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Part II

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

The following two chapters aim to illustrate that this conception of democratic law is not a mere overlay, so abstract as to be divorced from the considerations that shape law's content. Rather, a communicative conception of democratic law can and should make a difference to concrete legal issues. If mutual, ongoing communication and affirmation of our values and commitments is a foundational organizing end of democratic law, then we must *generate* coherent, morally legible law as an articulate representation of our values.

By contrast, reductionist conceptions of democratic law that understand law merely as a procedurally fair method of managing discrete disputes between contesting interests will view the generation of articulate law as more dispensable. Should disputes be managed another way, the absence of law represents no loss. Moreover, reductionist views regard incoherence within law as the unremarkable byproduct of

compromises reached by conflicting forces whose identity and power shift over time and circumstance. On such views, incoherence and inconsistency may be undesirable when they impede predictions of legal outcomes, but they do not otherwise represent intrinsic normative shortcomings. Whereas, a communicative conception regards incoherence and moral illegibility as substantial self-defeating defects of a democratic legal system.

In this Part, I will pursue two examples to illustrate how greater consciousness of a communicative conception of democratic law could influence the generation and content of law. Chapter Two explores the communicative moral significance of generating law and in particular, the common law, by investigating a specific case involving federal pre-emption and the common law of contract. Chapter Three addresses issues of incoherence and incompletely realized commitments in the context of constitutional balancing by asking how we should understand the composition and sincere articulation of state interests within a balancing framework.

In both chapters, I focus on American examples because they are what I know, and because our system has *some* of the background architecture of democratic law. Although the United States is a deeply flawed and endangered exemplar of an aspiring democratic legal system, our Constitution expresses firm commitments about the equality of all persons, however imperfectly those commitments are understood or attained. It also expresses firm commitments to protect some of our essential rights and interests, however incomplete its lists and strained its realized protections. Further, our precedential, adversarial judiciary entertains arguments by the parties' own representatives, typically offers reasons for its decisions that guide future cases, and

engages in an ongoing dialogue of reasons with the public and other reason-giving officials. Indeed, the examples I will pursue highlight the judiciary's special role in a system of democratic law, a role that is neither secondary nor subordinate to the legislature's.

By concentrating on some shortcomings in the contemporary approach to common law and constitutional methodology, I leave aside extensive criticism of the more obvious defects of our aspirant democracy, both persistent and fresh. I appreciate the oddity of dwelling on a slow-acting disease afflicting some trees while a fire threatens the forest. I bracket some pressing issues not to diminish them, but because there's little need for further *theoretical* wrestling to conclude that our democratic aspirations compel us to resist contemporary initiatives to renege on these (already imperfectly fulfilled) commitments, and impel us better to realize them—by eradicating social oppression, economic and status inequalities, discriminatory policing, pointless and excessive incarceration, and private campaign financing (to name only a few priorities). Pragmatically, while we must counter attacks on our core principles and address shortfalls in their realization, we must also protect our still operative democratic institutions from decay. Conversations about their best functioning are part of their maintenance. We may teeter on the precipice of some cataclysmic changes, but some institutions and practices remain downstream from the earliest line of fire; their operation, on well-considered principles, may help to preserve some of the skeletal architecture of the republic or at least to slow the destructive momentum.

The examples I will discuss are, moreover, theoretically interesting because their departures from a communicative model of democratic law are subtler than the blunt

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

Chapter 2: Democratic Law and the Erosion of Common Law

Introduction

The conception of democratic law I have outlined in Chapter One should ignite a concern about a growing indifference to the democratic importance of the generation of common law. My allusion to the ‘democratic importance of the generation of the common law’ may startle some readers given the alleged tension between judicially articulated law and democracy. In the prior chapter, I gave some reasons to question that tension. In this chapter, I will elaborate upon my conviction that the common law has a central place in a communicative conception of democratic law by focusing on the recent case of *Northwest v. Ginsberg*, a unanimously decided Supreme Court preemption case that displaced the state common law about contractual good faith in the air travel context.¹ It is a somewhat obscure case, but it is not an isolated example of the troubling undervaluation of the common law that partly propels its disposition. Indeed, its perceived unremarkability is itself telling, signaling an internalization and normalization of substantial defects in the Court’s implicit view of the value of law and its relation to markets as well as of the common law in particular.

Some Background

To make one’s way into the case and the issues that concern me, it may help to introduce some preliminary background on federal preemption and common law. (I will also say more, in a bit, about the duty of good faith.) Federal preemption is one of

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

many legal doctrines that enforce the supremacy of the federal government over state governments. The basic notions, with which I have no quarrel, are simple: within the range of its enumerated powers, the federal government may decide to occupy a field of legislation and displace state law, whether or not the state law substantively conflicts with federal legislation and whether or not the federal legislation contains counterpart provisions that address the same questions or problems as the state law. This power to occupy complements the supremacy of federal law over state law, which resolves conflicts between valid federal legislation and state law in favor of federal law.²

Interesting *legal* issues arise in these domains about what counts as a conflict beyond explicit contradiction, which fields the federal government may occupy exclusively, whether the federal intent to displace state law must be clearly articulated, and how far the occupied field's boundaries extend.

