. Indeed, they play an important function in any well-functioning democracy consisting of a heterogeneous population. The persistence of such agreements offers a challenge to people who think that areas of law actually reflect some general theory, involving (for example) Kantian or utilitarian understandings. n15

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n15. See, e.g., Ronald Dworkin, Law's Empire 240-50 (1986) (arguing that tort law requires inquiry into abstract "justice"); Richard A. Posner, Economic Analysis of Law 23 (4th ed. 1992) (arguing that the common law actually promotes economic efficiency). Of course, advocates of a deep theory might urge that incompletely theorized agreements, taken as a class, tend to reflect a certain theory even if the theory has not been adopted self-consciously, and that those decisions that are inconsistent with the theory should be abandoned.

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I want, however, to make some normative claims as well. These claims are connected with the distinctive morality of judging and perhaps the distinctive morality of politics in a pluralistic society. It is customary to lament an outcome that has not been completely theorized, on the ground that any such outcome has been inadequately justified; but there are special advantages to incompletely theorized agreements in law (and elsewhere). Such agreements are especially well suited to the institutional limits of the judiciary, which is composed in significant part of multimember bodies, consisting in turn of highly diverse people who must render many decisions, live together, avoid error to the extent possible, and show each other mutual respect. The virtues of incompletely theorized agreements extend as well to social life, to workplace and familial life, and even to democratic politics. I will note these possibilities without discussing them in detail here.

Of course I do not suggest that there is no place in society or law for ambitious theories. Such theories are an important part of the academic study of law, which can influence legal and political institutions. Certainly such theories are legitimately a part of democratic deliberation. To reveal practices as confused or unjust, or to decide whether practices are confused or unjust, it may be necessary to think at high levels of abstraction. Indeed, judges might well raise the level of theoretical ambition if this is necessary to decide a case, or if a high-level theory can be shown to be a good one and they can be persuaded to agree to it. But participants in adjudicative institutions are - and should be - very cautious before taking this step. [\*1739]

I. Agreements Without Theory

A. In General

Incompletely theorized agreements play a pervasive role in law and society. It is rare for a person, and especially for a group, to theorize any subject completely - that is, to accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion. In fact, people often reach incompletely theorized agreements on a general principle. Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. People know that murder is wrong, but they disagree about abortion. They favor racial equality, but they are divided on affirmative action. Hence there is a familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases. n16

-Footnotes-

n16. For a valuable discussion, see Henry S. Richardson, Specifying Norms as a Way to Resolve Concrete Ethical Problems, 19 Phil. & Pub. Aff. 279, 306 (1990).

-End Footnotes-

This sort of agreement is incompletely theorized in the sense that it is incompletely specified - a familiar phenomenon with constitutional provisions n17 and regulatory standards in administrative law. Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration means, and in this sense, they can maintain a measure of both stability and flexibility over time. At the same time, they can conceal the fact of large-scale social disagreement about particular cases.

-Footnotes-

n17. Thus, such terms as "equality" and "freedom" are "essentially contested" in the sense made famous by W.B. Gallie, Essentially Contested Concepts, 56 Proc. Aristotelian Soc'y 167 (1955-56).

-End Footnotes-

There is a second and quite different kind of incompletely theorized agreement. People may agree on a mid-level principle but disagree both about the more general theory that accounts for it and about outcomes in particular cases. They may believe that government cannot discriminate on the basis of race, without settling on a large-scale theory of equality, and without agreeing whether government may enact affirmative action programs or segregate prisons when racial tensions are severe. The connections are left unclear, either in people's minds or in authoritative public documents, between the mid-level principle and general theory; the connection is equally unclear between the mid-level principle and concrete cases. So too, people may think that government may not regulate speech unless it can show a clear and present danger, but fail to settle whether this principle is founded in utilitarian or Kantian considerations, and disagree about whether the principle allows government to regulate a particular speech by members of the Ku Klux Klan. [\*1740]

My special interest here is in a third kind of phenomenon - incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them. These terms contain some ambiguities. There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate or low level. We might consider Kantianism and utilitarianism as conspicuous examples of high-level theories and see legal illustrations in the many (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality to be undergirded by highly abstract theories of the right or the good. n18 By contrast, we might think of low-level principles as including most of the ordinary material of legal doctrine - the general class of principles and justifications that are not said to derive from any particular large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory. n19

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n18. See, e.g., Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972); Dworkin, supra note 15, at 407-10 (1986); Charles Fried, Contract As Promise 7-8 (1981).

n19. See Joseph Raz, On the Autonomy of Legal Reasoning, in Ethics in the Public Domain, supra note 4, at 310, 314-24 (1994) (discussing doctrine and the autonomy of law).

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By the term "particular outcome," I mean the judgment about who wins and who loses a case. By the term "low-level principles," I refer to something relative, not absolute; a principle is low-level only when compared to more abstract alternatives. I also mean the terms "theories" and "abstractions" (which I use interchangeably) in a relative sense: the notions "low-level," "high-level," and "abstract" are best understood as comparative, like the terms "big" and "unusual." The "clear and present danger" test is abstract when compared with the judgment that members of the Nazi Party may march in Skokie, Illinois, n20 but the test is relatively particular when compared with the constitutional abstraction "freedom of speech." The idea of "freedom of speech" is relatively abstract when measured against the notion that campaign finance laws are acceptable, but the same idea is less abstract than the grounds that justify free speech, such as the principle of autonomy. n21 The notion of a completely theorized judgment can be understood in the abstract: it refers to a judgment on a particular set of facts combined with all relevant vertical and horizontal judgments, as in a judgment in a free speech case accompanied by an understanding of all other free speech cases, or perhaps of all cases, and of all principles, at all levels of generality, that explain or justify that judgment.

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n20. See Collin v. Smith, 578 F.2d 1197, 1202-03 (7th Cir. 1978).

n21. See Scanlon, supra note 18, at 215-20.

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What I am emphasizing here is that when people diverge on some (relatively) high-level proposition, they might be able to agree if they [\*1741] lower the level of abstraction. People are sometimes able to converge on a point of less generality than the point at which agreement is difficult or impossible. In law, the point of agreement is often highly particularized - absolutely as well as relatively - in the sense that it involves a specific outcome and a set of reasons that typically do not venture far from the case at hand.

As I have said, reasons are, by their very nature, more abstract than the outcome for which they account. In analogical thinking, a judge cannot go from one particular to another; it is necessary to identify a principle or a reason to unify or separate the particulars. To the extent that law prizes reason-giving, it contains an impulse toward abstraction. Full particularity is rare. n22 What I am emphasizing is the lawyer's impulse to offer reasons on which people can unite from widely diverse foundations.

-Footnotes-

n22. See infra section II.C.

-End Footnotes-

Perhaps the participants in law endorse no high-level theory, or perhaps they believe that no such theory is yet available. Perhaps they find theoretical disputes irrelevant, confusing, or annoying. Perhaps they think that it is unnecessary to select a theory, because a certain outcome follows whatever theory they choose. Perhaps they disagree with one another as they enter into high-level debates. What is critical is that they agree on how a case must come out and on a low-level justification.

The argument emphatically applies to legal rules, whether set down by judges, legislators, or administrators. Legal rules are typically incompletely theorized in the sense that they can be accepted by people who disagree on many general issues. People may agree that a sixty-five mile-per-hour speed limit makes sense, and that it applies to defendant Jones, without having much of a theory about criminal punishment, and without making judgments about the domain of utilitarianism and the scope of paternalism. A key social function of rules is to allow people to agree on the meaning, authority, and even the soundness of a governing legal provision in the face of disagreements about much else. n23 Much the same can be said about other devices found in the legal culture, including standards, factors, and emphatically analogical reasoning. n24 Indeed, all of the lawyer's conventional [\*1742] tools can allow the achievement of incompletely theorized agreements on particular outcomes, though in interestingly different ways. n25

-Footnotes-

n23. See Joseph Raz, The Morality of Freedom 58 (1986) ("The practice [of proceeding through the mediation of rules] allows the creation of a pluralistic culture. For it enables people to unite in support of some "low or medium level" generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc.").

n24. I discuss the latter in Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741 passim (1993).

n25. I emphasize "can" rather than "will." Analogies are frequently disputed, and people often disagree on the meaning of a standard ("unreasonable risk," "discrimination," and so forth).

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It should now be clear that I am especially concerned with the use of ambitious thinking to produce "depth" - full accounts of the foundations of a decision, in the form of attempts to find ever deeper reasons behind the outcome. Incompletely theorized agreements do not offer such accounts. But such agreements also fail along the dimension of "width" - that is, they do not try to rationalize the law by showing how an outcome in one case fits coherently with particular outcomes in the full range of other cases. Judges, of course, attempt to produce local coherence, especially through reasoning by analogy. But they do not try for global coherence.

B. How People Converge

It seems clear that people may converge on a correct outcome even though they do not have a full account for their judgments. Jones may know that dropped objects fall, that bee stings hurt, and that snow melts, without knowing exactly why these facts are true. Much the same is true for law and morality. Johnson may know that slavery is wrong, that government may not stop political protests, and that every person should have just one vote, without knowing exactly why these things are so. Judge Wilson may know that under the Constitution, discrimination against the handicapped is generally permitted, and that discrimination against women is generally banned, without having an account of why the Constitution is so understood. We may thus offer an epistemological point: people can know that X is true without entirely knowing why X is true. This is very often so for particular conclusions about law.

There is a political point as well. People can agree on individual judgments even if they disagree on general theory. Diverse judges may agree that Roe v. Wade n26 should not be overruled, though the reasons that lead each of them to that conclusion sharply diverge. Perhaps the judges have different large-scale theories and can agree only on a low-level principle. Perhaps some of the judges have not developed ambitious accounts of the relevant area of the law at all. Thus some people emphasize that the Court should respect its own precedents; others think that Roe was rightly decided as a way of protecting women's equality; others think that the case was rightly decided as a way of protecting privacy; others think that the case has everything to do with state neutrality toward religion; others think that restrictions on abortion are unlikely to protect fetuses, and so the [\*1743] case rightly reflects the fact that any regulation of abortion would be ineffective in promoting its own purposes. We can find incompletely theorized political agreements on particular outcomes in many areas of law and politics - on both sides of the affirmative action controversy, both sides of the dispute over the death penalty, and in all facets of the debate over health care reform.

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n26. 410 U.S. 113 (1973). On the refusal to overrule Roe, see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992).

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C. Rules and Analogies

There are two especially important methods by which law might resolve disputes without obtaining agreement on first principles: rules and analogies. Both of these methods attempt to promote a major goal of a heterogeneous society: to make it possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible.

For purposes of law, reliance on rules might be incompletely theorized in three different ways. People might agree that rules are binding without having a full or agreed-upon account of why this is so. They can often agree on what rules mean even when they agree on very little else. n27 They can even agree that certain rules are good without agreeing on exactly why they are good. And in the face of persistent disagreement or uncertainty about what morality generally requires, people can sometimes reason about particular cases by reference to analogies. They point to cases in which their judgments are firm, and proceed from those firm judgments to the more difficult ones. From different foundations, they may be able to agree on the plausibility of an analogical claim because they share a judgment about a governing low-level principle in the face of disagreement about the abstractions underlying that principle.

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n27. Of course, substantive disagreements may break out during interpretation. See Frederick Schauer, *Playing by the Rules* 207-28 (1991); Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. (forthcoming July 1995).

