EXPRESSIVE THEORIES OF LAW: A GENERAL RESTATEMENT

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INTRODUCTION

Expressive conceptions of practical reason, morality, and law are gaining increasing currency. At the most general level, expressive theories tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes toward various substantive values. In one well-known version, the State is required to express equal respect and concern toward citizens. Expressivists do not present this view as some radically new theory of morality and law. Instead, we claim that much of our existing practices of moral and legal evaluation are best understood through expressivist perspectives—but that the more perspicaciously we can grasp the expressive structure of action, the more we can improve our evaluative practices. Expressivism is thus an internal account of existing normative practices, but one with sufficient critical capacity to exert leverage over those practices and to indicate where they ought to be reformed.

This Article provides a more comprehensive account than has previously appeared of the aims and features of such theories. It begins with a general analysis of the nature of expression. Next, we show how expressive concerns figure into normative theories of individual conduct: what makes an action morally right depends on whether it expresses the appropriate valuations of (that is, attitudes toward) persons. From individual morality, we move to the expressive character of collective action. Against skeptical claims to the contrary, we argue that most of the purposes, beliefs, attitudes, intentions, and other mental states that individuals can have on their own can also be properly attributed to groups, including the State. With these general accounts of expression and collective action in place, we then seek to show the pervasively expressive character of much of the law. We concentrate on constitutional law to exemplify this character, for we cannot here apply expressive accounts to all the fields in which such accounts have been emerging, such as environmental policy or criminal punishment. But one of our central aims, here and elsewhere,[1] is

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[1] *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998) [hereinafter *Trumps*] (arguing that "[c]onstitutional theory misunderstands actual constitutional practice because the dominant strands of contemporary rights theory miss the role of social meanings and norms in giving content to constitutional rights"); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (developing an expressive understanding of rational choice and criticizing conventional rational-choice theory and social-choice theory for failing to take the expressive dimensions of rationality into account); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and*

to show that much of constitutional doctrine—ranging from structural issues, like the Dormant Commerce Clause and federalism, to more rights-oriented and equality issues, such as the Establishment Clause and Equal Protection—is best understood through the conception we develop of the expressive dimensions of state action.

Matthew Adler's article impressively synthesizes the different work on expressivism that has emerged in diverse fields of law.[2] His work also brings a much appreciated philosophical rigor to these issues. Adler's analysis of expressivism poses two central and difficult questions that serve as the framework for his critique. First, what does it mean for action to express values or attitudes? Is this the same as actors intending to communicate those values or attitudes? If not, what is the difference between expression and communication? And why should we care about expression in the precise sense that expressive theories invoke? On these related questions, we will argue that Adler's objections rest on a fundamental misunderstanding of the concept of expression and the role it plays in expressive theories of law and morality. Second, even if it makes sense at the level of individual morality to care about the attitudes individuals express toward each other through their actions, how can it make sense to worry about collective actors—particularly the democratic State—expressing values and attitudes? Can collective actors actually have mental states, such as attitudes, that we attribute to individuals? Is this some deep metaphysical confusion?

On this second important theme, this Article will define the cir-

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Voting Rights: Evaluating Election—District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483, 483-84 (1993) (discussing voting-rights controversies and the constitutional principles that characterize *Shaw*). Robert Nozick similarly argues that rational choice theory must be reconceived so as to recognize the symbolic utility of acts, as well as their more familiar causal utility. Nozick argues that "the symbolic connection of an action to a situation enables the action to be expressive of some attitude, belief, value, emotion, or whatever." ROBERT NOZICK, THE NATURE OF RATIONALITY 28 (1993). To those who would deny the importance to an adequate decision theory of the expressive or symbolic dimension of action, Nozick rightly says, "A large part of the richness of our lives consists in symbolic meanings and their expression, the symbolic meanings our culture attributes to things or the ones we ourselves bestow." *Id.* at 30. Indeed, Nozick concedes that his earlier political claims in ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974), are inadequate precisely because they fail to recognize "the importance to us of joint and official serious symbolic statement and expression of our social ties and concern." NOZICK, THE NATURE OF RATIONALITY, *supra*, at 32. As he now says: "The libertarian view looked solely at the purpose of government, not at its *meaning*; hence, it took an unduly narrow view of purpose, too." ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 288 (1989).

[2] *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

cumstances under which it makes sense to attribute mental states to collective agents, such as the democratic State. We will also explore why the expression of these attitudes through state action is indeed a central focal point of constitutional law, as we believe it is and ought to be. Adler is right to raise these two central themes—the nature of expression and of collective agency—as crucial ones for expressivists to engage. But with a proper understanding of these crucial concepts in place, we will show why expressive theories of law are not prone to the kinds of critiques Adler makes.

I. EXPRESSIVE THEORIES OF REASON AND ETHICS IN GENERAL

A. *The Concept of Expression*

"Expression" refers to the ways that an action or a statement (or any other vehicle of expression) manifests a state of mind. The state of mind can be cognitive—it can be a belief, idea, or theory. The characteristic vehicles for expressing such purely cognitive states are declarative sentences, which can be uttered in speech or writing. But people can also express their cognitive states in action. In burning the United States flag, antiwar protesters expressed the belief that United States involvement in the Vietnam war was wrong.[3]

People can express other kinds of mental states besides beliefs, such as moods, emotions, attitudes, desires, intentions, and personality traits. They can do so not only through speech and instrumental action, but through gestures, tone of voice, posture, forms of art, and other ways. At the level of individual action, a shrug may express indifference; a whisper, reverence; a swagger, cockiness; a song, joy; a sneer, contempt. At the level of state action, as we will show, deliberative principles and policies can be appropriately interpreted as expressing official state beliefs and attitudes, such as hostility toward certain racial groups or approval of religion. Indeed, the law frequently treats state action as doing exactly this, as we will seek to demonstrate and justify.

The relationship between states of mind and their expressions has three dimensions: ontological, epistemic, and normative.[4] First, expressions of mental states *embody* and *realize* those states. Second, ex-

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[3] *See infra* note 6 and accompanying text.

[4] *See* Charles Taylor, *Action As Expression*, *in* INTENTION AND INTENTIONALITY 73, 73-89 (Cora Diamond & Jenny Teichman eds., 1979) (demonstrating how action satisfies the first two dimensions of expression).

pressions of mental states *manifest* those states: they cast them in a form that makes them *recognizable* as what they are. Third, expressive vehicles can do a better or worse job of expressing mental states. Let us consider each of these dimensions in more detail.

Expressive mental states may be viewed as potentialities that can be realized in more than one expression. They are mere potentialities in the sense that they require expression to be fully realized. If a father never pays attention to his daughter's interests, and never takes those interests as reasons for him to help her and to avoid harming her, we say that he does not actually love her. But if, out of love for his daughter, he did take her interests as a reason to help her, then his helping would, in expressing his love, realize it or make it real. For any state of mind, there are many different ways of expressing it. A person expresses the same thought in thinking "I am warm" as in saying "Es ist mir warm." Either the English or the German expression can be said to embody the same thought. The expressive relation is therefore a relation of realization or embodiment.

The expression of a mental state brings that state into the open, for oneself and potentially for others to recognize.[5] People *recognize* the mental state *in* its expression. This is an interpretive activity. To interpret what a statement means, we try to grasp what the speaker is saying. To interpret what an action means, we try to identify what the agent is doing. Deeds are identified, not by mere physical descriptions of bodily movement, but by the intentions that they express and that give them meaning. Interpretation is a matter of making sense of the speech or action in its context. Suppose an individual burns a piece of paper. What does this mean? If the paper is a draft card, and he burns it in the context of others doing the same thing at an antiwar rally, we understand his action to express outrage at the draft.[6]

Finally, states of mind stand in a normative relation to whatever expresses them. We can evaluate any vehicle of expression, whether a statement or action, in terms of how well it expresses its mental states. A speech may express ideas poorly by being confused, disorganized, vague, ambiguous, or inarticulate. Conduct also may express inten-

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[5] Of course, some mental activities such as contemplation can be kept in one's head. But it is only through the use of expressive media, such as words or pictures, that one can recognize one's own thoughts. The same expressive forms of media that are capable of manifesting one's thoughts to oneself are, in principle, capable of manifesting those same thoughts to others, when made public.

[6] *See* United States v. O'Brien, 391 U.S. 367, 369 (1968) (involving the burning of a draft card to protest the war in Vietnam).

tions, emotions, and attitudes poorly—for example, by being clumsy, distracted, self-defeating, or ambivalent. A bumbling lover's infatuation may cause him to express his love in awkward ways that repel his beloved. Such incongruity between the mental state and its manifestations is the stuff of comedy—or, if the failure is serious enough, of tragedy.

The concept of expression should be contrasted with causation, on the one hand, and communication, on the other. The expressive relation is not a causal relation between a mental state and that which expresses it. Not everything that expresses a state of mind is caused by that state of mind. Musicians can play music that expresses sadness, without feeling sad themselves. The music they play need not express their (or anyone's) sadness: the sadness is in the music itself. Similarly, lawmakers could pass a law that expresses contempt for blacks by denying them the right to vote, even if none of the lawmakers personally feel contempt for blacks and all are merely pandering to their white constituents. Conversely, not everything caused by a state of mind expresses that state of mind. The state of excitement causes some narcoleptics to fall asleep.[7] This does not make sleep an expression of excitement.

Expression must also be distinguished from communication. To express a mental state requires only that one manifest it in speech or action. To communicate a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention. One can express a mental state without intending to communicate it. The shoplifter may express her intention to get away with stealing a purse in her furtive glances. But she hardly intends to communicate this intention. Action, by definition, expresses intentions, and therefore always has expressive meaning.

B. *Expressive Theories of Individual Conduct*

A normative theory of action is an expressive theory if it evaluates actions in terms of how well they express certain intentions, attitudes, or other mental states. An expressive theory of action must therefore (a) prescribe norms for regulating the adoption of certain mental states, and (b) require actions and statements to express these states

[7] *See* BEDRICH ROTH, NARCOLEPSY AND HYPERSOMNIA 64 (Roger Broughton ed. & Margaret Schierlova trans., 1980) (explaining how "some patients fall asleep after an outburst of emotion").

adequately. This Part focuses on expressive theories of rationality and morality. Later, the discussion will turn to expressive theories of law.

Most of what we morally ought to do, we ought to do for the sake of people. Therefore, from a moral point of view, people are what is fundamentally valuable.[8] But how are people valuable? Expressive theories of morality interpret this question to mean: how should we value, or care about, people? Different moral theories answer this question differently. In Kantian ethics, we are supposed to *respect* all persons.[9] In the ethics of care, advanced by some feminists and in much of ordinary moral thought, we are supposed to *love* and be *concerned* for those with whom we have special relationships.[10] Virtue ethics tells us to be *benevolent, grateful,* and *considerate* to the appropriate people, to *honor* and *admire* others, and so forth.[11] All of these theories tell us that we ought to adopt particular attitudes toward people.

From the point of view of practical reason, much of what we find ourselves having reason to do stems from the ways we care about people. We feel friendly toward our friends, collegial toward our colleagues, erotically attracted to our lovers, concerned for ourselves, and so forth. Practical reason does not require that we take up these attitudes toward particular persons. But, there are standards for rationally holding these attitudes. For example, it is irrational to befriend an evil person. Suppose, then, we have a rational or morally required attitude toward a person. How can such an attitude give us reason for action?

To understand how rational attitudes can give us reasons for action, we must first understand what an attitude is. An attitude toward a person is a complex set of dispositions to perceive, have emotions, deliberate, and act in ways oriented toward that person. Consider parents who love their children. Loving parents are disposed to notice things concerning their children—how well they are nourished

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[8] Animals, nature, and perhaps other things also may be fundamentally valuable. To keep matters simple, this discussion is confined to the value of people. Nothing in the analysis would change, though, if we added that animals, ecosystems, and the like are also fundamentally important.

[9] *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (H.J. Paton trans., Harper Torchbooks 1964) (1797) ("Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.").

[10] *See, e.g.*, NEL NODDINGS, CARING 6 (1984) ("It is the recognition of and longing for relatedness that form the foundation of our ethic . . . .").

[11] *See generally* ARISTOTLE, *Nicomachean Ethics, reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., 1984) (presenting the classical formulation of virtue ethics).

and clothed, what they are learning and doing, events likely to interest them, emotional problems they are facing, and so forth. The things they notice concerning their children tend to arouse their emotions. They are alarmed at threats to their children's safety, take pride in their children's achievements, share their children's delight in the things they do together, and so forth. Let us call the things about which someone is emotionally aroused the objects of their emotions. A crucial function of emotions is to make their objects salient for deliberation.[12] A parent's alarm at seeing her toddler poke a key into an electrical outlet represents this fact as a threat to her toddler, and presents it to deliberation as an urgent reason to take preventive action. Loving parents tend to respond to such reasons.

Parents express their love for their children by manifesting *all* these dispositions. Normative expressive theories are interested in the expression of attitudes through *action.* They tell us that the rational (moral) thing to do is to act in ways that express our rational (or morally required) attitudes toward people. The above analysis suggests that the key connection between attitudes and actions is provided by reasons for action. To express an attitude through action is to act on the reasons that attitude gives us. Let us therefore define a norm or principle for expressing an attitude as a rule that tells us what to count (and reject) as reasons for adopting particular ends. For example, norms of parental love tell parents to take their children's needs as reasons for taking care of them. Norms of democratic equality or fraternity require us to reject the end of subordinating a racial group as a reason to classify people by race.

Expressive theories of action are fundamentally concerned not just with achieving certain ends, nor with prescribing or proscribing certain means (types of action), but with whether the connection between the means and the end is justified. They ask: does performing act *A* for the sake of goal *G* express rational or morally right attitudes toward people? That is, would a person who had rational or morally right attitudes toward people accept *G* as a reason to do *A*?

This approach to evaluating action diverges from both a purely

[12] Neuropsychology has shown that people who lack emotions cannot deliberate rationally because they cannot focus on important features of their situation. *See* ANTONIO D'AMASIO, DESCARTES' ERROR at xii (1994) ("[R]eason may not be as pure as most of us think it is or wish it were, [and] emotions and feelings may not be intruders in the bastion of reason at all: they may be enmeshed in its networks, for worse *and* for better.").

consequentialist approach,[13] which approves of any means that produces the "best" results, and from what might be called "vulgar deontology,"[14] which proscribes certain generic types of action (lying, stealing, killing) altogether, regardless of the consequences. To see more clearly the importance of evaluating the means-end connection, consider the following rationales for actions:[15]

(a) I will avoid visiting my mother in the hospital, in order to avoid transmitting my contagious illness to her.
(b) I will avoid visiting my mother in the hospital, in order to spare myself unpleasantness.
(c) I will avoid watching television, in order to spare myself unpleasantness.

Rationales (a) and (b) involve the same type of act, but action based on the first reason is permissible, or even required, while following the second is arguably wrong. This demonstrates that what makes (b) wrong is not that it involves a categorically forbidden type of action. Furthermore, it is not that there is something generally impermissible about the goal of (b) either, because (c) has the same goal, but is clearly permissible. What is wrong with (b) is taking the goal of avoiding unpleasantness as a justification for avoiding visiting one's mother in the hospital. In expressivist terms, avoiding her for this reason is wrong because taking this as one's reason for acting is callous, and it is wrong to express such an uncaring attitude toward one's mother.[16]

Thus, expressive norms regulate actions by regulating the acceptable justifications for doing them. People express their reasons for a given action through their intentions (which, at their simplest, have the form: I shall do act *A* in order to bring about end *G*). So, expressive norms regulate actions by regulating the adoption of intentions. The fundamental principle of an expressive theory of action is:

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[13] *See generally* DEREK PARFIT, REASONS AND PERSONS (1984) (presenting a consequentialist framework for actions).

[14] This view is known by its sympathizers as "moral absolutism." *See, e.g.*, PETER GEACH, GOD AND THE SOUL 117-29 (1969) (arguing that it is impossible to defy the moral absolutes of divine law).

[15] We borrow the examples (with modification) and the general point of this paragraph from CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 75 n.58 (1996).

[16] That it would be wrong to act callously toward one's mother does not imply that I ought to visit my mother. For it may also be the case that if I did visit, I would communicate a contagious illness to my mother. I have an obligation not to endanger her, so I ought not to visit.

E: Act in ways that express the right attitudes toward persons; that is:

E': Act in accordance with norms that express the right attitudes toward persons.

We have just argued that the basic form of an expressive norm is:

R: Take (or do not take) goal *G* as a reason for doing *A*.[17]

Notice that *G* is not *E*. Expressive theories of action do not say that one ought to take the expression of one's attitudes toward others as one's *goal* in acting. Expressive theories do not somehow tell us to maximize the amount of proper expression in the world. Instead, expressive theories are regulative theories that provide principled constraints on how we go about pursuing various ends. In this respect, expressive theories are like the rules of grammar or logic. Those rules do not tell us to maximize the amount of correct grammatical or logical statements in the world, as if that itself were the goal. Instead, those rules tell us that when we are speaking or reasoning, we should do so subject to certain regulative constraints.

Thus, in the moral domain, we express our benevolence in taking the advancement of others' interests as our goal, not in taking our own desire to be benevolent as our goal. We satisfy *E* in the course of pursuing the right goals, in the right way, for the right reasons. *E* functions as a regulative principle for intentions, not as a goal of action.

Expressive theories of action tell us to express certain attitudes adequately. The standard of adequacy is not met simply by intending to express those attitudes, or by thinking that one's actions do express those attitudes. Rather, the standard of adequacy is public, set by objective criteria for determining the meanings of action.

What attitudes people intend to express or think they are expressing can deviate from the public meaning of their action in at least three ways. First, they might act negligently or thoughtlessly, by failing to notice or take certain considerations as reasons for action. Teenagers blaring their car horn late at night might be consciously intending only to signal a friend to join them. But in failing to consider or to take the neighbors' interests in peace and quiet as a reason for ac-

[17] A more complete representation of reason-giving principles would also have to include the considerations that one may or may not act, that is, in spite of foreseen but unintended consequences of the act in question. It may be permissible to take *G* as a reason for doing *A*, but only on condition that doing *A* does not have some unintended consequences that ought to weigh decisively against doing *A*.

tion, their behavior expresses inconsiderateness toward their neighbors. Second, people may act in ignorance of social conventions or norms that set public standards for expressing certain attitudes. Thus, a person from a different culture might not know he is expressing disrespect for another by failing to shake his hand. Third, people may act on attitudes or assumptions of which they are unaware. In reviewing a novel, the reviewer might contemptuously interpret the text in ways that make the author look simpleminded. The reviewer might not be aware of her contempt for the author. She may just have difficulty imagining that he is capable of sophistication, and therefore interprets the author's words accordingly.

