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GENERAL PROPOSITIONS AND CONCRETE CASES (WITH SPECIAL REFERENCE TO AFFIRMATIVE ACTION AND FREE SPEECH)

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On October 27, 1995, the Wake Forest University School of Law hosted the Oliver Wendell Holmes Devise Lecture Series. Professor Cass R. Sunstein, the Karl N. Llewellyn Professor of Jurisprudence at the University of Chicago School of Law, delivered the following remarks as the lecture's keynote address. In addition, the lecture included four distinguished panelists who spoke in response to Professor Sunstein: A.E. Dick Howard, the White Burkett Miller Professor of Law and Public Affairs at the Virginia School of Law; Professor Sheri Lynn Johnson from Cornell Law School; and Professor Michael Kent Curtis and Professor Ronald F. Wright from the Wake Forest University School of Law. The remarks of these panelists are presented following the text of Professor Sunstein's speech.

INTRODUCTION

In this lecture I discuss two phenomena of special importance for law. The first involves *agreement on an abstraction*, unaccompanied by agreement on what the abstraction specifically entails. The second involves *agreement on a judgment in a concrete case*, unaccompanied by agreement about what sorts of considerations ultimately account for the judgment. These agreements are *incompletely theorized*, though in differ-

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago. This essay is the written version of the 1995 Oliver Wendell Holmes Lecture, delivered at Wake Forest University on October 27, 1995. For this lecture I have drawn on Cass R. Sunstein, LEGAL REASONING AND POLITICAL CONFLICT (forthcoming Mar. 1996); *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

ent ways. They are a clue to many features of a well-functioning legal culture, including the system of constitutionalism and the process of decision by reference to precedent. They also bear on democratic politics and practical reason in many arenas of social life. I connect these points with current debates over affirmative action and freedom of speech.

I. General Propositions

A. *In General*

Incompletely theorized agreements play a pervasive role in law and society. It is quite rare for a person or group completely to theorize any subject, that is, to accept both a general theory and a series of steps connecting that theory to concrete conclusions. Thus we often have, in law, an *incompletely theorized agreement on a general proposition*—incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases.

This is the sense emphasized by Justice Oliver Wendell Holmes in his great aphorism, "General principles do not decide concrete cases."[1] We accept the free speech principle, but disagree about pornography and commercial advertising. We know that murder is wrong, but disagree about whether abortion is wrong. We favor racial equality, but are divided on affirmative action. We believe in liberty, but disagree about increases in the minimum wage. Hence the pervasive legal and political phenomenon of an agreement on a general principle alongside disagreement about particular cases. The agreement is incompletely theorized in the sense that it is *incompletely specified.* Much of the key work must be done by others, often through casuistical judgments at the point of application.

Often constitution-making becomes possible through this form of incompletely theorized agreement. Many constitutions contain incompletely specified standards and avoid sharp-edged rules, at least when it comes to the description of basic rights. Consider the cases of Eastern Europe and South Africa, where constitutional provisions include many abstract provisions on whose concrete specification there has been sharp dispute. Abstract provisions protect "freedom of speech," "religious liberty," and "equality under the law," and citizens agree on those abstractions in the midst of sharp dispute about what these provisions really entail. Thus, in South Africa various parties have agreed on a statement of abstract principles that will receive greater specification in the future. The South African Constitution is an interim one setting the framework for a final document. And in South Africa, as elsewhere, the content of the free speech principle is unclear despite the existence of that principle; so too with the range of policies that go under the rubric "affirmative action." The many abstractions found in Eastern European constitutions coexist with sharp disagreements on particular issues.

1. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Incompletely specified agreements thus have important social uses. Many of their advantages are practical. They allow people to develop frameworks for decision and judgment despite large-scale disagreements. At the same time, they help produce a degree of a social solidarity and shared commitment. People who are able to agree on political abstractions—freedom of speech, equal protection of the laws, freedom from unreasonable searches and seizures—can also agree that they are embarking on shared projects. These forms of agreement can help *constitute* a democratic culture. It is for the same reason that they are so important to constitution-making.

Incompletely specified agreements also have the advantage of allowing people to show one another a high degree of mutual respect. By refusing to settle concrete cases that raise fundamental issues of conscience, they permit citizens to announce to one another that society shall not take sides on such issues until it is required to do so. Of course, there may be contexts in which more in the way of specification is a good idea. Sometimes it is important to move in the direction of rules.[2] I am not denying this, nor am I urging that incomplete specification is always desirable. I am urging only that it has important social uses, especially at the initial stages of lawmaking.

