

# PRIVATE LAW AND PUBLIC DISCOURSE

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*Democracies need institutions that help to build public consensus on fundamental principles of justice. However, the major public institutions associated with this task—electoral institutions, the press, education, and civil society—each face a trade-off between a high degree of governmental control over their agendas, on the one hand, and self-segregation by participants, on the other. This Article identifies private law—the litigation of private claims and their judicial resolution—as an unlikely but ultimately critical site for building consensus on political principles. After laying out what public discourse requires (and what it does not), this Article argues that private law is properly regarded as a site for public discourse even though courts are an arm of the state and even though private law litigants pursue self-interested claims. The Article then goes on to show that private law’s ground-level, bilateral process of reconciling opposing reactions to private encounters avoids some of the limitations of other discursive sites. Private law turns out to be a distinctive centripetal force on how we variously think about what justice demands.*

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### INTRODUCTION

Democracies depend on an overlapping consensus about the principles that govern our basic structure.<sup>1</sup> An overlapping consensus on principles of justice allows people who disagree about how best to live their individual lives to live together on terms that each of them, in principle, can accept. The need for an overlapping consensus is especially salient these days because it is not clear that major liberal democracies have secured such consensus.<sup>2</sup>

Political philosophers distinguish between the demands of justice and what we regard as good.<sup>3</sup> The leading liberal theory holds that members of a political community need not aspire to agreement about the good, which may include religious commitments, judgments about the value of art, sports, or

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1. Throughout I use the concept of “overlapping consensus” roughly as it was developed by John Rawls. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 388 (1971) [hereinafter RAWLS, TOJ]; John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1, 2 (1987); JOHN RAWLS, POLITICAL LIBERALISM 385 (1993) [hereinafter RAWLS, PL]; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765–807 (1997); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 32–38 (2001) [hereinafter RAWLS, JF]. Obviously, the concept itself is not the object of consensus. Nevertheless, this Article adopts the prevailing view that liberal democracies cannot conform to the demands of justice, substantive and procedural, (1) if there is not to a significant degree an overlapping consensus about high-level principles of political morality within the political community, or (2) an overlapping consensus on such principles makes it more likely that a liberal democracy will comply the demands of justice. I explore the concept and its challenges in greater detail in Part I, *infra*.

2. *See* Ryan Strickler, *Deliberate with the Enemy? Polarization, Social Identity, and Attitudes toward Disagreement*, 71 POL. RSCH. Q. 3, 3–4 (2018) (describing increased levels of polarization).

3. *See* RAWLS, PL, *supra* note 1, at 36–37, 50–51 (distinguishing between our rational capacity to adopt a conception of the good and our capacity for reasonableness; the latter corresponds to our recognition of the demands of justice).

parenthood, and everything else that drives our particular life projects.<sup>4</sup> A liberal state ought not to pursue or even favor a single conception of the good life.<sup>5</sup> But in order for a political community to meet the demands of justice, citizens must broadly agree about principles of justice.<sup>6</sup> A perpetual majority could impose institutions that are compliant with the demands of substantive justice on a perpetual minority that does not recognize the principles of justice that those institutions reflect. But then the political community fails to meet the requirements of democracy; it does not recognize the political autonomy of those “strung along” to substantive justice. While people do not have to agree on all matters of politics, only if most people recognize basic principles that shape and constrain the conversation can we productively negotiate the precise laws and institutions by which we attempt to realize justice. Although scholars disagree about the nature of and prospects for an overlapping consensus, it is an important feature of the most influential theory of liberal democracy.<sup>7</sup>

One might have hoped that overlapping consensus on basic political principles could be achieved by our individual powers of reason. That is, we might be tempted to think that each of us thinking hard on our own<sup>8</sup> could deliver consensus on a range of questions about justice, just as we can all separately arrive at the solution to a math problem. But individual deliberation about moral questions tends to bring us to separate conclusions, even when citizens undertake private deliberation with rigor and good faith.<sup>9</sup> Simple observation of politics across liberal democracies largely suffices to conclude that we should not and do not rely on private reason. Instead, we rely on a variety of institutional devices to engineer something like an overlapping consensus.<sup>10</sup> The state attempts to secure the conditions of its own legitimacy by inculcating political values consistent with the leading conceptions of justice and by facilitating public discourse among citizens from which an overlapping consensus can emerge. Our realistic aspiration is not total agreement but a working set of political principles to which we can refer as we debate specific policies.

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4. See RAWLS, JF, *supra* note 1, at 19 (defining a conception of the good as, “an ordered family of final ends and aims which specifies a person’s conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life”).

5. See Peter de Marneffe, *Neutrality*, in THE CAMBRIDGE RAWLS LEXICON 557–60 (John Mandle & David A. Reidy eds., 2014) (associating liberalism with neutrality on conceptions of the good); see also RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

6. RAWLS, TOJ, *supra* note 1, at 492–93; RAWLS, PL, *supra* note 1, at 12.

7. For a review of the concept of an overlapping consensus and its critiques, see *infra* Section I.A.

8. “Reflective equilibrium” is one way we could characterize such individual deliberation. See RAWLS, TOJ, *supra* note 1, at 20–21, 48–53 (describing the process by which we reconcile specific moral judgments with general principles).

9. People deliberating about the same political questions will arrive at different answers. RAWLS, PL, *supra* note 1, at 54–58 (referring to this aspect of human reason as the “burdens of judgment”).

10. See *infra* Section II.B.

While many institutions and social practices contribute to the forging and sustenance of an overlapping consensus, I will discuss four of the more obvious institutions on which we rely for this purpose with the aim of arguing that private law is another. I do not claim that private law is, or should be, designed primarily for this purpose, though my claims have consequences for certain evolving features of private law adjudication, including the terms of access and the frequency of arbitration. Nor do I claim that private law entirely succeeds in delivering an overlapping consensus. No single institution is likely to succeed; not even a combination of institutions can promise such a result. It is because overlapping consensus is both essential and precarious that it is worth understanding the role played by private law. Private law is an overlooked but effective engine of consensus because it promotes agreement by way of a unique process of regulated argument between two people at a time over concrete claims that implicate high principles.

In Part I, I will describe in greater detail the concept of an overlapping consensus as it was developed by John Rawls and the controversy it has engendered. I will then discuss the ways in which electoral institutions, public education, press, and civil society each contribute to movement toward such a consensus. But I will also argue that each of those institutions faces inherent limitations in that function. Part II will set out the more general concept of public discourse as the social practices through which overlapping consensus is generated (including but not limited to some of those discussed in Part I) and then argue that private law too, perhaps unexpectedly, is properly conceived as a site of public discourse.

In Part III, I offer a detailed account of how private law discourse exerts a gentle centripetal pressure on our political–moral commitments and why it has institutional virtues that allow it to overcome some of the challenges associated with more intuitive engines for consensus. Instead of relying on mass dialogue about abstract principles, private law adjudication aims to reconcile individual reactions to bilateral harm. The slow, ground-level process of managing what I call “reactive discord” between private law litigants helps build a common set of political values to which we can refer in other realms of conflict, too. I conclude by considering the implications of recognizing private law as a site of public discourse for how we read and assess legal arguments in private law.

## I. OVERLAPPING CONSENSUS

The concept of an overlapping consensus is both intuitive and controversial. It is intuitive at a high level of generality; it is controversial in its specification. I will begin this Part by reviewing the arguments in favor of engineering for overlapping consensus and then the critiques of that project.

After identifying the limited notion of a consensus that I deploy here, I turn to the four major institutions that we tend to rely on to generate and preserve something like an overlapping consensus in liberal democracies. My ultimate aim is to identify the institution of private law adjudication as another, but here, I use the four familiar candidates to explore how these institutions contribute to an overlapping consensus and the systematic challenges that they face.

### A. *The Concept of an Overlapping Consensus*

The idea of an overlapping consensus appears to solve an otherwise intractable problem in liberal democracies: liberalism demands that people are free to pursue their own ideas about how to live, which projects are worthwhile, and which moral theories to endorse. That is, states must respect individual autonomy. But robust democracy requires that people regard the laws that govern them as their own; they must be able to see themselves as authors of the basic structure that shapes collective life, even if they do not support every legislative choice behind it.<sup>11</sup> How can we *all* see the state and its handiwork as our own if we have such divergent views about what is valuable? An overlapping consensus does the trick: if we can agree on basic political principles, then we can all identify with the basic terms of social cooperation, including the social and political fact that we will each pursue our own separate lives within that collective framework.<sup>12</sup>

If an overlapping consensus is to serve this legitimating function, people cannot agree on just anything.<sup>13</sup> Initially, Rawls seemed to conceive of the target object of consensus as the two principles of justice that he himself proposed, what he called “justice as fairness.”<sup>14</sup> But in later works, especially his second major text, *Political Liberalism*, he appeared to have become more flexible; his focus shifted to the search for reasonable agreement rather than the best account of what reason demands.<sup>15</sup> People do not need to agree on a complete theory of justice. Instead, liberal societies will benefit from agreement on a loose set of political–moral principles that flow from the idea of people as fundamentally free and equal. Although politics must deliver more determinate judgments about specific policies,

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11. Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS 654, 660 (1993) (governmental decision-making in a democracy must be subordinated to public discourse in order to “instill[] in citizens a sense of participation, legitimacy and identification” and thus “reconcile individual autonomy with collective self-determination”). Although the theoretical interest is in the possibility of citizens regarding themselves as authors rather than their actual perception, some scholars reject the emphasis on citizen perception altogether as a red herring. See A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 750 (1999) (“It is a mistake . . . to focus in an account of state legitimacy on the attitudes of subjects or on the capacity of a state to produce or sustain these attitudes.”).

12. The idea of an overlapping consensus was Rawls’s solution to the problem of sustaining a stable, just society under conditions of reasonable pluralism. See RAWLS, PL, *supra* note 1, at 133–34.

13. See Jurgen Habermas, *Reconciliation through the Public Use of Reason: Remarks on John Rawls’ Political Liberalism*, 92 J. POL. PHIL. 109, 121 (1995) (distinguishing—and arguing that Rawls fails adequately to distinguish—acceptability and acceptance, emphasizing stability at the expense of justification).

14. See RAWLS, TOJ, *supra* note 1, at 492–93.

15. See RAWLS, PL, *supra* note 1, at 12; see also Alexander Schafer & Robert Siscoe, *Incoherent but Reasonable: A Defense of Truth-Abstinence in Political Liberalism*, 46 SOC. THEORY & PRAC. 573, 576 (2020) (“The political conception that constitutes the focus of an overlapping consensus attains its vindication via its reasonable acceptability, not its truth.”).

public discourse can proceed—and is properly constrained—by a common commitment to general background principles.<sup>16</sup>

Rawls was optimistic about the prospects for an overlapping consensus in the United States. Although he imagined that consensus takes generations to achieve as a political culture gradually entrenches shared political principles,<sup>17</sup> he understood most of that process to have already taken place in the United States.<sup>18</sup> Perhaps for this reason, Rawls himself did not have much to say about the institutional conditions for generating consensus. Legal scholars like Jack Balkin have similarly suggested that we benefit from a “narrative understanding of ourselves as part of a greater whole, collectively working towards the fulfillment of the principles of the Declaration [of Independence]” and that this constitutional story “constitute[s] us as a people with a purpose and a trajectory.”<sup>19</sup>

While the idea of an overlapping consensus has been enormously influential, some scholars find the concept naïve, if not dangerous. One might worry that people who are unable to converge on a single conception of the good are unlikely to converge on a single conception of justice, either. One might distrust the aspiration to consensus as a thin guise for preferring the political views of dominant groups and an attempt to silence dissenters. One might predict that, even if we are ever lucky enough to enjoy something like an overlapping consensus, the conditions of free thought that liberalism demands make it unlikely that the consensus will persist; individuals and groups will instead spiral off into separate theories of justice, and the consensus will collapse. I consider these three problems—improbability, illusion, and instability—in turn.