Interesting *political* issues arise concerning *when* the federal government should exercise its preemption power to displace concurrent state law. Resolving these issues requires considering: when tensions between diverse state and federal means and purposes become untenable; whether we want dual sovereigns pursuing the same aims or we prefer a single agent of implementation; and how to interpret provisions and purposes that are not explicitly articulated. Should we interpret federal statutory provisions and pre-emptive intent narrowly to preserve a robust arena in which states

² Stephen Gardbaum distinguishes between supremacy (conflicts are to be resolved in favor of the federal government), an automatic federal power, from preemption, a discretionary federal power through which the federal government elects to displace state power. Stephen Gardbaum, "Congress's Power to Preempt the States," *Pepperdine Law Review* 33, no. 1 (2006): 39-68, at 40-41. Although his distinction is sound and important, I use 'preemption' to refer to both for convenience.

may develop a distinctive form of law, or should we interpret federal provisions broadly to ensure the more successful pursuit of federal aims and a unified national approach?

From a communicative perspective on democratic law, these are important questions for two reasons. First, local and state governments may have a special significance for communicative approaches. Some democratic legal aims are better realized when the community is powerful enough to develop a distinctive voice yet small enough to generate a distinctive identity and camaraderie between citizens. An overly expansive preemption regime may foreclose some of the opportunities for developing distinctive communities that elicit strong affiliations.

Second, the balance struck between federal and state power will also affect the scope of common law. Judicially articulated common law is the primary source of general property, contract, and tort law. When courts act as common law courts, rather than interpreting and applying a statutory text, they apply and expand upon previously judicially articulated law to articulate the law further as cases present themselves. With some exceptions,³ since the landmark case of *Erie Railroad Company v. Tompkins*,⁴ common law jurisprudence has been largely a state law matter, given definitive articulation by state courts.⁵ So, when a federal statute pre-empts state law, it may

³ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (finding that Congress “expected the courts to give shape to the [the Sherman Antitrust Act’s] broad mandate by drawing on common-law tradition”); Ernest A. Young, “Preemption and Federal Common Law,” *Notre Dame Law Review* 83, no. 4 (2008):1639-80, at 1639-46 (discussing the forms federal common law has taken, as well as its origins).

⁴ 304 U.S. 64 (1938).

⁵ For example, there is no general federal common law of contracts, although there is federal common law for some specific situations, such as cases involving federal government contracts or those contracts governed by ERISA. See 14D CHARLES ALAN

hinder the development and articulation of common law; in tandem, it may weaken or constrain the reach and depth of the local social-moral culture. These ramifications should trouble us from a democratic, communicative perspective.

Although it officially espouses a doctrine of narrow construction to preserve state autonomy,⁶ the Supreme Court has increasingly expanded the scope of federal preemption in recent years. For example, the Court has preempted states' common law unconscionability jurisprudence through its finding that the Federal Arbitration Act evinces strong support for clauses in standard employment and consumer contracts that mandate individual arbitration.⁷ I share critics' reservations about the Act's interpretation and the hazards of facilitating corporate preferences for mandatory individual arbitration. Such reservations are reasonably intensified when the arbitration process is too cumbersome, time-consuming, and expensive for individuals

WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1 (4th ed.) (2017) & 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4514 (3d ed.) (2017). And, of course, federal courts may rule on state common law issues appropriately presented to them (as when they have diversity jurisdiction), but they are bound to follow the relevant state's interpretation of its common law (or where it is unsettled, to predict the state's highest court's interpretation). 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4507 (3d ed.) (2017).

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

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

to navigate just for themselves, when repeat arbitrators tilt corporate, and when a rigid, asymmetric bargaining dynamic precludes individual bargaining around these clauses.⁸

As enforceable arbitration clauses proliferate, in addition to depriving individual litigants of due process, the common law may languish because substantive, important disputes over commonplace contracts may never reach court.⁹ Similarly, the growing trend of permissiveness toward enforcing remedial clauses (commonly known as liquidated or stipulated damages clauses) may likewise suppress the development of common law remedial principles.¹⁰ Enabling these private agreements thus deprives us of the opportunities to resolve important disputes publicly through the articulation of legal principles and thereby to contribute to our evolving public understanding of our mutual commitments.

Northwest v. Ginsberg *and the Duty of Good Faith*

⁸ See, e.g., Judith Resnik, "Fairness in Numbers: A Comment on *AT&T v. Concepcion*, *Wal-mart v. Dukes*, and *Turner v. Rogers*," *Harvard Law Review* 125, no. 1 (2011): 78-170, at 114; David S. Schwartz, "Mandatory Arbitration and Fairness," *Notre Dame Law Review* 84, no. 3 (2009), at 1247; David S. Schwartz, "The Federal Arbitration Act and the Power of Congress Over State Courts," *Oregon Law Review* 83, no. 2 (2004): 541-630. See also William B. Rubenstein, "Procedure and Society: An Essay for Steve Yeazell," *UCLA Law Review Discourse* 61 (2013): 136-48, at 142-43 (decrying the inconsistency between corporate insistence on individual arbitration and its conveyance through standard-form contracts of adhesion).

⁹ See Myriam Gilles, "The Day Doctrine Died: Private Arbitration and the End of Law," *University of Illinois Law Review* 2016, no. 2 (2016): 371-424, at 409-413; Resnik, *supra* note 7, at 114.

¹⁰ See Seana Valentine Shiffrin, "Remedial Clauses: The Overprivatization of Private Law," *Hastings Law Journal* 67 (2016): 407-42 (discussing how enforceable remedial clauses may suppress the development and refinement of common law remedial principles).

Triggering a common law vacuum is not only a potential side effect of the Court's arbitration decisions and the proliferation of remedial clauses. It is also the direct, unacknowledged product of another, unanimously decided, preemption case, *Northwest v. Ginsberg*, that flew under the nation's radar. Three years ago, *Ginsberg* held that the Airline Deregulation Act (ADA) preempts state common law with respect to the implied covenant of good faith and fair dealing in contractual relations involving frequent flyer programs.