B. Why General Propositions Do Not Decide Concrete Cases

I have referred to Holmes' suggestion that "General propositions do not decide concrete cases."[3] I believe that this is the greatest of Holmes' many great aphorisms. But like most aphorisms, it needs a good deal of unpacking. Much of law seems to consist of general propositions. How can law fail to decide concrete cases? What, most simply, does the statement mean?

I think that Holmes' central point is that general propositions are incompletely specified. It is for this reason that they do not resolve particular cases, which turn on the specification. The Equal Protection Clause is an obvious example. To know whether a law denies someone "the equal protection of the laws," a great deal of supplemental detail is necessary. The Equal Protection Clause does not say whether a law discriminating on the basis of disability is violative of the equality norm. It does not say whether sex discrimination is acceptable. It does not tell us whether affirmative action is or is not constitutionally permissible.

This point applies to many general propositions whose meaning depends on abstract terms conspicuously capable of many different meanings. In such cases, concrete cases depend on a substantive argument, not on a language lesson. Those who stress language tend to disguise the substantive argument and to conceal the substantive argument behind a (false) claim about the inevitability of a particular specification.

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2. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (forthcoming Mar. 1996).

3. *Lochner*, 198 U.S. at 76.

But there is another and somewhat subtler meaning to Holmes' claim. A general proposition may fail to decide concrete cases even if it appears not to be incompletely specified and appears not to include vague or ambiguous language. Suppose, for example, that a statute says that no one may drive over sixty-five miles per hour. A provision of this kind appears to decide concrete cases—in fact, all concrete cases that arise under the provision. But this is false. Suppose, for example, that a police officer is attempting to capture a fleeing felon, or that a driver is trying to escape someone who is shooting at him. In either case there may well be a legally sufficient excuse. Any legal system is likely to authorize judges to make exceptions in cases of absurdity or palpable injustice. If this is so, even a rule-like general proposition will fail to decide concrete cases, since the meaning of the proposition in particular circumstances may not have been fully settled in advance.

C. Examples

At this point, I want to emphasize that a real pathology of any legal system occurs when an incompletely specified abstraction is said to decide concrete cases. Unfortunately, the pathology is common. It even happens within the Supreme Court. Thus, the Court has sometimes written as if the text of the Equal Protection Clause compels the conclusion that affirmative action programs must be treated the same as ordinary racial discrimination.[4] The text of the clause of course reads: "Nor shall any State . . . deny to any person . . . the equal protection of the laws."[5] The view that these words necessarily forbid affirmative action, or require it to be treated the same as ordinary discrimination, is a species of formalism in its worst sense—one of the few truly venal sins of legal interpretation.

Despite frequent protestations to the contrary, there is certainly no clear textual ban on affirmative action. In fact, the textual arguments are entirely inadequate. To be sure, the Constitution calls for "equal" protection of the laws; but on the validity of affirmative action, this point is neither here nor there.[6] The term "equal" cannot possibly mean "the same," if we understand "the same" to forbid legal classifications according to one perceived difference. If "equal" meant "the same," then law, which consists of classifications, would not be possible at all. Nor must all classifications be treated "the same." Thus, it is no offense to the Equal

4. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (holding all racial classifications imposed by government actors to be subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (holding that a city plan which required contractors who were awarded city construction projects to subcontract specified amount to minority-owned businesses violated the Equal Protection Clause); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (holding that a medical school's admissions policy requiring a certain percentage of minority students violated the Fourteenth Amendment).

5. U.S. CONST. amend. XIV, § 1.

6. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE 56-61 (1988) (discussing the evolution of equal protection jurisprudence in the context of affirmative action).

Protection Clause if courts scrutinize sex-based classifications more skeptically than they scrutinize age-based classifications, even though this difference does not treat people "the same." The Court's own cases do not violate the Equal Protection Clause insofar as those cases treat different kinds of classification differently.

The real question is what the word "equal" requires in this context. It is possible to think that the word "equal" requires affirmative action; it is possible to think that the word "equal" forbids affirmative action. The word itself is incompletely specified. The only way to make progress is to go outside of the text. It is there that we must look to find possible understandings of the Constitution's equality principle.