Many scholars have dismissed the idea of an overlapping consensus as simply improbable.<sup>20</sup> Given deep and persistent disagreements about what is good and valuable, why would people come to agree on political values in particular? A stronger version of this skepticism deems consensus not merely improbable but actually impossible.<sup>21</sup> Disagreement, after all, is not just a contingent fact about modern societies; it is the human condition that motivates the liberal project. It is

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16. From a common moral space, we “can try to determine from case to case what is good or valuable, or what ought to be done.” CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 27–28 (1989).

17. See RAWLS, *TOJ*, *supra* note 1, at 2–17.

18. Michael Barnhart, *An Overlapping Consensus: A Critique of Two Approaches*, 66 *REV. POL.* 257, 261 (2004).

19. Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 *WIDENER L. SYMP. J.* 167, 180 (1999).

20. See George Klosko, *Political Constructivism in Rawls’s Political Liberalism*, 91 *AM. POL. SCI. REV.* 635, 637–38 (1997); John Thrasher & Kevin Vallier, *Political Stability in the Open Society*, 62 *AM. J. POL. SCI.* 398, 399 (2018); GERALD GAUS, *THE TYRANNY OF THE IDEAL: JUSTICE IN A DIVERSE SOCIETY* (2016); Brian Kogelman, *Justice, Diversity and the Well-Ordered Society*, 67 *PHIL. Q.* 663 (2017); Justin Bruner, *Diversity, Tolerance and the Social Contract*, 14 *PHIL. POL. & ECON.* 429 (2015).

21. See, e.g., Fabian Wendt, *Peace Beyond Compromise*, 16 *CRITICAL REV. INT’L SOC. & POL. PHIL.* 573, 575 (2013); Matt Sleat, *Legitimacy in a Non-Ideal Key: A Critical Response to Andrew Mason*, 40 *POL. THEORY* 650, 651 (2012).

paradoxical to offer consensus as a theoretical fix for a project intended to offer an account of justice under conditions of deep disagreement.

Other commentators are even more skeptical about the normative aspirations of the idea of overlapping consensus. Given the improbability of consensus, they claim, invoking the idea of consensus is really just the assertion of it. The concept offers consensus up as an ideal in such a way (for example, using the language of trust<sup>22</sup>) that it at once shames those who would opt out of it and invites others to proceed as if consensus exists, even if it does not.<sup>23</sup> The leading critic, Chantal Mouffe, has argued that the focus on reason-giving and the search for reasonable consensus leads deliberative democrats to set aside identity differences, antagonism, and power relations, which are actually all constitutive of modern democracy.<sup>24</sup> On this view, overlapping consensus is a dangerous illusion that elevates dominant conceptions of justice, with the effect of pushing dissidents out to the periphery on the grounds that they are extreme and destabilizing.

A final major critique of the concept argues that, even if overlapping consensus were achievable and desirable, it would be inherently unstable.<sup>25</sup> Rawls seems unduly idealistic when he posits that people will become attached to their understanding of justice such that it will naturally perpetuate itself.<sup>26</sup> Liberalism is committed to allowing new ideas to flourish, and inevitably some of those ideas will challenge prevailing conceptions of justice.<sup>27</sup> Some of those ideas will be illiberal, yet liberalism will tie the hands of the state from responding to the threat

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22. See Lawrence Mitchell, *Trust and the Overlapping Consensus*, 94 COLUM. L. REV. 1918, 1924 (1994) (“[T]rust is likely to fail in the absence of some shared values.”); *Id.* at 1918 (“Interpersonal trust among the members of a reasonably just society and their trust in the institutional values of the social structures and political mechanisms they construct and control” bind the overlapping consensus). See also RAWLS, PL, *supra* note 1, at 163.

23. Cf. Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1323 (2010) (“Bureaucracy and law each rest on the presumption of agreement, although not necessarily on the fact of agreement.”).

24. CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 7 (2000).

25. James Nickey, *Rawls on Political Community and Principles of Justice*, 9 L. & PHIL. 205, 212–13 (1990) (arguing that it is not clear why the state can maintain consensus on political principles without coercion or oppression but not with respect to comprehensive conceptions of the good). *But see* Robert Westmoreland, *Realizing ‘Political’ Neutrality*, 30 L. & PHIL. 541 (2011) (arguing that Rawls can justify imposing neutrality on public institutions without unprincipled favoritism toward particular conceptions of the good).

26. See RAWLS, JF, *supra* note 1, at 194 (“We conjecture . . . that as citizens come to appreciate what a liberal conception achieves, they acquire an allegiance to it, an allegiance that becomes stronger over time.”).

27. See Seth Mayer, *Resolving the Dilemma of Democratic Informal Politics*, 43 SOC. THEORY & PRAC. 691, 703 (2017) (observing apparent choice between oppressive measures to sustain agreement on democratic principles and risk of collapse of such consensus).

those ideas pose.<sup>28</sup> Some of these scholars doubt that pluralism of the sort that Rawls embraces is ultimately compatible with liberalism at all.<sup>29</sup>

These limitations in the idea of an overlapping consensus have two implications for the discussions here. First, the version of the concept I rely on is particularly thin. I do not take the object of consensus to be a tightly bound set of political principles; it is here merely a loose set of principles, the precise content of which is debated even while its language is consistently invoked across the political spectrum.<sup>30</sup> In the United States, almost all political interlocutors decry racism and sexism, though they disagree about who or what is racist and sexist. Almost all citizens espouse the ideals of equal opportunity, though they disagree about what measures are necessary to achieve that ideal. No one disputes that some people have more than they are entitled to while others have considerably less, though they disagree about who those people are and what should be done about it. Most will agree further that we have an obligation to protect the vulnerable, though we disagree about who they are and what protection entails. People tend to agree that we must all abide by the same rules and that we are responsible for the harm we inflict on others, though we will disagree about what conduct results in harm and even what constitutes harm. Perhaps most importantly, we agree that some individual interests are too profound to give way to collective ends, while other interests must give way; of course, we do not agree on which interests fall into either category. One might think that failure to agree on the content of these generically stated principles leaves them too hollow to do any work. But these principles organize public discourse in the United States. They help convert simple conflicts about what we want into something recognizable as moral disagreement.<sup>31</sup> And because we understand that the content of these principles supplies our common standard for justice, we understand we cannot *simply* disagree but need to try to persuade others of our views in order to actualize them.

The impetus to persuade relates to another important respect in which my working concept of overlapping consensus here is thin. I do not take the normative upshot of consensus to be the achievement of democratic legitimacy; instead, I

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28. See John Skorupski, *Rawls, Liberalism and Democracy*, 128 ETHICS 173, 191 (2017) (stating unreasonable but rational and shrewd positions will destabilize consensus about justice).

29. See Peter Lassman, *Political Theory in an Age of Disenchantment: The Problem of Value Pluralism: Weber, Berlins, Rawls*, 4 MAX WEBER STUDIES 253, 254 (2004) (describing existential modernist angst about whether pluralism is fundamentally compatible with liberalism).

30. This is broadly consistent with Rawls's own later take on it. See RAWLS, PL, *supra* note 1, at 164 ("the focus of an overlapping consensus is [probably] a class of liberal conceptions" not the particular conception of justice as fairness he earlier defended); *id.* at xvii (espousing "reasonable pluralism" about justice). See also Paul Weithman, *Autonomy and Disagreement about Justice in Political Liberalism*, 128 ETHICS 95, 96 (2017).

31. Cf. Maria Ferretti & Enzo Rossi, *Pluralism, Slippery Slopes and Democratic Public Discourse*, 60 THEORIA 29, 31 (2013) (noting the "need for social, legal and political institutions capable of mediation among citizens' moral and cultural differences and of channeling conflicts into a constructive discourse").



treat consensus as an aspiration that promotes legitimacy. Consensus is a moving target toward which our discourse is oriented.<sup>32</sup> It operates as a constraint without ever coming to fruition because it motivates public argument; it gives people a reason to make certain kinds of arguments rather than others because only arguments that pay homage to the reigning principles—whose content remains contested—will actually move people into adopting the specific policies that one advocates. Arguments that simply deny the equality of persons or propose to interfere in the lives of others without even attempting to show the harm they are doing to others will go nowhere.

Moreover, because consensus is understood here to be an elusive objective, it cannot delegitimize particular speech acts by citizens. Tentative agreement on formal principles gives people a reason to say some things and not others because only some are persuasive to others, but it does not give us a basis for silencing the unpersuasive on the theory that they are unreasonable.

The second implication of the controversy surrounding the idea of an overlapping consensus is that we cannot simply hope for the best. The state must attempt to overcome the improbability and instability problems discussed above while simultaneously avoiding the silencing of disfavored groups in order to manage the appearance of false consensus. It must seek to do this through concrete institutions responsive to what we know and continue to learn about how people and societies work.<sup>33</sup> I now turn to the four institutions that are traditionally associated with this task.

### ***B. Institutional Mechanisms for Generating Consensus***

The political principles we commonly endorse and attempt to fill out over time are at stake in many aspects of our lives, not just the obvious domain of legislative decision-making. Even decisions about how to organize family life turn on principles of sex equality that must be negotiated within the family.<sup>34</sup> Liberal states do not attempt to govern discourse in most of these sites; I will explore the requirements of public discourse in the next Part. But four institutions play an outsized role in our understanding of how we strive toward agreement on principles of justice, and the state makes express choices about how to regulate them.

First, electoral institutions themselves are designed to avoid dominance or despair.<sup>35</sup> There is no obvious way for boundaries to be drawn around political

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32. See Robert Post, *Democracy and Equality*, 603 ANNALS OF AM. ACAD. POL. SCI. 24, 27 (2006) (citing J.N. FINDLAY, KANT AND THE TRANSCENDENTAL OBJECT: A HERMENEUTIC STUDY 241 (1981)) (agreement is not literally possible, it is a “regulative idea”).

33. See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 223, 246 (1989) (observing need to examine whether his conception of justice is practical given the possibilities of political socialization).

34. For the canonical extension of Rawlsian principles of justice to the family, see generally SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989).

35. Electoral systems can be engineered to be centripetal. See generally DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985); BENJAMIN REILLY, *DEMOCRACY IN*

units and no natural way to tabulate support for particular policies or representatives.<sup>36</sup> Every regime attempts to make these institutional choices with an eye to self-preservation over time.

For example, proportional representation<sup>37</sup> in the parliamentary system puts a wide spectrum of views in direct conversation with each other at the highest level.<sup>38</sup> Moreover, because coalitions are often required to achieve a parliamentary majority, parties are forced to work cooperatively with each other.<sup>39</sup> Because parties have an interest in the votes they accumulate, even in areas in which they are not likely to receive a plurality of votes, they are less likely to ignore certain regions of the country. The dynamics of governance and electoral politics in these systems create incentives for parties to adopt and promote positions that are conducive to cooperation with opposing parties.

The United States has a winner-take-all system for each representative position, which reinforces a two-party system.<sup>40</sup> This system is widely perceived to push candidates toward the middle in search of so-called swing voters,<sup>41</sup> though primary elections that overrepresent the will of the most zealous partisans

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DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT (2001). Stability comes from the expectation of possibly winning another time. See ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EUROPE AND LATIN AMERICA* 24–26 (1991).