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We might consider, in this regard, Justice Stephen Breyer's discussion of one of the key compromises reached by the seven members of the United States Sentencing Commission. n28 As Justice Breyer describes it, a central issue was how to proceed in the face of disparate theoretical commitments. Some people asked the Commission to follow an approach to punishment based on "just deserts" - an approach that would rank criminal conduct in terms of severity. But different commissioners had different views about how different crimes should be ranked, and a rational system was unlikely to follow from a collaborative ranking effort. Other people urged the Commission to use a model of deterrence. There was, however, no empirical evidence to link detailed variations in punishment to prevention of crime. [\*1744] Though Justice Breyer does not stress the point, it seems clear that the seven members of the Commission were unlikely to agree that deterrence provides a full account of the aims of criminal sentencing. n29

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n28. See Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 15-18 (1988).

n29. See id. at 17.

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In these circumstances, what route did the Commission follow? In fact, the Commission adopted no general view about the appropriate aims of criminal sentencing. Instead, the Commission adopted a rule - one founded on precedent: "It decided to base the Guidelines primarily upon typical, or average, actual past practice." n30 The Commission reached an incompletely theorized agreement on the value of starting (and usually ending) with past averages. Hence unusual judicial sentences would be filtered out through adoption of typical or average practices. Consciously articulated explanations, involving low-level reasons, were used to support particular departures from the past. Justice Breyer saw this effort as a necessary means of obtaining agreement and rationality within a multimember body charged with avoiding unjustifiably wide variations in sentencing. n31

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n30. Id.

n31. See id. at 18; supra p. 1733.

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The example suggests a quite general point. Through both analogies and rules, it is often possible to achieve convergence on particular disputes without resolving large-scale issues of the right or the good. For judges and officials at least, this is an important virtue.

The fact that we can obtain an agreement of this sort - about the usefulness and meaning of a rule or the existence of a sound analogy - is no guarantee of a good outcome, whatever may be our criteria for deciding whether an outcome is good. The fact that there is agreement about a rule does not mean that the rule is desirable. Perhaps the rule is bad, or perhaps the judgments that go into its interpretation are bad. The resolution of the Sentencing Commission deserves approval only if average practices were not pervasively unjust. Perhaps the Sentencing Commission incorporated judgments that were based on ignorance, confusion, or prejudice. n32 Perhaps a more deeply theorized approach would have produced better guidelines. n33

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n32. For arguments to this effect, see Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 905-07 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1703-05 (1992).

n33. I do not discuss the choice between rules and rulelessness here.

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Some of the same things may be said about analogies. People in positions of authority may agree that a ban on same-sex marriages is analogous to a ban on

marriages between uncles and nieces. But the analogy may be misconceived because there are relevant differences, because the similarities are far from decisive, or because the principle that accounts for the judgment of similarity cannot be sustained. The fact that people agree that case A is analogous to case B does not [\*1745] mean that case A or case B is rightly decided. Problems with analogies and low-level principles might lead us to be more ambitious. Participants in law may well be pushed in the direction of general theory - and toward broader and more ambitious claims - precisely because low-level reasoning offers an inadequate and incompletely theorized account of relevant similarities or relevant differences.

All this should be sufficient to show that the virtues of incompletely theorized outcomes - and the virtues of decisions by rule and by analogy - are partial. Those virtues should not be exaggerated, and sometimes participants will have to raise the theoretical stakes. But no system of law is likely to be either just or efficient if it dispenses with incompletely theorized agreements. In fact, it is not likely even to be feasible.

II. Justifications and Institutions

What might be said on behalf of incompletely theorized agreements, or incompletely theorized judgments, about particular cases? As I have indicated, incompletely theorized agreements may be unjust or otherwise wrong. Indeed, we are accustomed to thinking of incomplete theorization as reflective of some important problem or defect. When people theorize by raising the level of abstraction, they do so to reveal bias, or confusion, or inconsistency. Surely participants in a legal system should not abandon this effort.

There is a good deal of truth in these usual thoughts, but they are not the whole story. On the contrary, incompletely theorized judgments are an important and valuable part of both private and public life. n34 My principal concern is how judges on a multimember body should justify their opinions in public; the argument therefore has a great deal to do with the problem of collective choice. But some of the relevant points bear on other issues as well. They have implications for the question of how an individual judge not faced with the problem of producing a majority opinion - a judge on a district court, for example - might write; they bear also on the question of how a single judge, whether or not a member of a collective body, might think in private as well as write for the public; and they relate to appropriate methods of both thought and justification wholly outside of the adjudicative setting. I will say more about these issues below.

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n34. I have discussed some of these points in the specific context of analogical thinking. See Sunstein, supra note 24. I try here to broaden and generalize the discussion and also to correct some ambiguities and errors in that discussion.

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[\*1746]

A. The Case for Incomplete Theorization

1. Multimember Institutions. - I begin with the special problem of public justification faced by a multimember body. The first and most obvious point is that incompletely theorized agreements are well suited to a world - especially a legal world - containing social disagreement on large-scale issues. By definition, such agreements have the large advantage of allowing a convergence on particular outcomes by people unable to reach anything like an accord on general principles. This advantage is associated not only with the simple need to decide cases but also with social stability, which could not exist if fundamental disagreements broke out in every case of public or private dispute. n35

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n35. The institution of the concurring opinion shows that judges sometimes reject a colleague's low-level justification, perhaps because they accept the result but would prefer a different low-level justification, perhaps because they would prefer a lower-level or higher-level justification. As concurring opinions proliferate, we may begin to reach full particularity in the sense of an agreement on an outcome without agreement on a low-level rationale. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J. concurring); *infra* pp. 175457. This phenomenon is revealing insofar as it demonstrates the possibility of agreement on an outcome unaccompanied by agreement on any set of reasons. But judges struggle very hard to avoid full particularity, and they seek incompletely theorized agreements as a way of providing an explanation and a degree of guidance despite their differences.

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Second, incompletely theorized agreements can promote two goals of a liberal democracy and a liberal legal system: to enable people to live together, n36 and to permit them to show each other a measure of reciprocity and mutual respect. n37 The use of rules or low-level principles allows judges on multimember bodies and hence citizens generally to find commonality - and a common way of life - without producing unnecessary antagonism. Perhaps more important, incompletely theorized agreements allow people to show each other a high degree of mutual respect, civility, or reciprocity. Ordinary people frequently disagree in some deep way on an issue - the Middle East, pornography, gay marriages - and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions (even if they do not at all respect the particular conviction that is at stake). n38 If reciprocity and mutual respect are desirable, it follows that judges, perhaps even more than ordinary people, should not challenge a litigant's or one another's deepest and most defining commitments, at [\*1747] least if those commitments are reasonable and if there is no need for them to do so. Thus, it would be better if judges intending to reaffirm *Roe v. Wade* could do so without challenging the belief that the fetus is a human being, n39 or if judges seeking to invalidate the death penalty could do so without saying that the punishment of death is invalid because of its sheer brutality. n40

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n36. This aspect of liberalism is emphasized in Charles E. Larmore, *Patterns of Moral Complexity* 42-47 (1987).

n37. See Rawls, *supra* note 4, at 16-17 ("The idea of reciprocity lies between the idea of impartiality, which is altruistic[,] ... and the idea of mutual advantage understood as everyone's being advantaged with respect to each person's present or expected future situation as things are.").

n38. Cf. Stephen Holmes, *Gag Rules or the Politics of Omission*, in *Constitutionalism and Democracy* 19 *passim* (Jon Elster & Rune Slagstad eds., 1988) (discussing rules designed to prevent discussion of issues that paralyze political participants).

n39. This is the goal of the equal protection argument. See Cass R. Sunstein, *The Partial Constitution* 259-61, 272-85 (1993).

n40. This is the goal of the argument that the death penalty is invalid because it is arbitrary in its application. See *Callins v. Collins*, 114 S. Ct. 1127, 1129-30 (1994) (Blackmun, J., dissenting from denial of certiorari); *Godfrey v. Georgia*, 446 U.S. 420, 437-40 (1980) (Marshall, J., concurring in the judgment).

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Institutional arguments in law, especially those involving judicial restraint, are typically designed to bracket fundamental questions and remove them from the realm of the judiciary. n41 The allocation of certain roles has the important function of allowing outcomes to be reached without forcing courts to make decisions on fundamental issues. n42 Those issues are resolved by reference to institutional competence, not on their merits. n43

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n41. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980) ("It is not the mission of this court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy.").

n42. See Don Herzog, *Happy Slaves* 112 (1989) ("Judges must simply ignore a host of politically charged facts.").

n43. This is part of the legal process tradition. See William N. Eskridge, Jr., & Philip P. Frickey, *The Making of The Legal Process*, 107 Harv. L. Rev. 2031, 2037-38 (1994). The merits are thus excluded as a reason for action. For a general discussion of exclusionary reasons, see Joseph Raz, *Practical Reason and Norms* 73-76 (2d ed. 1990).

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To be sure, some fundamental commitments might appropriately be challenged in the legal system or within other multimember bodies. Some such commitments are ruled off-limits by the authoritative legal materials. Many provisions involving basic rights have this function. n44 Of course, it is not always disrespectful to disagree with someone in a fundamental way; on the contrary,

such disagreements may reflect profound respect. For example, objections to judgments based on prejudice may reflect respect for the person at the same time that they attempt to overcome the judgments at issue. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. The same is true when those commitments are rooted in a rejection of the basic dignity of all human beings, or when it is necessary to undertake the contest to resolve a genuine problem. n45 But many cases can be resolved in an incompletely theorized way, and that is all I am suggesting here.

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n44. See, e.g., U.S. Const. amend. XIII.

n45. Cf. Rawls, supra note 4, at 4 (discussing reasonable pluralism); see also Hampton, supra note 4, at 292-312 (responding to Rawls).

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2. Multimember Institutions and Individual Judges. - I turn now to reasons that call for incompletely theorized agreements whether or [\*1748] not we are dealing with a multimember body. The first consideration here is that any simple general theory of a large area of the law - free speech, contracts, property - is likely to be too crude to fit with the best understandings of the multiple values that are at stake in that area. Monistic theories of free speech or property rights, for example, fail to accommodate the range of values that speech and property implicate. Human goods are plural and diverse, and they cannot be ranked along any unitary scale without doing violence to our understanding of the qualitative differences among those very goods. n46 People value things not just in terms of weight but also in qualitatively different ways. In the area of free speech, a simple top-down theory - stressing, for example, autonomy or democracy - is likely to run afoul of powerful judgments about particular cases. For this reason, monistic theories are usually inadequate. n47

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n46. See Elizabeth Anderson, Value in Ethics and Economics 55-59 (1993); Amartya Sen, Plural Utility, 81 Proc. Aristotelian Soc'y 193, 193-210 (1981); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 795-812 (1994).

n47. See T.M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 519-20 (1979) (rejecting autonomy theory as a full account). Analogical reasoning is especially desirable here. This way of thinking allows judges and lawyers to build doctrine with close reference to particular cases and thus with close attention to the plurality of values that may well arise. This plurality will confound "top-down" theories that attempt, for example, to understand speech only in terms of democracy, or property only in terms of economic efficiency.

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Of course, a "top-down" approach might reject monism and point to plural values. n48 But any such approach is likely to owe its genesis and its proof - its point or points - to a range of particular cases, and considered judgments

about particular cases, on which it can build. Top-down approaches based on plural values may seem convincing, but incompletely theorized judgments are well suited to a moral universe that is diverse and pluralistic, not only in the sense that people disagree, but also in the sense that each of us is attuned to pluralism when we are thinking well about any area of law. n49

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n48. See, e.g., Amartya Sen, *Commodities and Capabilities* 33-37 (1985); Sen, *supra* note 46, at 199-204.

n49. See Joseph Raz, *The Relevance of Coherence*, in *Ethics in the Public Domain*, *supra* note 4, at 298-303 [hereinafter Raz, *Relevance of Coherence*] (discussing pluralism and coherence).