It follows that people's conscious purposes and intentions, while relevant, are not the sole determinants of what attitudes their actions express. That is, an agent's sincerely avowed purposes are not the sole determinants of what her actions mean. Expressive theories of action hold people accountable for the public meanings of their actions. This is true of collective actors as well, as legal doctrine already recognizes. The articulated reasons of legislators can be relevant in determining whether a state law expresses impermissible purposes or values, but ultimately it is a question of law, and hence of external normative judgment, whether the state action does indeed express impermissible purposes or values.

Expressive theories of action evaluate given actions according to how well they express attitudes that we ought to have toward people. Stated at this level of abstraction, expressive theories may seem strange and counterintuitive. Isn't the point of action to bring about good consequences? Shouldn't we evaluate actions in terms of how well they bring about good consequences? If you think expressive theories somehow deny this, you are probably imagining that these theories prescribe the expression of attitudes as a goal to be pursued, regardless of other consequences. This is to mistake *E* as a goal-setting principle, rather than as a regulative principle for intentions. This mistake leads people to think that expressive evaluation somehow requires us to ignore the consequences of action—an absurd position.

Expressivism rejects this position. We cannot adequately express the right attitudes toward people while ignoring the consequences of our actions. We express our respect, love, concern, and other favorable attitudes toward people largely *through* the pursuit of consequences that are good for them. To disregard the consequences of one's actions is one way to fail to care about people in the ways we ought to care about them. Expressive theories, therefore, tell us to

pursue consequences that are good for people, provided that pursuing those consequences by the means selected is compatible with caring about people in the right ways.

Expressive theories, therefore, do not deny that the consequences matter. Rather, they tell us *why* the consequences matter, and *which* consequences matter. We ought to care about the consequences of our actions for people because we ought to care about people. If people were not worth caring about, then we would not have reason to pay attention to their interests. Which consequences involve their interests is determined by which consequences would arouse the rational concern of whoever cares about them.[18] Expressive theories tell us which consequences matter, and what actions toward them are justified.

This Part has described expressive theories of action as they apply to individual conduct. According to these views, we are all morally required to express the right attitudes toward people, and we all have good reason to express our rational attitudes toward people. We believe that similar normative principles apply to the actions of collective agents, including the actions of States. To understand why this is so, we need to understand what collective agents are, and how they too are capable of expressing purposes, attitudes, and other mental states.

II. EXPRESSION AND COLLECTIVE ACTION

A. *Collective Agents in General*

In conventional discourse, we speak without puzzlement about social groups or collective actors having beliefs, emotions, attitudes, goals, and even characters. People say that the big tobacco companies knew they were lying when they denied that cigarettes are addictive; that Russia is angered at NATO's expansion plans; that rival gangs hate each other; that the Congressional Budget Office is trustworthy and nonpartisan. Yet, the ascriptions of mental states to collectives seems puzzling to some philosophers and social scientists. Max Weber insisted that "there is no such thing as a collective personality which 'acts.'"[19] With the rise of rational-choice theory and methodological individualism in many domains of social science, this skepticism about

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[18] *See generally* Stephen Darwall, *Self-Interest and Self-Concern*, SOC. PHIL. & POL'Y, Winter 1997, at 158.

[19] MAX WEBER, 1 ECONOMY AND SOCIETY 14 (Gunther Roth & Claus Wittich eds., University of California Press 1978) (1922).

collective agency has become, in some academic circles, more pronounced than ever—conventional discourse notwithstanding.

However, recent work on collective agents provides a systematic analysis of how we can meaningfully ascribe purposes, beliefs, and other mental states to social groups—and thereby help vindicate our everyday understandings of group action.[20] Margaret Gilbert provides a key insight to understanding what this amounts to by arguing that certain collectives should be viewed as "plural subjects."[21] A group is a plural subject if its members (1) can properly refer to themselves as "we," and (2) make normative claims upon one another in virtue of their belonging to that "we."[22]

Consider the fact that almost any activity I can do alone, we can do together. I can walk by myself; we can walk together. I can cook a meal by myself; we can cook a meal together. I can talk to myself; we can have a conversation. Skeptics about collective agents might try to argue that such "we" talk amounts to nothing more than ascribing such activities to all or most members of the group in question. But our doing something together is not the same as each of us engaging in the same activity unilaterally. Each of us could be hiking along the same trail at the same time, in close proximity. This is not enough for us to be hiking together. What more is needed for us to be doing something together?[23]

Suppose a snowstorm buries a street. Each of several neighbors starts digging out, with the personal goal of clearing the snow from the street. Although each neighbor is engaged in the same activity, with the same end in view, they are not yet clearing out the snow together. The snow might be so high that each is unaware of the others' efforts. So let us add common knowledge to their activities. Each neighbor knows that everyone else is digging, with the goal of clearing their street, and everyone knows that everyone knows this. Still, they

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[20] We draw heavily upon MARGARET GILBERT, ON SOCIAL FACTS (1989), in the following discussion. Other accounts of collective agency have been developed in ANNETTE C. BAIER, THE COMMONS OF THE MIND (1997); Michael E. Bratman, *Shared Intention*, 104 ETHICS 97 (1993); John R. Searle, *Collective Intentions and Actions*, *in* INTENTIONS IN COMMUNICATION 401 (Philip R. Cohen et al. eds., 1990); J. David Velleman, *How To Share an Intention*, 57 PHIL. & PHENOMENOLOGICAL RES. 29 (1997). *See generally* 2 CONTEMPORARY ACTION THEORY: SOCIAL ACTION (Ghita Holmström-Hintikka & Raimo Tuomela eds., 1997).

[21] GILBERT, *supra* note 20, at 204.

[22] *Id.* at 205, 380-81.

[23] The following two paragraphs closely follow the argument of Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, 15 MIDWEST STUD. PHIL. 1 (1990).

are not acting together: their actions might not be coordinated in the right way. Some of the neighbors might be blowing snow into areas that others have just cleared. So let us add coordination to these efforts. Suppose each neighbor acts on her own to coordinate her actions with that of others, so that the street cleaning is efficiently carried out, and that this is common knowledge to all. Even this is not enough to make it true that they are digging out the street together, because any neighbor could decide to stop, and no one else would have a claim on them to continue their activity. Each still acts merely on a personal goal, not on a collective goal, to clear out the street. To count as a "we," a plural subject acting together on a collective goal, each member of the group must further acknowledge a commitment or obligation to the others to act in concert with them to achieve that goal.[24]

Suppose the neighbors agree with one another that they will join together to clear out the street. They could do this explicitly through an oral agreement; or they could have agreed in advance to empower some subgroup, say an association of block leaders, to make collective commitments to which they would all agree to be bound. At this point, they are committed to digging out the street *together.* What has happened? These acts of communication, or delegated power, have manifested each neighbor's willingness to join forces with the others in achieving a common goal, conditional on the others' open willingness to do the same. They publicly acknowledge a shared understanding of the basis upon which they are to act. This shared understanding is one in which each is conditionally committed to the others to act to achieve a common aim as, in effect, a single body. These communications of conditional commitments *create* a collective agent or plural subject, entitling each member to refer to them all as "we," and to make claims upon one another in the name of what *we* are supposed to be doing. These shared understandings obligate each member to take *our* goal as a reason for acting. Members claim these rights and obligations by virtue of their membership in the group, not because the individuals in question have an independent moral duty to

[24] In confirmation of the view that there is a necessary connection between plural subjecthood and mutual obligations, consider the following exchange between two neighbors: *A*: "Where are you going? I thought we were digging out the street together." *B*: "What do you mean, 'we'?" *A* claims a right to sanction *B* for unilaterally withdrawing from the shared goal, and *B* defends himself by refusing to acknowledge membership in the group. This exchange would make no sense if both parties did not understand that plural subjecthood entails obligations. These obligations may, of course, be overridden by other goals.

unilaterally engage in the activity in question.

This account suggests a general formula for what it means for a collective to have purpose, attitude, belief, principle for action, or other mental state:

> A group, *G*, has mental state *M* if and only if the members of *G* are jointly committed to expressing *M* as a body.

To express *M* as a body is to express it together, not just as a collection of unilateral acts. The members of *G* are jointly committed to expressing *M* when each manifests a willingness to express *M* together with the others, conditional upon the others manifesting a like willingness. *M* could be any kind of mental state: purpose, belief, principle, reason for action, emotion,[25] attitude, and so forth. The concept of "expression" used in this definition is the broad one explicated above. If *M* is a purpose, its basic expression is in collective action aimed at *M*. If *M* is a belief, it may be expressed in the group's avowal of it (for example, through an authorized spokesperson), or more generally in every member's willingness to accept conclusions that take *M* as a premise, or that would make no sense in the given context unless M were taken as true. If *M* is a principle of action, it is expressed in actions that follow *M*.

When groups share beliefs, they are often the product of successful conversational exchange.[26] Suppose, while waiting for the bus, two people discuss whether the clouds in the sky threaten rain. One says, "Those clouds look like they are getting dark, so we'll be getting rain." The other replies, "No, they just look dark because the sun is setting." The first says, "Oh," nodding in agreement. This conversation establishes, through joint acknowledgment of the claim that the clouds do not indicate rain, a belief held by the conversational group. Henceforth, further conversational exchanges, if they are to make sense, will proceed on the assumption that rain is not impending.[27] "Better get

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[25] *See* MARGARET GILBERT, *Collective Remorse, in* SOCIALITY AND RESPONSIBILITY 123, 123 (2000) (arguing that groups can have emotions); MAX SCHELER, THE NATURE OF SYMPATHY 12-13 (1970) ("[A]ll fellow-feeling involves *intentional reference* of the feeling of joy or sorrow to the other person's experience.").

[26] On the analysis of collective belief, we follow Margaret Gilbert, *Remarks on Collective Belief, in* SOCIALIZING EPISTEMOLOGY: THE SOCIAL DIMENSIONS OF KNOWLEDGE 235 (Frederick F. Schmitt ed., 1994), and GILBERT, *supra* note 20, at 237-314.

[27] Alternatively, one might call for revision of the previously accepted conclusion in light of new evidence. Note how apt it would be, in this case, to acknowledge the previous group belief in the call for revision. "I know we just agreed that it wasn't going to rain, but wasn't that the sound of thunder?" What one may not sensibly do is talk as if the joint agreement were not in force.

your umbrella!" would not be a coherent response by either party in light of the claims they just acknowledged together. Shared beliefs perform the vital function of enabling conversation to proceed on a commonly understood basis.

Groups can also share principles of action, social norms, or conventions. A culture might have a convention to wear black at funerals. In this case, everyone who identifies and is accepted as a member regards herself as obligated to follow the convention, in virtue of the fact that every member is jointly committed to it.[28] A principle of action might also take the form of a regulative principle for intentions, of form *R*. In deliberating together about what to do, a group may be committed to accepting certain considerations as reasons for action and rejecting others. Each neighbor may personally dislike a particular resident of the street. Yet, in the name of neighborliness, they may jointly commit themselves to a deliberative principle excluding consideration of anyone's personal dislikes of their neighbors as a reason to guide the actions of their block association. Then, although each member of the block association dislikes this resident, the block association itself does not. Indeed, the block association may be positively friendly toward the disliked neighbor, inviting him to block parties and the like. This shows that groups can express attitudes that *none* of its members have individually. This is possible because individuals can commit themselves to express attitudes that are not their own. When they do so in their capacities as group members, they act as agents or spokespersons for the group.

In stressing our abilities to act and think together, and recognizing obligations rooted in our collective identities, we do not suggest that people always follow these obligations, or that these obligations override other reasons for action. Individuals have multiple conflicting identities, both collective and individual. Sometimes individual members of a group act in accordance with a decision frame in which they regard themselves as "I"s rather than as "we." This is why explanatory strategies based on methodological individualism, as exemplified in rational choice theory, often provide insight into human affairs, especially when collective action breaks down. Nevertheless, we

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[28] *See* GILBERT, *supra* note 20, at 373 (arguing that conventions are constituted by joint conditional commitments among the members for whom it is valid). This analysis directly challenges David Lewis's famous account of convention. *See* DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 36-51 (1969) (arguing that conventions arise from individual strategically rational choice in coordination games, without involving any obligations of joint commitment). *See generally* GILBERT, *supra* note 20, at 329-67 (providing a critique of Lewis's account).

observe far more cooperation and successful collective action than can be explained by rational choice theory.[29] Moreover, collective action often breaks down because a group's members identify with competing collective identities, rather than because its members pursue their self-interest at the expense of the group's goals. Social theories that recognize the reality of full-fledged collective action can explain these phenomena without denying the genuine insights of individualist approaches to explaining human action.

This Article has argued that collectives can have beliefs and purposes and can act on reasons and principles of action. Because collectives are capable of responding to reasons, they can respond to reasons for having attitudes. Groups, be they legislatures, political associations, or social groups, can therefore also act on the reasons those attitudes give them. Groups thereby have all of the mental capacities needed to have attitudes toward people. This is all that is required for collectives to be subject to expressive theories of reason and morality.

It would be bizarre if things were otherwise. If I can express attitudes toward people on my own, why can't we express attitudes toward people together? And if the value of persons can morally demand certain attitudes—say, respect—of all individuals acting on their own, why can their value not morally demand the same attitude of individuals acting together? We do not suddenly become exempt from fundamental moral demands simply by acting together on shared goals, rather than independently on personal goals. There is no reason to think that, in acting together, we become subject to a fundamentally different *kind* of moral or rational demand than applies to us when we act independently. Of course, collectives stand in different relations to people than their individual members do when they act as

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[29] *See, e.g.*, Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, *in* BEYOND SELF-INTEREST 97, 99 (Jane J. Mansbridge ed., 1990); Ernst Fehr & Simon Gächter, *How Effective Are Trust- and Reciprocity-Based Incentives?*, *in* ECONOMICS, VALUES, AND ORGANIZATION 337, 338 (Avner Ben-Ner & Louis Putterman eds., 1998) (discussing "why, in some organizations, [groups are] successful in selecting the high effort equilibrium while in others shirking is the [norm]"); John M. Orbell et al., *Explaining Discussion-Induced Cooperation in Social Dilemmas*, 54 J. PERSONALITY & SOC. PSYCHOL. 811 (1988); Andrew Schotter, *Worker Trust, System Vulnerability, and the Performance of Work Groups*, *in* ECONOMICS, VALUES, AND ORGANIZATION, *supra*, at 364, 364 (concluding that "people do not always fully exploit their opportunities to violate agreements at the expense of others"). For a general discussion of the relationship of individualist to collective explanations of behavior, see Elizabeth Anderson, Beyond Homo Economicus: New Developments in Economic Theories of Social Norms 21-28 (1999) (unpublished manuscript, on file with authors).

individuals. This implies that collectives often ought to have different attitudes toward people than their individual members have, and are thereby subject to different expressive demands. The demands, however, are still expressive and are not of a radically different, nonexpressive sort. Collectives are still required to express the right attitudes toward people. That is, they ought to obey principles that take the form of *R*, above: to take or reject certain goals as reasons for certain actions. We now turn to applying these principles to the actions of a particular kind of collective agent, the democratic State.

B. *The Democratic State As a Collective Agent*

Expressive theories of law are concerned with evaluating state action. On the rights and equality side of constitutional law, such theories assert that state action is required to express the appropriate attitudes toward persons. State action must express "equal concern and respect" for all persons (to cite Ronald Dworkin's well-known formulation).[30] It also must express a collective understanding of all *citizens* as equal members of the State, all equally part of "us," notwithstanding their racial, ethnic, or religious differences. On the structural side, as we shall show, such theories assert that various governmental institutions, such as States or the national government, are obligated to express adequate conceptions of their relationships with other governmental units.

To speak of governments as having attitudes may make some legal theorists leery.[31] Recall our argument that the fundamental way in which actors express attitudes is by following principles of form *R*: to take or reject certain considerations as reasons for action. In order to ascribe attitudes to an agent coherently, therefore, we need only be able to sensibly interpret the agent's actions as resulting from reasons—that is, as taking particular goals or purposes as reasons for particular actions.

This requires nothing more than what is routinely required when judges engage in purposive interpretation of laws, whether in constitutional or statutory interpretation. The understandings and practices that underwrite conventional purposive interpretation are sufficient to support expressive approaches to law. For example, Matthew Ad-

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[30] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

[31] As Lewis Kornhauser worries, this view might be thought to require that the State be inappropriately "personified." Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1633 (1998).

ler's view of constitutional rights as "rights against rules" requires precisely this kind of purposive interpretation. In his view, rights are not general liberties of action, but are rather rights not to have the State infringe upon certain individual liberties or interests for certain impermissible purposes.[32] To enforce this view of rights, courts must be able to ascribe purposes, including illegitimate ones, to Congress. With qualification, we share Adler's view that many constitutional rights are best understood as constraints upon the kinds of reasons for which the State can act.[33] Expressivism adds to this a particular account of which purposes are illegitimate: those which, if Congress adopted them as reasons for enacting laws, would express constitutionally impermissible attitudes toward persons, such as hostility or contempt for racial or ethnic groups. Neither Adler nor any other purposive theorist is in a position to advance skepticism about the ability of collectives to express meanings through their actions without undermining the very purposive approach to interpretation those theorists, in other contexts, defend.

Public-choice theorists can more consistently advance skepticism of this form. To hold democratic States to expressive requirements demands that we be able to ascribe reasonably coherent purposes to them. Public-choice and social-choice theorists advance three principal forms of skepticism regarding the possibility of attributing such purposes. The first is based on Arrow's Theorem.[34] The Theorem shows that, in a system of pairwise voting among multiple options under nondictatorial conditions, there may be no consistent outcome (no "Condorcet winner") that a majority of legislators prefers. A different outcome from the actual one might have been adopted if the sequence of options being voted upon had been altered. The mere adoption of proposal *A*, therefore, does not indicate that it is truly a majority-preferred option. How, then, can we say that option *A* expresses a collective purpose, attitude, or other mental state, when

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[32] *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13-42 (1998).

[33] *See, e.g.*, *Trumps*, *supra* note 1, at 729-31 (arguing that rights do not create spheres of absolute personal immunity but rather limit and channel the kinds of reasons for which the government is permitted to act in distinct spheres).

