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CONFLICT AVOIDANCE IN CONSTITUTIONAL LAW

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Hard cases present a dilemma at the heart of constitutional law. Courts have a duty to decide them—to vindicate rights, to clarify law—but doing so leads to errors (judges do not know the “right answer”) and strains the credibility of courts as impartial decision makers. Theories of constitutional adjudication tend to embrace one horn of this dilemma. We explore a principle for deciding hard cases that appreciates both. We argue that courts should decide hard cases against the party who could have more easily avoided the conflict in the first place. This is the conflict-avoidance principle. The principle builds on and systematizes “least cost avoidance” in private law and myriad constitutional doctrines. We apply the principle to several cases, generating insights into discrimination, affirmative action, religion, and so on. The principle represents a form of common-law constitutionalism, and it reveals connections between rights, markets, and State power. It also invites objections, to which we respond. Conflict avoidance is not “value-neutral,” and it cannot resolve every hard case. But it can resolve many in a practical way.

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Take any demand, however slight, which any creature, however weak, may make. Ought it not, for its own sole sake, to be satisfied? If not, prove why not? The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way.

William James (1891)¹

INTRODUCTION

How should courts resolve hard constitutional cases?² On the one hand, deciding them on the merits strains courts’ credibility as impartial

¹ William James, *The Moral Philosopher and the Moral Life*, 1 *Int’l J. Ethics* 330, 339 (1891).

² See Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1060 (1975) (defining hard cases as ones where “no settled rule dictates a decision either way”).

decision makers, especially when they engage in judicial review of legislation where the constitutional text is vague and the interests at stake essentially political.³ On the other hand, courts are constitutionally charged with deciding such cases. A refusal to decide them amounts to shirking that responsibility.⁴ Theories of constitutional adjudication often embrace one horn of this dilemma.⁵ This Article explores a principle that appreciates the force of both horns: *courts should decide hard cases against the party who could have more easily avoided the constitutional conflict in the first place*. We call this the conflict-avoidance principle.

³ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 971–73, 977–78 (1987) (criticizing interest balancing). For a thorough and optimistic account of the capacity of courts to balance interests optimally, see generally Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans., Oxford Univ. Press 2002) (1986) (offering an account of constitutional rights that connects the analytical, empirical, and normative dimensions of legal doctrine); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 *Ratio Juris* 131 (2003) (arguing that there is a rational structure within balancing). Roughly speaking, interest balancing focuses on which party (or possibly which group) can bear a loss in court more easily. Are the losses to this side (or to this principle) outweighed by the gains to the other? Our enterprise is quite different. We focus on which party could have avoided more easily the conflict that led to the hard case in the first place.

⁴ U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 70 (1962) (explaining that not deciding cases must “be justified as compatible with the Court’s role as defender of the faith”).

⁵ Theories of judicial deference embrace the first horn by treating most constitutional issues as political ones appropriately decided by the political branches. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 129–39 (1893) (explaining origins of judicial review); see also Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 7–8 (2004) (comparing early judicial review to contemporary practice). Originalist theories, “moral” interpretations, and “living constitutionalism” tend to treat constitutional questions as essentially legal questions with which the Court is properly tasked with deciding, thereby embracing the second horn. See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 45–46 (1997) (discussing issues with living constitutionalist interpretations); James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 *B.U. L. Rev.* 1171, 1172–73 (2012) (offering a “complete, ecumenical approach to constitutional interpretation”); David A. Strauss, *The Living Constitution* 41–44 (2010) (arguing that judges and lawyers are not properly equipped for originalist interpretation). Process theory and prudential approaches attempt to reconcile the two. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 4–5 (1980) (arguing that judicial review is best justified when it can be understood as a mechanism for improving the democratic process); Bickel, *supra* note 4, at 64 (“No good society can be unprincipled; and no viable society can be principle-ridden.”). Our approach draws on elements of both the process and prudential traditions.

To preview the principle, consider an example. Suppose a student wears a Confederate flag shirt to school, in violation of the dress code, and gets disciplined. She argues that this violates her free speech rights, and the school responds that it has the authority to ensure a conducive learning environment.⁶ For the sake of argument, assume the case is hard (we will say more about “hard cases” below). A court applying conflict avoidance would compare the relative costs to the parties of avoiding the conflict in the first place. Could the student have expressed herself in another way? Could she have transferred to a school with a more permissive dress code? Could the school have ensured a conducive environment without banning the flag? Whoever could have avoided the conflict more easily would lose.