36. See Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 *POL. THEORY* 277, 284 (1994) (“[A]ny electoral outcome is at least partly an artifact of the aggregation mechanism through which it is produced. Therefore, electoral results always require interpretation and justification.”).

37. See Jack H. Nagel, *Proportional Representation*, in 19 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 205 (James D. Wright ed., 2015) (defining and explaining proportional representation).

38. See AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 150 (1984); AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 143 (1999). Lijphart expressly associates proportional representation with so-called “consensus democracy.”

39. I am offering a simplified account. There are myriad variations on every electoral system, including proportional representation. For an overview, see Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 *INT’L POL. SCI. REV.* 297, 303 (1997).

40. MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (1963) (stating what is known as Duverger’s law, i.e., “the simple-majority single-ballot system favors the two-party system”).

41. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 117–27, 135 (1957). *But see generally* Lawrence Ezrow, *Parties’ Policy Programmes and the Dog That Didn’t Bark: No Evidence That Proportional Systems Promote Extreme Party Positioning*, 38 *BRIT. J. POL. SCI.* 479 (2008) (challenging conventional wisdom).

undermine the centrist dynamic.<sup>42</sup> The incentive to woo median voters creates an incentive for parties to adopt and promote positions that most people can accept.

More recently, states that were previously subject to the preclearance requirement of section 5 of the Voting Rights Act have struggled with the best procedure for drawing electoral districts after years when they were required to ensure racial minorities minimally adequate representation in Congress by drawing so-called majority-minority districts. Recent Supreme Court cases<sup>43</sup> have eliminated the preclearance requirement and have made judicial challenges to districting more difficult. The effect has been to unravel earlier districting practices. Districts are being redrawn across the country, forcing us to make choices anew about the extent to which people who disagree about most things should be lumped together or separated into distinct voting units.<sup>44</sup> The way boundaries are drawn and how governance power is allocated reflects choices about who is forced into direct competition with each other in the context of electoral politics and then who is forced into cooperation in the context of governance.

The second, and perhaps most obvious, institution that we look to in order to develop overlapping consensus is the press. The most romantic site of public discourse, newspapers, and television traditionally promised that citizens could be informed and engaged about important political questions without manipulation by political insiders. We have seen the press come under severe pressure to fulfill this function today.<sup>45</sup> Many commentators have observed that social media has lowered the cost of producing and accessing content to the point where many people are not engaged in debate and do not even share information with the people with whom they disagree deeply.<sup>46</sup>

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42. See David Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEG. STUD. Q. 79, 82 (2007) (harnessing evidence that shows primary candidates move away from even party medians).

43. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (eliminating preclearance); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding partisan gerrymandering cannot be challenged in federal court); *Merrill v. Milligan*, 142 S. Ct. 879, 879–82 (2022) (granting the stay of a lower court order suspending Alabama’s congressional election map).

44. See, e.g., *Allen v. Milligan*, 143 S. Ct. 1487, 1517 (2023) (overturning Alabama redistricting plan because it went too far in undermining the efficacy of Black voters).

45. Habermas himself was a skeptic of the role of the press in the modern public sphere because of its evolution into a site of advertising and entertainment that renders public opinion increasingly staged. See JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 232 (1962). See also Richard Bernstein, *The Normative Core of the Public Sphere*, 40 POL. THEORY 767, 772 (2012) (describing “mass manipulation of fact and opinion”).

46. See Evan Stewart & Douglas Hartmann, *The New Structural Transformation of the Public Sphere*, 38 SOCIO. THEORY 170, 175 (2020) (“Rather than creating a singular open space for multiple publics, individuals [using new communication technology] often tailor their networks along lines of social homophily and partisan sorting—avoiding

The third institution on which we have heavily relied is more controversial because the state has its fingerprints all over it: public education.<sup>47</sup> Aristotle said that “the citizens of a state should always be educated to suit the constitution of their state,” and Rawls affirmed that “[e]ducation . . . should encourage the political virtues so that [citizens] want to honor the fair terms of social cooperation.”<sup>48</sup> Public education, then, does not just train people for jobs but educates them, almost as soon as they are fully verbal, on how to take turns, make collective decisions, share stories, and persuade and empathize with each other. It then later instills in children a shared narrative of their country’s history and the virtues and possibly the vices of its basic institutions. This agenda is profound, and for that reason, it is a little alarming. The line between public education and state indoctrination is not a bright one.

Our worries about state control over education in the United States, at least, are mitigated by a high level of local control.<sup>49</sup> As a result, students in different localities are exposed to starkly different political values. While public education remains an essential element to our quest for an overlapping consensus, the limits of decentralized education—from which a significant portion of the population opts out altogether—leave us in need of further means by which to propel us toward common principles. Local control mitigates worries about a heavy state hand on education at the expense of a common educational agenda.

Still, another favorite measure by which public discourse is preserved is freedom of association. Freedom of association enables civic organizations to play a central role in our lives without state control.<sup>50</sup> “Civil society,” the fourth important institution, may include religious and other charitable organizations, unions, trade associations, sports clubs, and other community groups.<sup>51</sup> These organizations allow people outside of the state to join together for self-selected purposes and govern themselves within the context of those pursuits, an exercise that ideally allows them to practice and absorb principles that carry over to politics.<sup>52</sup>

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conflict, intentionally or unintentionally, by segregating their networks into separate social enclaves.”).

47. See 14 JOHN DEWEY, *THE LATER WORKS OF JOHN DEWEY 1925–1953*, at 227 (2008) (emphasizing critical role of education in sustaining public sphere). See also AMY GUTMAN, *DEMOCRATIC EDUCATION* 42 (1987).

48. See RAWLS, PL, *supra* note 1, at 199.

49. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59–60, 64 (1973) (endorsing local control of education in majority, concurring, and dissenting opinions).

50. See Larry Diamond, *Rethinking Civil Society: Toward Democratic Consolidation*, 5 J. DEM. 4 (1994).

51. Arguably, political parties also fall into this category. See Russ Muirhead & Nancy Rosenblum, *Political Liberalism vs. “The Great Game of Politics”: The Politics of Political Liberalism*, 4 PERSPS. ON POL. 99 (2006) (arguing that political parties are an important site for public deliberation).

52. See JOHN KEANE, *CIVIL SOCIETY* 114 (1998) (“The emerging consensus that civil society is a realm of freedom correctly highlights its basic value as a condition of

In some countries, civil society is a wholly separate sphere outside the state; but in many, civic organizations provide state-funded services, perform delegated rule-making functions, or benefit from tax-exempt status. Countries differ significantly in how much control the state exercises over what these organizations actually do. In most liberal states, there is reluctance to use state power to significantly shape these organizations, at least in terms of setting their affirmative agenda.<sup>53</sup> The result is that, while this civic sphere enables people to engage one another in ways that are relevant to self-governance, the state itself does not usually play a significant role in directing the content of what these organizations do or how they operate. And, because people do not share priorities to begin with, they do not belong to the same organizations. The result is that civic organizations can actually contribute to polarization. Although an important site for discourse and developing democratic habits of self-governance, they are not a force that consistently pushes us toward overlapping consensus on substantive principles.

What we observe from the limited discussion above is a consistent trade-off between two properties of any institution to which we might look to develop an overlapping consensus. To the extent it brings together individuals who disagree with each other to begin with, the institution tends to rely on state coercion and control over the programmatic mandate of that institution. We see this both within and across the practices above. For example, the press is largely private and not subject to state control in liberal democracies, but under current technology, the result is that people can self-segregate into echo chambers that do not force them to consistently hear news or arguments contrary to their starting views. By contrast, public education imposes an intellectual agenda on children at the earliest age, but it must tread lightly on any topic of potential controversy because it is appropriately self-conscious about the risk of state indoctrination. Similarly, the state can be more or less selective in which private organizations it enlists for the provision of various social services, but the more selective the criteria, the greater the appearance of illiberal state domination. The more open the criteria, the greater the risk of empowering and legitimizing illiberal organizations. Even in electoral design, there is a choice between forcing candidates to compete for the votes of an electorate that encapsulates significant disagreement, thereby bringing those diverse voters into a common deliberative exercise, or instead allowing voters to “elect their own” in districts that are tailored to form predictable majorities. Alternatively, proportional representation forces elected representatives to cooperate with each other at the governance stage.

Since none of these practices operate in isolation, in principle, it is not necessary that any single practice evade the trade-off, i.e., bring people of

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democracy: where there is no civil society there cannot be citizens with capacities to choose their identities, entitlements and duties within a political-legal framework.”).

53. For a discussion critical of the literature celebrating the ideal of an autonomous civil society and emphasizing the critical role of the state in maintaining civil society, see generally Neil A. Englehart, *What Makes Civil Society Civil? The State and Social Groups*, 43 *POLITY* 337 (2011).

opposing viewpoints into a conversation whose agenda is not controlled by the state. Still, there would be a distinctive value to an institution that manages to avoid the trade-off, as I will argue private law might do.

## II. PRIVATE LAW AS PUBLIC DISCOURSE

We have seen that the concept of an overlapping consensus is not motivated by stability alone. A consensus on basic political principles is necessary to secure justice, and such a consensus cannot be counted on to emerge spontaneously. If peace requires that the state manage conflict, justice requires that the state manage disagreement. Private law is commonly associated with managing interpersonal conflict; in this Part and the next, I will show that it is also essential to managing foundational disagreement about political principles.

Private law may be an unlikely site for public discourse. That is because it offers an altogether different method of achieving consensus from those discussed in Part I. When we think of the public institutions associated with public discourse, we tend to think of mass discourse: many people, perhaps millions of people, engaging one another on a common platform.<sup>54</sup> When we think of political discourse outside of those platforms, we might envision people sitting in cafés or around dining tables debating politics in an ad hoc way with the people they choose, without content restrictions or public scrutiny.<sup>55</sup> In private law, we see something different: strangers who encounter each other for apolitical reasons must try to work out what they owe each other with reference to principles of justice, two people at a time.<sup>56</sup> They do not simply negotiate; they argue about their rights and obligations by reference to reasons that others will find compelling, reasons that bear on how our society operates. While private law is an unfamiliar site for public discourse, in this Part I will show that it is nevertheless properly recognized as one. I will first explore what it means for any social institution to qualify as such a site.<sup>57</sup> In the next Part, I will elaborate on the

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54. The standard model of public discourse is collective. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24 (1965) (proposing “the traditional American town meeting” as a “model” for public debate).

55. See Jane Mansbridge, *Everyday Talk in the Deliberative System*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 212 (Stephen Macedo ed., 1999) (including ordinary talk as a form of public deliberation).

56. As an institution, private law up-ends traditional assumptions about the spectrum of deliberative institutions, which imagine that governmental institutions in which discourse is highly regulated are directly involved in producing legislation and not principally aimed at opinion formation. Standard accounts assume that institutions further removed from the state are correspondingly less regulated and more directed at opinion formation and less at decision making. See Jeremy Neill, *Deliberative Institutions and Conversational Participation in Liberal Democracies*, 39 *SOC. THEORY & PRACT.* 449, 452 (2013). See also Carolyn Hendriks, *Integrated Deliberation: Reconciling Civil Society’s Dual Role in Deliberative Democracy*, 54 *POL. STUD.* 486 (2006).

57. See Seyla Benhabib, *The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond*, 90 *THEORIA* 1, 10 (1997) (rather than thinking of the public sphere as a single grand stage on which discourse takes place, our contemporary model should be a

features of private law that allow it a distinctive role to play in the pantheon of critical discursive sites.