[34] Arrow's famous impossibility theorem has been interpreted as an argument against the possibility of ascribing a coherent will to multimember nondictatorial decision-making bodies. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963) (explaining the general possibility theorem for social welfare functions). For pessimistic interpretations of the political significance of Arrow's Theorem, see generally ALFRED F. MACKAY, ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE (1980); WILLIAM RIKER, LIBERALISM AGAINST POPULISM (1982).

some other majority of legislators would have preferred a different option?[35] Because *A* was the option the legislators in fact jointly committed themselves to adopting as expressive of the legislative will. The fact that some other option might have been adopted had the agenda structure been different does not prevent option *A*, when adopted, from being fully valid law. If we treat it as valid law, there is no reason we cannot likewise treat it as expressing particular purposes, even if some other majority would have existed for another option.

The second form of public-choice skepticism is based on the view that legislative purpose or expression must be the aggregate effect of that which was in the heads of individual political officeholders. Problems then grow like Topsy: legislators might have any number of private reasons or goals in voting for legislation. Even with regard to the public purposes they willingly avow, individual officeholders often disagree. Should the government's "mental states" therefore be identified with the thought(s) in a majority of officeholders' heads, or with those in whichever set of officeholders carried the day with respect to a particular decision? What if the individuals comprising the decisive group disagree among themselves about what they are enacting and why they are enacting it? This line of reasoning leads to endless conundrums.[36]

One way out of these difficulties is to consider legislation from the

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[35] For this form of skepticism about legislative intent or purpose, see Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) ("The existence of agenda control makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact."). Alan Schwartz has recently argued that enacted legislation most often does reflect the presence of a Condorcet winner, and offers this empirical fact as a solution to the problem of ascribing interpretive intent to a legislature. But Schwartz's empirical response treats the theoretical concern as right in theory and hence repeats a mistaken critique of legislative intent that emerges from the public-choice literature. Even a statute that is *not* a Condorcet winner is treated as fully effective law, of equal status as any other law, and rightly so. For the same reasons that support this practice, we can just as easily adopt interpretive practices that make that statute as coherent as possible and that interpret it according to ascribed purposes. *See* Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 11-16 (2000). Indeed, if one is to take Arrow's Theorem seriously on the question of interpretation, it probably suggests that non-Condorcet statutes have the *greatest* coherence because a narrower set of legislators is responsible for them. But at a minimum, our point is that Arrow's Theorem need not have any implication for statutory interpretation.

[36] The extreme version of this skepticism is expressed in Justice Scalia's dissenting opinion in *Edwards v. Aguillard*, 482 U.S. 578, 610 (1986) (Scalia, J., dissenting) (criticizing the Court for ignoring an abundantly supported legislative purpose, and instead substituting its own notion of what "*must* have motivated the legislators").

internal perspective of Congress, regarded as a plural subject or "we." Congress has adopted various mechanisms, institutional structures, and conventions through which it understands itself to be manifesting its purposes. Members are deemed to have accepted these mechanisms or structures by virtue of accepting their seats. Thus, members of Congress recognize that the official reports of the substantive committees that approve specific pieces of legislation carry the most authoritative weight, after the text of the bill itself, in giving meaning to proposed legislation. Similarly, Congress treats the official interpretations of pending legislation offered by the bill's sponsor(s) as particularly authoritative. Members of Congress jointly accept that certain mechanisms are more authoritative than others for the expression of collective aims.[37] Thus, the aims of all members simply do not count equally in understanding those collective aims.

A third public-choice inspired critique of the possibility of attributing expressive meaning to state action is that legislative acts often reflect no more than intense interest-group deals and political compromises with no overarching purpose or meaning.[38] This concern is often overstated. Even when statutes contain some provisions that reflect compromise, this does not mean that the statute as a whole cannot be said to reflect a coherent overall meaning and purpose. Moreover, individuals, too, are often riven with conflict, ambivalence, and confusion, but expressive theories of law need not ascribe any more coherence to democratic States than the law ascribes to individuals.

These responses to public-choice skepticism about collective purposes rely only on the resources internal to legislatures that entitle them to ascribe definite purposes to their own actions. However, expressive theories of action, whether applied to individuals or groups, do not treat agents' own conscious intentions—that is, their own un-

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[37] For a fuller discussion of the division of labor that generates coherence for the legislative task, see Pildes & Anderson, *supra* note 1, at 2203-04. Context may determine whose interests or ideas a representative must express.

> For example, at the Conference Committee stage of the legislative process, members do not view themselves as free to pursue their own personal preferences regarding policy, or even the positions that would most favor their districts or constituents. Instead, norms of the Conference Committee process lead members to pursue the rationales underlying the positions of the House or Senate, whose interests at this juncture they are expected to represent.

Id. at 2202.

[38] *See* Easterbrook, *supra* note 35, at 540 ("Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.").

derstandings of what they were doing in acting—as controlling the expressive meaning of action. For purposes of constitutional assessment, courts will not defer even to authentic legislative statements of official purposes. Expressive theories have resources, beyond agents' self-interpretations, for interpreting their purposes.

These resources are found in the public meanings of actions. On the one hand, those engaging in expressive action can readily fail to grasp the action's public meanings. Consider a white man who checks into a hotel and drops his car keys into the hands of the first black man he sees near the door. The black man is wearing a business suit and carries a briefcase, but the white man doesn't notice; he just assumes that any black man near a hotel entrance is a valet. The black man has been insulted, notwithstanding the white man's sincere protests that he did not intend any offense. At the same time, the "recipients" of actions also do not have exclusive control over the public meanings of those actions, as legal cases frequently illustrate. In *City of Memphis v. Greene*,[39] for example, black residents challenged the erection of a traffic barrier that closed off an all-white enclave to through-going traffic that largely involved black drivers. Despite the testimony of black residents and expert witnesses stating that these black residents suffered significant "insult and humiliation,"[40] the Court found that the construction of the barrier did not violate the Constitution and did not reflect a discriminatory purpose. We cannot explore the facts fully enough here to analyze whether the *Greene* holding ought to be considered correct in its actual context. But the general principle that can be extracted from it and of which it is only one embodiment in the law must surely be right: judgments concerning whether laws create unconstitutional "stigma"[41] are not controlled by the experiential response of the alleged targets of those laws, even if those judgments take such responses into account among other considerations.

Indeed, the public meaning of an action is not even determined by shared understandings of what the action means.[42] Not long ago, it was commonly accepted in the United States that respect permitted men in business settings to routinely compliment their female col-

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[39] 451 U.S. 100 (1981).

[40] *Id.* at 140 n.3 (Marshall, J., dissenting).

[41] *Id.* at 128.

[42] This would correspond to what Adler, following Grice, calls "sentence meaning"—the conventional, or commonly understood, meaning of an action. *See* Adler, *supra* note 2, at 1393-97.

leagues and subordinates on the way they looked. It took the feminist movement to suggest that such behavior amounted to treating women as if they were not serious workers, but merely sexual or aesthetic adornments in a business scene. The habit was insulting to many working women before people generally recognized it as such. It could be recognized as insulting because of the ways in which it contradicted norms of professional conduct that working men took for granted among themselves (which held that neither homosexual attraction nor heterosexual rivalry were appropriate objects of notice in business contexts). It could also be considered insulting because of the ways that the practice of complimenting women workers fit into the gendered hierarchy of labor, traditions of excluding and marginalizing women from positions of responsibility, and presumptions of male workers' entitlement to sexual gratification from their female colleagues and subordinates.

The expressive meaning of a particular act or practice, then, need not be in the agent's head, the recipient's head, or even in the heads of the general public. Expressive meanings are socially constructed. These meanings are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community. Although these meanings do not actually have to be recognized by the community, they have to be *recognizable* by it, if people were to exercise enough interpretive self-scrutiny. This is the sense in which expressive meanings are public constructions. It is not that the public interpretation is infallible or definitive of what a practice means, but that a proposed interpretation must make sense in light of the community's other practices, its history, and shared meanings. Thus, to grasp the expressive meaning of an act, we try to make sense of it by fitting it into an interpretive context.[43] Contrary to some views, this does not mean that expressive theories require that "a norm display[s] its justification on its face."[44] The expressive meaning of a norm does not inhere in that norm in isolation, but is a product of interpreting the norm in the full context in which it is adopted and implemented.

All of these points apply equally well to individuals, nongovernmental groups, and the State. For legal interpretation, there are still further reasons that Congress cannot be the authoritative interpreter

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[43] *Cf.* CLIFFORD GEERTZ, *"From the Native's Point of View": On the Nature of Anthropological Understanding*, *in* LOCAL KNOWLEDGE 55, 58, 70 (2000) (arguing that understanding someone's mental states is "more like grasping a proverb, catching an illusion, seeing a joke" than it is like "putting oneself into someone else's skin,").

[44] Kornhauser, *supra* note 31, at 1628.

of its own acts. Judicial review is an institution based on suspicion about the exercise of political power. From *McCullough v. Maryland*[45] on, courts have inquired whether publicly-articulated, legitimate purposes are "pretexts"[46] for other impermissible purposes that violate the Constitution. Whether a city council sincerely believes its authorization of religious symbols on public property does not constitute an impermissible endorsement of religion, or whether it does aim at endorsing religion but veils that aim behind the articulation of other, public-regarding purposes, the courts will make independent judgments about the ultimate legal question of endorsement.

Moreover, legal interpretation is the external attribution of meaning. That attribution will reflect the purposes, as courts understand them, of the legal order as a whole. Thus, if there are systemic reasons to read a new statute, *A*, as if it can be integrated harmoniously with existing statutes, *B* and *C*, courts might decide it is appropriate to do so, whether or not the enacting legislature was even aware of the existence of *B* and *C*. The Legal Process school of the 1950s asserted that courts should assume that the legislature was made up of "reasonable persons pursuing reasonable purposes reasonably."[47] In the 1980s, some public-choice theorists attacked this position as lacking in political realism. As other scholars have recognized, however, positions like these need not be offered as descriptive truisms, but rather can be construed as presumptions that courts ought to bring to the enterprise of interpretation for reasons that stand outside the specific purposes and processes of the enacting legislatures.[48] These reasons have to do with institutional concerns about the proper relationships of courts and legislatures, and general systemic aims of the legal system as a whole. Courts may use presumptions or other substantive tools to guide the inquiry into expressive meanings. These tools will be based upon substantive values external to the specific aims of the enacting legislators.

For purposes of expressive conceptions of law, the democratic State is thus both like and unlike other plural or collective subjects. It is like them in that, just as we can attribute purposes, beliefs, attitudes,

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[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] *Id.* at 359.

[47] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[48] Indeed, Hart and Sacks explicitly indicate the normative dimensions of their presumptions of reasonableness. As they put it, the courts should not engage in interpretation "in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session." *Id.*

and other states of mind to various plural subjects under certain conditions, we can do the same for political bodies. The extreme reductionist view, which asserts that groups cannot have or express mental states, is mistaken about what it means for groups to do so.[49] To coherently ascribe mental states to a collective, its members must be capable of understanding themselves as expressing such mental states. The members are not, however, the final authorities about the meanings of their actions. The expressive meaning of collective actions is a matter of public and shared meanings. Yet the democratic State is also a distinct kind of collective. When courts attribute purposes and expressive meaning to the State's actions, they will also do so for extrinsic reasons accounting for various systemic considerations. These further reasons reinforce the point that the expressive meaning of legislation is not just a matter of the legislature's own intent. While the process of determining the expressive meaning of any particular action will undoubtedly be complex, there is no reason in principle that the democratic State cannot be viewed expressively.

C. *The Nature of Expressive Harm*

Expressive theories of morality and law show their distinctive power in matters concerning expressive harms. A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her. Suppose some neighbors cavalierly toss beer bottles onto your lawn. The ugliness of the litter and the inconvenience of picking it up are burdens, but they are not expressive harms. The expressive harm is in the neighbors' *rudeness*, in the casual disregard for your interests expressed in their actions. Had the bottles been blown onto the lawn by heavy winds that knocked over the neighbors' trash can, you would still suffer the ugliness and inconvenience, but not any expressive harm.

Communicative harms are a special class of expressive harms. A

[49] One typical example can be found in the economically informed literature that argues against corporate criminal responsibility or corporate "punishment" through punitive tort damages. Thus, this literature asserts that "legal fictions cannot commit criminal acts . . . [nor] can they possess mens rea, a guilty state of mind." Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996). Similarly, in arguing against corporate punitive damages except where necessary to provide efficient incentives toward optimal levels of care, Polinsky and Shavell argue that "[t]he notion that individuals would want to punish firms per se strikes us as not entirely different from the idea that individuals would want to punish inanimate objects for causing harm (such as trees that fall on people)." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 949 (1998).

person suffers such a harm when she is treated according to principles that *communicate* negative or inappropriate attitudes toward her—that is, when people treat her in ways that express these attitudes, with the intention of "sending a message" to her regarding their attitudes. Suppose the neighbors conspicuously dump their beer bottles on your lawn as a declaration of enmity toward you. Now their act is not merely thoughtless, but malicious. It also constitutes an invitation, or a dare, to establish a certain kind of social relationship with them: to be enemies.

The communication of attitudes creates social relationships by establishing shared understandings of the attitudes that will govern the interactions of the parties. Consider how this works in the context of state action. A State may communicate its contempt for blacks by requiring the racial segregation of public facilities. Racial segregation sends the message that blacks are untouchable, a kind of social pollutant from which "pure" whites must be protected. For the communicative goal to be realized, its meaning must be acknowledged. This does not mean that the addressees must believe, approve of, or accept the message. They simply have to understand it. Once people share an understanding that segregation laws express contempt for blacks, these laws constitute blacks as an "untouchable," stigmatized caste.

Shared understandings of the attitudes governing social or political interactions introduce conventional elements to these interactions. Before acknowledgment by either side, state actors may have expressed their contempt for blacks in spontaneous and unselfconscious ways. For example, white emergency rescue workers may have preferred to resuscitate white victims at mixed-race disaster scenes. After all sides acknowledge that their relationship is governed by contempt, the State's expressions of contempt become a *language* of contempt that is governed by conventions of meaning. The spontaneous expression of disgust—avoidance—becomes stylized and regulated by segregation laws.

This Part has argued that social relationships are constituted through shared public understandings and meanings, which are created through communication. This lets us grasp the special import of expressive harms constituted by the communication of negative or unjustified attitudes toward their victim. *Communications can expressively harm people by creating or changing the social relationships in which the addressees stand to the communicator.* This can happen in two ways. First, a communication can be expressively harmful by forcing someone to acknowledge, and thereby enter, a disvalued relationship with the

speaker. This kind of expressive harm is embodied in legally enforced racial segregation.

Second, a communication, or a failure to communicate in contexts that demand a communicative response, can constitute a repudiation, retraction, or withholding of the acknowledgment of a valued social relationship with someone else. A social relationship is constituted by a shared acknowledgment of the attitudes (and hence the conventions for expressing them) that govern the interactions of the parties to that relationship. Because the acknowledgment must be shared, one party can dissolve or refuse to form the relationship by withdrawing or withholding acknowledgment. This is why aggrieved individuals and groups so often demand that the State acknowledge their grievances and share their outrage at wrongs the State has inflicted upon them.[50] Recognition and appropriate condemnation can, in certain contexts, be necessary to ensure that political and social relationships remain constituted according to the principles previously thought to govern them. This is why, it seems, even token compensation makes wealthy landowners more accepting of redistribution.[51] Compensation, even if not commensurate with loss, expresses recognition that the State is inflicting serious harm on individuals in the service of justifiable ends. Nominal damages for violations of constitutional rights play a similar role.[52] These and other "expressive legal remedies" matter because they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant relationships are to be constituted.

We say that a person suffers an expressive harm when treated according to a principle that expresses an inappropriate attitude toward her. The principle may express the attitude without communicating it, as in cases of negligent, inconsiderate, and reckless action. Even deliberate wrongdoing can expressively harm the victim without the actor intending to make her bad attitude an issue between her and her victim. (Traditional deontological ethics, which stresses such distinctions of intentionality, represents one attempt to account for the

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[50] One of the first extended discussions of this as a matter of political theory is Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 25-44 (1992).

[51] *See* ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, LAND REFORM AND DEMOCRATIC DEVELOPMENT 194-97 (1987) (demonstrating this phenomenon in the context of massive state land redistribution schemes across numerous countries).

[52] *See, e.g.*, Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (holding that nominal damages are the appropriate remedy for violations of constitutional rights where actual injury cannot be shown).

different expressive harms suffered in virtue of being treated according to different principles.)

Alternatively, the principle may express the attitude in communicating it—in bringing it out in public space for acknowledgment by the addressee. The constitutive aim of such communication is that the attitude be publicly acknowledged as governing the interactions of the speaker and the addressee. Successful communications of good and bad attitudes and consequent joint orientation of action around these shared understandings are constitutive of social relationships, including friendship and enmity, collegiality and rivalry, and superior and inferior caste status. In communicating our attitudes to others, or in refusing to do so when the context demands it, we place ourselves in social relationships or take ourselves out of such relationships.

Of course, people can also suffer nonexpressive harms to their material and liberty interests, their psyches, and their social reputations. From an expressive point of view, these harms are also important for the evaluation of action. But these types of harm are not significant for the evaluation of action in the same way. They are incommensurable: one cannot add up the expressive and the nonexpressive harms on the same scale and then choose the action that minimizes total harm (or maximizes total benefit). The expressive harm is a result of acting on an unjustified expressive principle (a principle that expresses the wrong attitudes), while the nonexpressive harm is a causal consequence of the action. Consideration of the two types of harm, therefore, enters into our deliberations about what to do at different points: the first, in ensuring that we are acting on the right attitudes and thus on the right expressive principles; the second, in applying those principles to the case at hand. Expressive principles tell us to look after the nonexpressive interests of others *in the right way* (respectfully, considerately, gratefully, and so forth). If we do this, people's expressive interests will take care of themselves. In other words, we respect people's expressive interests *in* acting on the right principles (attitudes); we promote their nonexpressive interests *through* acting on the right principles (attitudes). To try to put the two types of interest on par only creates a deliberative muddle.[53]

Thus, even after we meet the required expressive constraints on state action, we can be further concerned about getting the "cultural

[53] This argument is highly compressed. For extended discussions, see generally ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1-90 (1993); Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 90 (Ruth Chang ed., 1997).

consequences" of public policies right.[54] Actions that are equally consistent with principles of equal concern and respect, for example, might nonetheless have very different cultural or (more narrowly) instrumental effects. Policy and law certainly ought to be concerned with these further consequences. At the same time, actions that violate various expressive constraints also can have pernicious cultural or material consequences. But expressive theories do not condemn such actions only *because* of those cultural or material consequences, as this Article will seek to demonstrate through a survey of constitutional doctrines. If expressive theories are right, state action should be wrong—and unconstitutional, if constitutional law tracks expressive concerns—when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences.