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Second, incompletely theorized agreements serve the crucial function of reducing the political cost of enduring disagreements. If judges disavow large-scale theories, then losers in particular cases lose much less. They lose a decision but not the world. They may win on another occasion. Their own theory has not been rejected or ruled inadmissible. When the authoritative rationale for the result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their deepest ideals. To be sure, some theories should be rejected or ruled inadmissible; this is sometimes the point of authoritative legal materials. But it is an advantage, from the stand [\*1749] point of freedom and stability, for a legal system to be able to tell most losers - many of whom are operating from foundations that have something to offer, or that cannot be ruled out a priori - that their own deepest convictions may play a role elsewhere in the law.

The third point is that incompletely theorized agreements may be valuable when what is sought is moral evolution over time. Consider the area of constitutional equality, where considerable change has occurred in the past and is likely to occur in the future. A completely theorized judgment - at least if it takes rule-like form - would be unable to accommodate changes in facts or values. n50 Incompletely theorized agreements are a key to debates over constitutional equality, which raise issues about whether gender, sexual orientation, age, disability, and other characteristics are analogous to race. Incompletely theorized agreements have the important advantage of allowing a large degree of openness to new facts and perspectives. At one point, we might think that homosexual relations are akin to incest; at another point, we might find the analogy bizarre. A completely theorized judgment would, of course, have many virtues if it were correct. But at any particular moment in time, this is an unlikely prospect for human beings, including judges, in constitutional law or elsewhere. n51

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n50. I am assuming here that complete theorization results in fixed rules rather than principles whose application can change over time. An agreement on an abstraction would not create fixity if the abstraction were indeterminate or capable of new meanings in new contexts.

n51. Rawls says that, in all cases, the "struggle for reflective equilibrium continues indefinitely." Rawls, supra note 4, at 97.

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Fourth, incompletely theorized agreements may be the best approach available for people with limited time and capacities. The search for full theorization may be simply too difficult for participants in law to complete, and so too for others attempting to reason through difficult problems. A single judge faces this problem as much as a member of a multimember panel. In this respect, the principle of stare decisis is crucial: attention to precedent is liberating, not merely confining, since it is far easier for judges to decide cases if they can take much law as settled. The rule of precedent thus assists in the process of obtaining agreements among people who disagree on first principles. Indeed, precedents can lower the level of theorization by making more foundational views irrelevant or even inappropriate n52 and by binding judges to outcomes that they would like to reject. n53 In any event, incompletely theorized agreements have the advantage, for ordinary lawyers and judges, of humility and modesty: they allow past judgments to be treated as given and make it unnecessary to create the law anew in each case.

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n52. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806-11 (1992) (using stare decisis to avoid new judgment on merits of abortion right).

n53. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177-80 (1989) (discussing virtues of rules).

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Fifth, and finally, incompletely theorized agreements are well adapted to a system that should or must take precedents as fixed points. This is a large advantage over more ambitious methods, since ambitious thinkers, in order to reach horizontal and vertical coherence, will probably be forced to disregard many decided cases. In light of the sheer number of adjudicative officials, law cannot speak with one voice; full coherence in principle is unlikely in the extreme. n54 The area of contract law is unlikely to cohere with the field of tort law, or property law; contract law is itself likely to contain multiple and sometimes inconsistent strands. Multiple and sometimes inconsistent strands are a natural outgrowth of incompletely theorized agreements, which are themselves a way of minimizing the extent and depth of conflict. To be sure, the existence of such agreements may increase conflict by virtue of inconsistency.

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n54. The point counts against Dworkin's Hercules metaphor, see Dworkin, supra note 15, at 239-40, and also against efforts to find an analogy between legal reasoning and the search for reflective equilibrium.

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It is important, then, that analogical thinkers and rule-followers usually take precedents as given even if they disagree with those precedents as a

matter of first principle. The fact that precedents are fixed points helps to bring about incompletely theorized agreements as well, by constraining the areas of reasonable disagreement. The result is a degree of stability and predictability that are important virtues for law.

We can find many examples in ordinary life. Parents' practices with their children may not fully cohere. Precedents with respect to bedtime, eating, homework, and much else are unlikely to be susceptible to systematization under a single principle. Of course parents do not seek to be inconsistent - of course a child may justly feel aggrieved if his sibling is allowed to watch more hours of television for no good reason - but full coherence would be a lot to ask. The problem of reaching full consistency is much more severe in law, where so many people have decided so many things, and where disagreements on large principles lurk in the background. We need not say this with regret.

None of these points suggests that incompletely theorized agreements always deserve celebration. The virtues of such agreements are partial. If an agreement is more fully theorized, it may provide greater notice to affected parties, at least if the fuller theorization yields rule-like judgments about a wide range of cases. n55 Moreover, fuller theorization - in the form of wider and deeper inquiry into the grounds for legal judgment - may be valuable or even necessary to prevent inconsistency, bias, or self-interest. We should be wary of judicial out [\*1751] comes based on grounds that have not been stated publicly. If judges on a panel have actually agreed on a general theory, and if they are truly committed to it, they should say so (even if, for reasons I have suggested, they should usually be reluctant to commit). Judges and the general community will learn much more if they are able to discuss the true motivating grounds for outcomes. All these are valid considerations, and nothing I am saying here denies their importance.

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n55. See Scalia, supra note 53, at 1177-80; cf. Sunstein, supra note 27 (criticizing extravagant enthusiasm for rules).

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B. Judges, Theory, and the Rule of Law

There is an association between the effort to attain incompletely theorized agreements and the rule of law ideal. Insofar as our system prizes rule by law rather than rule by individual human beings, it tries to constrain judgments before particular decisions are made. Indeed, a prime purpose of the rule of law is to rule off limits certain deep ideas of the right or the good, at least in the sense that those ideas ought not to be invoked by officials occupying particular social roles. n56 Among the forbidden or presumptively forbidden ideas are, often, high-level views that are taken as too hubristic or sectarian for judges precisely because they are so high-level. The presumption against high-level theories is an aspect of the ideal of the rule of law to the extent that it is an effort to limit the exercise of judicial discretion at the point of application.

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n56. See Herzog, supra note 42, at 110-47 (connecting the law-politics distinction with the need to distinguish between the sphere of adjudication and the sphere of legislation).

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In this way, we might begin to make distinctions between the role of high theory in the courtroom and the role of high theory in the political branches; these distinctions are central to the claims I am making here. In democratic arenas, there is no taboo, presumptive or otherwise, against invoking high-level theories of the good or the right. n57 Such theories have played a role in many social movements with defining effects on American constitutionalism, including the Civil War, the New Deal, the women's movement, the civil rights movement, and the environmental movement. n58 Many of the most ab [\*1752] stract arguments of high principle have come from participants in deliberative democracy - James Madison, Thomas Jefferson, Abraham Lincoln, Franklin Delano Roosevelt, Martin Luther King, Jr., and Rachel Carson. n59 To be sure, incompletely theorized agreements play a key role in democratic arenas too; consider laws that are supportable by reference to diverse foundations, such as those protecting endangered species or granting unions a right to organize. But high-level theories are an indispensable part of democratic politics.

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n57. I am putting to one side the questions raised by "comprehensive views." See Rawls, supra note 4, at 13-14, 175.

n58. See Bruce Ackerman, We the People 44-80 (1991). It might be responded that there are many cases in which high principle was invoked judicially - consider, for example, the fairly dramatic and rapid shift in the treatment of sex equality. See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, Constitutional Law 676-718 (2d ed. 1991). In cases of this sort, the Court does use principles of a relatively high-level, even if it thinks analogically. High-level arguments can certainly be found in some important constitutional cases, including, for example, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), in which the Court accepted a large-scale view of the state as "passive" rather than "affirmative." See id. at 195-97. Note, however, that the Court, in invoking theories, is usually likely to be following democratic trends rather than initiating new ones, and indeed, in the area of sex discrimination, the Court was building self-consciously on democratic developments. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973). It is notable, too, that the Court was also reluctant to develop a theory to account for its new approach to sex equality, but relied instead on a set of relevant factors. See id. at 682-87. (I am grateful to Susan Moller Okin for raising this issue.)

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By contrast, use of large-scale theories by courts is usually problematic and understood as such, within the judiciary (as exemplified by judicial

practice) if not within law schools. The skepticism is partly a result of the simple fact that judges who invoke large-scale theories may have to require large-scale social reforms, and courts are usually ineffective at implementing such reforms on their own. n60 An important part of the problem lies in the fact that courts, in common law or constitutional cases, must decide on the legitimacy of rules that are aspects of complex systems. In invalidating or changing a single rule, courts may produce unfortunate systemic effects that are not visible to them at the time of decision and that may be impossible for them to correct thereafter. n61 Legislatures are in a much better position on this score.

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n60. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 5-7, 336-38, 342-43 (1991) (discussing problems in judge-led reform).

n61. Examples are offered in R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* 110-12, 176-78, 190-92 (1983), and Donald L. Horowitz, *The Courts and Social Policy* 260-73 (1977). The point is described from the theoretical point of view in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 393-405 (1978), and Joseph Raz, *The Inner Logic of the Law*, in *Ethics in the Public Domain*, cited above in note 4, at 222, 222-25.

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For those who believe that the Warren Court provides an enduring model for American constitutionalism, this cautionary note may be inadequate; perhaps courts can take important steps in producing justice where there is now injustice, and perhaps a degree of theoretical abstraction is necessary for them to perform this role. Even if this is so, constitutional law is only a small part of adjudication, not the whole picture, and in any case, a degree of social reform in the name of the Constitution might be produced through judgments that are not completely theorized. n62 Moreover, constitutional courts are unlikely to want to produce large-scale social change; the mode of selecting [\*1753] judges, and American history itself, suggest that courts will rarely attempt to replicate the Warren Court's role. And judges who use such theories may well blunder. Judges are not trained as political philosophers, and in many cases, use of abstractions not developed by close reference to particular problems has led to major mistakes. n63

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n62. See Sunstein, *supra* note 24, at 767-69, 780-82 (claiming that analogy and low-level principles need not be conservative).

n63. Consider the large-scale reference to the passive state in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195-97 (1989), a view that cannot withstand analysis in light of the role of the state in protecting property rights, contract rights, and rights of plaintiffs in certain settings. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 872-80, 886-87 (1986); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 72-76.

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Even more fundamentally, judges lack a democratic pedigree, and it is in the absence of such a pedigree that the system of precedent, analogy, and incompletely theorized agreement has such an important place. The right to a democratic system is one of the rights to which people are entitled, and in such a system, judicial invocation of large theories to support large decisions against democratic processes should be a rare event. n64 To be sure, judges have a duty to interpret the Constitution, and that duty authorizes them to invoke relatively large-scale principles, seen as part and parcel of the Constitution as democratically ratified. Many people think that judicial activity is best characterized by reference to use of such principles, n65 and it would be wrong to deny that there are occasions on which this practice occurs and is legitimate.

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n64. Of course the point must be qualified by reference to the democratic failures of existing majoritarian arrangements. For variations on this theme, see John H. Ely, *Democracy and Distrust* 105-24 (1980), and Cass R. Sunstein, *The Partial Constitution* 133-53 (1993).

n65. This is the vision of judicial review in Ackerman, cited above in note 58, at 4, 38-39, 131-32, 284. Note that it differs dramatically from the understanding in Dworkin, cited above in note 15, at 355-99, in the sense that Ackerman insists that the large-scale principles have sources in actual judgments of "we the people." There is, however, a commonality between Ackerman and Dworkin in the sense that both see the use of such principles as a large part of the Court's work. It is along that dimension that I am doubting both of their accounts.

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To identify those occasions, it would be necessary to develop a full theory of legal interpretation. For present purposes, I urge something more modest. Most judicial activity does not involve constitutional interpretation, and the ordinary work of common law decision and statutory interpretation calls for low-level principles. Indeed, constitutional argument is itself based largely on low-level principles, not on high theory, except on those rare occasions when more ambitious thinking becomes necessary to resolve a case, or when the case for the ambitious theory is so insistent that a range of judges do and should converge on it. n66

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n66. See *infra* p. 1766 (discussing the phenomenon of contested views becoming uncontested and vice versa).