**A. What is Public Discourse**

Once we veer from the core institutions associated with establishing a common political culture, or a shared commitment to political-moral principles, public discourse is the amorphous catch-all mechanism to which we turn. The concept is more fundamental than that of an overlapping consensus. Consensus requires public discourse, but whether we think consensus is attainable or even an aspiration to embrace, democratic principles require public discourse to legitimate democratic governments.

As Robert Post explained, self-government properly conceived requires some degree of individual engagement, or “people in their collective capacity [might] decide issues” while “individuals within the collectivity feel hopelessly alienated from these decisions.”<sup>58</sup> Post invokes Jean-Jacques Rousseau for the idea that “collective decision-making is merely oppressive unless there is some internal connection between the particular wills of individual citizens and the general will of the collectivity.”<sup>59</sup> The most influential contemporary theorist of public discourse, Jurgen Habermas, identified public discourse as the mechanism by which individuals meaningfully participate in the substantive choices of politics.<sup>60</sup> Given the overwhelming influence of Habermas on our understanding of an idealized operation of public reason, public discourse is also associated with the spaces he described as the public sphere.

I offer here some rudimentary criteria by which we can identify a practice that is public and discursive. The criteria are significantly informed by Habermas’s account of the constraints on and legitimizing function of public reason. However, I am interested here in public discourse not just for its role in securing the procedural justice of law, or its democratic quality, but specifically for its role in cementing an overlapping consensus on substantive principles of justice.

First, public discourse must be public. But this does not entail that it be strictly speaking “open,” that is, available to anyone for participation at will. Such open-endedness would be unwieldy in any large-scale political community—even in the smallest towns, truly “open” hearings can be chaotic. Instead, the publicity criterion entails several more specific features: transparency, equal access, and impersonality.

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“medium of loosely associated, multiple foci of opinion-formation and dissemination which impact each other in free and spontaneous processes of communication”).

58. Post, *supra* note 32, at 26.

59. *Id.* at 27 (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 58–62 (Maurice Cranston trans., Penguin 1968) (1762)).

60. *Id.* at 28 (citing JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81 (Thomas McCarthy trans., Beacon 1987) (1981)) (“Public discourse continuously but unsuccessfully strives to mediate between individual and collective self-determination. . .”).

Transparency requires that any site for public discourse be subject to potential scrutiny by those outside a given communication. For example, a debate between leaders of two diametrically opposed organizations that is posted online qualifies as transparent even if the debate was held at a private site because others can view the debate—and assess the merits of what was said there—after the fact.

Equal access might sound like an unattainable requirement, but the requirement as it is envisioned here is modest. It does not require that everyone talk at once. A site of public discourse need not even be accessible to all at once or on demand.<sup>61</sup> But every citizen should, in principle, be able to participate in the discourse. Any discursive space that systematically excludes a segment of the political community undermines, rather than promotes, the democratic legitimacy of political ideas that gain traction there.<sup>62</sup>

Finally, public discourse is impersonal, in contrast with private conversation. While private conversations among friends might also play a critical role in democratic deliberation, the practice of socializing is not properly characterized as public discourse just by virtue of the public nature of the topics that people discuss in private. For discourse to be public, it must take place among people who relate to one another in significant part as members of a political community and address each other *qua* citizens. While their status as co-citizens might not exhaust their relationships, if co-citizenship is overwhelmed by some other relation, such as a familial one, then their interaction is not properly described as an instance of public deliberation. The reasons closely related participants offer each other can appeal to common interests and understandings; these cannot be the basis for political principles that govern the rest of the community. Public reason requires the test of justifiability to the other.

Discursive practices that are transparent, accessible on equal terms, and impersonal are public. What makes a practice discursive? A social practice is discursive in the relevant sense if it contemplates more than one answer to political questions and if participants assess the relative merits of answers to those questions on the basis of communicated reasons.<sup>63</sup> Thus, public discourse is characterized by disagreement (controversy), political valence,<sup>64</sup> and reason-giving (deliberation).<sup>65</sup>

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61. Ari Adut, *A Theory of the Public Sphere*, 30 SOCIO. THEORY 238, 240 (2012) (“Public communication rarely involves widespread, egalitarian participation.”).

62. See Benhabib, *supra* note 57, at 19 (“The free public sphere in a democratic polity must allow equal access to all groups within civil society to re-present themselves in public.”).

63. See Knight & Johnson, *supra* note 36, at 285–86 (stating deliberation requires fair procedures, reasoned argument, and aims at resolving political conflict).

64. Some understandings of public discourse would reject this criterion. See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 1 (2004) (“A democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance. It concerns each individual’s ability to



To consider whether private law qualifies as public discourse, we consider whether it is, on the one hand, transparent, equally accessible, and impersonal and, on the other, controversial, political, and deliberative. After concluding in the remainder of this Part that private law is properly regarded as a site for public discourse, I will explore its unique institutional virtues in this role in Part III.

### ***B. Private Law as Public Discourse***

Is private law even the kind of institution that can qualify as a site for public discourse?<sup>66</sup> At first blush, it has features that make it an unfamiliar candidate. It is squarely an arm of the state; as law, it is coercive and top-down. This feature seems at odds with the idea of public discourse as citizen-driven, or a practice in which citizens engage one another directly. Moreover, private law quite literally holds itself out as private, concerning itself with bilateral relationships rather than society at large. Traditional accounts of private law are reluctant to link the principles of justice at stake in private law with the principles of justice that govern major political choices.<sup>67</sup>

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participate in the production and distribution of culture.”). However, I am specifically interested in practices that generate political principles that could be the object of an overlapping consensus.

65. Cf. John Dryzek, *Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia*, 33 *POL. THEORY* 218, 224 (2005) (“[C]ommunication is required to be first, capable of inducing reflection; second, noncoercive; and third, capable of linking the particular experience of an individual or group with some more general point or principle.”).

66. I refer to private law here as the process by which private law claims are adjudicated, including both judicial process and related social practices. I am not referring here to the actual rules of private law, or any theoretical concept of private law.

67. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 80 (1995) (“As an autonomous form of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution.”); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *IOWA L. REV.* 515, 607 (1992) (“The justification of abstract right and of its principles of acquisition does not depend in the least on the prior satisfaction of any distributive requirements of background justice.”); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES* 237, 247 (Jeremy Horder ed., 2000) (“[Corrective justice is] an independent moral principle that operates within the context of distributive justice, but not as a part of it.”); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *VA. L. REV.* 1391, 1395 (2006) (“Both tort and property protect what people happen to have, without any thought about how they got it or what they should have from a moral point of view. The law attends to the form of the transaction or holding, rather than the needs or interests of the parties to it.”) (emphasis omitted). For additional discussion of this viewpoint, see also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 584 (1982) (stating that “[t]he acceptance of the distributive motive into the discussion of what rules of agreement should be in force has never been more than partial and oblique”).

In this Section, I will first argue that neither the fact that private law is law nor the fact that it concerns private claims disqualifies it as a site of public discourse. Having addressed the two major objections, I then make the affirmative case, assessing private law as a site of public discourse using the criteria identified in Section II.A.

### 1. *Prima Facie Objections*

Let us consider first the significance of the fact that private law is law. Legal institutions raise three immediate concerns: they are coercive and top-down; they purport to deliver final judgments; and they purport to apply settled rules as if those rules are determinate and fixed. A legal institution's top-down character is a potential problem if we think an institution that is fundamentally part of the state machinery, with controlling agents (judges) often appointed by the executive with legislative consent, is not in a position to operate as a site in which ideas can be openly contested and developed outside of specific policy battles. We might also worry that because legal decisions purport to be binding, final judgments, they cannot be discursive; to the contrary, they seem to conclude conversations. Finally, not only does private law deliver final judgments, but it often uses language that suggests the rules that judges applied were determinate such that the judgments could not have been otherwise. Invoking the authority of statutes and past judgments does not appear to lend itself to forward-looking deliberation either. I take these challenges in turn.

Scholars have disagreed about the discursive character of the courts. Cass Sunstein insists that “the real forum of high principle is politics, not the judiciary—and the most fundamental principles are developed democratically, not in courtrooms.”<sup>68</sup> However, his target was judicial review. Rawls, assessing similar judicial activity, regarded the Supreme Court as an exemplar of public reason.<sup>69</sup> As Seana Shiffrin has explained, adjudication allots critical roles to private citizens that render them genuine participants in the judiciary's delivery of legal judgments on the basis of articulated reasons.<sup>70</sup> Private law in particular is less top-down than many other subjects of law because it generally looks to private agreements, custom, trade usage, and common understandings of reasonable meaning and conduct to define parties' obligations. The justificatory reasons that arguments and decisions about private law invoke—and thereby seed and cultivate in our legal culture—cumulatively and incrementally amount to a collective discourse.<sup>71</sup>

Even if legal argument in private law is meaningfully discursive, we might be suspicious of the boundary-drawing role of courts in their coercive capacity. Judges decide, after all, which claims will succeed. They do so in a way

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68. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 7 (1996).

69. RAWLS, PL, *supra* note 1, at 231–40.

70. *See* SEANA VALENTINE SHIFFRIN, *DEMOCRATIC LAW* 52–53 (2021).

71. I take the features of private law on which my argument turns to be true of private law in most liberal democracies, not just in common law countries. However, private law in common law countries might be exemplary because of the open-textured nature of judicial decision-making. *See generally* BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) (describing judicial decision-making in the common law).

that effectively controls which claims are going to be heard at all, and which reasons the parties will advance. One could suspect that judges are like conductors; they choose the music, who plays when, and how loudly. We hear the musicians play, but it is not their music.

Discourse, in the context of legal argument, is indeed bounded by the conservative and hierarchical character of law as an institution. Law elevates some moral claims over others and motivates parties to conform to the dominant normative script. It is actually surprising how often socially transformative litigation succeeds given these features. Sometimes, litigants are able to draw attention to previously neglected moral claims or alter the social narrative surrounding certain kinds of harms, notwithstanding the straitjacket of formal legal argument. Sometimes mass litigation against powerful corporate firms delivers astounding damage awards that threaten an industry or a longstanding corporate practice. Sometimes individual plaintiffs led by entrepreneurial attorneys succeed on novel legal theories.

It would be a mistake to think that discourse can only be meaningful, effective, or dynamic if unbounded. But also important, legal argument is not successful *qua* public discourse only when it shifts the conversation suddenly from one track onto another entirely. Part of the reason litigation succeeds in putting people in conversation with one another in ways that resonate with political discourse is because parties are motivated, and perhaps pushed, to use normative language that links their claims with moral principles we already recognize. They are motivated to make even new claims sound familiar.

One might worry that even if the formal, top-down character of courts does not doom their discursive status, their actual elitism does. That is, litigants are not the leading actors in courtroom dramas—their attorneys are. They are not usually the ones formulating legal arguments or attempting to persuade each other or the jury. At best, they approve their counsel's strategy. While it is true that parties to private law disputes do not usually direct their own litigation, they are nevertheless the real protagonists of those disputes. The claims are theirs; they choose to assert them, and they are usually moved by the moral force of those claims. Moreover, they are likely to have some rough sense of how their moral intuitions about the validity of those claims ground the corresponding legal arguments that their attorneys make on their behalf. When private litigation becomes public spectacle, the parties and their claims are the primary object of public judgment. More often, claims are processed quietly, but, just as important, parties tell the stories of their legal disputes to friends and acquaintances as their own stories. To a far greater extent than for their attorneys, parties will take their rare encounter with the machinery of the courts as a window into their operations, principles, and fundamental fairness (or lack thereof). Litigants, not their lawyers, are parties to the arguments that take place in private litigation.