III. EXPRESSIVE THEORIES OF LAW: THE EXPRESSIVE DIMENSIONS OF CONSTITUTIONAL LAW

One could try to offer an expressive theory of law (or morality) as a comprehensive theory of legal (or moral) wrongs. Such a theory would account for both expressive and nonexpressive harms in ultimately expressivist terms. We do not attempt such an ambitious task here. Nor can we address all the legal areas to which scholars are applying expressive theories. Instead, the remaining discussion will focus on issues of structure, equality, and rights in some exemplary areas of constitutional law.

Expressive accounts of constitutional doctrines do not provide easy answers, but they do orient analysis toward the right questions. They also eliminate the conundrums that wholly consequentialist approaches generate.[55] Expressive considerations provide both a better

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[54] *See generally* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 939 (1991) (contending that "the cultural consequences of the means selected to pursue . . . instrumental goals can undermine their realization").

[55] Larry Alexander's work, for example, consistently raises puzzles about the structure and justification of constitutional rules. In our view, these puzzles ultimately stem from his explicit rejection of expressivist accounts of the doctrine in favor of consequentialist accounts. While we do not have the space here to elaborate, we believe that most of the problems that concern Alexander do indeed dissolve once one recognizes the central role of expressivist considerations in constitutional doctrine. For representative works by Alexander in this vein, see Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENTARY 287 (1994), and Larry Alexander, Rules, Rights, Options, and Time (Nov. 29, 1999) (unpublished manuscript, on file with the authors and the *University of Pennsylvania Law Review*).

rationalization of many existing patterns of constitutional decision-making and a better account of the theoretical purposes of the provisions being enforced. This Part will argue that even where the rhetorical structures of justification in judicial opinions invoke consequentialist (or functional or instrumental) language, the patterns of decision are best understood in expressive terms. Just as public discourse over certain policy issues is often carried out in consequentialist language despite the fact that people's views appear actually rooted in expressive considerations,[56] so too do modern Supreme Court constitutional decisions often cloak expressive considerations in non-expressive terms.[57]

Expressive theories of constitutional law show their distinctive power in two types of cases. The first is comprised of cases in which laws are struck down *solely* on account of their expressive harms. In these cases, the court finds that the law in question has caused no material injuries or other objectionable harms, but nevertheless rejects the law for expressing an unconstitutional purpose or attitude. The second type of case occurs when several laws have similarly harmful causal consequences, but the court rejects some of these laws while upholding others. Because their causal consequences are the same, the grounds for discriminating between the laws must lie elsewhere—we shall argue, in expressive considerations.

Both types of cases arise in litigation involving the Equal Protection and Establishment Clauses. This should not be surprising, since these are the areas scholars most often point to as best understood in expressivist terms.[58] This Article will defend a general expressivist approach to these doctrines without necessarily endorsing the Court's applications of this approach in every case. More surprising is the power of expressivist approaches in understanding the Constitution's

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[56] *See generally* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (arguing that while citizens may speak and argue in the lexicon of deterrence, more probing analysis of policy preferences shows them to rest instead on expressive considerations).

[57] We cannot explore here why this is so. For some thoughts on this matter, see Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1992) (reviewing MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990)).

[58] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-57 (discussing aspects of Equal Protection cases that can be considered expressive); Pildes & Niemi, *supra* note 1, at 506-16 (focusing on the Equal Protection and Establishment Clauses in analyzing expressive harms as constitutional injuries); Deborah Hellman, The Expressive Dimension of Equal Protection (Dec. 1999) (unpublished manuscript, on file with the *University of Pennsylvania Law Review*) (same).

structural dimensions. We shall argue that expressive theories of law make the best sense of the Dormant Commerce Clause and recent federalism-based decisions banning congressional "commandeering" of state officials. This analysis shows that expressive considerations apply not only to the areas with which they are most readily associated, such as Equal Protection, but also throughout much of American constitutionalism.

A. *The Equal Protection Clause*

Contemporary Equal Protection doctrine incorporates expressive concerns in at least two ways. First, it makes unconstitutional all laws that rest on certain impermissible purposes: those that express contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups, or that constitute them as social inferiors or as a stigmatized or pariah class.[59] Second, it opposes laws that, by giving too much weight to suspect classifications, express a divisive conception of citizens—a conception that represents their racial, ethnic, religious, or other parochial identities as more important

[59] The "one pervading purpose" of the Equal Protection Clause was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The Slaughter-House Cases, 83 U.S. 36, 71 (1872). It grants to the "colored race . . . the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society." Strauder v. West Virginia, 100 U.S. 303, 308 (1879). The Court rejected the discriminatory administration of ordinances regulating laundries because "no reason for it [the discriminatory administration] exists except hostility to the race and nationality to which the petitioners belong." Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). Similarly, the Court rejected the denial of a permit to a home for the mentally retarded because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985). The Court had to reject Cleburne's policy because "it rests on a bare desire to treat the retarded as outsiders, [as] pariahs who do not belong in the community." *Id.* at 473. "It is the duty of the State and its subdivisions to ensure that such forces [of racial hostility] do not shape or control the policies of its school systems." Freeman v. Pitts, 503 U.S. 467, 490 (1992). Some cases suggest a broad principle that the State is obligated not to act with animus toward any targets of legislative classifications. The Court, however, has applied this principle in only a few cases. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down selective restructuring of state governmental processes partly on the ground that "the amendment seems inexplicable by anything but animus toward the class that it affects"); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

than their common identity as citizens of the United States. The Court has struck down laws expressing contemptuous, hostile, and divisive attitudes simply for their expressive content, without requiring any demonstration of adverse causal consequences.[60] Case law illustrations of pure expressive harms are of course rare because when legislators act for impermissible purposes they are not typically seeking to do so for that sake alone, but to bring about some further set of aims. Nonetheless, existing examples confirm that expressive harms violate Equal Protection. The following discussion considers a few of these examples, then explains why the Court's approach to the cases makes sense from the expressive perspective.

The intersection of race and politics affords the richest examples. In 1970, the city of Richmond was 52% black.[61] It then undertook a series of controversial annexations, which decreased the black population to 42%.[62] Before annexation, the city council had nine members, all elected from the city as a whole in at-large elections.[63] If voting is racially polarized, this system makes it difficult for black voters to elect their preferred candidates. After annexation, the Richmond City Council was redesigned so that members were elected from individual wards, with four heavily black-majority wards. This change meant that black voters would have voting power proportionate to their population even if voting remained racially polarized.[64] Section 5 of the Voting Rights Act prohibits electoral changes—including annexations—that have the "purpose [or] . . . effect" of abridging the right to vote.[65] In *City of Richmond*, the Supreme Court held that this post-annexation structure fully complied with the requirement that there be no discriminatory effect.[66] As long as the post-annexation election plan reflected the level of black voting power, annexations would not be treated as having any discriminatory effect.

For those who believe constitutional or statutory equality doctrine is concerned only with material injuries, that should be the end of the

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[60] *See supra* note 59 (describing many such cases).

[61] *See* City of Richmond v. United States, 422 U.S. 358, 363 (1975).

[62] *See id.*

[63] *See id.*

[64] A fifth ward was 40.9% black in population. In the actual elections, five of the nine seats were filled by black candidates. This is the black-majority city council that enacted the set-aside program later held unconstitutional in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989).

[65] Voting Rights Act of 1965, § 5, Pub. L. No. 89-110, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973(c) (1994)).

[66] *City of Richmond*, 422 U.S. at 371-72.

matter. Yet the Court further held that, were there a discriminatory *purpose*, the annexation would be invalid even if all its legal *effects* were acceptable. The Court remanded the case to the lower courts to determine whether Richmond had an impermissible purpose.[67] The Supreme Court's opinion is one of the purest statements of the expressive view of constitutional or statutory equality in the case law:

> [I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. *The answer is plain, and we need not labor it.* An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race *has no legitimacy at all under our Constitution or under the statute.* . . . Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Annexations animated by such a purpose have no credentials whatsoever*; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, *whatever its actual effect may have been or may be.*[68]

Both the holding and the language through which it is justified reveal that expressive harms in themselves are constitutional injuries. The Court indicated concern with "gross racial slurs" and with the "despoiling" of a group of citizens.[69] This is language of offense, of insult, of degradation; these are references to the character of the State's action, not to how black voters experienced it.[70] Notice too how emphatic the legal conclusion is: state acts motivated by racist purposes have "no legitimacy" and "no credentials" at all.[71] Facing one of the few laws with discriminatory purposes but no discriminatory effects, the Court made clear that bad purpose in and of itself is

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[67] And indeed, the lower court held the action illegal because of its purpose alone.

[68] *City of Richmond*, 422 U.S. at 378-79 (citations omitted) (emphasis added) (first and second alterations added, third and fourth in original).

[69] *Id.* at 378.

[70] No proof of such psychological or cultural effects, of course, is required. Legal rights, especially in cases involving the design of political institutions, are often asserted by those whose interests do not reflect the interests that justify recognizing the right in the first place. The law does not, however, inquire into the "true" interest behind the claim. The constitutional requirement of one-vote, one-person, for example, is often enforced by actors with partisan political interests, not individual rights-holders genuinely aggrieved by the purported denial of political equality. *See* Richard H. Pildes, *A Theory of Political Competition*, 85 VA. L. REV. 1605, 1608-09 (1999) (describing 1980s one-voice, one-person cases brought to pursue partisan objectives).

[71] *City of Richmond*, 422 U.S. at 378.

constitutionally impermissible.[72]

The same conclusion is implicit in *Hunter v. Underwood*, in which the Supreme Court held that the 1901 Alabama Constitution was designed to restore white supremacy by disenfranchising black voters.[73] In the 1980s, black and white litigants challenged the constitutionality of provisions in the 1901 Constitution that disenfranchised those convicted of "crimes involving moral turpitude."[74] The Court found that the pattern of criminal disenfranchising provisions that had been included and excluded, as well as the constitutional convention's history, justified the conclusion that this provision had been adopted for racist purposes. The provision had a massively disproportionate racial impact at the time adopted. However, temporal changes generated gaps between the original purposes of the law and its actual effects, leading to a much smaller but still significant racial impact in the present.[75] The Court unanimously held the provision unconstitutional. If the law had no racially disproportionate impact in the present, would the Court still have struck it down? It seems so, from the extent to which the courts emphasized the historical materials related to original purposes, and mentioned the continuing disparate impact only in

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[72] Just as this Article went to press, an intensely divided 5-4 Court complicated this issue, at least with respect to interpretation of Section 5 of the Voting Rights Act, by limiting *City of Richmond* to the specific context of annexation cases. Thus, in *Reno v. Bossier Parish School Board*, the Court held that Section 5 and *City of Richmond* banned State actions with respect to voting that had one kind of impermissible purpose, a "retrogressive purpose," but did not ban action that had a more general discriminatory (but non-retrogressive) purpose. 120 S. Ct. 866, 878 (2000). Having narrowly construed the kind of purposes the Act made illegal, the Court did seem to continue to recognize that State action reflecting such a purpose would be illegal, even if the action did not have the statutorily-impermissible effect of causing retrogression of minority voting power. The Court also suggested a distinction between "denials" of the right to vote and "abridgements" of that right; the former might continue to violate the statute when done with a discriminatory purpose, even if not a retrogressive purpose, and even if without discriminatory effect. *Id.* at 877 n.6. The decision does not appear to address directly, certainly not with any extended analysis, whether the Fourteenth and Fifteenth Amendments require both discriminatory purpose and effect, or whether discriminatory purpose alone violates the Constitution, as the few cases to address this issue directly indicate. But certain passages in the Court's general formulation of the law do suggest both are constitutionally required. *See, e.g., id.* at 876 ("At the time *Beer* was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation . . . .").

[73] 471 U.S. 222, 232 (1985) ("[W]e simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race . . . .").

[74] *Id.*

[75] Initially, the provision disenfranchised 10 times as many blacks as whites; at the time of the litigation, the figure was 1.7 times as many blacks as whites. *See id.* at 227.

passing.[76] As Justice Holmes said, speaking of this same Alabama Constitution, "[I]t would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent."[77] Certainly our view is that they should invalidate such laws because the expressive character of state action matters without regard to its further effects.

The most conventional expressive concerns with equal protection doctrine involve issues of stigma and second-class citizenship. For at least twenty-five years, constitutional doctrine has also recognized other expressive concerns with the use of race, though these concerns are less noticed and less emphasized by scholars. One such concern is with the State using race too cavalierly. Another is with the State using race in an overly divisive manner or letting race play too central a role in its decisionmaking processes.[78]

Consider a relatively uncontroversial example to start. Suppose a State must ration access to gasoline during an energy crisis. It permits some drivers to fill up on certain days, other drivers on other days. The State might choose even and odd license plate numbers, which is administratively convenient for gas station operators to monitor. The State might also choose race of driver on similar grounds of administrative convenience. Such a law would be neither hostile nor stigmatic; it neither would impose a material inequality (supposing the State gave equal opportunities for all races to fill up) nor brand any race as inferior. Nonetheless, it evidently is unconstitutional. Courts would find that it fails strict scrutiny: a law justified on grounds of administrative convenience would not meet the "pressing public necessity" prong, especially where alternative means are readily available.[79] The deeper reason behind this doctrinal response would be

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[76] This is particularly evident in the unanimous court of appeals decision. *See* Underwood v. Hunter, 730 F.2d 614, 618 (11th Cir. 1984) (focusing on an intent-based analysis rather than disparate impact arguments), *aff'd*, 471 U.S. 222 (1985).

[77] Giles v. Harris, 189 U.S. 475, 487 (1903). This statement is, though, ironic in the context of *Giles*, for Holmes's opinion there upheld the massive and blatantly unconstitutional disenfranchisement of black voters in the South. *Id.* at 488. For an extended discussion of *Giles* and its implications for contemporary constitutional law, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Constitution*, 17 CONST. COMMENTARY (forthcoming May 2000).

[78] This answers Adler's charge that expressive views fail to recognize that nonstigmatizing laws can also violate Equal Protection. *See* Adler, *supra* note 2, at 1436 ("[A] stigma-based account of the Equal Protection Clause, albeit a genuine expressive account, is unpersuasive.").

[79] For a discussion of administrative convenience as insufficient justification under strict or intermediate scrutiny, see City of Richmond v. J.A. Croson Co., 488 U.S. 469,

that the too cavalier use of race itself raises constitutional concerns. By highlighting, without compelling justification, the racial distinctions that have historically divided us, such laws express an improperly *divisive* conception of the public.

This notion of racial divisiveness does not refer to the particular law's actual cultural effect in encouraging racialized thought and policy. The Court's incantation of themes of racial division and hostility as *effects* of race-conscious laws is invariably a broad historical judgment, and is not based on any specific inquiry into the actual effects of the particular law in issue (as if that were somehow possible). As Justice O'Connor speculated in *Croson*, "Classifications based on race . . . [u]nless they are strictly reserved for remedial settings . . . *may* in fact . . . lead to a politics of racial hostility."[80] Moreover, the actual divisiveness-in-fact of particular laws and policies cannot be of talismanic significance. The *Croson* formulation itself exempts remedial uses of race from its concerns with racially divisive laws, without investigating whether such policies in fact fan the flames of racial hostility. We all know, however, that racial hostilities were in fact aroused by constitutionally required desegregation orders. Thus, any fact regarding the racially divisive consequences of laws is not decisive because those facts, in and of themselves, are not what matters. Instead, any judgments that courts may invoke about empirical effects of this sort must be parasitic upon a prior expressive judgment that the State's emphasis on race in a similar context makes racial divisions too salient. Those prior expressive judgments help distinguish when the divisive effects of race-conscious laws will and will not be constitutionally salient.

To clarify the expressive concern with "divisive" uses of race, consider the racial redistricting cases. The Court has permitted "racial gerrymandering"[81] in some contexts and denied it in others. Various ways of describing the boundary between "appropriate and reasonably necessary uses of race" in districting and "unjustified and excessive uses"[82] exist.[83] In one important formulation, when a State "subordinate[s] traditional race-neutral districting principles . . . to racial con-

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508 (1989); Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

[80] *Croson*, 488 U.S. at 493 (emphasis added).

[81] Bush v. Vera, 517 U.S. 952, 956 (1996).

[82] *Id.* at 995 (O'Connor, J., concurring).

[83] For example, where the Voting Rights Act actually requires racial redistricting, such redistricting does not violate the Constitution. There are obvious differences within the five-member majority in how to approach these redistricting cases, and the Court has not been consistent in its descriptions.

siderations," such that racial considerations are "predominant," the Constitution is violated.[84] For example, reasonably compact districts can be race-conscious in design, but "bizarre[ly] shape[d]" ones cannot.[85] The question of the precise harm that attended these forbidden uses of race loomed large in these cases. In early decisions, the Court suggested various harms that may have occurred, such as those tied to the representational quality in these districts. In later cases, defenders of challenged districts sought to prove that there were no such harms. The Court, however, did not treat these empirical proofs as relevant. In an earlier work, one of us characterized the harm as expressive;[86] the Court subsequently used this characterization to describe the harms from excessive racial redistricting.[87]

The harms are expressive because they are not tied to material injuries to specific individuals in the same way that harms involved in conventional individual rights cases are tied to discrete injuries. No one's voting power is diluted by drawing these districts in a race-conscious way. Rather, the problem is that certain districts convey the message that political identity is, or should be, predominantly racial. Again, this effect is a matter of the conception of political identity (that the Court believes is) expressed through the law, and is not a matter of what a specific district's voters actually think about their own political identities. Even if no one accepted such a racial message, the Court probably would reach the same constitutional result. The very creation of these districts expresses, in the Court's view, a constitutionally impermissible conception of the role of race in the design of democratic institutions. Such an expressive view, however, is of course not immune to factual circumstances and cultural debate. Indeed, a large part of what we debate in politics or advocate as lawyers is what meaning ought to be attributed to various state decisions as facts change and cultural attitudes shift. If advocates can persuade the Court that non-compact minority districts are integrative and do not express inappropriate or divisive conceptions of political identity, the Court's doctrine presumably will change.