This is a simple example, but the principle applies the same way in real, controversial cases like *Masterpiece Cakeshop*, *Our Lady of Guadalupe School*, *Fisher*, and *Janus*.⁷ We will examine these cases and others below.

Applying the conflict-avoidance principle has several advantages. For one thing, it requires courts to decide cases instead of deflecting or delaying judgment.⁸ Second, and more important, applying the conflict-avoidance principle requires courts to decide cases by looking to relatively concrete facts and considerations, rather than to abstract political values. Such an approach not only plays to courts’ institutional strengths; it may also produce a pattern of decisions that vindicate the relevant values where they are needed most. That, at least, is the theory of the common law.⁹ As Oliver Wendell Holmes famously said, “[i]t is

⁶ Cf. *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 538, 548 (6th Cir. 2001) (noting that a “disruption-free educational environment is a substantial government interest”); *Defoe v. Spiva*, 625 F.3d 324, 335 (6th Cir. 2010) (holding that the school officials’ concern that displays of the Confederate flag would be disruptive was reasonable).

⁷ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (on discrimination and religion); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (same); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (on affirmative action); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (on speech).

⁸ Cf. *Bickel*, *supra* note 4, at 71 (approving Justice Brandeis’s statement that “[t]he most important thing we do . . . is not doing” and observing that Brandeis “had in mind all the techniques . . . for staying the Court’s hand”).

⁹ Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. 883, 883 (2006) (“Treating the resolution of concrete disputes as the preferred context in which to make law . . . is the hallmark of the common law approach.”).

the merit of the common law that it decides the case first and determines the principle afterwards.”¹⁰

Finally, the conflict-avoidance principle encourages parties to avoid the sorts of conflicts that produce hard cases. Deciding such cases imposes real costs. In addition to financial costs, such cases can undercut the legitimacy of courts as judicial institutions, especially when the political stakes are high.¹¹ Furthermore, deciding hard cases can lead to errors in the sense that judges do not know the “correct” answer (if they did, the case would not be hard). We think reducing the incidence of hard cases is itself a benefit.¹²

The conflict-avoidance principle has roots in private and public law. It relates to least cost avoidance, which Guido Calabresi identified and developed in tort law.¹³ It also resonates with various constitutional doctrines—such as time, place, and manner doctrines in First Amendment law—that inquire into the alternative courses of action available to the parties to a dispute.¹⁴ Also, some scholars have advanced proposals that sound in cost avoidance.¹⁵ Thus, we do not offer a radically new approach

¹⁰ Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870) (unsigned article by Oliver Wendell Holmes).

¹¹ Precisely that concern underlies the Supreme Court’s practice of treating some politically charged issues as “political questions,” incapable of impartial judicial resolution. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that cases lacking “judicially discoverable and manageable standards” or requiring a “policy determination of a kind clearly for nonjudicial discretion” involve political questions).

¹² We relax the assumption that deciding hard cases imposes more costs than benefits. See *infra* Part V.

¹³ Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 135 (1970) (advocating placing liability on “those acts or activities . . . which could avoid the accident costs most cheaply”).

¹⁴ See *infra* Part IV.

¹⁵ The clearest example would appear to come from Professor Tang, who has two papers in draft form. See Aaron Tang, *The Costs of Supreme Court Decisions: Towards a Best Cost-Avoider Theory of Constitutional Law* (Sept. 27, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457533 [<https://perma.cc/3UAQ-WF-WW>] [hereinafter Tang, *Cost-Avoider*]; Aaron Tang, *Constitutional Law After Mazars, Vance, & June Medical: The Case for Harm-Avoider Constitutionalism*, 109 *Calif. L. Rev.* (forthcoming 2021) (on file with authors) [hereinafter Tang, *Harm-Avoider*]. Professor Tang’s work and ours, which developed simultaneously and independently, are quite different. In brief, we aim to minimize conflicts by placing the onus on the party who could have avoided the dispute at lowest cost, whereas Professor Tang aims to minimize the “costs” of judicial decisions by placing the onus on the group that could bear the loss most easily. See *infra* note 46. Professor Tang’s work relates more closely to interest balancing, covering, or mitigation (i.e., bearing loss after the fact) than to a conventional understanding of avoidance (preventing the loss from occurring).

to constitutional adjudication. Rather, we collect strands of reasoning that already permeate law and legal scholarship and show how, once systematized, they yield a promising and innovative approach to hard cases.