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At this point, it should be remarked that incompletely theorized agreements are not necessarily conservative, and it would therefore be [\*1754] wrong to identify enthusiasm for such agreements with a belief in Burkeanism or traditionalism for law. n67 Many incompletely theorized agreements are highly critical of existing social practices; consider the judgment that sex

discrimination is unacceptable, a judgment that may rest on diverse theoretical foundations but at the same time lead to sharp challenges to many current social and legal practices. Whether incompletely theorized agreements produce approval or disapproval of existing practice depends on their content, not on the fact of their incomplete theorization. n68 Of course, high-level theories need not be critical of current practices; many such theories are designed to defend them. n69

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n67. A form of Burkeanism is defended in Anthony T. Kronman, *The Lost Lawyer* 19-52 (1993). Much of what Kronman says about practical reason is convincing, see *id.* at 53-108, but one may accept what he says, or much of it, without accepting his form of traditionalism.

n68. See Sunstein, *supra* note 24, at 767-69, 780-82 (discussing conservatism and analogy). Joseph Raz defends analogy as responsive to the possible problems of "partial reform" and hence as conservative in Joseph Raz, *Law and Value in Adjudication*, in *The Authority of Law* 180, 200-06 (1979), but if the judgments of principle that underlie claims of analogy are critical of existing practice, there may be nothing conservative about analogy. See, e.g., Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 *Yale L.J.* 145, 147 (1988) (arguing that sodomy laws are invalid by analogy to the invalidation of miscegenation statutes in *Loving v. Virginia*, 388 U.S. 1 (1967)).

n69. Henry Sidgwick so understood utilitarianism, broadly speaking. See Henry Sidgwick, *The Methods of Ethics* 475-77 (Hackett Publishing 1981) (7th ed. 1907). Richard Posner uses economics to defend much of the common law. See Posner, *supra* note 15, at 23-25, 31-32, 251-64.

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C. Full Particularity?

Reason-giving is usually prized in law, as of course it should be. Without reasons, there is no assurance that decisions are not arbitrary or irrational, and people will be less able to plan their affairs.

In a few areas of law, however, institutions are permitted to operate with full particularity. People converge on the result, but they need offer no reasons for their decision. n70 With full particularity, the judgment is not merely incompletely theorized; it is not theorized at all. In denying certiorari, for example, the Supreme Court is silent; in issuing verdicts, juries do not give reasons; college admissions offices produce results but rarely justifications. Each decision applies to the case at hand and to that case alone. n71 Participants may actually have reasons but refuse to give them; or they may lack reasons in the sense that they are unable to articulate what accounts for their decision; or each of them, on a multimember institution, may have reasons but be unable to agree with one another about them, and hence they leave an outcome officially unexplained. In any of these cases, this approach [\*1755] offers full particularity because, by their very nature, reasons are more abstract than the outcomes that they justify. Once offered publicly, reasons may therefore apply to cases that the court, in justifying a particular decision, does not have before it. n72 This is why reason-giving promotes

planning. Perhaps the most famous (or infamous) illustration of full particularity comes from Justice Stewart:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. n73

All well-functioning legal systems value the enterprise of reason-giving. But there is a good reason to be wary of reason-giving: reasons may be both over- and under-inclusive. In this way, reasons are like rules, which are also over- and under-inclusive if measured by reference to their justifications. n74 Whenever a court offers reasons, there is a risk of future regret - not simply because the court may be confined in a subsequent case and thus have to avoid inconsistency, but because the reasons offered in case A may turn out, on reflection, to generate a standard, a principle, or a rule that collides with the court's considered judgment about case B. The constraint produced by the reason may limit discretion and promote predictability, but it may also produce a bad result.

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n70. I draw here on the illuminating discussion of full particularity in Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. (forthcoming 1995).

n71. See id.

n72. Consider John Dewey's rendition of "the old story of the layman who was appointed to a position in India where he would have to pass in his official capacity on various matters in controversies between natives. Upon consulting a legal friend, he was told to use his common-sense and announce his decisions firmly; in the majority of cases his natural decision as to what was fair and reasonable would suffice. But, his friend added: "Never try to give reasons, for they will usually be wrong.'" John Dewey, Logical Method and Law, 10 Cornell L.Q. 17, 17 (1924).

n73. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

n74. See Schauer, supra note 27, at 31-34.

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The distinction between holding and dictum helps reduce this problem. Indeed, the distinction squarely addresses the problem of excessively theorized judgments, and it helps to ensure that legal decisions are incompletely theorized. If we understand the holding to be the narrowest possible basis for the decision, a subsequent court is able to offer sufficiently narrow reasons for the outcome in the previous case - that is, reasons that ensure that the outcome in the previous case does not apply to a case that is genuinely different. In initially giving a reason, court one may be unaware of possible applications that will falsify that reason because of its imprecision and excessive generality. But court two, able to offer some narrower and better-fitting explanation for the outcome, can eliminate the difficulty. It can label the excessive generality "dicta."

There is another difficulty with reason-giving. One might sometimes know something without knowing the reasons for it. For exam [\*1756] ple, one may know that this is Martin's face, and no other face, without knowing, exactly, why one knows that fact. Or one might know that a certain act would be wrong, without knowing, exactly, why it would be wrong. It is certainly possible to know that something is true without knowing why it is true.

Is there an analogy in law? No simple answer would make sense. As I have suggested, a special quality of most legal systems is a presumptive requirement of reasons for legal outcomes. This requirement makes it hard to prize a capacity to know what the law is without knowing why it is as it is, or how a case should come out without knowing why it should come out that way. On the other hand, some people think that many of our judgments about similarity and dissimilarity - a key to legal reasoning - do not rest on reasons but instead simply constitute our descriptive and normative worlds. n75 Conceivably, there is an aspect of socialization into law that enables people to see that case A is "like" case B, and not at all "like" case C, without always having much of an account of why this is so.

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n75. See Mark Johnson, Some Constraints on Embodied Analogical Understanding, in Analogical Reasoning 25, 39 (David H. Helman ed., 1988) ("Analogies cannot be understood as propositional or conceptual mechanisms for reflecting on already-determinate experiences; rather, we can actually speak of them as constitutive of our experience, because they are partially constitutive of our understanding, our mode of experiencing our world. Analogy is a basic means by which form, pattern, and connection emerge in our understanding and are then articulated in our reflective cognition and in our language.").

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More concretely, it is possible that experienced judges, like experienced lawyers, develop a faculty - best described as wisdom, perception, or judgment - that allows them to reach decisions very well and very quickly. This is a distinctive faculty. It seems to be associated with the ready and sympathetic apprehension of a wide range of diverse particulars and with an appreciation of the appropriate weight to be given to each. n76 Certainly, we can imagine a class of people who have a wonderful capacity to tell whether one case is relevantly like another, or to decide who should win cases, but who lack much of a capacity to explain what underlies their ultimate judgments, or their convictions about relevant similarity and difference. They are not theorists at all. But they have a "good ear," unlike some others who have a "tin ear" for law.

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n76. See Kronman, supra note 67, at 53-62 (describing this skill as "statesmanship"); see also Jon Elster, Sour Grapes: Studies in the Subversion of Rationality 16-17 (1983) (discussing the existence and importance of this skill in professions other than law).

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Perhaps it would ultimately be possible for such people (or at least outside observers) to explain what underlies these good apprehensions, but this may not be so. It is important not to mystify these issues. What is asserted to be a capacity for perception may in fact be a product of bias or confusion, and reason-giving helps diminish this risk. The faculty of wisdom, perception, or judgment probably [\*1757] amounts to a capacity to think very quickly of a resolution that takes account of everything that matters, including a wide array of competing considerations, and that coheres well with the rest of our particular and general judgments. Compare this striking description of President Franklin Delano Roosevelt:

Frances Perkins later described the President's idea ... as a "flash of almost clairvoyant knowledge and understanding." He would have one of these flashes every now and then, she observed, much like those that musicians get when "they see or hear the structure of an entire symphony or opera." He couldn't always hold on to it or verbalize it, but when it came, he suddenly understood how all kinds of disparate things fit together.... Roosevelt made up for the defects of an undisciplined mind with a profound ability to integrate a vast multitude of details into a larger pattern that gave shape and direction to the stream of events. n77

When someone is thought to be wise about particulars in law, it is because she is able to see how to resolve a case without doing violence to other judgments at the horizontal and vertical levels. She is thus able to decide cases, and to decide who wins and who loses, while minimally endangering other valued goods and goals. She may not be able to explain what underlies her decisions (though we should hope that she can). Something of this sort underlies the conviction that a person is "judicious," and it helps explain why full-scale theorization is so rare in law. Of course, someone generally described as judicious might be wrong much of the time, and more ambitious theory might be introduced to show where the errors lie.

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n77. Doris K. Goodwin, No Ordinary Time 193 (1994).

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III. Hercules and Theory

A. An Ambitious Alternative

Enthusiasm for incompletely theorized agreements meets with many adversaries. An especially distinguished example is Ronald Dworkin, who urges, at least as an ideal, a high degree of theoretical self-consciousness in adjudication. n78 Dworkin argues that when lawyers disagree about what the law is, they are disagreeing about "the best constructive interpretation of the community's legal practice." n79 Dworkin claims that interpretation in law consists of different efforts to make a governing text "the best it can be." n80 This is Dworkin's conception of law as integrity.

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n78. I discuss some of these points in Sunstein, cited above in note 24, at 784-87, and I draw on that discussion here. My current goal is to generalize

some of the points made in a very narrow context.

n79. Dworkin, supra note 15, at 225.

n80. Id. at 229.

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Dworkin's account appears to require judges to develop high-level theories, and it does not (to say the least) favor theoretical modesty. [\*1758] There is no presumption against abstraction. In his hands, the relevant theories are large and abstract; they sound like political philosophy or moral theory. n81 These theories are derived from or brought to bear on particular problems. But this is not how real lawyers and real judges proceed. If they can, they avoid broad and abstract questions.

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n81. See, e.g., id. at 403-04 (discussing tort law and equal protection). Dworkin writes about constitutional interpretation:

The Constitution is foundational of other law, so Hercules' interpretation of the document as a whole, and of its abstract clauses, must be foundational as well.... It must be a justification drawn from the most philosophical reaches of political theory.... In constitutional theory philosophy is closer to the surface of the argument and, if the theory is good, explicit in it.

Id. at 380. These are points that I am denying here. In fact, Dworkin's account of the judicial role says very little about the various fact-finding and theory-building weaknesses of judges, who are after all unelected, and about the judges' own knowledge of their weaknesses, even though much of judge-made law is based on that knowledge. This seems to me a major gap in Dworkin's view.

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Let us distinguish here among four situations: the individual judge thinking through a case on his own and sitting on a single-judge district court; the individual judge writing for a single-judge district court; the individual judge thinking through a case privately but also sitting on a multimember court; and the individual judge writing or participating in an opinion to be joined by members of a multimember institution. The constraints in the four situations are different. In all of them, the judge would probably prefer to decide a case knowing that the outcome and supporting rationale can be justified by reference to a range of diverse and more general theories. If so, it is unnecessary for the judge to choose among them; if so, the judge may put aside the more theoretical debates, knowing, for example, that whether he is a Kantian or a Benthamite - whether he cares about fairness or deterrence - someone who has assaulted another must pay compensation for the wrong done.