Nor is it helpful to say that the Constitution speaks of "any person" rather than of groups. The Supreme Court, together with many others, appears to think that the reference to "any person" means that the clause speaks of individuals rather than of groups, and that this point counts strongly against affirmative action.[7] The claim contains some truth, but it is highly misleading. To be sure, "any person" may complain that a classification is unacceptable. But under the Equal Protection Clause, *all claims of unconstitutional discrimination are based on group status, and no one denies this.* This is because anyone who complains of unconstitutional discrimination is necessarily complaining about the government's use, for purposes of classification, of some characteristic that is shared by some number of group members. The only serious question is whether the government's use of that shared characteristic is disfavored from the constitutional point of view. In this sense, claims of unconstitutional discrimination are always group-based claims.

For example, Jones has a claim to careful scrutiny of laws disadvantaging her if those laws classify on the basis of gender. But she has no such claim if those laws classify on the basis of age.[8] She is entitled to a degree of scrutiny corresponding to the basis of the classification of which she complains. As a person, she is always entitled to complain. But the degree of scrutiny is a function not of the fact that she is a "person," but of the characteristic according to which she has been disadvantaged.

Consider as well many discussions of freedom of speech, where hard cases are sometimes claimed to be settled by the general proposition, stated in the First Amendment, that "Congress shall make no law . . . abridging the freedom of speech."[9] It is implausible to say that the First

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7. *See Adarand*, 115 S. Ct. at 2112 (recognizing the "basic principle" that the Fourteenth Amendment "protect[s] persons, not groups"); *Croson*, 488 U.S. at 493 (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948), for the proposition that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual"); *Bakke*, 43 U.S. at 289; *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 399-405 (similarly discussing United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)).

8. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-16 (1976) (holding that a state police department's mandatory retirement policy did not violate the Fourteenth Amendment).

9. U.S. CONST. amend. I; *see also* NADINE STROSSEN, DEFENDING PORNOGRAPHY 37-38, 50-51 (1995) (claiming that the text of the First Amendment contains no exception for sex-

Amendment is an "absolute"; the counterexamples—perjury, treason, bribery, fraud—are too insistent. But the use of the general proposition puts people on the defensive in arguing for particular restrictions on the speech. Following Justice Black, many people act as if the general proposition in the text resolves the hard cases.[10] This phenomenon may be useful as a social matter, since it helps reduce the regulation of speech. But it is not helpful for clear thinking, and it is also dishonest, for the outcome in the concrete cases will depend on something other than the general proposition.

The Supreme Court has thus lost sight of Holmes' edict in affirmative action cases, and much of the culture seems to have done the same thing in the context of free speech. But some lawyering suffers from the same vice. In fact, much ineffective advocacy is ineffective because it consists of pressing hard on a general proposition, when the question is the meaning of the proposition in concrete settings—a question that cannot be settled by repeating the general proposition. Lawyering would be far better if it relied less on general propositions and more on the concrete, disputed details on the specific case.

II. CONCRETE CASES

I turn now to how judges settle concrete cases—and, more specifically, to incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them. These terms contain some ambiguities. We might consider, as conspicuous examples of high-level theories, Kantianism and utilitarianism, and see legal illustrations in the many distinguished (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality as undergirded by highly abstract theories of the right or the good.[11] 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.

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; I mean to do the same thing by the terms "theories" and "abstractions" (which I use interchangeably). In this

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ual expression but that the Court has consistently and often inexplicably created such exceptions in the area of pornography).

10. *See* STROSSEN, *supra* note 9, at 50-54 (criticizing the Supreme Court for failing to apply unambiguous principles in the area of sexual speech).

11. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 297-301 (1986) (discussing different conceptions of equality and principles that support them); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION vii (1981) (noting that the one purpose of the book is to show that "a small number of basic moral principles" govern the complex law of contracts).

setting, the notions "low-level," "high," and "abstract" are best understood in comparative terms, like the terms "big," "old," and "unusual." The "clear and present danger" standard is a relative abstraction when compared with the claim that members of the Nazi Party may march in Skokie, Illinois.[12] But the "clear and present danger" idea is relatively particular when compared with the claim that nations should adopt the constitutional abstraction "freedom of speech." The term "freedom of speech" is a relative abstraction when measured against the claim that campaign finance laws are acceptable, but the same term is less abstract than the grounds that justify free speech, as in, for example, the principle of personal autonomy.