None of this is to say that lawyers do not play an essential role. But the role of lawyers and judges in translating the grievances and defenses of litigants into legal claims and legal defenses does not undermine the discursive character of

the enterprise.<sup>72</sup> On the contrary, they help establish the links between intuitive claims about concrete disputes, legal claims, and political principles; those links are what deliver the public dimension of private law discourse.

The second worry about the finality of legal judgment is also misplaced. As John Dryzek observed, people rarely change their minds in a deliberative forum itself.<sup>73</sup> My claim here is not that judicial opinions standing alone are “entries” into public discourse but rather that the process of adjudication, of which ostensibly final judgments are a part, is discursive. Even though judgments in particular cases resolve particular conflicts, the reasons set forth by both litigants and judges serve two purposes at once. They explain (or advocate for) the resolution of the conflict at hand, *and* they contest and develop both the rules behind the judgment and—directly or indirectly—the principles that underlie those rules. So even when a final judgment shuts down the conversation about a particular interpersonal conflict, it does not end but rather furthers public discourse about what justice means. Judicial norms actually direct judges to shy away from announcing larger principles than necessary, thereby keeping alive argument about the basic principles at stake in individual judicial decisions.

Similarly, even though legal opinions are often written as though they derive logically from recognized authority,<sup>74</sup> such as statutes and case law, especially in the common law, we are fairly open about the fact that judges are making law and that further social choices remain to be made.

We can now consider the other *prima facie* objection to private law as public discourse, namely, that it is too “private.” One might think that good faith participation in public discourse requires a good faith effort to promote the public good.<sup>75</sup> Private law litigants, by contrast, bring their own agendas to court; they are motivated primarily to obtain a remedy or avoid one. Such financial incentive

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72. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 11 (2008) (describing lawyers’ ideal of “negative capability” by which they are self-effacing and promote their clients’ agency in the adjudicative process, aiming only to channel their clients’ views).

73. Dryzek, *supra* note 65, at 229 (citation omitted).

74. See Post, *supra* note 23, at 1347 (“The professional and institutional structure of judicial decision making requires actors to argue cases as though they could be subject to definitive resolution. But the internal legal presumption of agreement should not blind legal actors to the ongoing social fact of disagreement.”).

75. While Rawls seems to have contemplated only overtly political speech as public discourse, scholars developing his views have been less restrictive. See Alexander Kaufman, *Stability, Fit and Consensus*, 71 J. POL. 533, 538 (2009) (explaining that restrictions on public reason only apply to public discussions about the structure of government or the terms of citizenship, and not most of public discourse); David Beaver & Jason Stanley, *Neutrality*, 49 PHIL. TOPICS 165 (2021) (rejecting neutrality requirement for public reason). Just as comprehensive doctrines may be introduced into public discourse as long as public reasons are ultimately offered to justify whatever those comprehensive doctrines were invoked to support, self-interested reasons may not only subjectively motivate but be the basis for a legal argument in support of a legal rule, as long as public reasons are ultimately available in law and public discourse (including academic commentary) to justify those rules.

skews the arguments they make.<sup>76</sup> Perhaps the resulting “conversation” is at best hollow and, more perniciously, a distraction that promotes ideas without any genuine deliberative engagement with their merits.

From a political-economic perspective, litigation is surely skewed toward the economically powerful; in a grossly unequal society, almost every public forum has this fundamental problem. But as a relative matter, litigation at least forces participants to translate their private interests into the language of the public good, and it regulates the contest of ideas to confer more equality—albeit formal equality—than obtains in most other corners of the public sphere. Everyone is entitled to put forward a claim. Everyone is invited to argue for the claims they make and defend against the claims made against them. The procedure is highly stylized, and the court oversees it.

We should not take the self-interested motivations of litigants as a mark against the public significance of the arguments they make. Argument can be about specific objects or private claims and simultaneously engage political principles.<sup>77</sup> In fact, the dual nature of private law claims—at once self-interested and political—encourages the exercise of translating private reasons into public ones, an essential civic skill. Seyla Benhabib describes the Arendtian idea of an “enlarged mentality” as “the authentic political attitude [that consists of] the capacity and willingness to give reasons in public, to entertain others’ point of view, [and] to transform the dictates of self-interest into a common public goal.”<sup>78</sup> The Aristotelian idea of political speech similarly regards it as a bridge between the public and private spheres.<sup>79</sup> The exercise of translation is essential to public discourse.

Arguably, not only should we be open to non-traditional political speech, but we should also be wary of efforts to sharply delimit what “counts” as political speech. The effect of imposing such norms may be to devalue speech that has just as much political value as other speech but does not have the dressings of overt policy or constitutional argument. The effect is to relegate those speakers to the sidelines of public discourse, or altogether outside the bounds of public discourse

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76. It certainly skews who comes to the courts to argue at all, a point I shall address in the next Section.

77. See Brandon Morgan-Olsen, *A Duty to Listen: Epistemic Obligations and Public Deliberation*, 39 SOC. THEORY & PRAC. 185, 189 (2013) (“In any public political culture, there are going to be systematic reasons why an argument that strikes a listener as nonpublic at first blush may in actuality contain public content.”).

78. Benhabib, *supra* note 57, at 6.

79. Triadafilos Triadafilopoulos, *Politics, Speech and the Art of Persuasion: Toward an Aristotelian Conception of the Public Sphere*, 61 J. POL. 741, 742 (1999) (defending an Aristotelian ideal of political speech as bridging “the gap between the public and the private spheres, passions and reason, individual interests and the common good, equity and law”).

narrowly drawn.<sup>80</sup> We should instead aim to recognize the political where it arises regardless of its presentation, even its own self-conception.

Finally, we should remember that some of the apparently outlandish arguments that private litigants make, either asserting or denying responsibility, gain plausibility over time. Major changes in private law areas, such as products liability and liability waivers, are associated with a few major cases, but those cases were preceded by others that helped clear the groundwork for the more famous ones. Similarly, recent legislative and executive action around noncompete provisions and arbitration are clear reactions to private law litigation, especially failed litigation. Of course, all of these cases were brought by self-interested parties—standing rules require that it be so—but the claims they asserted resonated with broader principles of justice. The result was that third parties, including governmental bodies, recognized their political valence notwithstanding their origins in contract disputes. The incremental character of private law evolution allows participants to press arguments that make a difference in the long run even when they lose in the short term. Moreover, they can do this without constituting a significant threat to the stability of the polity in the manner of “extreme” political speech. While speech outside the bounds of public reason as presently conceived risks destabilizing an overlapping consensus, the movement of any consensus to better conceptions of justice over time depends on people pushing the boundaries at any given time.<sup>81</sup> Pushing those boundaries in the context of private law dispute resolution enables litigants to “try out” arguments and principles that might or might not gain traction but with less risk of contaminating public discourse writ large if there is no uptake on the ideas presented there.

Neither the fact that private law is law nor the fact that the claims it entertains are private, then, should distract us from its function as a site for public discourse.

## 2. *The Affirmative Case*

Having rejected two prima facie arguments against private law as a site of public discourse, I turn to the affirmative argument by applying the criteria for public discourse developed in the last Section.

### a. **Transparency**

The long-standing tension between the private and the law-like features of private law illuminates the question of whether private law is sufficiently transparent to qualify as a public practice. One might argue that the control that litigants have over private law renders it too opaque an institution to fall within the bounds of a legitimately public practice. Most disputes that are governed by private law never reach the courts. Hopefully, many potential disputes do not arise

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80. See generally Alice Cary, *Neutrality, Critique, and Social Visibility: Response to David Beaver and Jason Stanley*, 49 PHIL. TOPICS 187 (2021) (developing her critique of the rejection of emotional or “irrational” speech in the public sphere).

81. See Linda M. G. Zerilli, *Value Pluralism and the Problem of Judgment: Farewell to Public Reason*, 40 POL. THEORY 6, 9 (2012).

at all under the shadow of clear entitlements. There is no public record of any of those disputes or even reliable empirical understanding of how people conduct themselves in their course. Even when legal claims are filed, claims are usually settled before the substance of the disputes is on public record. Indeed, even when a state court offers a final judgment, the judgment may not be published. Even in those cases when an opinion is published, the reasons behind that judgment may be perfunctory or rely on technical or formal reasons that take for granted rather than treat as contestable underlying rules or principles.

Many of these features of private law undermine its transparency. They may speak to the merits of contemporary procedural changes, formal and de facto, including the rise of arbitration. But private law has other essential features that warrant characterizing it as a fundamentally transparent institution.

First and foremost, the vast majority of the time, the rules of private law, as well as the reasons behind those rules, are accessible to all. That is, even if the process of contestation in private law does not create a public record of how a given dispute was resolved and why it was resolved in that way, everyone governed by the private law of a regime can glean those relevant rules from the record in other related cases, as well as scholarly commentary on private law that helps elaborate the reasons behind rules.

Moreover, the public record that elucidates the rules and their reasons reflects disagreement. Through dissents and simple consideration of the parties' adversarial briefing, court opinions reveal argument and the disparate possibilities for how courts might treat new or long-standing controversies. The reasons that judges offer are primarily precedential, but where the precedent itself takes a substantive position that the judge knows is the object of disagreement, the judge usually cites argumentative language from the precedent rather than relying solely on the fact of precedent.

Finally, the formality of court proceedings allows that, while the vast majority of claims receive no public scrutiny, when a particular case encapsulates a debate that resonates with the public, that case plays out in front of the public (absent special considerations that warrant confidentiality). To the extent the publicity around these cases feels unseemly, the significance of public engagement with high-profile cases should give us pause before we pull back on public access.

#### **b. Equal Accessibility**

Formal properties of law also account for equal access to private law. Immediately, we might reject this formal equality as misleading, given that in practice, litigation is expensive, and most people never engage in any litigation and forego legal claims because the costs of litigation are prohibitive.<sup>82</sup> The problem of access to justice genuinely undermines private law's claim to be open to all on equal terms. Nevertheless, we can characterize private law as equally accessible in

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82. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE POSTSOCIALIST CONDITION* 76 (1997) (critiquing Habermas's account of the public sphere because it did not account for the inability of "interlocutors in a public sphere to bracket status differentials and to deliberate 'as if' they were social equals").

some thin, formal sense and return to the problem of access as one of the normative implications of identifying private law as a site for public discourse. While there are steps we can take to improve access to private law justice, as long as people are permitted to choose whether to bring claims and whether to settle them, and as long as we permit private counsel, there is no way to guarantee equal participation and voice in private law any more than in any other site of public discourse.<sup>83</sup>

### c. Impersonality

We have seen in the above discussion of traditional sites of discourse that the more private an institution, the greater the risk of self-segregation. In private discursive spaces, citizens tend to encounter only those most like themselves. But there are spaces where we encounter strangers. They are usually nondiscursive spaces, such as the marketplace, or physical spaces, like streets. In the latter spaces, we mostly navigate around each other without expressly engaging our respective political–moral commitments. But when our interactions with strangers go wrong, those underlying commitments bear on what was owed and what is owed going forward.

Some claims in private law are between people who know each other well. But at the point when they are invoking legal claims, they have taken a step back from their personal relationships to assert claims as members of the political community. While some accounts of private law might suggest that they assert claims by virtue of personhood alone, the claims we assert in private law are highly contingent on the political regime we inhabit. What qualifies as a legitimate business practice depends on the particular market in which a seller operates. What qualifies as a negligent omission depends on the level of care that prevails in a given society. The entitlements do not just turn on empirical facts about the society but about the principles of responsibility that it has endorsed.