Rabbi Ginsberg was a platinum-level frequent flyer with Northwest Airlines who regularly lodged complaints. Northwest Airlines abruptly terminated his membership in the program, citing this contractual provision: "[a]buse of the . . . program (including . . . improper conduct as determined by [Northwest] in its sole judgment[]) . . . may result in cancellation of the member's account."¹¹ Northwest provided neither a description of Ginsberg's alleged improper conduct, nor any compensation for his accumulated miles. Ginsberg sued, claiming inter alia, that Northwest violated an implicit, common law covenant of good faith and fair dealing by failing to give reasons for his termination.

The implied duty of good faith invoked by Ginsberg is a theoretically noteworthy doctrine. It requires that contractual parties exhibit "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."¹² Contractual parties need not serve as each other's advocates or fiduciaries just by virtue of their having formed a contract. They are, however, expected to avoid "subterfuges

¹¹ *Ginsberg*, 134 S. Ct. at 1426-27.

¹² RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981).

and evasions....of the spirit of the bargain...[and] abuse of a power to specify terms....”¹³ As one court put it, the duty of good faith demands that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”¹⁴ While contracts may allocate degrees of discretion to parties in how they assess and execute their agreed-upon duties, they are constrained to exercise that discretion with good faith.

One manifestation of good faith is that one’s exercise of discretion is guided by non-arbitrary reasons, the contents of which respect the point of the agreement, and which could be understood, publicly, to do so.¹⁵ Described in this way, the duty of good faith naturally commands the interest and the approbation of the sort of motive-attentive democratic legal theory I defended in Chapter One. Incorporating a duty of good faith into its contract law is a way a democratic legal system concretizes our expectation that citizens should keep their commitments and that they should do so in a deliberate way that reflects an understanding of the purpose of the agreement. This latter expectation resonates with the moral conviction that while respectful action involves some actions that may be specified in advance, respectful action also depends animating motives that, among other things, provide meaning and guidance when parties enter interstitial territory.

¹³ *Id.* at cmt. d.

¹⁴ *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. Sup. Ct. 1995) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 85 (1933)).

¹⁵ *Nickerson v. Fleet Nat’l Bank*, 924 N.E.2d 696, 704 (Mass. 2000) (explaining that focus of a good faith inquiry is not on the action but the reason or motive for its performance and whether it showed an absence of good faith).

So, although, under the contract, Northwest had substantial discretion to assess ‘improper conduct,’ Ginsberg alleged that Northwest had to have a reason related to improper conduct to terminate Ginsberg. That reason, as well as Northwest’s conception of what constitutes ‘improper conduct’ would have to be consistent with the spirit of their bargain. It could not simply terminate him for reasons of convenience or profit. In turn, Northwest countered that the ADA pre-empted the duty of good faith through its provision that “a State...may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier....”¹⁶ The ADA did not explicitly articulate any intent to displace common law, in general, or the implied duty of good faith, in particular, so the dispute was over whether the ADA’s pre-emptive provision implicitly extended that far.

In addressing this dispute, the Court operated under some pressure to remain true to an earlier preemption decision, *American Airlines, Inc. v. Wolens*,¹⁷ in which plaintiffs challenged retroactive changes to American Airlines’ frequent flyer program. The *Wolens* Court held that the ADA pre-empted a state statute regulating fraud but not breach of contract claims, including claims of improper modification of terms, because contracts represent voluntary undertakings by the parties.¹⁸ If pre-emption did not

¹⁶ 49 U.S.C. § 41713(b)(1) (1994).

¹⁷ 513 U.S. 219 (1995).

¹⁸ *Id.* at 222. How *Wolens* understood the division between state-imposed regulation and contract law is questionable. In what follows, I advocate a distinction between statutory law and common law based on their different normative contributions to a legal system, but I do not think that division is well understood by checking to see if there is a statutory text. Some statutory texts, after all, are simply codifications of common law principles. See, e.g., Lewis Grossman, “Codification and the California Mentality,” *Hastings Law Journal* 45, no. 3 (1994): 617-39, at 621; Cal. Civ. Code §5; Gunther A. Weiss, “The Enchantment of Codification in the Common-Law World,” *Yale*

reach breach of contract claims, then breach of the implied covenant of good faith would seem to fall under *Wolens'* protective umbrella. After all, the default interpretative rule of good faith is both a constitutive portion of the parties' "voluntary undertaking" and a rule of interpretation that makes sense of specific terms. Further, state court oversight of whether airlines administer frequent flyer programs in good faith is not a back-door way for states to reintroduce price controls into the airline market, so the covenant of good faith need not conflict with those federal aims.

Nonetheless, Northwest prevailed for reasons that flirt with the sort of reductionism about law that I contrasted with a democratic conception at the outset of this Part. Justice Alito reasoned that the frequent flyer program related to price because Ginsberg used his miles for flights and upgrades.¹⁹ Further, the opinion offered the assurance that the free market and the Department of Transportation would adequately police bad faith.²⁰ The decision stressed that the implied covenant of good faith cannot be contracted around in Minnesota and so that duty was deemed not a 'voluntary

Journal of International Law 25, no. 2 (2000): 435-532 (analyzing the codification movement in common-law societies, including the United States); see also *Wolens*, 513 U.S. at 236 (Stevens, J., concurring in part and dissenting in part) (analogizing state's fraud statute to "a codification of common-law negligence rules"). Moreover, looking for a text only makes sense if you think the issue turns on whether the state has exerted extra effort or zeal as a marker of its agency in imposing an obligation. I think the issue is less the degree of state activity and more one of substance. Among the factors one might investigate include whether the statute attempted to move beyond or to reverse common law principles and whether the duty in question is part of an agreement elected by the parties, incident to one, or independent of one.