What I am emphasizing here is that when people diverge on some (relatively) high-level proposition, they might be able to agree when they lower the level of abstraction. Incompletely theorized judgments on particular cases are the ordinary material of law. And in law, the point of agreement is often highly particularized—absolutely as well as relatively particularized—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. High-level theories are rarely reflected explicitly in law.

The point is especially important in the areas of equality and free speech. In such cases, the Court makes decisions, but they have been incompletely theorized in the sense that the majority does not make a final judgment about what underlies the equality or free speech principle. People can converge on the result—protecting true and nonmisleading commercial speech, offering something other than rational basis review for affirmative action—from many different foundations. Thus the Court's First Amendment jurisprudence reflects no choice among the deepest foundations of the free speech principle.

Perhaps the participants in law endorse no such theory, or perhaps they believe that they have none, or perhaps they cannot, on a multimember court, reach agreement on a theory. Perhaps they find theoretical disputes confusing or annoying. What is critical is that they agree on the best rule or on how a case must come out. Consider both rules and analogical thinking. Many rules—the speed limit law, the rule requiring people to compensate for intentional torts—can be accepted from diverse foundations. In fact, legal rules often are acceptable to people who diverge on the ultimate basis of law.

The same is true for analogies. People might think that *A* is like *B*, and covered by the same low-level principle, without agreeing on a deep theory to explain why the low-level principle is sound. They agree on the matter of similarity, without agreeing on a large-scale account of what makes the two things similar. In the law of discrimination, for example, many people think that sex discrimination is "like" race discrimination and should be treated similarly, even if they lack or cannot agree on a

12. *See* Collin v. Smith, 578 F.2d 1197, 1204-05, 1207 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

general theory of when discrimination is unacceptable. In the law of free speech, many people agree that a ban on speech by a Communist is "like" a ban on speech by a member of the Ku Klux Klan and should be treated similarly—even if they lack or cannot agree on a general theory about the foundations of the free speech principle.

III. Incomplete Theorization and the Constructive Uses of Silence

What might be said on behalf of incompletely theorized agreements, or incompletely theorized judgments, about particular cases? It is tempting to think of incomplete theorization as quite unfortunate—as embarrassing or reflective of some important problem or defect. Perhaps people have not yet thought deeply enough. 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. Sometimes more in the way of abstraction does reveal prejudice or confusion. But this is not the whole story. On the contrary, incompletely theorized judgments are an important and valuable part of both private and public life. They help make law possible; they even help make life possible. Most of their virtues involve *the constructive uses of silence*, an exceedingly important social and legal phenomenon. Silence—on something that may prove false, obtuse, or excessively contentious—can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense. In law, as elsewhere, what is said is no more important than what is left out. Certainly this is true for ordinary courts, which have limited expertise and democratic accountability, and whose limits lead them to be cautious.

My principal concern is the question of 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 trial court, for example—might write; they bear on the question of how a single judge, whether or not a member of a collective body, might think in private; and they relate to appropriate methods of both thought and justification wholly outside of the adjudication and even outside of law.

A. Multimember Institutions

Begin with the special problem of public justification on a multimember body. The first and most obvious point is that incompletely theorized agreements are well-suited to a world—and especially a legal world—containing social dissensus 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.[13] In the area of equality, it may be much easier to decide whether a particular practice is legitimate than to decide on a broad theory of human equality.

Second, incompletely theorized agreements can promote two goals of a liberal democracy and a liberal legal system: to enable people to live together and to permit them to show each other a measure of reciprocity and mutual respect.[14] The use of low-level principles or rules allows judges on multimember bodies and even citizens generally to find commonality and thus a common way of life without producing unnecessary antagonism. Both rules and low-level principles make it unnecessary to reach areas in which disagreement is fundamental.

Perhaps even more important, incompletely theorized agreements allow people to show each other a high degree of mutual respect, or civility, or reciprocity. Frequently, ordinary people disagree in some deep way on an issue—the Middle East, pornography, homosexual marriages—and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions and showing a measure of reciprocity and respect (even if they do not at all respect the particular conviction that is at stake). 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 least if those commitments are reasonable and if there is no need for them to do so. Thus, for example, it would be better if judges intending to reaffirm *Roe v. Wade*[15] could do so without challenging the judgment that the fetus is a human being.[16]

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. Of course, it is not always disrespectful to disagree with someone in a fundamental way; on the contrary, such disagreements may sometimes reflect profound respect. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. So, too, 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. But many cases can be resolved in an incompletely theorized

13. Of course, concurring opinions are common, sometimes because an incompletely theorized agreement is possible on a result without being possible on a rationale, and sometimes because one judge wants to theorize an issue more (or less) deeply than do others. Sometimes the existence of a concurring opinion can compromise rule of law values by making it hard to form expectations; sometimes concurring opinions raise issues of collegiality, since authors of majority opinions are not thrilled to find separate concurrences.