Thus, private law is impersonal in the sense that public discourse requires. People engage each other as members of a common political community. They invoke their common status as members of that community to justify the demands they make of each other.

### d. Controversial

So far, I have proposed that private law is public in the sense that public discourse contemplates because it is transparent, impersonal, and offers open access. Now I consider whether it is discursive. The first criterion identified above is that it must center around disagreement. By contrast, for example, public celebrations or ceremonies in connection with national holidays assume unanimity and shared values.

Private law is intuitively characterized by controversy in this sense. The practice consists of dispute adjudication, so it is driven by disagreement about what people owe each other. Importantly, the practice of private law includes the

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83. See Post, *supra* note 32, at 29 (stating there is no way to ensure equal participation in public discourse that is not tyrannical).



process of argument about entitlements and responsibilities, not just the authoritative judgments that might be delivered at the end of a dispute. The judgments themselves presuppose controversy; they are unintelligible absent disagreement.

#### e. Political

Some readers will regard skeptically the proposition that private law controversies implicate our basic political–moral commitments. The corrective justice account of private law describes private law as animated by a principle of justice that is independent of distributive justice and other principles that regulate public institutions.<sup>84</sup> On that view, private law protects entitlements that public law creates, but under the suggested division of labor, the justice of underlying entitlements is not at issue in the adjudication of private disputes. Private law makes it possible for individuals to go about their business in the ordinary course of life. We have to look to public law to shape the basic structure of society.

While I doubt that private law has quite so narrow a function, my objective here is not to argue about the kinds of reasons that should drive private law rules or judgments. Instead, I argue here that the foundational principles that underlie controversies in private law, even if mediated by some independent principle like corrective justice, overlap significantly with those at stake in political discourse.<sup>85</sup> Questions about the allocation of responsibility, the scope of human agency, and the demands of equality arise in private law just as they do in the context of conventional politics.<sup>86</sup> Moreover, the particular manner in which private law operates to reconcile the distinct vantage points of parties to private disputes, a topic to which I return below, helps lay the groundwork for shared conceptions of social obligation, equality, and freedom—the fundamental political principles we invoke to resolve more overtly political questions, such as those about just taxation, environmental and safety regulation, and the welfare state. In neither private law nor policy debates do we debate directly the analytic content of abstract political–moral principles. We approach them through concrete controversies in each context. But because the principles at stake are the same, any measure of consensus in one sphere pays dividends in the other.

When we decide a summer camp is liable for negligence, we are deciding the standard of childcare that parents are entitled to, and inevitably, we are trading that off against the cost of such care. We are balancing the equality interest in maintaining safe conditions for all children with the liberty interest in allowing individual parents to choose which risks they are prepared to assume in order to spend their money differently.

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84. See generally WEINRIB, *supra* note 67.

85. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

86. Arthur Ripstein, a leading corrective justice theorist, has himself elaborated the ways in which basic principles of freedom and equality operate across tort law, criminal law, and institutions associated with distributive justice. See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* 12 (1998).

When we decide whether a customer who claims that she relied on a representation about the manufacturing process behind her clothing can return that clothing or obtain other damages, we have to characterize what kind of wrong it was for the manufacturer to have said one thing and done another. When we raise or lower the evidentiary bar for the plaintiff, we are implicitly taking a position on what we can reasonably expect in the mass marketplace and the scope of responsibility for manufacturers. We are answering questions about entitlement and responsibility not far from those that we have to answer in the more familiar spaces of public discourse. From a natural law perspective, private law operates on moral principles that are derivative from the moral principles that we use in personal relationships. But while private law is private, it is not personal. It is a state institution that mediates relationships between strangers. Whether or not it is more immediately governed by a distinct principle of corrective justice or civil recourse, private law presents questions of *political* morality.

#### **f. Deliberative**

The idea that private law is deliberative is more familiar. Arguments in private law are reason-based; as previously discussed, even authoritative opinions that accompany judgments aim to be persuasive.

That said, the extent to which the institution is deliberative may vary depending on contingent features. For example, open-ended standards under a precedential common law system might be more likely to invite arguments that invoke questions of fairness and policy, while a civil law system might aim to restrict arguments to narrower questions of statutory interpretation. Because of the limits of language and the inability of even detailed code to anticipate the full variety of disputes that arise under it, it seems likely that legal practice will engage with substantive questions of fairness and policy in any system. Law is conceptually so bound up with the idea of reason-based decision-making that it is hard to conceive of an institution that qualifies as private law that is not deliberative.

### **III. PRIVATE LAW'S CENTRIPETAL FORCE**

In Part I, I aimed to show the difficulty of constructing a site for public discourse that draws together people who disagree in a way that engages fundamental questions of justice—even though the task of developing and sustaining an overlapping consensus seems to require just such an institution. In Part II, I aimed to show that private law can be understood as a site for public discourse. In this Part, I will argue that private law is a site for public discourse with some unique properties that potentially overcome the trade-off between state control and polarization. I will do this by offering a more detailed account of how private law might operate as a centripetal social force.

Specifically, private law helps to manage what I will refer to as “reactive discord” between citizens as they encounter each other in public spaces, such as public streets and commercial markets. By offering authoritative resolutions to our private disputes on terms that aim to reflect community norms and conventional morality, private law works through moral principles at the bilateral level that we can then extend to other matters of public policy.

In many respects, the institutional processes by which we collectively produce private law and carry it through are ones that characterize other kinds of law as well. Legal process more generally bears many of the properties of public discourse that I identified in Part II.<sup>87</sup> However, private law has features that render it a particularly powerful site for pushing us gently toward common political–moral principles. Private law operates on private disputes in which citizens are commonly and particularly invested. Our engagement with legal machinery is rare, but our self-conscious engagement with private law more broadly—that is, the rules of property, contract, and tort, as well as related subjects like family law and employment law—is almost unavoidable over the course of ordinary life. And when we find ourselves in discord, the disagreement that must be resolved is immediately with another private citizen. Our respective attitudes toward the principles that govern our dispute are thus palpably at play in our engagement with background law. This Part aims to show how the process by which private law resolves disputes helps to generate some degree of consensus on those principles.

#### A. *Reacting to Harm*

Peter Strawson introduced the concept of reactive attitudes to describe the ways in which we respond to the actions of other agents.<sup>88</sup> Strawson pointed to our reactions of resentment and blame as indicative of the responsibility we assign agents.<sup>89</sup> While feelings predicated on the phenomenon of responsibility do not establish that agents are in fact responsible,<sup>90</sup> Strawson argues that their centrality to our emotional life is evidence that the attribution of free will to agents is basic to our moral life.<sup>91</sup>

Strawson distinguished between personalized reactions, on the one hand, and objective reactions, on the other. Personalized reactions are relational: we react to the wrongs done to us.<sup>92</sup> Our objective reactions are directed to actions to which we are third party observers.<sup>93</sup> Stephen Darwall has argued that personalized reactions are key. Our basic equality as moral agents is manifest in the reciprocal demands we make on each other.<sup>94</sup>

My aim here is not to evaluate Strawson’s theoretical contribution on its own terms. I begin with the fact that we react emotionally to harm that we inflict on others or experience at the hands of others. Benjamin Zipursky and John Goldberg have observed that victim responses in private law resemble those of

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87. Thanks to Malcolm Thorborn for this point.

88. See generally P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* (1974).

89. *Id.* at 13.

90. See JOHN FISCHER & MARK RAVIZZA, *PERSPECTIVES ON MORAL RESPONSIBILITY* 18 (1993) (distinguishing between being responsible and being held responsible).

91. See STRAWSON, *supra* note 88, at 5.

92. *Id.* at 15.

93. See *id.*

94. See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT AND ACCOUNTABILITY* 35 (2006).

victims of other moral wrongdoing.<sup>95</sup> With Darwall, I assume that mutual respect requires that we take seriously how others react to our actions and entitles us to demand a response from those who harm us. I focus on a phenomenon on which neither Strawson nor Darwall elaborated: reactive discord, or inconsistency, between the reactive attitudes of an agent and her “victim.” For semantic ease, I refer to a person adversely affected by the actions of another person as a “victim,” even when the action is not blameworthy and the causal agent is not culpable. It would not be fair to say that either Strawson or Darwall overlooked discord; rather, discord was not central to either of their theoretical objectives. Strawson was intervening in a debate about determinism, and Darwall aimed to prioritize the relational standpoint over an objective one.

Strawson distinguished at the outset between attitudes that are personally held by agents party to a transaction, on the one hand, and attitudes held objectively, on the other. I will distinguish more systematically between the reactive attitudes of those who have inflicted harm on others and the reactive attitudes of those who have suffered harm—both fall within Strawson’s category of personalized reactions—and elaborate on the relationships between those kinds of agential reactions. The “short list” of attitudes that I discuss is not intended to be exhaustive. There are other morally charged reactions that people can, and do, have to the actions of others.<sup>96</sup> These are reactions that seem especially salient, and, most importantly, they can be sorted into pairs. That is, we can expect and would desire alignment between the attitudes that I discuss here.

In the remainder of this Section, I will first identify three sets of reactive “pairs” and then introduce the concept of reactive discord. I will then argue that private law manages discord by promoting shared understandings of what we owe each other, which in turn promotes a shared, albeit threadbare, political morality.

Both Strawson and Darwall are more concerned with how we react to harm-doing by others than the reactions of the harm-doers themselves. But a harm-doer does not merely react to the reaction of her victim; she first has a direct reaction to the event. Broadly speaking, a harm-doer can be expected to react in one of three ways to the fact of her having harmed another person.<sup>97</sup>

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95. See John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1154 (2007) (“[V]ictims of . . . norm violations are likely to regard themselves as having been wronged and tend to have concomitant feelings of resentment and blame in response.”). See also Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1790 (2009) (“[T]he reactive attitude of resentment is a natural response to the kind of wrong that is at the core of a negligence claim.”).

96. See, e.g., Stephen de Wijze, *Tragic-Remorse—The Anguish of Dirty Hands*, 7 ETHICAL THEORY & MORAL PRAC. 453 (2005) (describing tragic remorse as a reaction that is neither guilt nor remorse as I define it here).

97. One might doubt that individuals make these distinctions in their reactions. That is, one might argue that individuals are either guilty or indignant, or not, depending on which side of harm they find themselves. See generally D. Justin Coates, *Being More (or Less) Blameworthy*, 56 AM. PHIL. Q. 233 (2019) (arguing that reactive attitudes do not vary

First, she might feel guilty. She will or should feel *guilt* if the imposition of harm was a moral wrong for which she is culpable.<sup>98</sup> We might think of guilt as the most basic reactive attitude of a harm-doer because, in cases where the harm-doer's role is central, guilt might be the instinctive emotional starting point. It often requires further deliberation—and assurance from others—to conclude that one's role does not amount to wrongdoing. At that point, guilt might be downgraded to a weaker reactive attitude.<sup>99</sup>

If the harm-doer decides that she is not properly guilty, she nevertheless may feel *remorse* for choices she made that resulted in harm.<sup>100</sup> In such cases, the harm-doer regrets her own actions and feels responsible for the harm. I intend remorse to capture the attitude of a person who accepts responsibility for an outcome of some adverse event, even if it reflects poor luck.<sup>101</sup> She is sometimes properly held to account for the harm that resulted from her actions.<sup>102</sup> Although she maintains that her actions were not wrongful, she wishes, with the benefit of hindsight, that she had acted differently. She is apologetic. Ordinary usage of the term “remorse” does not precisely track this usage but, among available concepts,

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in intensity to reflect degrees of underlying blameworthiness). But even if we observe that individuals do not consciously regulate their emotional reaction to harm to correspond to their intellectual judgments about culpability or responsibility, our reactions do vary in type. The reactive attitudes discussed here are some of the most basic ones on each side of harm.