The *Bakke* line between impermissible quotas and permissible

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[84] Miller v. Johnson, 515 U.S. 900, 916 (1995).

[85] *Bush*, 517 U.S. at 980.

[86] *See* Pildes & Niemi, *supra* note 1, at 526-27 (arguing that *Shaw* and other redistricting cases where "race concerns appear to submerge all other legitimate redistricting values" are "fundamentally concerned with expressive harms").

[87] *See Bush*, 517 U.S. at 984 (characterizing *Shaw* injuries as "expressive harms"); *id.* at 1053 (Souter, J., dissenting) (recognizing that *Shaw* injuries are "probably best understood as an expressive harm").

preferences has a similar structure and justification as the boundaries in the racial redistricting cases.[88] From a consequentialist or functionalist point of view, this distinction seems empty. Either means—quotas or preferences—can produce the same racial outcomes. As long as race can be taken into account, how can the *form* in which it is taken into account matter so much?

An expressive understanding of action makes it easier to see why form can matter morally and legally. Form is not just about form for formalism's sake. Different means of pursuing affirmative action can express different understandings about the appropriate role of race in public life. In *Bakke*, the Court was particularly concerned about the racial reservation of places—specifically, that some opportunities were closed to competition by members of all races, and that members of different races were insulated from comparison with one another by the use of separate admissions boards and standards. In the public education context, the Court held that equality required that everyone be able to compete on the same terms for all places.[89] Race may be a factor in university admissions, but only so long as it is treated in the same way as other factors contributing to diversity. Applications of the Equal Protection Clause make such differences in form important because those differences are taken to express different understandings and valuations of race.

The Equal Protection cases we have discussed manifest expressive concerns in two ways. First, they focus on the purposes and attitudes expressed in the law, and on the relation of race-conscious means to ends, rather than on race-conscious means or consequences alone. Second, they embody a distinctively expressive conception of the harms inflicted by laws that violate the Equal Protection Clause. These two broad expressive features of the Court's opinions are important to recognize, whether or not one agrees with their application in specific cases.

The Court has steered a careful course between purely consequentialist and rigid deontological views of equal protection. A purely consequentialist view of equal protection would require all laws—and only laws—with a racially differential impact of sufficient magnitude to be struck down. While Congress has made insufficiently justified differential racial impacts actionable in some arenas, such as in public

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[88] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315-19 (1978) (distinguishing a quota system from a preference-based system for achieving racial diversity).

[89] *See id.* at 319 (suggesting that discrimination occurs when applicants, "[n]o matter how strong their qualifications, . . . are never afforded the chance to compete").

employment and voting rights, the Court has held that racially-differential impacts alone cannot violate the Fourteenth or Fifteenth Amendments.[90] Differential impacts do matter, however, precisely as a clue to expressive concerns; these impacts matter as evidence of discriminatory purpose. The Court also recognizes that laws with invidious purposes but with no demonstrable differential impact can be unconstitutional, as *City of Richmond* shows.[91] Moreover, the Court treats policies with the same differential impact differently, on grounds of their form, because it concludes that different forms of race-consciousness can express more or less acceptable conceptions of the proper role of race in society. This is the linchpin of *Bakke*.[92]

Under a rigid deontological view of equal protection, the Court might strike down all race-conscious means to state ends. This view, that the Constitution should be "color-blind," is an example of what we might label "vulgar deontology." The Court, however, has rejected the position that the bare use of racial classifications is inherently and therefore always unconstitutional. Racial classifications are justifiably used to undo prior unconstitutional uses of race, as in school desegregation,[93] public employment,[94] and voting rights cases.[95] The evaluation of laws that classify by race depends not on the bald fact of its use, but on the purposes for which the classification is used.

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[90] *See* City of Mobile v. Bolden, 446 U.S. 55, 65-80 (1980) (holding that an at-large electoral system does not violate the Fifteenth Amendment just because it has a disproportionate racial impact); Washington v. Davis, 426 U.S. 229, 248 (1976) (holding that a facially neutral law is not unconstitutional solely because it has a racially disproportionate impact). While these cases are consistent with an expressive view, expressive theories would not require these rulings. We do not agree with the application of the purpose test in these specific cases. An expressive theory could hold, for example, that some differential racial impacts of state policies with regard to vital group interests are so severe as to license the inference that only a State grossly indifferent to the fate of that group could tolerate them. The theory would then require a holding that actions that express gross indifference to the interests of a racial group are unconstitutional.

[91] *See supra* notes 79-80 and accompanying text (explaining that administrative convenience is an unconstitutional justification for a classification).

[92] 438 U.S. at 315.

[93] *See, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (holding a state law forbidding use of race in school assignments unconstitutional); McDaniel v. Barresi, 402 U.S. 39, 41-42 (1971) (holding a race-conscious assignment of students to public schools constitutional).

[94] *See* United States v. Paradise, 480 U.S. 149, 185-86 (1987) (holding a race-conscious state trooper promotion requirement constitutional).

[95] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 985 (O'Connor, J., concurring) (arguing that racial redistricting cases hold unconstitutional the "*unnecessary* and *excessive* governmental use and reinforcement of racial stereotypes" (emphasis added)).

Thus, the Court has consistently held that equal protection cannot be applied by looking at the means or consequences of laws alone. One must also examine the law's expressive purposes and the justificatory connection between its means and ends. Racial classification is wrong either when it is used for impermissible ends—those that express hostile, contemptuous, or other unjustified "negative attitudes"[96]—or when the Court concludes there is gratuitious, divisive, or excessive reliance on racial means for permissible ends. Such reliance expresses a conception of racial identity as having the wrong kind of role in public affairs, even if public policies are permissibly race conscious to some extent. Such a focus on the expressive content of ends and on the connection between means and ends is, as we have shown above, the touchstone of an expressive theory of action.

Second, the Court recognizes the distinctive character of expressive harms as harms inherent in the principle on which the laws are enacted, rather than in the causal consequences of the laws. Policies adopted out of contempt or hostility toward a racial group, or with the purpose of branding a racial group as inferior, are expressively harmful and therefore unconstitutional regardless of their direct material, social, and psychological consequences. For example, the harm from racial segregation does not lie simply in its material consequences. As parts of the opinion in *Brown* recognized,[97] "[s]eparate educational facilities are *inherently* unequal,"[98] "even though the physical facilities and other 'tangible' factors may be equal" in white and black public schools.[99] There is thus also an independent expressive harm, which we would call a "stigmatic" harm.

One could argue that "stigma" refers to the causal consequences of laws violating equal protection—that is, their tendency to damage their target's self-esteem—rather than to the fact that stigmatizing laws communicate a message of inferiority. In favor of this view, critics of expressivism could cite the *Brown* Court's notorious reliance on social scientific evidence that racial segregation "generates a feeling of inferiority" in black children's minds.[100] This reliance, however, was

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[96] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for [discrimination].").

[97] *Brown v. Board of Education* can be read as offering several different accounts of what was wrong with segregation, including this expressive account. For a detailed reading that takes a similar tack on expressive meanings, see Hellman, *supra* note 58.

[98] Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (emphasis added).

[99] *Id.* at 493.

[100] *Id.* at 494.

short-lived. In the series of summary affirmances after *Brown*, the Court held segregation unconstitutional in every public space, including parks, swimming pools, buses, beaches, and golf courses,[101] without any purported proof of the types of cultural or personal effects gestured at in *Brown*'s famous footnote.[102] Similarly, in striking down state anti-miscegenation laws, the Court focused exclusively on the laws' history and meaning, not on their specific cultural or psychological effects.[103]

This doctrinal approach surely seems right: the State is not justified in heaping indignities on people just because they can "take it." In their cultural context, segregated schools were unequal in themselves, independent of their material effects. Given that the Court has consistently rejected the view that racial classifications per se violate equal protection,[104] the only logical alternative interpretation of this declaration is expressive: racially segregated educational facilities are inherently unequal because they embody a message of inferiority or an attitude of contempt or hostility. This conclusion is correct both as a matter of law and of morality. To insist that what is wrong about actions that communicate bad attitudes toward others is the psychological trauma they inflict on their addressees is to hold that only the thin-skinned and psychologically fragile are entitled to be treated with dignity.[105] We reject the view that no harm results from trying to humili-

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[101] *See, e.g.*, Gayle v. Browder, 352 U.S. 903, 903 (1956) (invalidating segregation on buses); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (invalidating segregation on golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (invalidating segregation on beaches).

[102] *Brown*, 347 U.S. at 494 n.11 (citing authorities describing psychological effects of segregation).

[103] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."). For an interesting justification of the *Brown* Court's reliance on evidence of actual harm and the *Loving* Court's disregard of such evidence, see John Hart Ely, *If At First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENTARY 215 (1998).

[104] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring) (noting that States may intentionally create majority-minority voting districts and "may otherwise" take race into consideration without triggering strict scrutiny, "so long as [the State] do[es] not subordinate traditional districting criteria to the use of race for its own sake or as a proxy"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (recognizing that "[r]acial and ethnic distinctions are inherently suspect and thus call for the most exacting judicial examination," but not "all such restrictions are unconstitutional" (citing Korematsu v. United States, 323 U.S. 214, 216 (1944))).

[105] This position also threatens to turn equal protection doctrine into a subjective test, as if individuals could prove that a law is unconstitutional just by showing that it

ate another person, so long as one does not succeed. Action taken with the purpose of humiliation is an expressive harm in itself.

Alternatively, one could argue that a law becomes stigmatizing as a result of its impact on public perceptions of the targets of the law—that is, its tendency to lower the social standing of those the State brands as inferiors. According to this view, a law communicating a message of inferiority would not be objectionable if citizens at large rejected that message.[106] This misses the point, however, that legal communications of status inferiority constitute their targets as second-class citizens. The view only makes sense if one fails to recognize that the democratic State consists of citizens acting collectively through their representatives. Or, at the least, the democratic State consists of state officials acting collectively to express the lower regard the State has for the targets of a stigmatizing law. If it is wrong for individuals acting on their own to treat certain social groups as inferior, it is also wrong for citizens acting collectively to do so.[107]

In our view, equal citizenship status in a legitimate State is a significant objective good for human beings. Adler has offered no reason to think that, among all expressive relations individuals could have to others, the relations they have to their fellow citizens acting collectively through the State are uniquely irrelevant to their welfare. In addition, Adler's alternative view—that the State's communications matter only for their effects on people's subjective feelings or social status—leads to unacceptable implications. It implies that there is nothing wrong with the State heaping indignities on the thick-skinned. It implies that the validity of state laws should be held hostage to the self-esteem of the hypersensitive. It implies that blacks

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makes them feel bad about themselves. Such a test would hold the constitutionality of laws hostage to the feelings of the hypersensitive. Whether the feelings of inferiority induced by a law are constitutionally relevant ought instead to depend on a prior judgment of whether the law is expressively objectionable in itself.

[106] Adler argues this point. *See* Adler, *supra* note 2, at 1431, 1434-36.

[107] Adler's attempt to deny the welfare impact of expressive harms that the State inflicts is puzzling. Adler correctly notes that there is a distinction between legal and social status. The attitudes known to govern particular persons' relations to the State (citizens acting collectively), may differ from the attitudes that govern these persons' relations toward citizens acting as individuals or as members of private groups (for example, firms). This fact, however, hardly indicates that only social status, not legal status, is relevant to people's welfare. A comparable assertion would be that blacks should not object to being segregated in jury boxes unless such segregation leads restaurant owners to segregate them as well. But this assertion would be so strange that it makes us wonder whether we are reading Adler correctly: surely blacks' struggles for equality of citizenship matter in themselves, beyond any effects their citizenship status has on their treatment by people acting in their private capacities.

should not mind segregation in their City Hall unless such segregation causes private individuals to degrade them in similar ways. And it implies that illegitimate States have a moral license to treat some of their citizens with contempt.

One might object that our insistence that stigmatizing laws can inflict expressive harms apart from the psychological trauma or reputational damage they cause is like insisting that the proverbial tree falling in the forest makes a sound even if no one hears it. We do not suppose that laws that communicate messages of inferiority generally fall on deaf ears, or on no ears at all. Rather, we hold that the expressive harm of communicative acts can be realized simply by people *understanding* the degrading message, not only by people accepting, internalizing, or endorsing that message. A target of the message may manifest her grasp of it through indignant defiance, and nontargeted, sympathetic observors might share her indignation. This does not make the message any less offensive.[108] In other cases, people can suffer expressive harms of which they are unaware by being denied standing in certain relationships without their knowledge. For example, the expressive harm of adultery is not found in the knowledge that one has been betrayed, nor in others' knowledge of this betrayal, but in the very fact of betrayal itself. Similarly, the expressive harm embodied in the State regarding its citizens in primarily racial terms does not consist in anyone knowing this, but simply from the fact that by so regarding citizens, the State denies them the primacy of their common identity as fellow citizens.

B. *The Establishment Clause*

The Establishment Clause is another constitutional arena in which expressive accounts have become central to both doctrine and scholarship.[109] We do not attempt to offer a comprehensive expressive ac-

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[108] One might think that feelings of indignation or offense are psychologically harmful in and of themselves. This would be an error. Feelings of indignation or offense are typically expressions of great self-regard. They also can be empowering. The objects of our indignation, however—the things we are indignant or offended about—*are* harmful. They are always expressive harms.

[109] Adler rightly notes this. *See* Adler, *supra* note 2, at 1438. The central manifestation of expressivist approaches is the "no endorsement" test, discussed extensively *infra* text accompanying notes 127-29. For two important criticisms of this test, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147-57 (1992); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). We cannot undertake a response here to these critiques, although many of Smith's arguments rest on premises

count of the Establishment Clause, nor do we endorse all of the Court's applications of expressive views to particular cases. Nevertheless, it is clear that Establishment doctrine has been powerfully shaped by a concern to define the appropriate attitude of the State toward religion. The Court has attempted to steer a course between laws that express *hostility* to religion, in violation of the Free Exercise Clause,[110] and laws that *endorse* religion, in violation of the Establishment Clause.[111] The middle road is one in which the State takes the appropriate expressive stance toward religion.[112]

As discussed below, all the hallmarks of an expressive theory are present in Establishment doctrine. First, the doctrine prohibits state infliction of purely expressive harms, even when unaccompanied by

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similar to Adler's, and we do respond to a central confusion between communication and expression that we believe Smith shares with Adler. *See infra* note 185.

[110] Thus, in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948), the Court claimed that any state actions that "manifest a governmental hostility to religion" would violate the Free Exercise Clause. In *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), the Court, while affirming the separation of church and state, rejected the claim that the State may not release students during school hours for voluntary unsubsidized religious instruction, on the grounds that such an interpretation of the Establishment Clause would render state and religion "aliens to each other—hostile, suspicious, and even unfriendly." In *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), the Court declared that the Constitution "[a]ffirmatively mandates accommodation, not merely tolerance, of all religions," because "anything less" would express "callous indifference" toward the religious.

[111] "The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public." School Dist. v. Ball, 473 U.S. 373, 397 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) (overruling *Ball*'s holding, but not the principle of neutrality upon which it was based, so that the State's conveyance of a message of state support for religion is still unconstitutional). The State's endorsement of prayer activities at the beginning of each school day is "not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." Wallace v. Jaffree, 472 U.S. 38, 60 (1985). Although, in refining the definition of governmental action that unconstitutionally "advances" religion, the Court's subsequent decisions have variously spoken in terms of

> "endorsement," "favoritism," "preference," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (quoting *Lynch*, 465 U.S. at 687) (O'Connor, J., concurring)).

[112] One description of the appropriate expressive stance is the following: "while protecting all, it prefers none, and *disparages* none." Minor v. Board of Educ. (Ohio Super. Ct., Feb. 1870) (Op. of Taft, J., dissenting), *rev'd*, 23 Ohio St. 211 (1872). This opinion is not reported, but is quoted in *School District of Abington Township v. Schempp*, 374 U.S. 203, 215 (1963).

differential causal impact between adherents and nonadherents of a religion. Second, far from treating laws with the same effects equally, it treats certain effects as of constitutional concern only when they are caused by a law already found objectionable on expressive grounds. Third, Establishment doctrine clearly distinguishes the expressive meaning of state action from what state actors intended to communicate, and holds the State accountable for the former. Fourth, it recognizes how the State's communications can expressively harm people by changing their relationship to the State.

We will now explore each of these issues in greater depth below.

State infliction of purely expressive harms, as manifested in sectarian creche displays on public property (which involve no significant material aid to religion or differential material impact between adherents and nonadherents) are unconstitutional.[113] This should not be surprising given that the State's concern in these cases mirrors its concern in Equal Protection doctrine cases: namely that, in endorsing a particular message, the State may affect "a person's standing in the political community."[114] As Justice O'Connor, the Justice who is most responsive in general to the expressivist perspective, powerfully stated: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[115]

Whether state action actually makes nonadherents *feel* like pariahs is irrelevant. Justice O'Connor writes, "The relevant issue is whether an objective observer . . . would perceive [the action] as a state endorsement of [religion]."[116] The focus on objective observers rather than actual observers indicates that the endorsement inquiry is about the objective meaning of the State's message, and not about its subjective psychological effects. This focus is proper, because the constitutionality of state laws cannot be held hostage to observers' subjective feelings. A subjective perspective would make adjudication impossible because people could claim to *feel* like an outsider, either as a result of the State's aiding or as a result of its not aiding, religion.[117] People's

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[113] *See County of Allegheny*, 492 U.S. at 621 (holding that a Roman Catholic Nativity scene in front of a county courthouse violates the Establishment Clause).

[114] *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

[115] *Id.* at 688.

[116] *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

[117] It is no wonder the Court has been careful to insist that, no matter what adher-

psychological reactions to a law matters in the context of constitutional challenges only when their reactions are based on an "objectively" valid understanding of the law's expressive meaning.

Justice O'Connor's concern about the message sent by state involvement in religious matters is also (properly) not related to the cultural impact of state expression. Her concern is not related to whether the State persuades citizens to personally accept such messages, and thereby influences these citizens to regard nonadherents as outsiders. Citizens acting together through the State are already regarding nonadherents as outsiders when they endorse religion. This collective action in itself constitutes a change in the citizenship status of nonadherents, whether or not citizens individually believe such a change is justified. Citizenship is a legal status, not a matter determined by the individual opinions prevalent in the culture. Laws cannot raise or lower citizenship because of how people subjectively respond to them. A law can do so only by virtue of the standing of citizens created in or expressed through the law itself.