¹⁹ *Ginsberg*, 134 S. Ct. at 1430–31. This rationale is rather strained, for surely the plaintiffs in *Wolens* who objected to an airline's retroactive change of frequent flyer terms also sought to use miles for flights and upgrades.

²⁰ *Ginsberg*, 134 S. Ct. at 1433. The invocation of the Department of Transportation was odd in light of *Wolens'* stress on the fact that the Department of Transportation "lack[s] contract dispute resolution resources." *Wolens*, 513 U.S. at 234.

undertaking,' but instead as a 'state-imposed' obligation.²¹ The Court considered whether it should matter that the federal law would pre-empt a common law doctrine rather than a state statutory provision.²² It batted off this concern rather brusquely, reasoning that both statutory and common law have the force of law and declaring that "[w]hat is important...is the effect of a state law, regulation, or provision, but not its form...."²³ The Court unfortunately took no time to consider the different forms and attendant procedures of the production of statutory versus common law and how those differences might bear on the content and function of the law. All of these arguments seem flawed, but, as I will now elaborate, the claims about contracts, good faith, and common law merit a special rebuke from a communicative perspective that values law as a forum of public communication and transmission of public values.

Is the Duty of Good Faith a Discrete, State-Imposed Obligation or Is It Implicit in the Parties' Promises?

To begin -- the division the Court drew between the state's imposition of a duty of 'good faith' and the parties' voluntary undertakings is strange.²⁴ After all, the duty of

²¹ *Ginsberg*, 134 S.Ct. at 1432; *see also Wolens*, 513 U.S. at 228–29.

²² *Ginsberg*, 134 S.Ct. at 1429–30.

²³ *Id.* at 1430.

²⁴ It recalls another strange distinction the Minnesota Supreme Court drew in *Cohen v. Cowles Media Co.*, 457 N.W. 2d 199, 203–05 (1990). That case distinguished between contract claims based on promissory estoppel which, when involving promises by the press of confidentiality for a source, it represented as raising special state action and First Amendment concerns, as contrasted with those contract claims based on consideration which the Court regarded as private action, whose enforcement thus did not raise First Amendment concerns. On review, the U.S. Supreme Court found that enforcement would not violate the First Amendment and took no strong stand on the distinction between consideration contracts and promissory estoppel. Nonetheless, it

good faith (and cousin doctrines like ‘best efforts’) is largely understood as a way to interpret the meaning of those voluntary undertakings. It requires that one interpret the content of the parties’ agreements through active engagement with their underlying purpose and not by relying only upon a superficial fixation on what is explicitly detailed.²⁵The duty of good faith might be considered a kind of secondary duty that

affirmed that enforcement of the promise, under a theory of promissory estoppel, would constitute state action and cited without criticism the Minnesota Court’s holding that promissory estoppel “created obligations never explicitly assumed by the parties.” 501 U.S. 663, 668 (1991). Largely, most common law jurisdictions in the U.S. now regard these as different voluntary pathways through which contracts are formed—one by *voluntarily* making representations that reasonably invite and elicit reliance and the other by *voluntarily* exchanging consideration. All contractual interpretation and enforcement by courts involve state action, as Justice O’Connor has eloquently noted. See *Wolens*, 513 U.S. at 248–50 (O’Connor, J., dissenting); see also *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially discriminatory housing covenant constitutes state action); Morris R. Cohen, “The Basis of Contract,” *Harvard Law Review* 46, no. 4 (1933): 553-92, at 562 (arguing that judicial enforcement of contracts involves public, not merely private, interests and “puts the machinery of the law in the service of one party against the other”). Courts do not treat estoppel-based claims as quasi-contract or otherwise *distinctively* a product of the state as opposed to those contracts created by the exchange of consideration. See Susan M. Gilles, “Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy,” *Buffalo Law Review* 43, no. 1 (1995): 1-84, at 64 (“[T]he decision to enforce a contract is as much a policy decision as is a state court’s decision to enforce promissory estoppel . . .”). For criticism that the Court’s citation of ‘ordinary contract principles’ is not accompanied by sufficient grasp of them in the domain of interpretation, see Robert A. Hillman, “The Supreme Court’s Application of ‘Ordinary Contract Principles’ to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire,” *ABA Journal of Labor & Employment Law* 32 (2017): 299-325 (discussing *M & G Polymers USA v. Tackett*).

²⁵ See, e.g., U.C.C. § 2-313(b); Daniel Markovits, “Good Faith as Contract’s Core Value,” in Gregory Klass, George Letsas, and Prince Saprai eds., *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014), 272-94, at 284 (explaining that good faith is not a “separate undertaking” of contracting parties, but rather “recognize[s] the authority of the contract, and hence the authority . . . to insist on performance according to the contract’s terms”); Steven J. Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith,” *Harvard Law Review* 94, no. 2 (1980): 369-404, at 371 (noting that the doctrine of good faith is a tool for interpreting contracts). Notably, the duty of good faith only applies after formation of a contract and

flows from the primary commitments – a secondary duty that demands attentiveness to the spirit of the bargain in certain contexts as a way of ensuring that parties honor the agreement and its primary commitments. What those contexts are and whether the parties’ identities or mutual standing affects the stringency of the good faith obligation may vary in different jurisdictions and with respect to different subject matters.²⁶ Still, whether the duty of good faith is understood to be robust or modest,²⁷ variant interpretations of the duty converge on this point: to understand the scope of the

not to pre-contractual negotiations. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (AM. LAW INST. 1981) (noting that contractual good faith protections generally do not apply to negotiations preceding contract formation); see also U.C.C. § 1-203 (AM. LAW INST. & UNIF. LAW COMM’N 2015) (imposing good faith protections in the “performance or enforcement” of contracts).