Now it may be that some individual judges would like to think things through very deeply in order to be sure that they are right. There is certainly nothing wrong with an aspiration of this sort, though limits of time and capacity may make the aspiration unrealistic, and the system of precedent will complicate

matters. But even the individual judge sitting on a single-judge court may be reluctant to set forth his preferred abstractions in public - on the theory that the judicial role calls for the avoidance of dicta, understood here as statements about the law that are not necessary to the decision. Perhaps the outcome can be justified on narrower grounds that involve more modest and more reliable principles and that are less likely to create problems for unforeseeable future cases.

The point is even clearer for the participant on a multimember panel. To some extent, the avoidance of more abstract or theoretical claims stems from purely strategic or pragmatic considerations, as [\*1759] when individual judges on a multimember body have a highly abstract theory but are unable to persuade their colleagues to accept it. n82 But often, the avoidance is not strategic in this way but stems instead from the fact that highly abstract questions can be too hard, large, and open-ended for legal actors to handle. Members of a multimember panel may especially fear that any responses will go wrong when tested against concrete cases not before the court, will be too sectarian and hubristic, and will take too long to offer, because they are too deeply theorized. On multimember bodies, efforts to answer such abstract questions can prevent people who disagree on large principles from reaching consensus on particular outcomes when, in fact, those outcomes, and low-level explanations, could command agreement from a variety of perspectives.

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n82. If the judge has thought the relevant issues through in an ambitious way and made the moral judgments that are raised by the issue (to the extent that they are legally relevant), we may have more assurance that the process of adjudication is reliable, in the sense that it is likely to lead to results that are just. What I am emphasizing is that the judge might sign an opinion that contains a more modest account.

-End Footnotes-

Because of his enthusiasm for abstractions, Hercules - Dworkin's patient and resourceful judge - could not really participate in ordinary judicial deliberations. He would probably be seen as a usurper, even an oddball. On a single judge court, he would suffer from the vice of hubris. On a multimember panel, he would lack some of the crucial virtues of a participant in legal deliberation. These virtues include collegiality and civility, which incline judges toward the lowest level of abstraction necessary to decide a case. n83

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n83. I should say that I do not know to what extent this counts as a criticism of Dworkin, since Dworkin presents Hercules as a thought experiment, and it is unclear to what extent Hercules' approach is supposed to be an ideal for real-world judges. To my knowledge, Dworkin has not discussed the question of appropriate levels of abstraction in legal justification. But see supra note 81 (noting Dworkin's suggestion that, in constitutional law, the relevant justification is "drawn from the most philosophical reaches of political theory").

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Dworkin anticipates an objection of this kind. He notes that it might be paralyzing for judges to seek a general theory for each area of law, and he acknowledges that Hercules is more methodical than any real-world judge can be. n84 But Hercules, in Dworkin's view, "shows us the hidden structure of [ordinary] judgments and so lays these open to study and criticism." n85 Of course, Hercules aims at a "comprehensive theory" of each area of law, while ordinary judges, unable to consider all lines of inquiry, must seek a theory that is "par [\*1760] tial." But Hercules' "judgments of fit and political morality are made on the same material and have the same character as theirs." n86

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n84. See Dworkin, supra note 15, at 264-65; see also id. at 380-81 (referring to the need "to gain the votes of other justices and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level").

n85. Id. at 265.

n86. Id.

-End Footnotes-

It is these points that I am denying here. The decisions of ordinary judges are based on different material and have a different character. They are less deeply theorized not only because of limits of time and capacity, but also because of the distinctive morality of judging in a pluralistic society. I will qualify this claim below. n87 But for the moment, I suggest that the ordinary judge is no Hercules with less time on his hands, but a different sort of figure altogether.

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n87. See infra pp. 176566.

-End Footnotes-

B. Conceptual Ascent?

Borrowing from Henry Sidgwick's suggestions about method in ethics, n88 advocates of ambitious thinking might respond in the following way. There is often good reason for judges to raise the level of abstraction and ultimately to resort to large-scale theory. As a practical matter, discrete judgments about particular cases will often prove inadequate. n89 Sometimes, people do not have clear intuitions about how cases should come out. Sometimes, seemingly similar cases provoke different reactions, and it is necessary to raise the level of theoretical ambition to explain whether those different reactions are justified or to show that the seemingly similar cases are different after all. Sometimes, different people simply disagree. By looking at broader principles, we may be able to mediate the disagreement. In any case, there is a problem of explaining our considered judgments about particular cases - to make sure that they are not just an accident n90 - and at some point, the law may well want to offer that explanation.

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n88. See Sidgwick, supra note 69, at 96-104.

n89. See id. at 100.

n90. "The resulting code seems an accidental aggregate of precepts, which stands in need of some rational synthesis." Id. at 102.

-End Footnotes-

Ambitious thinkers might therefore urge that low-level principles may conflict with one another or be demonstrably wrong. In these circumstances, judges might well resort to higher theory. When our modest judge joins an opinion that is incompletely theorized, he must rely on a reason or a principle that justifies one outcome rather than another. Perhaps the principle is wrong because it fails to fit with other cases, or because it is not defensible as a matter of political morality. n91 A distinguished judge will seek to add a good deal in the way of both width and depth by exploring other cases and by deepening the theoretical ambition of his analysis. He will therefore experience a kind of conceptual ascent in which the more or less isolated and small [\*1761] low-level principle is finally made part of a more general theory. Perhaps this would be a paralyzing task, and perhaps our judge need not often attempt it. But it is an appropriate model for understanding law and an appropriate aspiration for evaluating legal practice.

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n91. See Dworkin, supra note 15, at 251-54 (discussing local priority).

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The conceptual ascent is especially desirable in light of the likelihood that incompletely theorized agreements will contain large pockets of injustice and inconsistency. Unambitious principles and high levels of particularity may ensure that the similarly situated are not treated similarly. Or perhaps some areas of the law will make internal sense, but because the categories with sense are small, they may run into each other if they are compared. We may have a coherent category of law involving sex equality and a coherent category involving racial equality, but these categories may have a strange relation to each other or to the categories involving sexual orientation and the handicapped. Various subcategories of tort law may make sense, but they may not fit together, or they may not cohere with the law of contract. We might conclude that judges should think of incompletely theorized agreements as an early step toward something both wider and deeper. Many academic understandings of law undertake the task of developing that wider and deeper conception. n92

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n92. See, e.g., Dworkin, supra note 15, at 276-312 (discussing the law of tort); Posner, supra note 15, passim.

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There is some truth in this response. Very probably, moral reasoners should try to achieve vertical and horizontal consistency, not just the local pockets of coherence offered by incompletely theorized agreements. In democratic processes, it is appropriate and sometimes indispensable to challenge existing practice in abstract terms. But the response ignores some of the distinctive characteristics of the arena in which real-world judges must do their work. Some of these limits involve bounded rationality and thus what should happen in a world in which people face various constraints; others involve appropriate judicial (and in some ways political) morality and mutual interaction in a world in which judges are mere actors in a complex system and in which people legitimately disagree on first principles. In light of these limits, incompletely theorized agreements have the many virtues described above, including the facilitation of convergence, the reduction of costs of disagreement, n93 and the demonstration of humility and mutual respect. As I have noted, incompletely theorized agreements are especially well adapted to a system that must take precedents as fixed points; lawyers could not try to reach full integrity without severely compromising the system of precedent. Usually, local coherence is the most to which lawyers may aspire. n94 Just as legislation cannot be understood as if it came from a single mind, so precedents, compiled by many people responding to different problems in many different periods, will not reflect a single authorial voice.

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n93. See Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (forthcoming 1995).

n94. See Raz, *Relevance of Coherence*, *supra* note 49, at 298-303.

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There are many lurking questions here. What are the criteria for evaluating moral or political judgments? What is the relation between provisional or considered judgments about particulars and corresponding judgments about abstractions? n95 Some people write as if abstract theoretical judgments, or abstract theories, have a kind of reality and hardness that particular judgments lack, or as if abstract theories provide the answers to examination questions that particular judgments, tested against the theories, may pass or fail. On this view, theories may be treated as searchlights that illuminate particular judgments and show them for what they really are. n96 But we might think instead that there is no special magic in theories or abstractions, and that theories are simply the (humanly constructed) means by which people make sense of their ethical and political worlds. The abstract deserves no priority over the particular: neither is foundational; neither is harder or more real. A (poor or crude) abstract theory may simply be a confused way of trying to make sense of our considered judgments about particular cases, which may be much better than the theory. Of course, particular judgments may be confused too. n97

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n95. In Rawls' understanding of the search for reflective equilibrium, we consult "our considered convictions at all levels of generality; no one level, say that of abstract principle or that of particular judgments in particular cases, is viewed as foundational. They all may have an initial credibility." Rawls, *supra* note 4, at 8 n.8.

n96. See, e.g., Bruce A. Ackerman, Private Property and the Constitution 15-20 (1977) (comparing "Scientific Policymakers" with "Ordinary Observers"); Posner, supra note 15, at 23-24 (arguing that economic theory often underlies opinions that appear to be based on other grounds).

n97. For illuminating remarks on abstractions, see Rawls, cited above in note 4, at 44-46. Rawls thinks that we turn to abstractions "when we are torn within ourselves." Id. at 44. This is undoubtedly true, but sometimes we turn instead to particulars when we are so torn.

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C. Legitimacy

Dworkin's conception of law as integrity offers a theory of what it means for law to be legitimate. Hercules can produce vertical and horizontal consistency among judgments of principle in law. Do incompletely theorized agreements comport with any plausible conception of legitimacy? We have seen that a legal system pervaded by such agreements need not yield anything like full coherence. Perhaps this is a decisive defect.

A complete response would require a detailed discussion of one of the largest issues of political morality; for the moment, a few brief remarks must suffice. In fact, the idea of integrity, insofar as it is a judicial product, is unlikely to provide a convincing theory of legitimacy. Indeed, it seems plausible to say that integrity, as Dworkin de [\*1763] scribes it, is neither necessary nor sufficient for legitimacy, judicial or otherwise. Legitimacy stems not simply from principled consistency on the part of adjudicators (or someone else) but from a justifiable exercise of public force. That theory should be founded in a theory of authority n98 and hence (if we are democrats) in suitably constrained democratic considerations. In this light, Dworkin's conception of integrity offers an excessively court-centered conception of legitimacy. It sees legitimacy not as an exercise of legitimate authority, or as an outcome of well-functioning democratic procedures, but instead as a process of distinction-making undertaken by judges. n99 Even if done exceptionally well, distinction-making by principled judges is an inadequate source of legitimacy.

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n98. See Raz, supra note 23, at 21-69 (offering a theory of authority).

n99. There is some ambiguity in Dworkin's treatment, since integrity is a political virtue, not simply a legal one. I am not sure of the intended relation between political integrity and integrity in law. See Dworkin, supra note 15, at 186-219. Hence I am not sure of Dworkin's views on the general question of political legitimacy.

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Of course, principled consistency should not be disparaged, and a regime of principle, as Dworkin understands it, has many advantages over imaginable alternatives. Problems of legitimacy may arise precisely because of the absence of such consistency. But a theory of adjudicative legitimacy should be part of a theory of just institutions, and an approach focused solely or principally on adjudication will not provide any such theory. By contrast, those who stress

incompletely theorized agreements insist that adjudication is part of a complex set of authoritative institutional arrangements, most prominently including democratic arenas. They attempt to design their theory of judicial conduct as an aspect of a far broader set of understandings about appropriate institutional arrangements and about institutions in which the (suitably constrained) public can deliberate about its judgments.

Above all, they see the American system as one of deliberative democracy in which judges play a partial role. n100 For reasons of both policy and principle, the development of large-scale theories of the right and the good is most fundamentally a democratic task, not a judicial one. n101 These are brief and inadequate remarks, but they tend to suggest the ingredients of an account of legitimacy of which incompletely theorized agreements would be a part.