14. *See* JOHN RAWLS, POLITICAL LIBERALISM 16-17, 50 (1993).

15. 410 U.S. 113 (1973).

16. This is the goal of the equal protection argument. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 257-90 (1993).

way, and that is all I am suggesting here.

B. Multimember Institutions and Individual Judges

Turn now to reasons that call for incompletely theorized agreements whether or not we are dealing with a multimember body. The first consideration here is that incompletely theorized agreements have 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 largest ideals. I have said that some theories should be rejected or ruled inadmissible. But it is an advantage, from the standpoint 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 second point is that incompletely theorized agreements are valuable when we seek moral evolution over time. Consider the area of constitutional equality, where considerable change has occurred in the past and will inevitably occur in the future. A completely theorized judgment would be unable to accommodate changes in facts or values. If the legal culture really did attain a theoretical end-state, it would become too rigid and calcified; we would know what we thought about everything. This would disserve posterity.

Incompletely theorized agreements are a key to debates over constitutional equality, with issues being raised about whether gender, sexual orientation, age, disability, and others are analogous to race; such 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. Of course, a completely theorized judgment would have many virtues if it is correct. But at any particular moment in time, this is an unlikely prospect for human beings, not excluding judges.

Consider too the fact that in the area of affirmative action, the Court's decisions have been highly case-specific, and that the Court has not offered a final resolution. Instead, it has largely "remanded" the issue to the public for a debate that is now underway. The fact that the Court has eschewed clear rules, and operated so casuistically, may appear to be lamentable, an offense to the rule of law. But it may well fit appropriately with the role of the Court, which decides cases and does not select broad theories of the right or the good. Moral evolution is far more likely to occur—and basic offense to others is less likely—when the Court acts in this fashion.

A particular concern here is the effect of changing understandings

both of facts and of values. Consider ordinary life. At a certain time, you may well refuse to make decisions that seem foundational in character—about, for example, whether to get married within the next year, or whether to have two, three, or four children, or whether to live in San Francisco or New York. Part of the reason for this refusal is knowledge that your understandings of both facts and values may well change. Indeed, your identity may itself change in important and relevant ways, and for this reason a set of commitments in advance—something like a fully theorized conception of your life course—would make no sense.

Legal systems and nations are not so very different. If the Supreme Court is asked to offer a fully theorized conception of equality—in areas involving, for example, affirmative action, or the rights of disabled people, children, and homosexuals—it may well respond that its job is to decide cases rather than to offer fully theorized accounts, partly because society should learn over time, and partly because society's understandings of facts and values, in a sense its very identity, may well shift in unpredictable ways. The point bears on many legal issues. It helps support the case for incompletely theorized agreements.

The third point is practical. Incompletely theorized agreements may be the best approach that is available for people of limited time and capacities. Full theorization may be far too much to ask. A single judge faces this problem as much as a member of a multimember panel. Here, too, the rule of precedent is crucial; attention to precedent is liberating, not merely confining, since it frees busy people to deal with a restricted range of problems. Incompletely theorized agreements have the related advantage, for ordinary lawyers and judges, of humility and modesty. To engage in analogical reasoning, for example, one ordinarily need not take a stand on large, contested issues of social life, some of which can be resolved only on what will seem to many a sectarian basis.

Fourth, 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 decided cases and adjudicative officials, law cannot speak with one voice; full coherence in principle is unlikely in the extreme.

There is a more abstract point here. Human morality recognizes irreducibly diverse goods, which cannot be subsumed under a single "master" value.[17] The same is true for the moral values reflected in the law. Any simple, general, and monistic or single-valued theory of a large area of the law—free speech, contracts, property—is likely to be too crude to fit with our best understandings of the multiple values that are at stake in that area. It would be absurd to try to organize legal judgments through a single conception of value.

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17. I borrow here from Joseph Raz. *See* JOSEPH RAZ, *The Relevance of Coherence, in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 261, 261 (1994).