²⁶ See Restatement of Contracts Second s. 205, comment a (defining good and bad faith by reference to ‘community standards of decency, fairness or reasonableness’). Compare *Fortune v. National Cash Register*, 364 N.E. 2d 1251, 1256 (Mass. 1977) (finding a good faith requirement for terminations of at will employment when commissions are part of compensation) with *Hartle v. Packard Electric*, 626 So. 2d 106 (Miss. 1993) (holding that at will employment relationships are not subject to the implied covenant of good faith). See also *Dirk Broad Co. v. Oak Ridge FM*, 395 S.W.3d 653, 655-66 (Tenn. 2013) (describing jurisdictional variation about whether refusals to permit assignments of a commercial sublease governed by a ‘silent consent’ clause must comply with an implied duty of good faith and adopting the ‘modern’ position that unreasonable refusals violate an implied duty of good faith).

²⁷ Some courts articulate the duty in spare terms, e.g., the duty bars “one party [from] ‘unjustifiably hinder[ing]’ the other party’s performance of the contract.” In re *Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). Some jurisdictions equate a violation of the duty of good faith with the presence of bad faith. See, e.g., *De La Concha of Hartford v. Aetna Life Ins. Co.*, 849 A.2d 382, 388 (Conn. 2004) (acts constituting breach of implied duty of good faith must have been taken in bad faith where ‘bad faith’ means more than mere negligence but “some interested or sinister motive,” a dishonest purpose. Others distinguish between the two, requiring that plaintiffs show only a lack of good faith. See, e.g., *Nickerson*, supra note 15, at 704. See also E. Allan Farnsworth, “Good Faith in Contract Performance,” in Jack Beatson and Daniel Friedmann eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995), 153-171, at 159-169 (describing doctrinal and theoretical disagreements about the meaning and extension of ‘good faith’).

parties' commitments and whether their actions honor them, one must ascertain the purpose of their transaction and judge whether the parties' own interpretations and actions represent a good faith effort to redeem it.

That is, doctrines like 'good faith' and 'unconscionability' offer interpretive guidance to fill in those gaps arising between an agreement's objective meaning and its explicit terms.²⁸ The interpolation of the duty of good faith is often necessary to save what was clearly meant to be a contract from what would otherwise fail for want of consideration given one of these gaps. For, if performance or termination is at one party's unbridled discretion, then he has made no commitment at all but if it is at that party's discretion *in good faith*, that is, his discretion is constrained, then there can be a commitment and hence, consideration.²⁹

²⁸ Harold Dubroff, "The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic," *St. John's Law Review* 80, no. 2 (2006): 559-619, at 562. The ambition of interpretative canons may be to do the same for law, with famously mixed opinions about the results. For optimism, see John F. Manning, "Legal Realism & the Canons' Revival," *Green Bag 2d* 5 (2002): 283-95; for pessimism, see Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed," *Vanderbilt Law Review* 3, no. 3 (1950): 395-406.

²⁹ See, e.g., *Cortale v. Educ. Testing Serv.*, 674 N.Y.S.2d 753 (N.Y. App. Div. 1998) (given Educational Testing Service's destruction of evidence and internal reviews suggesting bias, a genuine issue of fact remained over whether ETS canceled a score in good faith); *Dalton*, 663 N.E.2d at 293 (finding that ETS's reserved right to cancel any score it found questionable at its own discretion was limited by a duty of good faith to consider any relevant evidence submitted by the test-taker because the contract afforded the test-taker the right to submit that evidence); see also *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90-92 (1917) (finding an implied duty of an exclusive agent to make 'best efforts' to promote a client's sales).

Why are there such gaps? Sometimes the absence of prior articulation is the simple product of reasonable efforts at efficiency and economy: we decline to detail every conceivable scenario because their disposition follows from the more general commitments we have made, whether in the contract or through implicit incorporation of the well-established boilerplate of state-supplied default terms. Sometimes we simply fail to anticipate some circumstances, misunderstandings, or disagreements affecting performance. In other cases, we reasonably want to defer premature concretization. Incomplete articulation and specification of terms and the use of open-ended terms like ‘reasonable,’ ‘good faith,’ ‘fair-dealing,’ and ‘unconscionable’ have the virtue of affording contractors and the law the opportunity to proceed in a principled way while also allowing for more articulate understandings of our commitments to emerge and evolve over time as we observe them in action.³⁰

Thus, the Court’s preoccupation on the fact that Minnesota did not permit parties to contract around the covenant of good faith is peculiar. A failure of good faith is a way a contract may be breached but derogation of the duty of good faith does not underpin an independent cause of action.³¹ The duty of good faith is not a discrete, state-imposed

³⁰ See generally Seana Valentine Shiffrin, “Inducing Moral Deliberation: On the Occasional Virtues of Fog,” *Harvard Law Review* 123, no. 5 (2010): 1214-46, at 1222–29 (arguing that legal standards encourage moral deliberation by courts and citizens about the underlying moral purposes of law, deepening the motivational foundations of compliance with law and promoting an evolving understanding of the law’s content). See also Charles Fried, *Contract As Promise* (Cambridge: Harvard University Press, 1981), at 87-88 (“One sometimes cannot know what is specified in the system [of background expectations] until the question arises”).