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n100. See, e.g., Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* 16-17 (1994) (discussing political deliberation and the separation of powers).

n101. Ackerman, cited above in note 58, at 86-99, takes the same basic position but sees the judicial role as the "synthesis" of constitutional moments. I am rejecting the latter claim and saying that, with some exceptions, courts do and should avoid large-scale synthesis.

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Full integrity, moreover, consists of much more than a legal system of numerous, hierarchically arranged courts can be expected to offer. Judges generally should and will reason from cases with which they [\*1764] disagree - because of the need for predictability and stability in law, because of the need to avoid judicial hubris, and because similarly situated people should be treated similarly. n102 But across the broad expanse of the law, the resulting judgments are unlikely fully to cohere.

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n102. A challenge to this view can be found in Joseph Raz's illuminating discussion of coherence, but in my view, Raz concludes too quickly that "speaking with one voice" is not an independent ideal, and I think that he rejects too quickly the view that judges should reason from cases with which they disagree as a matter of morality. See Raz, *Relevance of Coherence*, supra note 49, at 297-98. Raz emphasizes the problems created when judges reason from cases that embody bad moral judgments. The answer to Raz's claim is institutional. Judges should reason from previously decided cases not because it is good to sacrifice good moral values, but because the judge's conception of good moral values is not always reliable, and because keeping (local) faith with precedent is a way of disciplining the judges, promoting predictability, and ensuring a form of equality. Of course, the extent to which a particular judge should keep faith with a past decision (which she believes wrong) cannot be decided in the abstract. What I am suggesting is that decisions that the judge believes wrong may not in fact be wrong, and that the obligation to reason from past cases makes best sense if it is seen as questioning the (ordinary) judge's ability to make this judgment well.

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#### IV. Incompletely Theorized Agreements Over Time

Incompletely theorized agreements have virtues, but as I have noted, their virtues are partial. Stability, for example, is brought about by such agreements, and stability is usually desirable, but a system that is stable and unjust should probably be made less stable. Agreement is important, but disagreement is important too, for it can be a creative force in revealing error and injustice. In this final section, I offer some qualifications to what has been said thus far. In brief: some cases cannot be decided at all without introducing a fair amount in the way of theoretical ambition. Moreover, some cases cannot be decided well without increasing the level of theoretical ambition. If a good abstraction is available, and if diverse judges can be persuaded that the abstraction is good, there should be no taboo against its judicial acceptance. The claims on behalf of incompletely theorized agreements are presumptive rather than conclusive.

##### A. Change

Thus far, the discussion has offered a static description of the legal process - a description in which judges are deciding what to do at a certain time. Of course, low-level principles are developed over long periods, and a dynamic picture shows something different and more complex. First, the understanding of these low-level principles may shift and perhaps deepen. At one point, libel of a public figure might seem analogous to libel of a private figure and therefore be unprotected; at another point, it might seem more analogous to political speech and therefore be protected. In this process, courts may move to higher levels of abstraction. [\*1765]

Second, a characteristic role of observers of the legal process is to try to systematize cases in order to see how to make best sense of them, to show that there is bias and inconsistency, or to show that no sense can be made of them at all. In any process of systematization, more abstraction will be introduced. Observers may try to invoke some higher-level idea of the good or the right in order to show the deep structure of the case law, or to move it in particular directions, or to reveal important, even fatal inconsistencies. A demonstration that the law makes deep sense might be a source of comfort and occasional reform. A demonstration that the law makes no sense, or reflects an ad hoc compromise among competing principles, might produce discomfort and large-scale change.

Third, the law sometimes reflects more ambitious thinking on the part of judges or reacts to these more ambitious efforts by outsiders. The law of antitrust, for example, is now based in large part on a principle of economic efficiency. n103 This development occurred through the gradual incorporation of economic thinking into the cases, beginning with the judicial suggestion, following academic observation, that some important cases "actually" or "implicitly" were founded on economics, and continuing until economics appeared to offer a large ordering role. n104 Some especially ambitious or creative judges will invoke theories too. Some of our great judges were principally nontheoretical thinkers - Harlan, Friendly, Cardozo - but some of them - Holmes, Brandeis, Marshall - had at least ingredients of a large-scale vision of the

legal order. They used analogies, to be sure, but often with reference to a relatively high-level theory about some area of law. Many areas of law now show the influence of Holmes, Brandeis, and Marshall, in part because courts, whether or not they deploy low-level principles, have adopted aspects of the relevant theory. n105

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n103. See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56-59 (1977).

n104. See, e.g., James C. Miller III & Paul Pautler, Predation: The Changing View in Economics and the Law, 28 J. Law & Econ. 495, 495-502 (1985) (discussing the prominent role that economic analysis and scholarly research have played in shaping antitrust predation law).

n105. The best example may be the law of free speech. See Whitney v. California, 274 U.S. 357, 372, 375-78 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624, 630-31 (1919) (Holmes, J., dissenting). Note, however, that even here, no unitary theory of free speech is offered, and nothing very much like a philosophical account appears in the relevant opinions.

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It is very rare for any area of law to be highly theorized. Most of the time, people starting from divergent points can accept (or reject) relevant outcomes. But I do not mean to say that it would always be bad for theories to be introduced, nor do I deny that small-scale, low-level principles can become part of something more ambitious. A descriptive point first: it is important to note that, after a period of time, the use of low-level principles may well result in a more completely theorized system of law. The process of low-level judging can yield greater abstraction, or a highly refined and coherent set of principles. [\*1766] In the areas of free speech and discrimination, some such process has occurred, resulting in occasionally ambitious claims, even if it would be far too much to say that full theorization or coherence can be found. n106

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n106. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-47 (1985) (failing to offer a full theory of equality); New York Times Co. v. Sullivan, 376 U.S. 254, 270-83 (1964) (failing to offer a full theory of free speech).

-End Footnotes-

An especially interesting phenomenon occurs when a once-contestable analogy becomes part of the uncontested background for ordinary legal work - or when the uncontested background is drawn into sharp question, sometimes via analogies. Thus, for example, the view that bans on racial intermarriage are "like" segregation laws is now taken largely for granted; it is part of the way that lawyers order their conceptual world. So too, perhaps, with the view that sex discrimination is "like" race discrimination - a view that would have been unthinkable in Supreme Court opinions as late as, say, 1965. Ordinarily, the slippage from the uncontested to the contested occurs in law through

encounters with particular cases that reveal gaps or problems with the conventional view. n107 In American law, views that once were taken as natural - or not even as views at all - sometimes become dislodged in this way. The original attack on the monarchical legacy took this form; n108 so too did the attack on racial hierarchy; so too did the New Deal, which depended on an insistence that common law categories were far from natural and prepolitical but instead were a conscious social choice. n109 Eventually, the contested can become uncontroversial as new categories emerge and harden through repeated encounters with particular cases.

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n107. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (challenging preexisting acceptance of sex discrimination); *New York Times*, 376 U.S. at 268-69 (finding libel law subject to the First Amendment); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

n108. Gordon Wood's description of this development traces the shift from the earlier view: "So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being.... Ordinary people were thought to be different physically, and because of varying diets and living conditions, no doubt in many cases they were different. People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring." Gordon S. Wood, *The Radicalism of the American Revolution* 27 (1992).

n109. See Sunstein, *supra* note 64, at 40-67.

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Now turn to the question of what judges should do. I have urged that there are reasons for judges to offer the least ambitious argument necessary to resolve cases, in the hope that different people from their diverse standpoints can converge on that argument, and with the belief that abstractions may prove troublesome for later cases. But if judges can agree on an abstraction, and if the abstraction can be shown to be a good one, judicial acceptance of that abstraction may hardly be troubling but, on the contrary, an occasion for celebra [\*1767] tion. n110 Who could object to judicial adoption of what is by hypothesis a good theory? If agreement is possible on a good abstraction, a legal system will have done its job especially well; consider, as possibilities, antitrust or equal protection law. But any abstractions will likely have been developed through the generalization and clarification of incompletely theorized outcomes, accomplished by constant reference to concrete cases against which the theory is measured. At least part of the test of the theory - if it is a theory of law meant for judicial adoption - is how well it accounts for the cases and for considered judgments about the cases, though of course judicial mistakes are possible, and these may be corrected by the theory, subject to the constraints of stare decisis.

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n110. Consider, for example, Alexander Meiklejohn's suggestion that *New York Times Co. v. Sullivan* was "an occasion for dancing in the streets," as reported in Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning*

of the First Amendment," 1964 Sup. Ct. Rev. 191, 221 n.125.

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I am thus declining to endorse what might be called a strong version of the argument offered here: a claim that incompletely theorized agreements are always the appropriate approach to law and that more ambitious theory is always illegitimate in law. What I am urging is a more modest point, keyed to the institutional characteristics of judges in any legal system we are likely to have. Judges should adopt a presumption rather than a taboo against high-level theorization. Usually, they should invoke the lowest levels of theoretical ambition necessary to decide the case. In many contexts, they will not be able to think of a good theory. In many cases, they will not be able to agree on any theory. The effort to reach agreement on relative abstractions may make it hard for judges or other people to live and work together, and unnecessary contests over theory can suggest an absence of respect for the deepest and most defining commitments of other people. n111

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n111. There are intrapersonal parallels. In our ethical lives as individuals, each of us may avoid choice among theories if we do not need to choose in order to decide what to do in particular cases. But the interpersonal case is perhaps more vivid.

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It may even happen that an area of judge-made law will become less theorized over time. A once-acceptable general theory may come to seem inadequate, and confrontations with particular cases may show its inadequacy and make it unravel. The Supreme Court's decisions in the Lochner era were relatively well-theorized, in the sense that they were founded on a recognizable general theory of the permissible role of the state. n112 The general theory was not replaced with a new one all of a sudden, or even at all; instead, it came apart through particular cases that attacked the periphery and then the core. n113 This is a familiar phenomenon, as the process of case-by-case decision tests [\*1768] any general theory and exposes its limits. Over time, an area of law may become more theorized or less so; over long periods of time, it may go from one to the other, and back again.

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n112. See Stone, Seidman, Sunstein & Tushnet, supra note 58, at 787-807.

n113. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-93 (1937); Nebbia v. New York, 291 U.S. 502, 535-39 (1934).

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If all this is right, we ought not to think of incompletely theorized agreements on particulars as a kind of unfortunate second-best, adopted for a world in which people disagree, are confused or biased, and have limited time. The alleged first-best - Hercules, or the (exhausted?) judge who has reached reflective equilibrium - calls for an extra-human conception of law. It is extra-human because it is so obviously unsuited to the real world. To say the

least, it is hard to know whether a top-down or highly theorized approach is appropriate for morality. But often, at least, it is easy to know that such an approach is inappropriate for law. The institutional features of the legal system - a human institution with distinctive constraints - require an account of law that is highly sensitive to the characteristics of the system in which it is situated. Among those characteristics are confusion or uncertainty about general theory, deep disputes about the right and the good, and a pressing need to make a wide range of particular decisions.

B. Disagreement

What of disagreement? The discussion thus far has focused mostly on the need to obtain agreement or convergence. This is only part of the picture. In law, as in politics, disagreement can be a productive and creative force - revealing error, showing gaps, moving discussion in appropriate directions. The American political order has placed a high premium on "government by discussion," n114 and when the process is working well, this is true for the judiciary as well as for other institutions. Progress in politics and even law is often fueled by failures of convergence and by sharp disagreement on both the particular and the general.

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n114. Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 74 (1993).