What can be said about law as a whole can be said about many particular areas of law. Monistic theories of free speech or property rights, for example, will fail to accommodate the range of values that speech and property implicate. Free speech promotes not simply democracy, but personal autonomy, economic progress, self-development, and other goals as well. Property rights are important not only for economic prosperity, but for democracy and autonomy, too. We are unlikely to be able to appreciate the diverse values at stake and to describe them with the specificity they deserve unless we investigate the details of particular disputes.

This is not a decisive objection to general theories; a "top down" approach might reject monism and point to plural values.[18] Perhaps participants in democracy or law can describe a range of diverse values, each of them at a high level of abstraction; acknowledge that these values do not fall under a single master value; and use these values for assessing law. But even if correct, any such approach would run into difficulty because of an important practical fact: social disagreements about how best to describe the relevant values. Moreover, any such approach is likely to owe its genesis and its proof—its point or points—to a range of particular cases on which it can build. Of course, full theorization of an area of law would be acceptable, or even an occasion for great celebration, if it accounted for the plural values at issue. But this would be a most complex task, one that requires identification of a wide range of actual and likely cases. At least we can say that 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.

None of these points suggests that incompletely theorized agreements always deserve celebration. The virtues of such agreements are partial. Some incompletely theorized agreements are unjust. If an agreement is more fully theorized, it will provide greater notice to affected parties. Moreover, fuller theorization—in the form of wider and deeper inquiry into the grounds for judgment—may be valuable or even necessary to prevent inconsistency, bias, or self-interest. If judges have actually agreed on a general theory, and if they are really committed to it, they should say so. Judges and the general community will learn much more if they are able to discuss the true motivating grounds for outcomes. Over time, greater theorization may well make sense. And disagreement plays an important place within courts as well as within democracy. Stability is often good, but an unjust system should probably be made less stable.

All these are valid considerations, and nothing I am saying here denies their importance. I am instead drawing attention to a pervasive phenomenon, highly characteristic of legal reasoning: legal judgments on a particular case unaccompanied by a deep theory of the right or the good, and joined by people who do not know what they think about foundational issues, or who are in disagreement on such issues. In the areas of

18. *See generally* AMARTYA K. SEN, COMMODITIES AND CAPABILITIES (1985).

equality and free speech, this is a characteristic feature of modern constitutional adjudication, where judges have tended to proceed casuistically, and avoided large-scale theories.

CONCLUSION

Legal argument is often weakened by the pretense that general propositions decide concrete cases. From the fact that the Constitution protects freedom of speech, it is often said that a particular conclusion follows with respect to (say) libel or commercial advertising. From the fact that the Constitution bars states from denying any person the equal protection of the laws, it is said that particular conclusions follow for affirmative action. These are species of bad formalism—a practice with continuing influence on the legal culture, and a practice against which Holmes frequently railed. The Supreme Court's performance in affirmative action cases has suffered by virtue of the Court's disregard of Holmes' suggestion, and this is a point that remains true whatever we think, in the end, of affirmative action. And the popular culture's treatment of free speech issues has suffered from a similar pathology, as people derive, from a general proposition, concrete results in hard cases.

I have sought to draw attention to two important legal phenomena—agreement on abstractions amidst uncertainty about particulars and agreements on particulars amidst uncertainty about abstractions. Constitutionalism—and modern lawmaking—are both made possible by the former phenomenon. Incompletely specified abstractions may well seem inconsistent with the rule of law, but they have important social uses. Moreover, agreements in particulars amidst uncertainty about abstractions are the hallmark of the common law, not excluding that form of common law that we know as constitutional doctrine. In fact, it would not be too much to say that incompletely theorized agreements on particulars are a defining characteristic of Anglo-American adjudication.

The pervasive place of these kinds of agreements casts doubt on the idea that full theorization is desirable for law, or even that full theorization is possible. I cannot adequately defend this proposition here. Instead, I end with a passage from a somewhat casual but in my view highly illuminating letter from Oliver Wendell Holmes, very much in the spirit of my remarks here, and pointing in the directions in which such a defense might go:

> I read Aristotle's *Ethics* with some pleasure. The eternal, universal, wise, good man. He is much in advance of ordinary Christian morality with its slapdash universals (Never tell a lie. Sell all thou hast and give to the poor[,] etc.). He has the ideals of altruism, and yet understands that life is painting a picture not doing a sum, that specific cases can't be decided by general rules, and that everything is a question of degree . . . .[19]

19. Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), *in* THE ESSENTIAL HOLMES 58 (Richard A. Posner ed., 1992).