³¹ This is explicit in the U.C.C.’s comments about good faith. “This section does not support an independent cause of action for failure to perform or enforce in good faith. . . . [T]he doctrine of good faith merely directs a court towards interpreting contracts

duty such as a requirement to post a bond or to self-insure in a specified way. Further, many rules of contract are fixed and not up to the parties, including some rules of interpretation, consideration, and damages, but that does not render the contracts made against that backdrop any less voluntary undertakings. The parties still must choose whether to contract in the first place and (unlike some other mandatory rules) the content of the duty of good faith closely tracks the content of the discretionary aspects of their voluntary undertaking.³²

Does It Make Sense to Deregulate Good Faith?

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

within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached." U.C.C. § 1-304 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2015). See also Markovits, *supra* note **Error! Bookmark not defined.**, at 276. See also Cramer v. Ins. Exch. Agency, 675 N.E.2d 897, 903 (Ill. 1996) (noting that the "good-faith principle, however, is used only as a construction aid in determining the intent of contracting parties..." and does not ground an independent cause of action in tort).

³² See, e.g., *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). The *Metcalf* court noted that some violations of good faith, like subterfuge, may be identified independent of the specific contractual terms, but "[i]n general, though, 'what that duty entails depends in part on what that contract promises (or disclaims),' " quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 830 (Fed. Cir. 2010). "That is evident from repeated formulations that capture the duty's focus on "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party" (Restatement § 205 cmt. a), which obviously depend on the contract's allocation of benefits and risks." *Id.*

assumption that the state will enforce the contracts the parties arrive at with their agreed-upon prices for services or goods in return. So understood, the Court's decision does not elaborate the deregulation commitment but is in tension with its presuppositions. After all, Ginsberg and Northwest concluded many agreements about flight tickets, in a context including the enticement of a frequent flyer program informed by the implicit duty of good faith, but this decision declines to enable their enforcement.

If one sought a 'good faith' analogy to price deregulation, it would not involve the sheer elimination of the common law standard of good faith with nothing but the commentary of market watchdogs to replace it. Price deregulation neither involves the elimination of prices nor judicial indifference to nonpayment of agreed-upon prices. The 'good faith' analogy to price deregulation would involve an instruction to the parties to devise for themselves an agreement about interpretative standards as a prerequisite to contracting (just as an agreement about price is a prerequisite to contracting), coupled with a commitment to enforce that agreement.³³ It is difficult to imagine that the ADA implicitly contains that burdensome instruction. Further, it is unlikely that the putative advantages of price deregulation and price competition carry over to market-based (or predictably corporate-dictated) systems of legal interpretation, given the complexity of law relative to price, transaction costs, and asymmetries of knowledge and information.³⁴

³³ It would then be a nice question for many theorists of contract whether interpretation of the parties' interpretative standards would itself require judgments about good faith.

³⁴ Parties may usually grasp the significance of prices, at least simply structured ticket prices, whereas legal standards and their significance are harder to grasp quickly, especially by non-experts. Price is also relatively simple to bargain over, while

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

Consider more closely the claim that there is no need for the common law regulation of good faith because the free market and Department of Transportation *could* adequately police bad faith.³⁵ Even assuming the best of the market and the Department of Transportation, the implicit suggestion that the question is just *which agent* will protect frequent flyers assumes that the issue is one of episodes of bad behavior, according to unspecified criteria, rather than the development of standards of interpretation that delineate what counts as compliance and what counts as non-compliance with the parties’ voluntarily assumed contractual duties. Contractual

bargaining over the complexities and precision of legal standards carries high transaction costs and is often unavailable where one party insists on standardized agreements. Further, comparison-shopping for standards also carries high transaction costs and may be unavailable where one party obscures its terms or practices.

³⁵ See *Ginsberg*, 134 S. Ct. at 1433.

provisions do not interpret themselves and do not contain provisions for every circumstance or controversy. If the standards of interpretation are left to the free market, then, as with the side effect of the widespread invocation of arbitration clauses, we exit the realm of law and re-enter the Wild West, where the powerful dictate terms and their meanings, and abide by them only at their pleasure.

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

The Department of Transportation does not have rules applicable to the terms of airline frequent flyer program contracts. These are matters of individual company policy. If you are dissatisfied with the way a program is administered, changes which may take place, or the basic terms of the agreement, you should complain directly to the company. If such informal efforts to resolve the problem are unsuccessful, you may wish to consider legal action through the appropriate civil court.³⁶

What if Department of Transportation did more than merely collect complaints and distribute the runaround? What if the Department of Transportation actually read and

³⁶ *Frequent Flier Programs*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/airconsumer/frequent-flier-programs> (last updated Jan. 21, 2015). While the U.S. Department of Transportation (DOT) accepts consumer complaints, its reports themselves concede that the agency does not investigate the complaints' validity. See, e.g., AVIATION CONSUMER PROT. DIV., U.S. DEP'T OF TRANSP., AIR TRAVEL CONSUMER REPORT 35 (Nov. 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/2016NovemberATCR.pdf> ("DOT has not determined the validity of the complaints.").

resolved them— by dismissing the unsupported ones and by issuing favorable rulings, backed by fines or what have you, for the legitimate ones? Even if the consumers' complaints would each, episodically, be satisfactorily addressed, the idea that dispute resolution is the principal function of law overlooks the importance of the public articulation of legal standards—in this case, the standard of good faith that common law jurisprudence provides.³⁷ The *Ginsberg* decision, through preemption, deprives the appropriate civil court of the relevant legal resources to apply. As a consequence, there are no applicable legal standards, whether for the frustrated party or for an airline eager to comply with the law.³⁸ My point is not to insist that we must, finally, tackle frequent flyer reform or to drive home that the Court offered flyers a false panacea. The details illustrate a more theoretical point about the value of law. It is hard to explain why we bother to have a social institution of contract—a public commitment to commemorate, facilitate, and honor private commitments—but we then fail to see our public commitment through.