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It should be unnecessary to emphasize that legal disagreements may have many legitimate sources. Two of these sources are especially important. First, people may share general commitments but disagree on particular outcomes. This is no less pervasive a social phenomenon than its converse, which I have stressed here. People may think, for example, that it is wrong to take innocent life, but disagree about whether the Constitution protects the right to have an abortion. They may think that everyone has a right to be free from invidious discrimination, but disagree about the legitimacy of affirmative action. It is common to find agreement on the general alongside disagreement on the particular. [\*1769]

Second, people's disagreements on general principles may produce disagreements over low-level propositions as well. People who think that an autonomy principle accounts for freedom of speech may also think that the government cannot regulate truthful, nondeceptive commercial advertising - whereas people who think that freedom of speech is a democratic idea may have no interest in commercial advertising at all. People who think that tort law is founded on Kantian understandings may think that strict liability is required, whereas utilitarians may disagree. Academic theorizing about law can have a salutary function in part because it tests low-level principles by reference to more ambitious claims. Disagreements can be productive by virtue of this process of testing.

It is important, then, to emphasize that disagreements are sometimes desirable and that incompletely theorized agreements may be nothing to

celebrate. If everyone having a reasonable general view converges on a particular (by hypothesis reasonable) judgment, nothing is amiss. This is the basic phenomenon to which I am calling attention here. But if an agreement is incompletely theorized, there is a risk that everyone who participates in the agreement is mistaken, and hence that the outcome is mistaken too. There is also a risk that someone who is reasonable has not participated and that if that person were included, the agreement would break down. Incompletely theorized agreements should therefore be subject to scrutiny over time. Nor is social consensus, or something approaching consensus, a consideration that outweighs everything else. Usually, it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which most or even almost all agree. Consensus or agreement is important largely because of its connection with stability, itself a valuable but far from overriding social goal.

Of course, it would be foolish to say that no general theory can produce agreement, even more foolish to deny that some general theories deserve general support, and most foolish of all to say that incompletely theorized agreements warrant respect whatever their content. What seems plausible is something more modest: except in unusual situations, and for multiple reasons, general theories are an unlikely foundation for judge-made law, and caution and humility about general theory are appropriate for judges, at least when multiple theories can lead in the same direction. This more modest set of claims helps us to see that incompletely theorized agreements are important phenomena with their own special virtues. Such agreements are the lawyer's distinctive solution to the problem of social pluralism.

C. Principle, Politics, Law

Henry Hart and Albert Sacks of course defended the view, influential for the last generation, that courts engage in principled reasoning [\*1770] and elaboration of basic social commitments, while the political process involves an ad hoc set of judgments often producing unprincipled compromises. n115 This view finds its most extreme statement in Dworkin's Hercules metaphor, which sees constitutional courts as "the forum of principle." n116 But as description, this view is historically myopic. Courts do offer reasons and principles, but those principles tend to be modest and low-level. By contrast, high principle has had its most important and most defining moments inside the political branches of government, not within courtrooms. The founding, the Civil War, the New Deal, and other periods of social reform n117 - progressivism, the civil rights movement, the women's movement - suggest that the key forum of principle in American government has been democratic rather than adjudicative.

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n115. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 643-46 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

n116. Ronald Dworkin, *The Forum of Principle*, in *A Matter of Principle* 33, 69-71 (1985); see also supra note 81. Note in this regard that Dworkin's discussion of "passivism" in constitutional law, see Dworkin, supra note 15, at 369-79, does not deal with the need for devices to limit the power of judicial review in light of the judges' likely biases and institutional weaknesses, and

it fails to see the possibility that, because of those weaknesses, there is a gap between the actual meaning of the Constitution and judicial pronouncements about that meaning. See *id.* at 370; cf. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213-28 (1978) (discussing that gap). The presumption in favor of theoretical modesty is one way of disciplining judicial power in light of judicial weaknesses.

n117. See Ackerman, *supra* note 58, at 40-56.

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The question might therefore be asked whether it would be possible to reverse the Hart and Sacks formulation, and to propose instead that high principle plays an appropriately large role in the democratic arena while low-level principles are the more appropriate and usual stuff of adjudication. Any such view would be too simple, but there is a good deal of truth to it. Of course, high principle does not characterize ordinary politics, but high principle has had an important defining role in American political life, and in any case, the principles that mark American constitutionalism owe their origins to political rather than legal developments. There are important exceptions, when courts make or refer to arguments of high principle, n118 but ordinarily those exceptions consist of vindications of (certain readings of) constitutional judgments made by previous generations. As I have suggested, the argument on behalf of incompletely theorized agreements is therefore part of a theory of authority and of just institutions, rooted in a claim that fundamental principles are best developed politically rather than judicially.

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n118. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), is, of course, the most important example.

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[\*1771]

Conclusion: The Limits of Theory

A key task for a legal system is to enable people who disagree on first principles to converge on outcomes in particular cases. Incompletely theorized agreements help to produce judgments on relative particulars amidst conflict on relative abstractions.

Notwithstanding these points, the impulse to theorize should not be disparaged. In some areas of law, we cannot think very well without embarking on a kind of conceptual ascent from the incompletely theorized outcome, and the conceptual ascent will require us to say broader and deeper things. It is sometimes desirable to think about an issue very deeply; this is certainly true for academic observers, and also for people in politics, in which abstractions and aspirations play a crucial role. But judges must decide many cases quickly; they have limited time and capacities. They must also work with each other, and contests over the right and the good can make it hard for them to do so. Like ordinary people, judges should obey a norm of mutual respect, or of

reciprocity, and this norm can incline judges to avoid large-scale contests, at least when they involve people's deepest or most defining commitments.

These considerations might be made part of a role-specific account of public reason - an account of public reason designed specifically for participants in adjudication. But it would not be surprising if at least some of these points turned out to connect with some of the broader aspirations of a well-functioning deliberative democracy. Like judges, ordinary people have limited time and capacities; they too must live with one another. At least as much as judges, they should discuss their disputes in ways that entail mutual respect, and thus avoid unnecessary controversies over fundamental commitments.

I have emphasized that general theory - involving broad claims about the right and the good - plays an appropriate role in the political sphere. In law, I have argued that there is, and should be, a presumptive taboo against making broad and general claims; there is, and should be, no such taboo in the world of public reason. But citizens and representatives, like judges, must make decisions about concrete controversies in the face of sharp or even intractable disagreements on first principles. Entirely outside of law, and in the world of ordinary democratic discussion, incompletely theorized agreements play an important role.

There is, however, an important exception to the general claim that I have made throughout this essay. In order for participants in law (or democracy) to accept that general claim, they must accept at least one general theory: the theory that I have attempted to defend. This is the theory that tells them to favor incompletely theorized agreements. That theory probably cannot itself be accepted without reference to general theoretical considerations, and its acceptance or rejection [\*1772] should not be incompletely theorized. Many people claim that law should reflect a high-level theory of the right or the good, and they will not be satisfied with incompletely theorized agreements. n119 The choice between the two approaches will turn on issues that are both high-level and quite controversial.

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n119. Recall, however, that the grounds for such agreements are diverse, and that it is possible to accept some while rejecting others. See supra pp. 174551. In this sense, an incompletely theorized judgment in support of incompletely theorized agreements is certainly imaginable.

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This is an important matter. But it is notable that the belief in incompletely theorized agreements, while tacit, is quite widespread. The best evidence is the legal culture itself. Such agreements are the usual stuff of law, and participants in the legal culture are suspicious of much in the way of theoretical ambition. There are reasons for their suspicion. What I have tried to do here is to spell out those reasons and to connect them to some of the most notable characteristics of thinking in law.

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COMMENTARY: ON ANALOGICAL REASONING.

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-Footnotes-

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-End Footnotes-

SUMMARY:

... Reasoning by analogy is the most familiar form of legal reasoning. ... In this section, I reject, as only part of a complex story, the view that analogical reasoning is a crude and incomplete version of the lawyer's search for "reflective equilibrium." ... There is an important commonality between analogical reasoning and the search for reflective equilibrium. ... So much for an important commonality between analogical reasoning and the search for reflective equilibrium; there are important differences as well. ... For some people, the proper analogy, in thinking about hate speech, is physical assault. ... -- The final objection to analogical reasoning is that the process has yet to be adequately specified, and that when it is, it will emerge as a primitive and failed substitute either for a more general theory or for the effort to reach reflective equilibrium. ... It seems plausible that the search for a relatively wide or extended version of reflective equilibrium is superior to analogical reasoning, and that the latter is a kind of crude, incomplete version of the former. ... As compared with the search for reflective equilibrium, analogical reasoning has the advantage, for ordinary lawyers and judges, of humility and circumspection. ... Here we have a striking and illuminating contrast between the search for reflective equilibrium and analogical reasoning. ...

TEXT:

[\*741] Reasoning by analogy is the most familiar form of legal reasoning. It dominates the first year of law school; it is a characteristic part of

brief-writing and opinion-writing as well. But exactly what is analogical reasoning, as it operates in law?

The subject receives little attention in the most influential works in Anglo-American jurisprudence and legal theory. n1 Often lawyers themselves are unenthusiastic about analogical reasoning, urging that this way of thinking about law is unconstrained or not a form of reasoning at all. n2 As a result, the legal culture lacks a sympathetic depiction of its own most characteristic way of proceeding. n3

-Footnotes-

n1 See RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); and H. L. A. HART, *THE CONCEPT OF LAW* (1961). The various essays in JUDITH J. THOMSON, *RIGHTS, RESTITUTION, AND RISK* 78-116, 257-260 (1986), are prominent nonlegal examples of the method of analogy, as I understand it here. Thomson's comments on her method are also relevant. *Id.* at 251.

n2 See PETER GOODRICH, *READING THE LAW* 77-78, 160-61, 184-86, 197-98 (1986); RICHARD A POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86-100 (1990); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1983); James A. Boyle, *The Anatomy of a Torts Class*, 34 *AM. U. L. REV.* 1003, 1051, 1054-55 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781, 818-19 (1983).

n3 The leading discussion of analogical reasoning in law is EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1947), discussed below in note 63. Helpful descriptions appear in STEPHEN F. BARKER, *THE ELEMENTS OF LOGIC* 186-95, 225-29 (5th ed. 1989); STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 25-40 (1987); MARTIN P. GOLDING, *LEGAL REASONING* 97-143 (1984); MARK T. KEANE, *ANALOGICAL PROBLEM SOLVING* 11-37 (1988); JOSEPH RAZ, *THE AUTHORITY OF LAW* 201-06 (1979); J. F. ROSS, *PORTRAYING ANALOGY* 202-11 (1981); and STEPHEN TOULMIN, RICHARD RIEKE & ALLAN JANIK, *AN INTRODUCTION TO REASONING* 148-150 (1979). For useful collections, see *ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY* (David H. Helman ed., 1988) [hereinafter *ANALOGICAL REASONING*]; *SIMILARITY AND ANALOGICAL REASONING* (Stella Vosniadou & Andrew Ortony eds., 1989). For short, suggestive treatments, see HILARY PUTNAM, *THE MANY FACES OF REALISM* 73-75 (1987); DAVID TRACY, *PLURALITY AND AMBIGUITY* 20-22 (1987); W. V. QUINE & J. S. ULLIAN, *THE WEB OF BELIEF* 83-95 (2d ed. 1978); Brian Barry, *On Analogy*, 23 *POL. STUD.* 86, 93-99 (1975); cf. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* 279-303 (1988) (defending particularistic case analysis -- "casuistry" -- against the view that morality consists of the application of a code of general rules).

-End Footnotes-

[\*742] In the face of this odd combination of general indifference and critical attack, analogical reasoning maintains its status as an exceedingly prominent means by which both lawyers and nonlawyers think about legal and moral questions. The principal goals of this Commentary are to offer an account of analogical reasoning and to suggest that, at least for law, it has distinctive advantages over forms of thought that seem to be far superior. The discussion will bear on the role of analogical thinking in ethics and politics as well.