The Court's concern with the effects of state legislation regarding religion depends on the Court's background judgments about the expressive meaning of the legislation in question. The case law prominently mentions two possible effects of such legislation: the risk of generating political divisiveness along religious lines, and the consequence of advancing religion. Consider first the possibility that state actions regarding religion could inflame religious divisiveness.[118] The Court has worried that state aid to parochial schools could inspire citizens to identify themselves primarily along religious lines, to regard those not belonging to their religion as antagonists, and thereby to submerge their common identities as U.S. citizens in favor of religious self-identifications. This would divert them from "the myriad [secular] issues and problems that confront every level of government," and inhibit their willingness to work together on political matters of common concern.[119]

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ents to religion may feel about the issue, their claim that the State's refusal to aid religion expresses hostility toward religion is unwarranted. *See, e.g.*, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948) ("To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths . . . does not . . . manifest a governmental hostility to religion . . . .").

[118] "When government . . . allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.'" School Dist. of Abington Township v. Schempp, 374 U.S. 203, 221-22 (1963) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

[119] Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).

Yet there is a fundamental asymmetry in the Court's treatment of the divisive consequences of a law and its expressive meaning. In *Wallace v. Jaffree*, the Court invalidated an Alabama statute providing for a period of "meditation or voluntary prayer" in public schools on the grounds that its purpose was to encourage prayer.[120] However, the Court asserted that a statute providing for a period of meditation would be constitutional if its purpose was neutral between religious and nonreligious uses of that period. Thus, the Court held that a sectarian purpose alone—that is, the expressive meaning of an act alone—could invalidate an otherwise permissible meditation statute.[121] By contrast, "political divisiveness alone [cannot serve] to invalidate [otherwise permissible] government conduct."[122] The Court does not want to allow litigious parties to have their way simply by virtue of the fact that they have picked a fight over an Establishment claim, thereby demonstrating its divisiveness.[123] More tellingly, O'Connor argued that the political divisiveness of a state action concerning religion is at best *evidence* of state endorsement of religion, and not an independent ground for invalidating the action. "[T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."[124] Her analysis mirrors this Article's argument for understanding the significance of the psychological or cultural impact of a law, and is exactly what an expressivist view calls for.

The *Lemon* test requires that a statute's "principal or primary effect must be one that neither advances nor inhibits religion."[125] This looks like a consequentialist test. Justice O'Connor has persuasively argued, however, that a pure effects test makes no sense in light of Establishment Clause case law. Many laws that the Court has held constitutional, such as the exemption from taxes of religious organiza-

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[120] *Wallace*, 472 U.S. at 43 ("Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had 'no other purpose in mind.'").

[121] *See id.* at 56 ("[T]he enactment [of the voluntary prayer act] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose . . . .").

[122] Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

[123] *See id.* ("A litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.").

[124] *Id.* at 689 (O'Connor, J., concurring).

[125] Lemon v. Kutzman, 403 U.S. 602, 612 (1971); *see also* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) ("If [the primary effect of the statute] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.") (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963)).

tions, and Sunday closing laws, have had a "primary effect" of advancing religion.[126] Instead, "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, *whether intentionally or unintentionally*, that make religion relevant, in reality or public perception, to status in the political community."[127]

In this passage, O'Connor clearly marks the distinction we have stressed between expressive and communicative (intended) meaning. A state action can *unintentionally* send a message of endorsement because of what the act means—that is, because of the attitudes and opinions it perhaps unwittingly manifests.

The expression of such meanings is important because it can change a person's status in the political community. As we have argued, social relations are partially constituted by mutual acknowledgment of the terms on which people are relating to one another. This implies that a *failure to express* certain meanings in contexts where such expressions are demanded can constitute a *withdrawal* of the acknowledgment to which people are entitled, and thereby can redefine the social relations constituted by the mutual acknowledgement.

For example, by encouraging the placement of exclusively Christian religious symbols on public property during the Christmas season, state legislators might intend to communicate nothing more than collective joy for the time of year. The ordinance permitting these placements might even say: "To communicate our collective celebration of Christmas, we hereby authorize the placing of the following symbols in the city square." Their action, however, manifests their exclusive conception of the "we" with whom they are collectively celebrating. "We" includes only Christians. Non-Christians do not participate in "our" collective celebration, and thus are excluded from the legislators' conception of who "we" are. The legislators fail to acknowledge the insider status of non-Christians in a context that demands such acknowledgment, and thereby withdraw from non-Christians the social status of fully-included citizens.

Expressivist analysis properly dominates the parts of Establishment doctrine that perform the same function for religious differences among citizens that Equal Protection doctrine performs for racial and ethnic differences among citizens. The Court's longstanding concern

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[126] *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

[127] *Id.* (emphasis added).

about excessive state entanglement with religion indicates that Establishment doctrine serves other purposes as well. We do not claim that expressivist analysis has equivalent analytic power to make sense of this vexed area of law.[128] However, even in the core areas where we believe expressivist theories of law make best sense of doctrine, Adler insists that expressivist concerns are misplaced. What about governmental endorsements of religion that have no cultural effects because citizens ascribe no authority to the government or ignore the meaning of its actions? In that case, he asserts, "[t]the expressivist must either insist on counting that statement [the endorsement] as a distinctive moral wrong, notwithstanding its cultural irrelevance, or she is no longer an expressivist."[129] For us, this is not a difficult question. The short answer is that we do count such endorsements as distinctive moral wrongs. Could constitutional law possibly do otherwise?

C. *The Dormant Commerce Clause*

In constitutional law, the provisions conventionally thought most likely to involve expressive considerations are the Establishment and Equal Protection Clauses. We believe that the expressive perspective extends well beyond these domains to structural features of the Constitution. Issues of national power vis-à-vis the States, and of relationships between States, are also best understood expressively. Expressivism thereby transcends the standard divide between structural issues and issues of rights or equality. Although it would be foolhardy to claim that any one perspective could unify all constitutional doctrines, constitutional practice is pervasively more oriented toward expressive considerations than is generally recognized. This Part illustrates this point by offering an expressive view of the Dormant Commerce Clause. The next Part proposes an expressive account of federalism.

Historically, the most important role of the Supreme Court has not been the (peculiarly post–World War II) task of protecting rights and equality. It has been to define the structural boundaries of the distribution of governmental powers between various institutions. In particular, the Court constrains state legislation that interferes unduly with national powers.[130]

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[128] Michael McConnell's critique of the endorsement test acknowledges that the test might be most apt for cases in which the only effect on religion of state action is symbolic. *See* McConnell, *supra* note 109, at 155-56.

[129] Adler, *supra* note 2, at 1448.

[130] As Justice Holmes famously observed early in the 20th century: "I do not think the United States would come to an end if we lost our power to declare an Act of Con-

Dormant Commerce Clause doctrine addresses constitutional limitations on the powers of States to regulate in ways that interfere unduly with the interstate market. To the Framers, the paradigmatic examples of state regulations infringing on the national commerce power included tariffs and embargoes on out-of-state goods, as well as the retaliatory state laws that tariffs, embargoes, and similar laws often triggered. If any doctrine might be thought grounded in purely consequentialist or welfare-maximizing considerations, the Dormant Commerce Clause would be. Even here, however, at the core of the commercial-affairs Constitution, constitutional doctrine is best rationalized and understood on expressive grounds.

Recall the possibilities the Court has explored for determining limits on state regulation of interstate commerce. At certain times, the Court sought to define mutually exclusive spheres of state and national authority over interstate commerce by differentiating functionally between activities that were "inherently" local from those that were "inherently" national.[131] The commercial integration wrought by transformations in communications, transportation, and technology, however, made this boundary increasingly elusive and nonfunctional. At other times, the Court tried to characterize the purposes behind state laws, aiming to invalidate those that had a "commercial" purpose rather than a purpose to protect health, safety, or welfare.[132] The artificial nature of distinguishing commercial from welfare purposes eventually undermined this approach. At still other times, the Court distinguished state laws that "directly" rather than "indirectly" affected interstate commerce.[133] Absent a theory of how to classify effects as either direct or indirect, however, no such line could be intelligibly applied.

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gress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O.W. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

[131] For a summary of these approaches and the associated cases, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 290-93 (3d ed. 1996). *See also* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 328-38 (1997) (explaining the evolution of the Court's interpretation of Congress's power to regulate commerce). For the classic exposition of 19th-century constitutional practice as organized around the definition of mutually exclusive spheres of power, see Duncan Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 14-17 (1980).

[132] *See* STONE ET AL., *supra* note 131, at 290 (discussing cases in which the Court determined the validity of state statutes by looking at the purpose for which they were enacted).

[133] *See id.* at 291 (discussing cases in which state statutes were invalidated for "directly" regulating interstate commerce).

In the modern period, the Court abandoned the mutually exclusive spheres approach and adopted the position that States and Congress had concurrent authority to regulate interstate commerce. But what limits should bound the scope of state regulation of national markets, and for what reasons? Supreme Court language often suggests that the Court should engage in consequentialist calculations about the effects of state laws and then "balance" these effects to determine if the state law is welfare-maximizing. The canonical formulation of *Pike v. Bruce Church* states: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[134] In an oft-cited article, Noel Dowling has explained this position as holding that a state law is unconstitutional if the burdens it imposes on interstate commerce outweigh the local benefits it generates.[135] As the doctrine developed, the Court repeatedly recited the language of *Pike* and frequently invoked the imagery of balancing.[136] If balancing were the real basis for these decisions, the doctrine would rest on adjudicating the costs and benefits of state laws to the interstate and local markets and would thus reflect the kind of consequentialist reasoning that some scholars believe severely determines constitutional doctrine.

However, as Donald Regan has demonstrated in a series of managerial articles, the modern Court's decisions are best rationalized as turning on whether the state law manifests the protectionist purpose of improving the competitive position of in-state economic actors at the expense of their out-of-state competitors.[137] Regan shows that the decisions in the last decade have become increasingly clear on this principle and correspondingly less likely to invoke the "balancing"

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[134] 397 U.S. 137, 142 (1970).

[135] *See* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 19-28 (1940) (advocating the balancing approach to cases involving restrictions on interstate commerce).

[136] *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (quoting the *Pike* balancing test); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442 (1978) (same); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 804 (1976) (same).

[137] *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094-98 (1986) (defining "protectionism" as it relates to the Dormant Commerce Clause). Regan's precise definition also includes the requirement that the law be "analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo." *Id.* at 1095.

rhetoric characteristic of effects-based doctrines.[138] Regan argues that the Court's practice, when understood as preventing protectionism by the States, best reflects the Constitution's original purposes and structural features.[139] The interesting question involves why constitutional boundaries on state power should turn on protectionist purposes. Why, from among all the state laws that burden the interstate market, are only those with protectionist purposes constitutionally forbidden?

The principal reason is that protectionist state laws are distinctly "inconsistent with the very idea of political union, even a limited federal union,"[140] that informs the American constitutional structure. As Regan puts it, protectionist legislation is "hostile in its essence."[141] As we would put it, protectionist legislation expresses a constitutionally impermissible attitude toward the interests of other States in the political union. The harm inflicted on out-of-state interests is not a by-product of otherwise legitimate aims, but rather is directly intended as a mechanism through which to enhance local economic well-being. State *A* takes economic product from State *B* producers and gives it to State *A* producers just because they are in State *A*. "Such behavior has no place in a genuine political union of any kind."[142] The idea of political union is constituted by a set of normative understandings concerning the relationship among States. States have considerable power, concurrent with the federal government, to affect interstate economic affairs. The power to act for reasons that express an antagonistic conception of state self-interest reflected in protectionist legislation, however, remains off-limits. Structural boundaries on state power are thus defined in expressive terms.

Of course, bad consequences can be expected to flow from protectionist state legislation. Protectionist laws tend to promote politics of divisiveness. Legislation that expresses State *A*'s hostility to State

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[138] *See* Donald H. Regan, Movement of Goods Under the Dormant Commerce Clause and the European Community Treaty 9-12 (undated) (unpublished manuscript, on file with authors and the *University of Pennsylvania Law Review*) (arguing that, since 1986, decisions have become even clearer in emphasizing protectionist purposes over balancing).

[139] *See* Regan, *supra* note 137, at 1124-25 (arguing that the main point of the grant of power to Congress to regulate commerce was to "disable states from regulating commerce among themselves").

[140] *Id.* at 1113.

[141] *Id.*; *see also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 379-81 (1976) (striking down a mandatory reciprocity provision of a Louisiana law for being "'hostile in conception as well as burdensome in result'" (quoting Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964))).

[142] Regan, *supra* note 137, at 1113.

B's interests is perhaps most likely, as an empirical matter, to generate cycles of resentment and retaliation among other States. Individual cases, however, do not require proof of concrete hostile reception and retaliatory effects of this sort. To require such a response would be perverse, as already seen in the Establishment Clause analysis. The very purpose of constitutional litigation is to encourage peaceful legal relief rather than actual regulatory retaliation. The Court has properly denied States the defense of justified retaliation for their own protectionist laws. Instead, the Court has required States to seek legal relief.[143] The determination of constitutional boundaries thus cannot rest on the actual divisive effects of state economic regulation.

Similarly, protectionist state laws can be seen as inefficient because they divert business from low-cost producers without the justification of a legitimate national benefit.[144] Constitutional doctrine, however, is hardly concerned with guarding against inefficient state legislation. States validly enact many laws that burden the interstate market and that are inefficient from an economic perspective.[145] Two points must be made here about the relationship between expressive considerations and consequences. First, expressivist constitutional doctrines are not inattentive to more tangible, concrete, or instrumental consequences. The Constitution embodies the idea of political union because the Framers thought that this principle would generate a "better" union in several senses. Second, however, these ideas and expressive considerations determine which bad consequences raise constitutional concerns. Inefficient state laws are not unconstitutional because they are inefficient. Rather, they are unconstitutional when they result from legislation to which courts ascribe a protectionist purpose. Thus, even with respect to issues of constitutional structure, a principal doctrine rests on expressive considerations.

In refuting expressive foundations for constitutional doctrines, some argue that judicial judgments of legislative purpose will be too arbitrary and indeterminate.[146] To be sure, such judgments will not be

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[143] *See Great Atlantic*, 424 U.S. at 375-81 (holding that a retaliatory measure "unduly burden[ed] the free flow of interstate commerce" and could not be "justified as a permissible exercise of any state power").

[144] *See* Regan, *supra* note 137, at 1124 (objecting to protectionist legislation because of its inefficiency).

[145] One striking example is Maryland's ban, enacted in the wake of the 1970s energy crisis, on vertically integrated oil producers owning retail gasoline stations in the State. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 119-20 (1978) (describing the Maryland statute).

[146] Adler repeats this concern. *See* Adler, *supra* note 2, at 1389-93 (discussing the

mechanical. The balancing tests suggested by *Pike*, however, are even harder to apply. How should courts balance local economic benefits against burdens on interstate commerce, given that the benefits might be environmental-, safety-, or health-oriented, while the burdens are economic? Even if this problem could be solved, one ought to wonder why judges would be particularly good at the complex cost and benefit calculations required by consequentialist balancing. As Regan has observed, if there is anything judges would be thought to have expertise about, it would be the attribution of purposes to political actors, not these exquisitely complex consequentialist calculations.[147]

D. *Federalism*

The more courts understand the Constitution's deep structural features and its rights and equality provisions in expressivist terms, the more compelling the case becomes that constitutional law is pervasively oriented to expressivist, rather than to consequentialist, welfare-maximizing, or functional concerns. Further, we suggest that expressive considerations play a major role in explaining current constitutional constraints on national power vis-à-vis the States, specifically the power to "commandeer" state officials. This proposition requires more speculation, for the Supreme Court has only recently, and only in two cases to date, announced and enforced these federalism-based constraints. The shape and justification of the doctrines, therefore, remains uncertain. Our point is not to endorse these recent decisions, but to suggest that expressive considerations play a major role here.[148]

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difficulties inherent in determining the "intention" of a multimember body).

[147] "'If we ask what subject matter judges as a class are most knowledgeable about (aside from legal doctrine), it is surely politics. It is not physics, chemistry, biology, engineering, economics, social psychology,' or other tools that might be necessary in evaluating the effects, rather than the justifications, of public policies." *Trumps*, *supra* note 1, at 754 n.92 (quoting Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1872-73 (1997)).

[148] That doctrines may be best justified in expressivist terms does not, of course, mean that they are right. There is an enormous wealth of literature debating the merits of constitutionalizing federalism. We do not purport to engage in those debates in any significant way, but merely to suggest a perspective on the developing doctrine that is not explored fully elsewhere and that links those doctrines to other doctrines of constitutional law. For some of the exemplary recent entries in the general debate, see DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (arguing in favor of the revival of the doctrine of federalism in the Court's decisions); Friedman, *supra* note 131 (discussing the benefits of both centrali-

In *New York v. United States* and *Printz v. United States*, the Court held that, in exercising its Article I legislative powers, Congress can neither coerce state legislatures to enact laws[149] nor coerce state executive officials to enforce federal laws.[150] The Court, however, permitted Congress to utilize many other means of obtaining state participation in effectuating federal policies. Congress can provide States with incentives for enacting laws, and offer States money for enforcing federal laws.[151] It can preempt entire regulatory fields, directly displacing state law-making power over specific subjects; conditionally preempt state regulatory powers over a subject unless the State complies with federal conditions; and condition federal grants on the States' willingness to comply with various federal conditions and purposes. The Constitution therefore permits Congress to "encourage" certain state action, but not to commandeer it.[152] We will first sketch an expressive account of these decisions, then compare it to the more immediate functionalist justifications upon which critics and supporters largely have focused.[153]

Under the Constitution, the States are distinct governmental entities in the complex structure of the overall system of democratic self-government. If this distinctness has any meaning, it is that States are not mere administrative units of the national government and cannot be treated as such.[154] The maintenance of States as distinct governmental entities does not, of course, possess an intrinsic value. Rather,

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zation and federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (discussing the evolution of federalist doctrine); Deborah J. Merritt, *Federalism As Empowerment*, 47 FLA. L. REV. 541 (1995) (discussing the Court's focus on empowerment of multiple units of government as a rationale for federalism); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903 (1994) (arguing against using federalism to constrain national policy).