Are Statutory Law and Common Law Interchangeable?

³⁷ Cf. Alexander M. Bickel and Harry H. Wellington, “Legislative Purpose and the Judicial Process: The Lincoln Mills Case,” *Harvard Law Review* 71, no. 1 (1957): 1-39, at 5 (complaining that a brief per curiam opinion that stated the holding but no reasons to support it “does not make law in the sense which the term ‘law’ must have in a democratic society”).

³⁸ As the overturned appellate court predicted, “if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit—a result that Congress never intended.” *Ginsberg v. Nw., Inc.*, 695 F.3d 873, 879 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1422 (2014).

Treating price and law as analogous is only one disturbing aspect of *Ginsberg*. So is the Court's abrupt dismissal of the suggestion that preemption of a state statute and preemption of a common law claim may raise distinctive issues. In its reading of the ADA's language that pre-empted state "law[s], regulation[s] or other provision[s] having the force and effect of law related to a price, route, or service of an air carrier,"³⁹ to encompass general principles of state common law, what the Court said was not exactly wrong: both statutes and common law have the status of law; both *could*, depending on content and effect, conflict with the ADA's de-regulatory aim.⁴⁰ These observations, however, are unsatisfying when offered as a complete justification for equating statutory law and common law in this context and thereby eliminating the application of common law in this domain. After all, the abstract possibility that the application of some common law rules *could* frustrate a statutory purpose does not show that purpose is frustrated in the specific case. A requirement that a program be administered in good faith does not amount to a regime of price controls. The Court's larger, simplistic reasoning was that if there is state action with the force of law around which the parties cannot contract, then the state has imposed a legal duty. Hence its only (easy) question was whether common law has the force of law. As I have already suggested, this is unconvincing because the duty in question is embedded within a complex, voluntary undertaking peppered with elected terms.

By analyzing only their impact in the instant case (would both statutory law and common law exert legal force?), the Court's result-oriented, reductionist approach to

³⁹ 49 U.S.C. § 41713(b)(1).

⁴⁰ See *Ginsberg* at 1429–30.

whether common law and statutory law differ for preemption purposes neglects some of the special strengths of common law as a form of collective moral articulation.⁴¹ First, the process of generating common law has some distinctive democratic virtues. Although any piece of common law jurisprudence is generated by a single judge or a handful of judges at most, through explicit reasoning, practices of precedent, and taking notice of other jurisdictional approaches, common law judges are in conversation with litigants, amici, and other judges over the generations and throughout the states. The issues themselves arise from the grass roots, in a way, as problems occur. Any party who may allege a prima facie cause of action may present arguments, have them heard, and elicit a reasoned response. This process contrasts favorably in many respects with the current state of legislative access which is highly and disproportionately responsive to organized lobbying and donors. Even in its more ideal forms, given the cumbersomeness of legislating, legislative responsiveness is slower to come by and predictably more keyed to larger problems and the needs of large (or highly organized) groups. Thereby, the common law process embodies a judicial manifestation of the

⁴¹ Indeed, I am tempted by an argument that either the *Ginsberg* decision is difficult to square with *Erie v. Tompkins* or, worse, it generates something approximating a lawless zone. If contracts are inherently incomplete, then their meanings will necessarily demand interpretation (a traditionally common law endeavor) and that interpretation will rely on rules of interpretation (whose articulation is also, traditionally, a common law endeavor). If federal law pre-empts the state law rules of interpretation, but does not offer an explicit standard of interpretation in its place, then what takes the place of the state law of interpretation? The general federal common law of contract interpretation, which *Erie* did away with? See also note 44.

equal importance of each citizen, a process less sensitive to affiliation and social power than many manifestations of the legislative process.⁴²

Second, the scope of the common law is broader and often more trans-substantive than statutory law: common law jurisprudence articulates law as cases present themselves. Its mission is not confined to the agenda articulated, however broadly construed, by statutory text. For some problems, such evolution may reflect a more considered and measured expression of our joint moral commitments than is contained within pieces of legislation that attempt to anticipate and resolve all issues at once. Thus, some statutes may be more effective when they emerge downstream from the development of common law so they can benefit from the uncovering of the issues and legal developments first forged in common law.

The common law's power to evolve, responsively, traces in part to a common law notion that a legal commitment's full scope may be difficult to articulate completely in any one explicit effort. (So too, it is a truism that no contract is or could be complete, which is to say that no contract could, explicitly, provide for all possible contingencies of interpretation and performance.⁴³ This is one reason why the doctrine of good faith and companion interpretative doctrines are necessary for a coherent and complete

⁴² Cf. Robert C. Hughes, "Responsive Government and Duties of Conscience," *Jurisprudence* 5 (2014): 244-64, at 261 (making the related point that litigation permits access to democratic deliberation to minority groups who may lack the political power to garner legislative attention).