I also hope to say something about the nature and possibility of normative argument in law and to suggest how and when certain views about legal disputes can be shown to be persuasive or even correct. n4 What does it mean to say that a difficult case is "rightly decided"? How, if at all, does such a judgment differ from a political or moral claim about what the law should be? What is the difference between a legally correct decision and a morally correct decision? An understanding of analogical reasoning should provide some clues.

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n4 Skepticism about normative argument has become prominent in law. See, e.g., Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. PA. L. REV. 933, 960 (1991) ("Normative discourse is indeterminate; for every social reformer's plea, an equally plausible argument can be found against it."); Robert W. Gordon, "Of Law and the River," and Of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 2 (1985) ("[B]ecause . . . [law] is founded upon contradictory norms, its principles cannot constrain a single set of outcomes even if intelligently, honestly and conscientiously applied. In contract law, for example, there is always a legitimate argument for maintaining one party's freedom of action and a contrary argument for protecting the other party's security; for every argument for enforcing the deal . . . there is a counterargument for voiding the deal. . .").

-End Footnotes-

The Commentary is divided into three parts. Part I describes analogical reasoning, primarily by comparing it to other methods of thinking that also have a place in law. Part II tries to make the description more concrete by showing how analogies might be helpful in thinking about the problems raised by legal restrictions on cross-burning. The Supreme Court's decision in R.A.V. v. City of St. Paul n5 provides a focal point for the discussion.

-Footnotes-

n5 112 S. Ct. 2538 (1992).

-End Footnotes-

Part III, evaluating analogical reasoning, is divided into two sections. The first explores the most prominent criticisms of this way of thinking. Here I challenge the view that analogical reasoning is indeterminate and that it depends on an apparatus -- a set of principles -- that it is unable to supply. The second section explores the vices and especially the virtues of analogical reasoning by contrasting it with some especially prominent approaches to legal reasoning, including those offered by Ronald Dworkin and economic analysts of law. [\*743] In this section, I reject, as only part of a complex story, the view that analogical reasoning is a crude and incomplete version of the lawyer's search for "reflective equilibrium." n6 I also claim that analogical reasoning has important advantages over general theories, because those who use analogies are especially attuned to the diverse and plural goods that are at stake in legal and ethical decisions.

-Footnotes-

n6 See JOHN RAWLS, A THEORY OF JUSTICE 19-22, 46-51 (1971); infra p. 756.

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I. ANALOGICAL REASONING AND SOME ALTERNATIVES

A. Analogical Reasoning in the Law

Outside of law, analogical reasoning often helps to inform our judgments. I have a German shepherd dog who is gentle with children. When I see another German shepherd dog, I assume that he, too, will be gentle with children. I have a Toyota Camry that starts even on cold days in winter. I assume that my friend's Toyota Camry will start on cold winter days as well. This kind of thinking has a simple structure: (1) A has characteristic X; (2) B shares that characteristic; (3) A also has characteristic Y; (4) Because A and B share characteristic X, we conclude what is not yet known, that B shares characteristic Y as well. n7

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n7 What I am describing in the text is a form of inductive analogy, in the sense that it depends on predictive conjectures about an unknown case that are based on but go beyond stated premises. See BARKER, supra note 3, at 191-93; Theo A. F. Kuipers, Inductive Analogy by Similarity and Proximity, in ANALOGICAL REASONING, supra note 3, at 299, 301-09. Inductive analogy is different from the usual case of induction, which occurs by enumeration. An example of nonanalogical inductive reasoning is: I have seen 100 German shepherds, and they are all gentle with children. From the large number of gentle German shepherds, I infer that the latest German shepherd is also gentle with children.

I deal throughout with analogical reasoning that is roughly propositional in a sense that should emerge from the discussion at pp. 744-49 below. I spend little time on the growing work dealing with analogy and metaphor at nonpropositional levels. See, e.g., GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 68-76 (1987); Mark Johnson, Some Constraints on Embodied Analogical Understanding, in ANALOGICAL REASONING, supra note 3, at 25, 39 ("[A]nalogies cannot be understood as propositional or conceptual mechanisms for reflecting on already-determinate experiences; rather, we can actually speak of them as constitutive of our experience, because they are partially constitutive of our understanding, our mode of experiencing our world. Analogy is a basic means by which form, pattern, and connection emerge in our understanding and are then articulated in our reflective cognition and in our language."). See also the brief discussion of metaphor and analogy below in note 26.

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This is a usual form of reasoning in daily life, n8 but it will readily appear that it does not guarantee truth. The existence of one or many [\*744] shared characteristics does not mean that all characteristics are shared. n9 Some German shepherd dogs are not gentle with children. Some Toyota Camrys do not start on cold days in winter. For analogical reasoning to work well, we have to say that the relevant, known similarities give us good reason to believe that there are further similarities and thus help to answer an open question. Of course this is not always so. At most, analogical thinking can give rise to a judgment about probabilities, and often these are of uncertain

magnitude.

-Footnotes-

n8 See Mary Hesse, Theories, Family Resemblances and Analogy, in ANALOGICAL REASONING, supra note 3, at 317, 317-18. Hesse writes:

It has long been obvious that the human problem solver does not generally think deductively or by exhaustive search of logical space. Propositional logic relies upon enumeration of premises, univocal symbolization, and exclusively deductive connections, and these cannot be either a good simulation of human thought or an efficient use of computers. In real human thinking, the meanings of concepts are constantly modified and extended by parallels, models and metaphors, and the rational steps from premises to conclusion are generally non-demonstrative, being carried out by inductive, hypothetical and analogical reasoning.

Id.; see also David E. Rumelhart, Toward a Microstructural Account of Human Reasoning, in SIMILARITY AND ANALOGICAL REASONING, supra note 3, at 298, 301 ("Most everyday reasoning does not involve much in the way of manipulating mental models. It probably involves even less in the way of formal reasoning. Rather, it probably involves assimilating the novel situation to other situations that are in some way similar -- that is, reasoning by similarity.").

n9 See GOLDING, supra note 3, at 44-45; Hesse, supra note 8, at 331. For an example of unacceptable analogical thinking, consider this: (a) A, a member of social group F, has undesirable characteristic X; (b) B is also a member of social group F; (c) B probably has characteristic X. This is a form of bad analogical reasoning -- bad because the probability claim in (c) may be false, and because even if it is true, it may be wrong to judge people by statistical measures of this sort. This example illustrates a particular problem for analogical reasoning. In some contexts, it may be illicit to judge an individual case, or an individual, on the basis of a characteristic shared with another case or another person. See also infra note 61 (noting that analogical reasoning may distract attention from the particulars of the case at hand).

-End Footnotes-

Analogical reasoning has a similar structure in law. Consider some examples. We know that an employer may not fire an employee for refusing to commit perjury; n10 it is said to follow that an employer is banned from firing an employee for filing a workers' compensation claim. n11 We know that a speech by a member of the Ku Klux Klan, advocating racial hatred, cannot be regulated unless it is likely to incite, and is directed to inciting, imminent lawless action; n12 it is said to follow that the government cannot forbid the Nazis to march in Skokie, Illinois. n13 We know that there is no constitutional right to welfare, n14 medical care, n15 or housing; n16 it is said to follow that there is no constitutional right to government protection against domestic violence. n17

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n10 See Petermann v. Local 396, Int'l Brotherhood of Teamsters, 344 P.2d 25, 27 (Cal. 1959). In the examples cited in this note and below in notes 11-17, I am describing how many observers see these cases, not the court's actual

opinions, which are a mixture of analogical and nonanalogical arguments.

n11 See *Svenko v. Kroser Co.*, 245 N.W.2d 151, 153-54 (Mich. 1976).

n12 See *Brandenburg v. Ohio*, 395 U.S. 444, 444-45, 447 (1969).

n13 See *Collin v. Smith*, 578 F.2d. 1197, 1201 (7th Cir. 1978).

n14 See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

n15 See *Harris v. McRae*, 448 U.S. 297, 317-18 (1980).

n16 See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

n17 See *DeShaney v. Winnebago County*, 489 U.S. 189, 196-97 (1989). In the legal examples we are dealing with non-inductive analogical reasoning. We are not making a prediction about likely facts in an unknown case, but are instead making claims about how an as-yet undecided case should be resolved in light of its similarity to a decided or clear case. See *BARKER*, supra note 3, at 225-29.

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[\*745] From a brief glance at these examples, we can get a sense of the characteristic form of analogical thought in law. The process appears to work in four simple steps: (1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects but shares characteristics X, or characteristics X, Y, and Z; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way. For example, someone asking for protection against domestic violence is requesting affirmative government assistance, just like someone asking the government for medical care; it is said to "follow" from the medical care case that there is no constitutional right to protection against domestic violence.

As in the nonlegal examples, n18 it should readily appear that analogical reasoning does not guarantee good outcomes or truth. For analogical reasoning to operate properly, we have to know that A and B are "relevantly" similar, and that there are not "relevant" differences between them. Two cases are always different from each other along some dimensions. When lawyers say there are no relevant differences, they mean that any differences between the two cases either (a) do not make a difference in light of the relevant precedents, which foreclose certain possible grounds for distinction, or (b) cannot be fashioned into the basis for a distinction that is genuinely principled. A claim that one case is genuinely analogous to another -- that it is "apposite" or cannot be "distinguished" -- is parasitic on conclusion (a) or (b), and either of these must of course be justified. n19

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n18 An important difference is that the dog and automobile cases involve analogies as a crude guide to statistical probabilities, whereas the legal examples involve normative judgments.

n19 It should be clear from the text that in analogical argument, precedents cannot be said to be uncontroversially binding or "on all fours." An argument

from analogy depends on the fact that there are both plausibly relevant differences and plausibly relevant similarities between the precedent and the case at hand.

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The major challenge facing analogical reasoners is to decide when differences are relevant. To make this decision, they must investigate cases with care in order to develop governing principles. The judgment that a distinction is not genuinely principled requires a substantive argument of some kind. For example, one difference between the Nazi march and the Klan speech is that the Nazi Party is associated with the Holocaust. This is indeed a difference, but American law currently deems it irrelevant. It appears unprincipled -- or excessively ad hoc -- for the states to ban prohibitions on political speech except when the speaker is associated with the Holocaust. n20 [\*746] As we will see, analogical reasoning goes wrong when there is an inadequate inquiry into the matter of relevant differences and governing principles. But what are the defining characteristics of a competent lawyer's inquiry into analogies?

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n20 The distinction between the principled and the excessively ad hoc is sometimes a matter of social convention. See e.g., Fredrick Schauer, Exceptions, 58 U. CHI. L. REV. 871, 886-91 (1991) (discussing the effect of social conventions on free speech principles and claims for exceptions).

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In law, analogical reasoning has four different but overlapping features: principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction. Taken in concert, these features produce both the virtues and the vices of analogical reasoning in law.

First, and most obviously, judgments about specific cases must be made consistent with one another. A requirement of coherence, or principled consistency, is a hallmark of analogical reasoning (as it is of reasoning of almost all sorts). It follows that in producing the necessary consistency, some principle, harmonizing seemingly disparate outcomes, will be invoked to explain the cases.

Second, analogical reasoning focuses on particulars, and it develops from concrete controversies. Holmes put it this way: a common law court "decides the case first and determines the principle afterwards." n21 Ideas are developed from the details, rather than imposed on them from above. In this sense, analogical reasoning, unlike many forms of reasoning, n22 is a version of "bottom-up" thinking. n23

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n21 Oiver W. Holmes, Jr., Codes and the Arrangements of Law, 44 HARV. L. REV. 725, 725 (1931) (reprinted from 5 AM. L. REV. 1 (1870)). IN a way this suggestion is misleading. To decide the case at all, one has to have the principle in some sense in mind; there can be no sequential operation of quite the kind Holmes describes. See T. M. Scanlon, The Aims and Authority of Moral