Why hasn't anyone systematized these ideas before? Why haven't judges and scholars, many of whom are familiar with least cost avoidance, already applied these ideas to constitutional law? Here is one explanation. Constitutional adjudication often proceeds "top-down."¹⁶ The constitutional principles at stake loom large, sweeping away particular case facts. In contrast, least cost avoidance proceeds in a "bottom-up," context-sensitive fashion.¹⁷ Courts concentrate on the facts (who could have avoided the crash more easily?), rather than on how to best apply the

For other scholarship that sounds in conflict avoidance, see, for example, Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 *BYU L. Rev.* 167, 193 (arguing that free exercise claims by service providers should not prevail over non-discrimination claims by LGBT customers in communities where "discrimination is still widespread"); J.H. Verkerke, *Is the ADA Efficient?*, 50 *UCLA L. Rev.* 903, 941 (2003) (applying least cost avoidance to disability law in the workplace); Robert D. Cooter, *The Strategic Constitution* 129–32 (2000) (connecting rights to mobility costs); Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 *Yale L.J.* 647, 666–86 (1971) (book review) (applying least cost avoidance to pollution).

We note that conflict avoidance can be seen as a distinct kind of "minimalist" theory of adjudication. See, e.g., Cass Sunstein, *Burkean Minimalism*, 105 *Mich. L. Rev.* 353, 355–56 (2006). Minimalist theories direct judges to concentrate on the facts of the case. See *id.* at 376 (describing as non-minimalist an approach that is "not limited to the facts of particular cases"). Conflict avoidance directs judges to focus on a particular subset of facts, namely on who could have avoided the conflict more easily.

Finally, we note that our argument is consistent with a broader, emerging approach to constitutional law. See generally Robert D. Cooter & Michael D. Gilbert, *Constitutional Law and Economics*, in *Research Methods in Constitutional Law: A Handbook* (Malcolm Langford & David S. Law eds., forthcoming 2021) (discussing the emergence of economic theory as applied to constitutional law).

¹⁶ Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 *U. Chi. L. Rev.* 433, 433 (1992) (defining top-down reasoning as when "the judge or other legal analyst invents or adopts a theory about an area of law—perhaps about all law—and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory").

¹⁷ For an analysis of the formal difference between bottom-up and top-down reasoning, see Charles L. Barzun, *Justice Souter's Common Law*, 104 *Va. L. Rev.* 655, 708–13 (2018) (explaining that, whereas under top-down reasoning, courts apply a fixed major premise (or rule) to the minor premise (or facts) in order to deduce a conclusion, with bottom-up forms of reasoning, the judge aims to let the facts of the case themselves be the guide to the proper outcome).

relevant legal principles. Applying least cost avoidance to the Constitution requires taking a bottom-up approach to a subject dominated by top-down reasoning.¹⁸

Gesturing at least cost avoidance and “bottom-up” reasoning is easy. The hard part is translating it to constitutional law. We take the main contribution of our project to lie in showing what the translation requires.

The conflict-avoidance principle is not a panacea; nor does it claim “value-neutrality.” But it does offer a fresh way of thinking about how to resolve hard cases. Rather than seeing constitutional conflicts as brute clashes of values—liberty vs. equality, positive liberty vs. negative liberty, substantive equality vs. formal equality—courts might make more progress by looking at the concrete difference that vindicating those values would have made in parties’ actual lives. The goal is to see what *work* rights claims are doing in social and political life.

We develop our argument in five Parts. Part I clarifies the scope of the principle: we confine its use to hard cases, where “hard cases” has a specific meaning that we will explain. Part II briefly reviews least cost avoidance in private law, drawing out a key distinction between avoiding costs and bearing them. Part III operationalizes the conflict-avoidance principle by developing a doctrinal test for its application. Part IV applies the test to real cases, including recent, controversial cases before the Supreme Court. In Part V, we respond to various objections. The Conclusion develops a broader point. Although the conflict-avoidance principle requires no special commitment to private ordering or negative liberty, it does illuminate a connection between markets, rights, and State power.

I. DELIMITING THE DOMAIN: HARD CASES

Soon we will develop and apply the conflict-avoidance principle to cases, including controversial cases on hot-button issues. But first, we must lay some conceptual groundwork.