[149] *See* New York v. United States, 505 U.S. 144, 188 (1992) (holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program").

[150] *See* Printz v. United States, 521 U.S. 898, 933 (1997) (applying the rationale of *New York* to strike down the Brady Handgun Violence Protection Act).

[151] *See New York*, 505 U.S. at 166 (noting that Congress retains "the ability to encourage a State to regulate in a particular way [and to] hold out incentives to the States as a method of influencing a State's policy choices").

[152] *See id.* (stating that Congress has the ability to encourage States to act a certain way as long as this encouragement does not take the form of coercion).

[153] Ongoing conversations with our colleague Professor Rick Hills significantly inform this discussion.

[154] As Professor Tribe puts it, States constitutionally must be recognized as "more than just territorially based departments of an omnipotent central authority ...." Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 111 (1999).

the constitutional structure presupposes that federalism will help realize some of the goods typically associated with this institutional configuration: more direct participation in government; more experiment and innovation; the diversity of choices a federal structure permits; the efficiencies of decentralization; and a reduced risk of tyrannical government when political power is divided across two governmental levels.[155] Achieving any of the benefits associated with federalism, however, presupposes that States remain distinct governmental entities, not merely arms of the national government.

If there are any expressive constraints on national power vis-à-vis the States, they likely are based on the distinct governmental status of States, which must be acknowledged and maintained to achieve the benefits associated with federalism. The principle articulated in the pathbreaking *New York* decision seems a particularly appropriate candidate for such an expressive constraint.[156] If there is any judicially enforced aspect to the distinct governmental status of States, it would surely seem to require that the most basic reflection of that distinctness—the choice to enact or not to enact specific laws—not be under the thumb of Congress. Forced legislation, no less than forced speech, can violate constraints on the means national power can adopt to pursue otherwise legitimate ends.[157] The follow-up decision in *Printz* is more difficult and more controversial. In *Printz*, state executive officials were told to implement federal policy, but were not forced seemingly to endorse it in as invasive a way as actually voting to adopt it.[158] The Court presents the decision as an extension of *New York*, and surely that is a plausible, if not compelled, ground on which to understand it. In the Court's view, national commandeering of state executive officials, like national commandeering of state legislative officials, fails to respect the sovereignty of state institutions that

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[155] Historically, of course, federalism also has served some of the most offensive values in American history, such as those associated with slavery. The Constitution has been modified substantially in an attempt to address the pernicious excesses of federalism. States have not been eliminated, however, and their continuing constitutional status is based on the desirable, long-term consequences that our post-Civil War modified federalism seeks to achieve.

[156] *See New York*, 505 U.S. at 188.

[157] For an earlier defense of *New York v. United States* on these grounds, see Pildes & Niemi, *supra* note 1, at 520 n.123.

[158] *See* Printz v. United States, 521 U.S. 898, 926-27 (1997) (describing the Government's argument that the Brady Bill was distinguishable from the statute in *New York* because it did not "require state legislative or executive officials to make policy, but instead issue[d] a final directive to state CLEOs").

the Constitution requires.[159] The political relationships constituted by and expressed through national legislation that simply orders state officials to become vehicles of Congress is, in the Court's view, inconsistent with the structural relationships that the Constitution establishes.

Adam Cox has elegantly documented how much of the language and rhetoric of justification in these decisions sounds in expressive terms.[160] The very word "commandeering" conjures up militaristic images, an extreme exercise of subordination and invasion justified, if ever, only by the most exigent necessities. In *Printz*, Justice Scalia characterizes Congress as having "dragooned" state officials and as having reduced the States to "[p]uppets of a ventriloquist Congress,"[161] which hardly seems consistent with the "[p]reservation of the States as independent political entities."[162] Similarly, at the oral argument of *Printz*, members of the Court depicted Congress as making the States "simply dance like marionettes on the fingers of the Federal Government."[163] This is a language of degradation, subordination, and domination. Such language does not focus directly or immediately upon the dysfunctional or negative policy consequences that some may think commandeering produces. It is language concerned with disrespect for the constitutionally stipulated relations between the federal government and the States.

One might link *New York* and *Printz*'s expressive concerns to specific cultural effects those decisions might produce,[164] such as the tendency, perhaps, of these decisions to make federal policymakers more self-conscious of the values of constitutional federalism. But an expressive justification of those decisions need not rest on such far-reaching cultural effects. Perhaps these decisions will indeed inspire federal policymakers to be more attentive to the distinct governmental status of the States, even beyond the constitutional prohibitions on

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[159] *See id.* at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

[160] *See* Adam B. Cox, *Expressivism in Federalism: A New Defense of the* Printz *Anticommandeering Rule*, 33 LOY. L.A. L. REV. (forthcoming 2000) (unpublished manuscript of Jan. 29, 2000, at 24-26, on file with authors and the *University of Pennsylvania Law Review*) (interpreting recent federalism decisions as grounded in expressivist concerns). This paragraph in the text borrows directly from Cox's fine piece.

[161] 521 U.S. at 928 (citations omitted).

[162] *Id.* at 919.

[163] Oral Argument, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503), *available at* 1996 WL 706933, at *38.

[164] For a discussion of the cultural effects of these decisions, see Cox, *supra* note 160.

"commandeering."[165] Perhaps they will cause citizens to perceive more clearly the sovereignty of the States, and to recognize that these enhanced perceptions will have further desirable consequences for the overall performance of the federal structure.[166] We do not think that the decisions depend upon speculation of this sort. In part, we wonder about the capacity of courts to assess these kinds of matters.[167] To suppose that courts must be making such judgments is to invite skeptical critics to ask whether "anyone think[s] that the Brady Act was really read by a substantial segment of the public as the precursor to the elimination of state sovereignty."[168] Expressive interpretations are concerned with the expressive character of laws, not with the direct cultural effects of decisions, with how some segment of the public reacts to a decision, or with extremely speculative parades of horribles.

Beyond focusing on the decision's language of justification, how would one try to "prove" whether the motivation for doctrines rests on expressive or functional grounds? One means, of course, is to see which grounds provide more convincing rationalizations for the patterns of doctrine.

While the federalism cases can be rationalized on expressive grounds, it is harder to make sense of them from most functional perspectives. First, any time the debate about constitutional doctrines involving governmental structures is framed in complex functional terms, the argument against judicial involvement will become powerful. Is Congress not in a better position than the Court to calculate whether public policy would be enhanced were Congress to possess the power to commandeer state institutions,[169] to employ legislative vetoes, or to empower the President with a line-item veto?[170] Second, the anticommandeering decisions fail to ensure state control over the substance of policy domains because Congress can preempt those

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[165] This possibility is considered in Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 134.

[166] This possibility is considered in Cox, *supra* note 160, at manuscript 20-22 (arguing that perceptions of state autonomy help preserve the States as credible political institutions).

[167] We depart from Cox on this point. *See id.*

[168] Adler & Kreimer, *supra* note 165, at 141.

[169] For one version of this critique, see Christopher L. Eisgruber, Constitutional Self-Government 4 (Sept. 20, 1999) (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

[170] The Court similarly held the latter two unconstitutional in *INS v. Chadha*, 462 U.S. 919, 959 (1983) (finding the legislative veto unconstitutional), and *Clinton v. New York*, 524 U.S. 417, 444 (1998) (striking down line-item veto provisions).

domains. Furthermore, Congress retains other powerful, even compelling means of influencing States to do its bidding. The doctrines constrain only the means Congress uses to gain final control, not the fact that it does retain final control. In response, functionalists have charged, third, that the anticommandeering doctrines are at best mere matters of "etiquette."[171] But surely, this argument continues, constitutional law is about more than etiquette, especially given that concrete rights, powers, and policies turn on these rules of law. If there are no direct functional justifications for the decisions, then they can only elevate form over substance—another manifestation of the always-difficult-to-extirpate impulse toward legal formalism.

Expressive understanding of the federalism cases avoids these functionalist critiques. First, expressive rationales do not depend on complex calculations of effects in particular cases. This is not to say that expressive doctrines are not concerned with consequences. Again, the ultimate justification for such doctrines will be in terms of the consequences for human welfare that they help realize. The way the law seeks to realize these consequences is not in a direct manner through some case-by-case instrumental calculation, but rather indirectly, through ensuring that laws express the constitutionally-required understandings of the appropriate structural relationship.

Second, expressive constraints are indeed constraints on the means used to realize various ends. As such, they are not justified in terms of the end states they permit or produce functionally, but in terms of how well they interpret and protect the underlying values that ground these constraints. Congress's preemption of a field of state policy expresses the superior political competence of the national government. When Congress conscripts state officials and orders them to legislate or execute federal laws, however, state officials become subordinates of Congress.

Third, from an expressive perspective, the charge of mere "etiquette" is nothing more than a disparaging label for means-based legal constraints. All legal rules that constrain some means of achieving ends, but not others, could be belittled as matters of mere etiquette. But "etiquette" is not so trivial: norms demanding public acknowledgment of the respect we owe to one another, or that groups and States owe to one another, are constitutive of the ways important relationships are mutually understood. All could be equally dismissed as

[171] *See* Adler & Kreimer, *supra* note 165, at 134 (suggesting that anticommandeering doctrines "may tend to guard against unthinking violation of [federal] values").

mere etiquette.

Another possibility is that the Court's decisions might be an amalgam of expressive and functional considerations. Professor Hills argues that Congress will not enact efficient policies if it is permitted to use state enforcement services for free. To ensure that Congress considers the opportunity costs of those services, it needs to pay for them.[172] The anticommandeering decisions therefore make functional sense when interpreted as encouraging a properly structured market in intergovernmental programs.

There is certainly force to this point. The oral arguments in *Printz* suggest that this consideration was part of that which troubled the Court.[173] But knowing whether a market in intergovernmental services would inflict functional efficiency, similarly to private markets, would require empirical insight into issues such as potential holdout problems, how politically free States and local governments are to turn down federal grants, and similar matters.[174] The opinions do not emphasize efficiency concerns at all, let alone offer a detailed efficiency-enhancing justification reflecting attention to the workings of a market in intergovernmental services. If these kinds of functional concerns played a role, then it seems most plausible to think that they did so in tandem with the expressive justifications that dominate the Court's language. Justices who believe that commandeering violates central expressive constraints on how Congress must relate to the States might be satisfied by a thin functional explanation—that the decisions might also make for more efficient policy and will not make outcomes drastically worse. We can debate whether the Court has adopted the appropriate expressive understandings of the federal relationship, but here we only suggest that the decisions require the debate to be framed, at least in part, in expressive terms.

A mix of expressive and more directly functional considerations seems best to explain the Court's recent state sovereign-immunity decisions. Justice Kennedy's opinion in *Alden v. Maine*[175] deploys expressivist language perhaps more explicitly than in any other judicial dis-

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[172] *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 862-63 (1998) (concluding that state governments often will forego federal funds if they must pay the related opportunity costs).

[173] *See* Oral Argument, Printz v. United States, *supra* note 163, at *39-42.

[174] Hills does attempt to provide a full policy-analytic justification of anticommandeering on purely functional grounds. *See* Hills, *supra* note 172, at 871 (considering the potential harm to the nation of these entitlements).

[175] 119 S. Ct. 2240 (1999).

cussion of constitutional federalism. The opinion repeatedly refers to the constitutionally-underwritten "dignity" of the States;[176] to the "esteem" with which Congress must regard States as sovereign entities;[177] to the "essential attributes" inhering in the States' constitutional status;[178] and to the requirement that Congress "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[179] The Court's mode of analysis is also predominantly historical, an effort to determine the meaning and character that the States' constitutional status has had in the original and ongoing practice of American constitutionalism.

All this has a strong expressivist cast. Indeed, the entire architecture of sovereign immunity and its qualifications, cabined in as it is with such exceptions as the *Ex parte Young*[180] doctrine permitting declaratory and injunctive actions against state officers, appears preeminently concerned with the form and means by which States are held accountable to federal law.

At the same time, however, more direct functional accounts of damages immunity are readily at hand, and Justice Kennedy explicitly adverts to these as well. Thus, "[u]nderlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."[181] Moreover, in the Court's view, potential financial liability "would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."[182] Note, though, that this functional concern for democratic participation and responsiveness must itself be interpreted and understood expressively, at least to the extent the justification for democracy itself rests upon the ideal of the political equality of all citizens. Thus, the sovereign immunity decisions combine a strong expressivist concern with more specific potential material consequences. Yet, at the same time, those material consequences themselves ultimately must be based upon ex-

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[176] *Id.* at 2247, 2264.

[177] *Id.* at 2268.

[178] *Id.* at 2247.

[179] *Id.* at 2263; *see also id.* at 2268-69.

[180] 209 U.S. 123 (1908).

[181] *Alden*, 119 S. Ct. at 2264. Unanticipated financial liability imposed against nonconsenting States has been a constant concern for Justice Kennedy in particular. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) ("Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs . . . .").

[182] *Alden*, 119 S Ct. at 2264.

pressive concerns for democratic political equality. None of this is to assess whether the decisions are right; the mere fact that decisions rest in part or in whole upon expressive considerations does not, of course, make them "right." This Article claims only that expressive analysis is centrally related to contemporary doctrine in structural areas of the Constitution.

Expressive theories of law, as we have shown, are deeply concerned with the form of the law. The rules of law and morality are pervasively structured through differences in the form with which action is taken, as Leo Katz has so convincingly shown.[183] Examples include distinctions between acts and omissions, between losses inflicted and gains foregone, between doing and letting happen, and between purposeful and accidental consequences. Because these expressive constraints in both private and public law are so central to the structure of law, it is hard to imagine a legal regime that does not distinguish between the "forms" through which action occurs. Such a legal regime is improbable because the underlying values that the law seeks to protect, in both constitutional law and elsewhere, require for their protection that actions be taken in ways that express respect for those values.[184]

IV. ADLER'S INTERPRETIVE ERRORS

Having laid out a general statement of expressive theories of law and their application to specific issues, we turn finally to Adler's critiques. Our account of the basic features of an expressive theory of law differs from the position Adler attributes to expressivism and then criticizes. To a large extent, the target Adler attacks is not one we wish to defend, nor is it one our previous writings have advanced. Even with a proper account of expressivism in view, however, Adler clearly would continue to be troubled by expressive theories of law.

In replying, we therefore face a two-fold task. First, we need to identify precisely where our account of the fundamental concern of

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[183] *See* Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 568-79 (1999) (discussing the formalistic nature of everyday morality that underlies law).

[184] Appropriate concern with *form in law* should not be equated with *legal formalism*. Legal formalism entails applying legal rules, categories, concepts, and forms without regard to the underlying purposes or values those rules ought to serve. Expressive constraints, by contrast, pay attention to these underlying purposes and values. Nothing in expressivist concern for form requires that such a concern be applied in a wooden, mechanical way. For criticism of some modern writers concerned with vindicating formal distinctions who do reason about them in just this way, see Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999).

an expressive theory of law diverges from the position Adler attributes to expressivists. Second, we need to locate our remaining points of contention.

With regard to the first task, the key difference resides in the concept of "expression." In our view, Adler confuses the concept of expression with the concept of communication. Once the concept of expression is understood as expressivists understand it, many of Adler's criticisms of expressive theories clearly miss the point. After explaining the appropriate concept of expression, this Part will argue that our remaining disagreements with Adler are based on some profoundly interconnected philosophical errors he has made regarding the nature of communication, meaning, and collective action.

A. *Confusing Expression with Communication*

The above account of expressive theories of law, morality, and practical reason is concerned with the attitudes and ideas that individuals and institutions *express*, not just with the attitudes and ideas that they *communicate*.[185] To express a state of mind is, among other things, to manifest it in action. To communicate a state of mind is to act with the intention of inducing others to recognize that state of mind by recognizing that very communicative intention. Communicative acts are only a small subset of all expressive acts.

Adler commits a simple but fundamental error in construing expressive theories of law, morality, and reason as concerned only with communicative acts. In his view, expressive theories of law must by definition have nothing to say about action that is not intended to communicate a particular idea—actions that, for this reason, Adler labels as expressively "meaningless." Such actions are expressively meaningless in Adler's view precisely because they are not intended as communicative acts. He manifests this confusion in his attempts to identify expressivist "moral factors" with particular linguistic utterances. But expressive theories of morality and law primarily concern the expression of attitudes—respect and contempt, friendship and hostility, unity and division, endorsement and condemnation, and so forth. Adler instead reduces this concern to one he believes can be captured fully by a concern for linguistic utterances alone.

Adler has two main descriptive or declarative ways of understand-

[185] In our view, this confusion is also central to Steven Smith's critique of the "no endorsement" test in Establishment Clause doctrine. *See* Smith, *supra* note 109, at 286-91. This confusion takes the force out of much of Smith's critique.

ing expression that inappropriately reduce it to linguistic utterances. According to Adler, expressive theories of law may be concerned with either (1) judgments of value or (2) professions of attitudes.[186] But expressive concerns, both in theory and in legal practice, are much broader than these limited alternatives.

Sometimes Adler suggests that what expressive theories of law address is the State's communication of value judgments.[187] According to this view, racial segregation is wrong because it invokes a convention for communicating the value judgment: "blacks are inferior." This construal dramatically narrows the point and scope of expressive theories of law. Uttering such value judgments is not the only way, much less the worst way, to express contempt for blacks. Calling someone "nigger" expresses contempt without expressing any value judgment. But segregating public facilities and under-funding the facilities designated for blacks does so as well. What expressive theories of the Equal Protection Clause find objectionable are all expressions of contempt for blacks, whether or not linguistically equivalent to communicating a value judgment.

At other times, Adler reduces the expressivists' fundamental communications of concern to professions of attitudes.[188] This confuses expression with profession. To express an attitude is, among other things, to put it into action. To profess an attitude is to claim that one has that attitude. Expressive theories of law, reason, and morality say that various agents ought to *express* certain attitudes. They do

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[186] We can, of course, use language to do other things besides describe states of affairs. For example, in uttering different words in the right contexts, we can promise, vote, warn, apologize, command, and so forth. In the ungainly terminology of the philosophy of language, what we do *in* saying something is called the "illocutionary force" of an utterance. This is contrasted both with the "locutionary force" or meaning of an utterance, which is found in the act of saying something, and with the "perlocutionary force" of an utterance, which is what we do *by* saying something. Suppose I say to you, "Please pass the salt." The locutionary force of this utterance is simply the act of uttering these words with their standard English meaning. Its illocutionary force is to request that the addressee pass the salt. Its perlocutionary force—that is, its causal impact—is to induce the addressee to pass the salt. These distinctions were first drawn by J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). This Part focuses on Adler's attempts to reduce the expressive meaning of legal actions to descriptive or perhaps declarative acts. The next Part focuses on an alternative, nondescriptive account of the illocutionary force of the State's communicative acts, arguing that Adler fails to see how communicative acts can be meaningful in creating or dissolving important human relationships.