⁴³ Indeed, the Restatement is explicit about this feature of 'good faith,' explaining that "[a] complete catalogue of types of bad faith is impossible." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981); see also Roger J. Traynor, "No Magic Words Could Do It Justice," *California Law Review* 49, no. 4 (1961): 615-30 (arguing that fear of judge-made law, resulting in excessive deference to the legislature and to precedent, hinders the law from evolving to respond to changing circumstances and data).

contract law.) For related reasons, whereas statutes tackle specific issues (airline safety and deregulation, fair housing, food quality) and often generate norms associated with those issues and the specific statutory approach dedicated to them, the common law ranges across issues and deploys the same concepts trans-substantively, facilitating the development of a topic-independent understanding of such concepts, as with the standard of good faith and a methodology of interpretation guided by the directive of good faith, forged as different cases arise, understood in terms of its underlying moral principle, and not reduced to a discrete list of actions. Because common law reasoning places greater pressure on courts to think comprehensively about how a concept's interpretation will fit into the legal system as a whole, there is some structural pressure for common law reasoning to generate greater trans-substantive unity than the more focused agenda enacted by statutes.

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

Thus, while both common and statutory law have the force of law, common law jurisprudence serves a distinctive function in giving principled voice to a local, emergent understanding of our mutual moral relations, one that underpins the governing culture and expectations citizens form about each other. In this example, the doctrine of good faith plays an important role in publicizing and enforcing expectations

about the significance of making a binding agreement. Through interpretation of the duty of good faith, courts contribute to the development of a public articulation of how to assess the spirit of a bargain and what it means to respect it in one's reasons when exercising discretion. How good faith is enforced and interpreted—whether they can expect that their agreements will be interpreted to have robust meaning or whether they should regard themselves more warily as at extended arms-length—in turn, has an influence on the scope of trust that it is safe for a contractual party to invest in her partner; the narrower that scope, the more anxious parties may have to attempt to devise explicit constraints to insert into their agreements. Indirectly and directly, the legal doctrine contributes to the nature of the local social-moral culture.

Given the trans-substantive, unifying function of many common law doctrines like this one, a piecemeal preemption practice that carves out distinctive rules concerning, say, unconscionability or good faith for particular industries leaves a hole in the moral fabric woven by the state common law. This, in turn, interferes with the cultivation of a general moral culture in which even non-specialists may develop the social-moral intuitions to navigate and rely.⁴⁴ That problem is compounded in the instant case where there are no rules that replace the state common law, but instead just a void. Even were the free market and the Department of Transportation to handle some specific cases of bad faith well, their disposition would not be public and deliberate. They would not generate a public record, give reasons for decisions, or generate precedent. When

⁴⁴ The interest in cultivating a general, transubstantive moral/legal culture gives reason to worry that further development and application of federal common law to those piecemeal cases where federal preemption applies would not constitute a fully adequate solution.

preemption goes beyond the piecemeal, those holes may further fray the local legal mechanisms that build a purposive and distinctive legal culture that makes law morally comprehensible and responsive.

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

Conclusion

I have used the seemingly minor case of *Northwest v. Ginsberg* to illustrate a number of themes about the significance of law from a democratic perspective and about its form. First, it is a mistake to locate dispute avoidance and dispute resolution, divorced from a conception of how they are achieved, as the sole or central significant purposes of the generation and application of law. In ways both small and large, that undervaluation of law facilitates arbitrary domination by more powerful actors. It also ignores the intrinsic importance of articulating mutual moral understandings and generating transparent, public mutual expectations. Dispute avoidance and resolution figure among the salutary consequences and benefits of such articulation but they are not its single, driving point.

Second, the democratic importance of generating and articulating law should not be mistakenly translated into a preference for statutory law in particular. What form law should take and how it should be generated depends a great deal upon its specific purposes, including always, its communicative aims, and how they are best achieved in the relevant context. The need for common law roughly parallels the need for good faith (and a doctrine of good faith) in contractual relations. Morally healthy and successful contractual relations are well served by expecting parties to act in good faith in light of the significant aspects of their agreement, rather than placing an onus on parties either to plan for every contingency, explicitly and in advance, or to take their chances. Such planning attempts are not only a costly exercise in futility, they encourage a counter-productive form of rigidity that deprives the relationship of the flexibility to serve as a locale for the development and redemption of trust and to evolve as circumstances change and as awareness of the values served by the agreement deepens. By contrast, mutual expectations of good faith can complement explicit understandings to preserve such opportunities, thereby advancing the purpose of the parties' specific understandings but also realizing the highest aims of a legal culture of contract—to facilitate and protect deliberate relations of trust.

In a similar vein, it may be both futile and counterproductive to attempt a complete and final articulate understanding of our joint moral commitments in one fell statutory swoop. As with other occasions for moral understanding, our apprehension may need time to evolve and crystallize through ongoing conversation. With respect to some questions, such evolution may be more deliberate if it is gradual and formulated in response to issues as they arise and not only as they may be predicted to arise. The

quality and depth of our apprehension may improve as we hear from a variety of those most affected by the issues and as we responsively refine our preliminary articulated understandings of our commitments through reasoned reactions to their arguments. Finally, for some values, they may be better served through a trans-substantive approach, especially an approach that contributes to the fostering of a distinctive local culture. If, as the democratic approach alleges, a driving purpose of law is to give voice to mutual moral commitments we must make to one another, the common law's distinctive strengths in these very regards should be celebrated and not eclipsed.