98. See Julie Tannenbaum, *Emotional Expressions of Moral Value*, 132 PHIL. STUD. 43, 50 (2007) (“A distinctive mark of feeling guilty is evaluating one's action as morally wrong.”).

99. The traditional Kantian position would not attach any moral opprobrium to a good will, no matter the consequence of its attendant action. Some scholars continue to reject the “weaker reactive attitudes” that I discuss here on the grounds that intentions are all that count. See, e.g., Peter A. Graham, *A Sketch of a Theory of Moral Blameworthiness*, 88 PHIL. & PHENOMENOLOGICAL RSCH. 388 (2014).

100. My use of the concept of “remorse” is intended largely to track Bernard Williams' concept of “agent regret.” I avoid the technical term more easily to distinguish simple regret, defined below. Williams introduced the concept of agent-regret to encompass the feeling of regret an agent properly bears in relation to choices that were not wrong but nevertheless produced some harm or undermined some good. BERNARD WILLIAMS, *Moral Luck*, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20, 28 (1981).

101. Moral luck refers to the arbitrary way in which one's individual normative position is altered by the situations in which one finds oneself and the ways in which one's choices happen to play out. See *id.*; THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24–38 (1979) (introducing together the concept of and literature on moral luck).

102. Tort theorists have used the concept of “outcome responsibility” to justify holding people legally as well as morally responsible for outcomes that they could foresee and control, even if those outcomes were unintended and the conduct was reasonable. See generally Tony Honoré, *Responsibility and Luck: the Moral Basis of Strict Liability*, L.Q. REV. (1988). See also John Gardner, *Obligations and Outcomes in the Law of Torts*, in RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORE ON HIS EIGHTIETH BIRTHDAY 111 (Peter Cane & John Gardner eds., 2001); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 506–07 (1992); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72 (Gerald J. Postema ed., 2001).

it seems to capture a reaction that is less severe than guilt but more rueful than mere regret.

I will reserve the label of regret for a third kind of reaction that an agent might have to an event; that is, simple *regret* that it occurred. In this last kind of reaction, the harm-doer regards herself as mostly unlucky for having been bound up in the causal chains of events that ended in another person's harm. She does not regard herself at fault or even responsible for the other person's loss. Regret in this sense is detached, but it is nevertheless directed at the person who has suffered a loss. A regretful person wishes events had unfolded differently for a particular person, not in general. While the attitude is rooted in part out of compassion, it is also linked with the agency of the harm-doer.<sup>103</sup> While the latter did not "inflict" the harm in any normatively thick sense, her own narrative is now marred by the event. It is part of her history as an agent, and she is linked to the other agent by the latter's misfortune.<sup>104</sup> These are important elements of what she regrets.<sup>105</sup>

We can distinguish among reactions by the person who suffers harm in similar fashion. While Strawson was more interested in the binary question of whether one regards a harm-doer as accountable and therefore bears any reactive attitude toward her,<sup>106</sup> our attitudes toward harm-doers are not subject to an on-off switch depending on whether we regard them as free agents. Instead, our reactions are graded depending on the kind of moral responsibility we assign her.

A person who suffers harm "at the hands" of another, or as a direct consequence of an interaction with another person, may feel *indignation* if she

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103. The language of regret is not always used this way. *See, e.g.*, L.N. Zoch, *Remorse and Regret: A Reply to Phillips and Price*, 46 *ANALYSIS* 54, 54–55 (1986) (using "remorse" to capture what I refer to as regret and using "regret" to refer to more distanced sorrow or displeasure about an outcome); Thomas Hurka, *Monism, Pluralism, and Rational Regret*, 106 *ETHICS* 555 (1996) (discussing rational regret that does not involve harm to others).

104. Tannenbaum, *supra* note 98, at 52–53 (2007), suggests that an agent may regret harms that come about by hand as reflective of a kind of failure to perform successfully whatever action resulted in the harm. For example, a driver that hits a pedestrian without wrongdoing or even negligence fails to realize her "sub-end" of driving without killing anyone. She offers this account in part to mitigate the worry that regret based just on the fact that one is "caught up" in another's misfortune puts undue and inexplicable focus on the agent, as if she regretted her involvement rather than the harm itself.

105. Again, this schema is controversial, and some scholars would reject the category of simple regret as I have described it here as illusory. *See, e.g.*, Eugene Chislenko, *Causal Blame*, 58 *AM. PHIL. Q.* 347 (2021) (doubting that causal blame of nonagential objects or phenomena is importantly different than interpersonal blame). My aim here is not primarily to defend the schema of reactive attitudes but to show that attitudes may be ideally correlative, and ultimately to explore the conditions and costs of reactive discord.

106. *See* Jonathan Bennett, *Accountability (II)*, in *FREE WILL AND REACTIVE ATTITUDES: PERSPECTIVES ON P.F. STRAWSON'S "FREEDOM AND RESENTMENT"* 47, 58 (Michael McKenna & Paul Russell eds., 2008) ("[W]hen you are drawn by naturalistic thoughts about someone's actions towards the conclusion that he is not to blame for them, you [lose] your feelings of indignation. . .").

believes that she was wronged.<sup>107</sup> Indignation is more than the belief that one has been wronged.<sup>108</sup> It is blame directed at the ostensible wrongdoer and entails a demand for accountability, albeit not necessarily legal accountability. An agent can be indignant about her treatment at the hands of an institution or other collective but only inasmuch as she attributes agency to the group that she blames. Similarly, one can be indignant about a state of affairs if there is an identifiable action or event that is actually or symbolically linked with having brought about the state of affairs. But because indignation is intense and exhausting, it is not a reaction that can be sustained indefinitely without great personal cost. Indignation is usually a reaction to a particular act of wrongdoing.

If an agent does not take another person to be at fault, she might nevertheless react with *resentment* toward him if he is responsible for her loss. The literature on outcome responsibility and moral luck is highly focused on the vantage point of the agent that is to be held to account.<sup>109</sup> It is easy to overlook how the impetus for the concept of outcome responsibility probably originates in the reactive attitude of the victim and the theoretical and institutional motivation to reconcile the victim's perspective with narrowly drawn conceptions of moral responsibility. The upshot of that literature, though, is not just that the harm-doer can be responsible for a loss even if he is not culpable for it, but also that he may be responsible *to* the victim, who rightfully demands that he in some form take ownership of what he has done and the consequences it has wrought.

Finally, the harm-sufferer might not assign the harm-doer any special normative status in relation to her own loss. Instead, she reacts with mere *disappointment* to her loss. The other party does not figure into it in any meaningful way except that she is associated with the tragedy (of whatever proportions). While this attitude comes close to being an attitude toward the event rather than an attitude toward the other agent, it does have a relational dimension because the exclusion of resentment and indignation is often a choice that requires some conscious exercise of virtue.

Disappointment, that is, is not just an attitude toward loss but also acceptance of the other agent's role in one's own misfortune. It entails affirmative rejection of the alternatives of resentment and indignation.

If parties regard events in the same way, these potential reactions will match. If parties agree that one party has wronged the other, the wrongdoer should feel guilty, and the victim should feel indignant. If the parties agree that one party is responsible for the other's loss, the harm-doer should feel remorseful and the

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107. Strawson uses the concept of indignation to refer to the reaction of a person removed from the wrongdoing she evaluates. While the terms are ambiguous in ordinary usage, that reaction seems better captured by the concept of outrage. I use the term resentment, below, more broadly than indignation.

108. I define indignation here without claiming that the concept has a stable meaning in ordinary language. The concept has been used to capture a range of emotions. See generally William Neblett, *Indignation: A Case Study in the Role of Feelings in Morals*, 10 METAPHIL. 139 (1979).

109. See Tannenbaum, *supra* note 98, at 50.

other party resentful. If both parties understand the harm as mere misfortune, the party that suffers a loss will feel mere disappointment, and the other party, somehow caught up in the misfortune of the other, will experience simple regret.

### ***B. Managing Reactive Discord***

Parties frequently do not react to events with correlative attitudes.<sup>110</sup> That is, while the victim may feel wronged by culpable conduct, the agent of harm may regard her action as justified and connected with the victim's loss only by accident of misfortune. Disagreement about the correct attitude to adopt toward harm will stem from disagreement about facts or disagreement about applicable principles—that is, the parties' obligations and rights. We might be tempted to think of disagreement about the application of principles to facts as a third category, but we can think of the latter disagreement as a disagreement about substantive principles at the granular level: if the parties achieved agreement on highly specified principles of right, we would not expect disagreement about how principles are applied to facts.

Whether the product of disagreement about facts or principles, reactive discord is a problem. At the least, it is a source of sustained negative emotion and personal acrimony. If parties were met with mutual acknowledgement when their interactions go wrong, their initial reactions might resolve more quickly. More fundamentally, reactive discord is problematic because mutual intelligibility, and the small units of mutual acknowledgement in which it consists, is valuable to most people. We instinctively desire that others endorse our normative perspective.<sup>111</sup> For Darwall, such mutuality is central to an account of moral obligation.<sup>112</sup> We rely on other people to process our relationships with them and the events we mutually “occupy” in our respective narratives. When our interpretation of events is affirmed by others, we can have more confidence in our subsequent judgments about how to navigate social spaces. If we are met with confusion or even hostility, our working narratives are rendered unstable in ways that might be productive but might also induce a sense of moral floundering. We are less sure how to move forward.

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110. Another kind of reactive discord might arise when harm-doer and victim react in ways that are correlative but with mismatched intensity. For example, the victim might be intensely indignant while the harm-doer is only a little bit guilty. However, it is not clear that our reactive attitudes are finely calibrated to correspond to our judgments about relative blameworthiness or responsibility. See Jonathan Adler, *Constrained Belief and the Reactive Attitudes*, 57 PHIL. & PHENOMENOLOGICAL RSCH. 891 (1997) (observing that reactive attitudes tend to be experientially binary and are usually based on limited evidence while the beliefs on which they are predicated admit to degrees of confidence based on a wider set of evidence); Coates, *supra* note 97, at 233. Mismatches in the intensity of a reactive attitude often reflect differences in temperament.

111. Cf. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 6 (1998) (describing our “desire to be able to justify [our] actions to others on grounds that they could not reasonably reject”).

112. See generally DARWALL, *supra* note 94.



While reactive harmony is valuable to the individual, incremental pushes toward reactive harmony have public value, too. Darwall points out that the possibility of compatible reactive attitudes is related to Rawls's understanding of public reasons.<sup>113</sup> While many of the reactive attitudes we harbor toward each other do not directly implicate public institutions, many do.<sup>114</sup> State regulation of our interactions rests on the prospect of justifying the underlying normative accounts to each of the persons to whom it is applied. Private law thus aims to offer an account of the entitlements it enforces that are consistent with the range of moral views that ground reactive attitudes. The justifications on which it implicitly and expressly relies need to vindicate our conceptions of freedom, equality, responsibility, and solidarity—or, if they consistently fail to do so, they will alienate and render the private law regime unstable.