[187] *See* Adler, *supra* note 2, at 1385-86, 1435-40.

[188] *See id.* at 1386-87, 1444-46 (describing his interpretation of Expressionism as "endorsement" of attitudes).

not say that agents must *profess* these attitudes.[189] Even sincerely and accurately professing one's state of mind may self-defeatingly fail to express it. If a well-meaning State posted signs at public restrooms saying "Jews are welcome here," would this action, by calling attention to the religion of those welcomed, genuinely express welcome for them, or would it express an embarrassing unease over their presence?

Because Adler thinks expressive theories of law and morality are concerned only with linguistic utterances or their equivalents, he supposes that whatever an expressive theory requires us to do can be achieved equally well simply by uttering certain words. For example, he attributes to expressive theories of punishment the view that "[p]unishing crime *C* is meaningful and, in particular, expresses condemnation, in the very same way that the utterance, 'crime *C* is wrong' is meaningful and expresses condemnation."[190] It would certainly save public finances if this were true, but would anyone believe such a position? Certainly we do not, nor do we know of any expressivist writings that take such a bizarre view.[191] Suppose a defendant convicted of a vicious crime is brought before a judge for sentencing. The judge declares, "Your crime is horrific and wrong, and the State condemns you for it," and then releases the convict without punishment. The outraged public would naturally think that the judge did not really *mean* what he said. The public would certainly be right in the sense in which we care about the practice of punishment. To condemn meaningfully requires not a mere utterance, even in the form of a stern lecture from the bench, but a practice of punishment socially understood to express condemnation effectively, such as incarceration. Of

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[189] We note in passing that Adler's claim that noncognitivists cannot claim that certain actions are really wrong or impermissible rests on exactly this same confusion. He seems to think that noncognitivists translate value judgments into professions of attitudes—that they treat "x is impermissible" as equivalent to "I do not approve of x." *See id.* at 1383-84. This interpretation of noncognitivism is mistaken for the same reasons Adler's understanding of expression is erroneous. Noncognitivists claim that value judgments have no truth values. But the claims of the form "I do not approve of x" are straightforwardly true or false. If value judgments essentially referred to attitudes, they would be straightfowardly true or false. Noncognitivists say that value judgments express the speaker's attitudes, not that they profess or refer to those attitudes.

[190] Adler, *supra* note 2, at 1385.

[191] Dan Kahan, one of the expressivists whom Adler criticizes, explicitly rejects precisely this "standard" confusion concerning an expressivist account of punishment. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 600-01 (1996) (noting that judicial communication of condemnation through words does not *express* condemnation in the same way that the action and practice of actual punishment does).

course, the forms of punishment that properly express the requisite condemnation can change as cultural understandings change. The State expresses its condemnation of criminals by punishing convicts for good reason; its expression of condemnation is not confined just to distinct linguistic acts that accompany that punishment. Thus, uttering words does not express condemnation "in the very same way" that punishment does. Such a strange position is not one to which expressivists subscribe. The linguistic utterance does not mean the same thing as the practice of condemnation, even when it purports to. There are some things we can express only with deeds because words alone cannot adequately convey our attitudes.

Any normative theory that concerns itself only with communication would be peculiarly narrow. No expressivist writing of which we are aware rests on this truncated view.[192] But it is only on such an artificially narrow view that Adler can criticize expressive theories of equal protection and establishment for failing to condemn so many state laws that courts should and do find unconstitutional. The actions he classifies as "meaningless," and hence beyond the scope of expressive theories of law, are actions performed without communicative intent. But such actions do not, for that reason, lack expressive content, nor do the courts view them as expressively meaningless. As *Lynch* makes clear, state actions can fail the endorsement test for *unintentionally* "communicating" certain ideas—that is, for expressing them.[193] Adler's narrow conception of expressive theories of law is therefore neither the view theorists advance nor that upon which courts act.[194]

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[192] Kahan, for example, expressly rejects it. *See* Kahan, *supra* note 56, at 419. John Broome commits the identical error of confusing expression with communication in criticizing the expressive theory of practical reason advanced by one of us in ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993). *See* Adler, *supra* note 2, at 1455 n.315 (quoting John Broome, *Review*, 9 RATIO (NEW SERIES) 90, 92 (1996)). Thus the point that Adler cites as a "fatal criticism" of expressive theories of action is based on a simple misinterpretation.

[193] *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("It is only practices having . . . [the effect of communicating government endorsement or disapproval of religion], whether intentionally or unintentionally, that make religion relevant . . . to status in the political community.").

[194] Interestingly, Adler's narrow view of expression does seem to track one very specific doctrinal problem—that of "symbolic" speech under the First Amendment. Precisely because so much conduct is expressive in the sense we invoke, the First Amendment, if extended beyond pure speech at all, could not possibly protect all conduct that also had expressive character. Instead, only conduct that is expressive in the very specific sense of intending to communicate specific ideas and emotions (and perhaps also likely to be understood as communicative) is potentially protected—and it is principally protected in the context in which government regulation aims at the supression of the ideas intended to be communicated. For a concise and illuminating

Adler's confusion of expression with communication further leads him to artificially separate expressive from justificatory accounts of legal doctrine. Recall that according to our view, attitudes are expressed in the purposes for which people act and the principles that justify their action (that is, in principles of form *R*). A person suffers an expressive harm in being treated in accordance with principles that express inappropriate attitudes toward her. State actions that rest on such unjustified principles can be unconstitutional for that reason, apart from their effects. Legal doctrines that invalidate action by sole reason of their purpose, or on account of the failure of their purpose to justify the means selected, are therefore expressive in form.

Ironically, Adler's own view of individual rights and of equal protection in his other scholarship makes the most sense from an expressive perspective. In his other work, Adler defines constitutional rights as rights against rules, as opposed to rights to certain outcomes.[195] This is meant as a counter to the view that rights are all-purpose trumps. Adler's view on the nature of rights is one we share.[196] In other words, individuals have rights that protect against certain of their interests and liberties being infringed by the State *for certain purposes.* But this is precisely to define rights in terms of expressive principles of form *R.* Similarly, Adler proposes that a law that "unjustifiably discriminates on racial lines" violates the Equal Protection Clause.[197] Yet Adler, understandably, leaves unspecified his notion of what makes racial discrimination "unjustified." When it comes to paying off this promissory note it will be hard to offer such an account, we believe, without including hostile and contemptuous purposes

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discussion of this complex problem, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 825-32 (2d ed. 1988).

In essence, Adler would reduce all constitutional concerns surrounding state expression to the narrowly targeted protection speakers receive for symbolic speech under the First Amendment. Of course, the specific values the First Amendment protects are limited and not co-extensive with the diverse values and purposes of other constitutional provisions, such as structural provisions or those securing against the establishment of religion.

[195] *See* Adler, *supra* note 32, at 13-42 (arguing that "[c]onstitutional rights in our own legal world are structured, not as shields *around* particular actions, but as shields *against* particular rules").

[196] *See generally* Richard H. Pildes, *Dworkin's Two Conceptions of Rights,* 29 J. LEGAL STUD. 309, 309 (discussing "the view that two distinct conceptions of the justification and structure of constitutional rights can be found in constitutional theory"); *Trumps, supra* note 1 (explaining how rights function in a variety of ways). Some rights might be broader than the rights against rules account, but for the most part, Adler's formulation captures well actual constitutional practice.

[197] Adler, *supra* note 2, at 1431.

among the "unjustified" discriminatory purposes. Any credible attempt to specify Adler's criterion, we suggest, will have to include expressive considerations.

Adler compounds his confusion of expression and communication by failing to distinguish formal from material moral principles. His entire "general argument" against expressive theories of moral and legal norms consists of an attempt to enumerate all of the plausible substantive "moral factors" that could bear on an assessment of action, and a demonstration that virtually none of them (except a deontological constraint against lying) have communicative content. This argumentative strategy works only if the constraining power of an expressive theory must be located in some substantive considerations that are on par with other moral factors, such as welfare and desert. But this is akin to arguing that the operation of multiplication is irrelevant to mathematics because it is not found in an enumeration of all of the types of numbers (rational, real, imaginary, and so forth). Expressive theories constrain action by constraining the ways in which we take various moral factors into consideration. They specify the form of normatively required constraints on action, not the contents of specific moral factors.

Expressivism is not an independent, substantive moral or political philosophy that specifies content-laden grounds on which the State cannot act. The contents of expressive legal constraints must come from the values that inform the constitutional order, such as the principles that political liberalism require or that specific constitutional provisions guarantee: principles of equal concern and respect, religious toleration, equal citizenship, and the like. Expressivism explains how our practices *realize* those substantive values in *expressing* them. We *express* equal concern and respect, religious toleration, a conception of ourselves as equal citizens, and so forth by following principles of form *R*. Expressivism argues that these values are realized, in large part, by action on formal principles that constrain the means through which the State pursues various legitimate ends.

B. *Communication, Shared Understandings, and Social Relationships*

Given our fundamentally different understanding of the concept of expression, it may seem as if all of Adler's criticisms fail to join issue directly with us. He critiques a much narrower theory than we or other expressivists advocate, a theory that evaluates only communicative acts.

Yet it remains true that even on the right account of expressivism,

communicative actions play an important role. At this point, we join issue with Adler more directly. On this point, we do not charge Adler with misunderstanding expressive theories, but we do have some philosophically deep disagreements with Adler's approach.

At root, we disagree with Adler about how communicative acts make a difference to the world. In our view, successful communicative acts establish shared or collective understandings between speaker and audience. When what is successfully communicated (mutually acknowledged) is the speaker's attitudes toward those addressed, an understanding of the attitude that governs the speaker's interactions with the addressee is shared between them. Such understandings are constitutive of social relationships.[198] These understandings can be established through communications with various kinds of what formal philosophy of language awkwardly refers to as "illocutionary force."[199] Some communications invite or dare people to enter social relationships. Legal communications of state attitudes typically *impose* social relationships on people: they change their legal or citizenship status. These relationships may be valuable, as relations of equality among citizens are, or harmful, as relations of contempt and hostility are. Because social relationships are built on mutual acknowledgment and thus shared understandings of the terms on which the parties interact, failures of such acknowledgment (or failures to communicate in contexts where communication is demanded) can have meaning too—as withdrawals or repudiations of established, assumed, or hoped-for relationships.

Adler does not see how communications (or failures to communicate) can establish or break social relationships. This lies at the root of his failure to recognize the distinctive character of expressive harms. We trace this failure to two intimately connected philosophical problems. First, Adler denies the very possibility of genuinely collective or shared understandings. Groups, he appears to think, cannot share beliefs in any robust, nonreductive sense. Second, he adheres to Grice's speaker-centered theory of meaning and Searle's speech-act theory of what we do in speaking (the "illocutionary force" of speech). The two errors are of a piece. According to a Gricean

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[198] Of course, the speaker and addressee may negotiate over the terms of their relationship. We do not wish to suggest that communicative creation of social relationships is a unidirectional act from the speaker to the addressee. Normally, the parties to a relationship take turns speaking and listening.

[199] *See supra* note 186 (providing a brief overview of John Austin's approach to language's many uses).

view of communication, meanings are primarily identified with the speaker's intentions. According to Searle's speech-act theory, communication itself is viewed as a unilateral act on the speaker's part. These individualistic and reductionist views represent the goal of communication as producing a unilateral response on the part of the addressee. In the classical Gricean account, the aim of communication is to induce a belief. Such accounts therefore classify the addressee's understanding of an utterance as a purely incidental causal consequence of speaking—that is, as part of its "perlocutionary force."

The Gricean and Searlean views fail to acknowledge that communication is a joint act—something we do together. As one critic observes of Searle, "For him, linguistic communication is like writing a letter and dropping it in the mail. It doesn't matter whether anybody receives, reads, or understands it."[200] Searle's view is flawed because the completion of the communicative act requires that the addressee understand what the speaker has said. Absent such an understanding, the speaker has not communicated anything. In the standard terminology of speech-act theory, the addressee's grasp of a communication is part of its illocutionary force—what we do in communicating—not merely part of its perlocutionary force—what the speaker causes by communicating.[201] Communication is not something a speaker can do alone; it is something the speaker and addressee do together.

Once it is understood that communication is a joint act, our conception of the constitutive aim of communication must be revised. The goal of communication is not merely to induce a unilateral response in the addressee. It is to bring out certain ideas between us, in public space, in order to make what is communicated an object of mutual, or shared, recognition.[202] The subject of this shared recognition is us, not you and I considered separately. Adler cannot see this because he thinks group mental states must somehow be reduced to unilateral mental states of all, or most, members of a group.[203]

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[200] HERBERT H. CLARK, USING LANGUAGE 137-38 (1996).

[201] "Speaker's meaning is a type of intention that can be discharged only through joint actions. Illocutionary acts . . . can be accomplished only as parts of joint actions . . . ." *Id.* at 139.

[202] Charles Taylor is one of the main theorists to advance this view. *See* CHARLES TAYLOR, *Language and Human Nature, in* HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS I, 215, 215-47 (1985); CHARLES TAYLOR, *Theories of Meaning, in* HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS I, *supra*, at 248, 248-92. For an extended critique of Grice from this point of view, see Charles Taylor, Book Review, 19 DIALOGUE 290 (1980).

[203] *See* Adler, *supra* note 2, at 1390 ("[I]f the action of a multi-member legal body is to possess a genuine speaker's meaning, the collective intention that confers such

Suppose what is communicated between the speaker and addressee is the speaker's attitude toward the addressee. Mutual acknowledgment of this attitude jointly commits the speaker and addressee to understanding this attitude as governing the speaker's interactions with the addressee. This joint understanding is constitutive of the nature of the social relationship. The illocutionary force of this communicative act is carried simply by shared understanding of what is communicated, not by any further psychological reactions (for example, acceptance, defiance, or psychological trauma) of the addressee to what the speaker has said.

Adler fails to see how communications of attitudes can, in establishing shared understandings, make and break social relationships and thereby expressively benefit and harm people. This causes him to cast about for alternative accounts of how such communicative acts could matter. The only place he can locate the significance of communication is in the narrow space of what it linguistically means. The effect of these definitional moves is to press expressivists into a dilemma: either (1) communications can mean something, but then it is hard to see how they can matter very much, or (2) communications can matter, but not in virtue of what they mean. Expressivists are impaled on the first horn of the dilemma if they focus on the speaker's unilateral act of uttering words with a conventional sentence-meaning. Given Adler's Gricean/Searlean framework, this act in itself cannot matter much, any more than the utterances contained in a letter dropped in the postbox can matter if the letter is never received.

To avoid this problem, Adler suggests that expressivists intend to focus on the listener's unilateral act of reacting to what the speaker says. This impales expressivists on the second horn of the dilemma, because to focus on the listener's psychological reaction to the communication is to focus on its causal impact. This seems to be what Adler thinks expressivists must mean to do. He repeatedly argues that expressivists must think communications matter to equal protection or establishment doctrine only when and because they inflict psychological trauma on the targets of a stigmatizing state expression, they reduce some people's social standing by persuading other listeners to accept the views and attitudes expressed in the communication, or they have some other causal influence on listeners' psyches. Now the jaws of the dilemma close. In the first case, Adler asserts that expressivists can lay claim to a genuinely expressive theory, but one that is

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meaning upon that action must be some function of the individual intentions of the members.").

rather implausible and irrelevant. In the second case, the theory is more plausible, but it can no longer claim to be expressivist, since even consequentialists would embrace a theory of law that focused on such effects.

The entire dilemma dissolves, however, as soon as successful communication is properly understood as a joint activity of the speaker and addressee acting together, rather than simply as a unilateral activity of one or the other party. Communication establishes a public space of meanings and shared understandings between the speaker and addressee. These understandings have normative force for both sides because they are constituted by joint commitments. For a meaning or understanding to have normative force, those for whom it is normative must be able to get it wrong. Meanings can therefore neither be reduced to the speakers' intentions—to what the speakers think they are saying—nor to the addressees' subjective reactions to what is said. The meanings of actions with which expressivists are concerned are normative and cannot be reduced to purely subjective, psychological, or empirical concepts such as speaker intentions and addressee reactions. Both the speaker and addressee are held accountable to public meanings. This means that the moral or legal import of both state action and public reactions to state action depends upon a prior judgment of the expressive meaning of the state action. The meanings of action do matter after all, independent of their causal consequences.

This conclusion applies with particular force to legal communications of state attitudes, which often impose different legal statuses on the citizens and residents of a State—as first- or second-class citizens, insiders and outsiders, innocents and convicts, and so forth. To avoid ascribing moral import to these legal communications in themselves, Adler shifts focus to the subjective reactions of addressees to these communications. This puts him in the bizarre position of having to argue that a law can be constitutionally invalid simply because it makes people feel like they are inferior or outsiders, or induces other people to regard them that way, but cannot be invalid because it manifests the State's poor regard for them. This makes the State accountable for everyone's attitudes but its own. Such a position could seem credible only to someone who denies that collectives can have mental states. As we have shown above, this is philosophically wrong and would carry untenable moral and legal implications. Of course we can analyze corporations as nexuses of contracts or study the incentives institutional environments give to individual actors within

them. It is a mistake, however, to confuse the benefits of these forms of positive social science with the normative concerns of the law. The law could hardly deny collective agency to corporate or legislative institutions, and there is no theoretical or philosophical justification for doing so.

CONCLUSION

This Article has offered the first general, theoretical account of the aims and features of expressive theories of law, morality, and practical reason. We have sought to explain with some precision what it means for individual and collective action to express purposes, values, and attitudes, and why it is that law and morality ought to care about these expressive dimensions of individual and collective action. Using constitutional law as an example, we have also suggested that existing legal practice is already oriented in significant respects toward expressive concerns. As with many reconstructive projects, our hope is that a deeper grasp of the structure and justification of expressivist approaches to law will enhance our collective capacity to better realize the aims of such approaches. The expressive approach to law captures many intuitive understandings of the concerns of law. We hope to have given more credence to those views by accounting for their deep foundation.

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