However, private law does not merely aim to mirror moral principles that resonate with the people subject to its rules. Those principles do not circulate in any consistent or coherent form, waiting to colonize private law. Judges have to construct those principles themselves from the concrete practices they observe.<sup>115</sup> Their feedback fuses, rationalizes, and reinforces the norms that circulated before.<sup>116</sup> In civil law systems, judges may not self-consciously take on such a role, but legal rules relate to background norms in a similar way. A civil code already aims to rationalize and embody relevant moral principles, and in the course of interpretation, judges are likely to refer to its underlying moral logic.<sup>117</sup>

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113. *Id.* at 23.

114. That is, we could say that some kinds of reactive discord stem from reasonable disagreement about the right while others turn on conflicting conceptions of the good.

115. See JOHN GOLDBERG & BEN ZIPURSKY, *RECOGNIZING WRONGS* 240 (2020) (“[M]odern common-law courts are in significant part elucidating and expanding upon norms of conduct. . .”).

116. *Id.* at 252 (describing tradition from Cardozo to Dworkin that emphasizes how common law courts articulate latent principles that allow law to cohere).

117. See Mélanie Samson & Louise Langevin, *Revisiting Québec's Jus Commune in the Era of the Human Rights Charters*, 63 *AM. J. COMPAR. L.* 719, 721 (2015) (quoting PAUL-ANDRÉ CRÉPEAU, *LA RÉFORME DU DROIT CIVIL CANADIEN: UNE CERTAINE CONCEPTION DE LA RECODIFICATION, 1965–1977*, at 6 (2003)) (“A civil code is ‘the most typical reflection of a people's values. One can say, show me your code, and I will tell you who you are!’ Thus, the very essence of a civil code is to evolve, including through interpretation, at the same rhythm as the society it governs.”); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 *U. PA. L. REV.* 687, 736 (1998) (“[M]odern civil law courts have seized upon certain abstract values reflected in the codes as delegations of broad authority to develop the law within their scope and to adapt the codes to accommodate changes in the regulated field of human activity.”). See also Bruce W. Frier, *Interpreting Codes*, 89 *MICH. L. REV.* 2201, 2202 (1991) (“European judges have seized upon [certain kinds of] general clauses as a legislative derogation to them of a general ‘moral’ authority and supervision in administering the codes; the general clauses have accordingly become a standard vehicle for achieving what is now almost universally recognized (at least in academic circles) as judicial legislation.”). See also Xiaoqun Xu, *Law, Custom, and Social Norms: Civil Adjudications in Qing and Republican China*, 36 *L. & HIST. REV.* 77 (2018) (describing the process by which norms and customs informed adjudication and the Chinese Civil Code);

When one person harms another, we rarely reason from scratch about whether the conduct was blameworthy, resulted in some moral responsibility, or was simply unlucky. Our reaction is rooted in our reading of prevailing norms. But we can read prevailing norms differently—indeed, they may very well differ across groups within a political community. When a court gives us the answer to a question, it announces that one set of norms controls (in civil law jurisdictions, the court may rely on the authority of earlier legislative statements, while in common law countries, the judge may openly author new norms). We can take away two things from the private law ruling: first, that one of us is right and the other wrong; and second, going forward, we had better conform to the controlling norm. It is in the nature of norms that they normalize. That is, if we all abide by a norm, we tend to come to regard it as not just binding but right. The next time parties find themselves in a situation where they either wish to assert a claim that sounds in private law or face a claim by someone else, they are likely to rely on the rules and reasons endorsed by courts in the past to inform how they negotiate their disputes. Citizens implicitly rely on the norms that have emerged from past litigation even in disputes that do not end up in court. Our use of legal principles to inform our understanding of what we owe each other outside of litigation helps to entrench a common take on the relevant moral principles.

The first time a store was held liable for the safety of customers in its parking lot, some people were surprised, while others found it long overdue. The first time that employers were held liable for the hostility between employees in their workplace, some people were dismayed, while others found the remedy still inadequate. But by now, at least in the United States, most people regard it as obvious that stores are responsible for maintaining some degree of safety on their property when they invite people on to it. And people might disagree about the exact liability and evidentiary standards, but it is a starting point that employers are responsible for making it possible for all kinds of people to comfortably work for them.

The dynamic by which private law threads together a shared understanding of justice is perhaps easiest to trace in the domain of contract because the parties' rights and obligations are expressly understood to turn on what they expected at the time of agreement. If a lender knows in advance under what circumstances a debtor can get out of repaying (e.g., by filing for bankruptcy), the creditor can hardly complain when it happens. Likewise, if a seller knows that a buyer can get out of the contract to buy a house if certain events occur, the seller cannot complain. When the state allows the buyer to exit the contract at no cost, it actually makes the case that, going forward, parties come to believe that it is right and fair that buyers get out under those circumstances.

By settling expectations up front, the state minimizes discord going forward. It does this, though, not just by resolving the particular legal questions

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Efrén Rivera Ramos, *The Impact of Public Anglo-American Institutions and Values on the Substantive Civil Law: Comments on Judge Aharon Barak's Keynote Address*, 78 TUL. L. REV. 353 (2003) (describing how public values have been incorporated into Puerto Rico's civil law).

that courts answer, but by establishing principles about what is required of each of us and what each of us is entitled to from others. We internalize these principles, and over time, that makes our future interactions less likely to be discordant.

Thus, the thin overlapping consensus that we pursue in private law is not developed through abstract contemplation of moral principles; that is not how it actually works in any important site of public discourse, including education, press, or civic organizations. Instead, when we reconcile our reactions—at once emotional and evaluative—to particular events with the particular other agents that have experienced them with us, we construct a common set of principles that we bring to bear on interactions outside the legal realm, as well.

The basic idea of law itself may be that everyone is accountable to others.<sup>118</sup> Beyond this foundational idea, though, private law espouses other substantive principles: we can be expected to comply with social expectations that protect our own well-being as well as the welfare of others; we have a duty to protect the vulnerable or at least avoid exploiting their vulnerability; we are responsible for harms that flow from our conduct and practices even if we did not specifically intend those harms; we are sometimes responsible for what other people do, and sometimes even what they do to themselves; most social goods we pursue are subject to a price, but some matters of right are not; we may not collectively run roughshod over individuals in order to enable socially valuable activities; some individual interests give way to the public interest; and we sometimes owe something to others for the benefits we have unjustly received even if we did not commit the underlying wrong ourselves.

Each of these ideas is a political–moral principle at work in private law. Some are more contested than others, and the principles that are contested are contested in the context of electoral politics and public law, as well.

The resolution of any given dispute will not depend on clear answers to these questions. But the way in which we resolve them over time builds a common understanding of what we owe each other as members of a single political community. Notably, substantive principles of private law vary across countries and do so in ways that probably roughly correlate with variations in political cultures. For example, it is not surprising that some Latin American and European countries are more attentive than Americans to obligations deriving from principles of social equality.<sup>119</sup>

To be clear, my claim is not that individuals find their disputes resolved under rules that are justified by principles, so those individuals endorse the principles and carry them over to political debate. There is no starting point at which individuals have no principles, such that private law could simply supply them. Instead, private law operates by interpreting, elevating, and extrapolating from principles that judges over time perceive their society to abide by or

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118. See SHIFFRIN, *supra* note 70.

119. See generally Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485 (2022).

endorse.<sup>120</sup> But because a liberal democratic society is not monolithic and does not pretend to be, this judicial exercise requires threading diverse practices and views. Judges aim to construct rules—and justificatory principles—that are plausible to people who disagree about a variety of matters, not least the dispute at hand. The next time people wonder about their rights and obligations under like circumstances, the resolution offered in the last case—and its justification—offer a common basis for social cooperation. The next time litigants argue their claims, they reinforce the legitimacy of the previously announced rules—and implicitly, their apparent justification—by invoking them as the basis for those claims. By interpreting and manipulating what judges have said, parties make private law their own.<sup>121</sup> Over thousands of disputes, this exercise pulls people toward common norms.

### CONCLUSION

The way we engage each other about what we owe each other in private law is a form of public discourse. By helping to manage reactive discord, private law helps to thread the overlapping consensus on which liberal democracies depend. The process of reflecting back on society a common set of political–moral principles amounts to a kind of collective exercise in reflective equilibrium.<sup>122</sup> This distinctive practice is both public and discursive, and it walks a tricky line for liberal states: a liberal state must push us toward overlapping political–moral principles, but it must do so with a light touch—by bringing people into conversation with each other in spaces that are not vulnerable to domination or cooptation, and in a way that does not simply impose beliefs on a population that passively receives them.

Every society faces an endless series of hard policy choices. It is hard to get traction on them without shared background moral principles. Political debate would not be productive if we all had private reasons for our policy preferences that made no sense to others because our positions depended on deeper, holistic views that others do not share. We would decide matters, in that case, only through voting. But then everything would depend on the ways in which state power is constituted, including the boundaries of the electorate and voting procedures. Public decisions would reflect the exercise of power without the legitimacy that comes from public justification.

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120. See SHIFFRIN, *supra* note 70. See also CARDOZO, *supra* note 71.

121. This point is central to Shiffrin’s account of the democratic virtues of legal practices. See *generally* note 70, *supra*. She focuses on the idea that parties make law as such their own, such that they author its inherent expression of equal respect. While the substance of private law does not communicate a complete theory of justice, its substantive principles do go further than bare equal respect. We need to go further because an overlapping consensus on a principle as general as equal respect is not enough to bring a liberal society in compliance with the demands of justice. Moreover, for private law to operate as a useful centripetal force, it must articulate, defend, and entrench norms that speak more directly to points of active disagreement.

122. See *generally* RAWLS, PL, *supra* note 1.

People will always disagree about the conceptions of the good that underlie their views about the appropriate scope and content of the law; in fact, such disagreement is the premise of a liberal order. Nevertheless, private law helps to manage practical conflict at the micro-level by building an overlapping consensus about basic principles of justice. To the extent it succeeds, that precarious consensus helps to draw a circle around political conflict too.

Recognizing the discursive function of private law has some pragmatic implications for how we conduct ourselves in that space. Most obviously, we should work harder to ensure that everyone has access to it. But there are also lessons here for the character of legal argument. While parties and judges should and do invoke concepts of fairness and responsibility, they should avoid relying on contested moral concepts that are associated with particular conceptions of the good life; such arguments are more likely to alienate segments of society than to broadly justify legal judgments. For example, in a liberal society, people will attach different value to the private moral practice of promise; the promissory principle, then, is not proper grounds for contract liability.<sup>123</sup> We are more likely to share the view that people should be compensated for harm that they have suffered at the hands of others, or that we benefit from a stable regime of mutual assurance.<sup>124</sup>

On the flip side, while litigating parties will argue first and foremost that their position is favored under existing law, we can evaluate their arguments from a dual perspective. The arguments will be effective (or not) as legal arguments. But litigants are simultaneously participants in a broader political discourse.<sup>125</sup> Private law scholars should help bring out the political principles that may be implicit in legal arguments. Instead of dismissing private law as the “wrong place” for arguments about how power, resources, and burdens should be allocated,<sup>126</sup> we should recognize private litigation as a critical site where people can persuade and—over the course of time—be persuaded about fundamental questions concerning our collective life.

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123. See Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 36 (2018) (arguing that the promissory principle is a thick moral principle about which people can reasonably disagree, and therefore, it should not be the basis for contract law in a liberal state).

124. See Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982) (internal citation omitted) (arguing that the harm principle is a better basis for contractual obligation than the promissory principle).

125. See generally MARTIJN W. HESSELINK, JUSTIFYING CONTRACT IN EUROPE: POLITICAL PHILOSOPHIES OF EUROPEAN CONTRACT LAW (2021) (connecting debates about specific contract doctrines with deep disagreements about political principles).

126. See *supra* note 66.