The conflict-avoidance principle has roots in least cost avoidance, a framework for analyzing private law. Least cost avoidance promotes *efficiency*. In contrast, the powers, immunities, rights, and duties of

¹⁸ Of course, our approach is top-down in the sense that it involves applying the conflict-avoidance principle to many different cases. But the point is that it is a *meta*-principle that directs courts to focus on the sort of factual nuances that bottom-up approaches consider critical.

constitutional law are generally understood to embody principles of political morality or justice.¹⁹ That difference matters. We do not seek to rebuild constitutional law from the ground up to serve efficiency; nor do we advocate invoking the conflict-avoidance principle in all cases. Instead, we explore the use of conflict avoidance as a default method—a tie-breaker of sorts—for resolving *hard cases*, specifically hard constitutional and quasi-constitutional cases. Narrowing the domain in this way requires saying something about “hard cases.”

By “hard cases” we mean cases where uncertainty exists with respect to the proper application of the legal sources *and* with respect to the moral principles the relevant law may embody. In other words, we mean cases where the demands of law and justice are unclear. In such cases, the court cannot simply assign priority to the weightier constitutional principle because the court does not know which principle that is.²⁰

We remain agnostic on several questions that any mention of “hard cases” might seem to raise. First, we take no position on how best to characterize hard cases as a jurisprudential matter. Our analysis is consistent with the view that the law “runs out,” leaving courts with room to legislate within the “gaps.”²¹ But it does not require that view. We could endorse Ronald Dworkin’s view that the law never “runs out”—that rarely is there no “right answer.”²² The ideas we develop only require epistemic uncertainty as to the right answer, not metaphysical indeterminacy.²³

We also remain agnostic on interpretive methods. We need not adopt any particular theory of constitutional interpretation. For instance, we

¹⁹ Cf. Ronald Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 196 (1980) (criticizing normative claims of economic analysis of the law).

²⁰ In this way, our definition differs from Dworkin’s. See Dworkin, *Hard Cases*, *supra* note 2, at 1060 (defining hard cases as those where “no settled rule dictates a decision either way”).

²¹ Ronald Dworkin, *Law’s Empire* 9 (1986) (describing and criticizing the view of law according to which at certain points “the judge has no option but to exercise a discretion to make new law by filling gaps where the law is silent”); see also H.L.A. Hart, *The Concept of Law* 252 (3d ed. 2012) (arguing that some cases are “legally unregulated and . . . to reach a decision in such cases the courts must exercise . . . ‘discretion’”); Benjamin Cardozo, *The Nature of the Judicial Process* 14 (1921) (“[C]odes and statutes do not render the judge superfluous There are gaps to be filled. There are doubts and ambiguities to be cleared.”).

²² Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. Rev. 1, 2 (1978) (“I now wish to defend the unpopular view” that almost all hard, interpretive questions “may well have a right answer.”); see also Hart, *supra* note 21, at 252 (“Dworkin rejects the idea that the law may be incomplete . . .”).

²³ It requires the *inconclusiveness*, not the *indeterminacy*, of legal materials. Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* 277 (1996).

take no stance on whether interpreting constitutional provisions requires making reference to background principles of morality, either because the original understanding so requires or because doing so would make the best sense of our constitutional practice.²⁴ Whether the conclusions that a case is “legally hard” and “hard as a matter of political morality” are independent or mutually reinforcing does not, for our purposes, matter.

Finally, we make no judgment on the proper weight accorded to constitutional sources. A hard case could result from a conflict among multiple, legitimate sources of constitutional law, such as a conflict between precedent and original understanding.²⁵ Or it could arise because a privileged source, such as the original understanding of the text, is unclear, relegating its resolution to the “construction zone,” where other sources for constructing the law cut in different directions.²⁶

Of course, when it comes to determining whether any particular case *really is hard*, thereby triggering the conflict-avoidance principle, the judge deciding the case must make controversial judgments. She must interpret the relevant sources of law and, in so doing, make an implicit judgment as to what the appropriate, or at least permissible, sources of constitutional interpretation are. Then she must make a judgment as to how difficult a case must be for it to count as “hard.”²⁷ Finally, she must decide whether the case at hand meets that standard.

²⁴ Compare William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349, 2358 (2015) (“What is important is not whether or not constitutional interpreters always look exclusively at the original meaning, but whether they look at those things in cases where the original meaning would say not to.”), and Hart, *supra* note 21, at 250 (“[T]he rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called ‘soft positivism.’”), with Dworkin, *Law’s Empire*, *supra* note 21, at 90 (stating that general theories of law “try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice.”).

²⁵ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7, 12–21 (1982) (surveying various types of constitutional argument, including, among others, textual, historical, prudential, and ethical arguments); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1193–94 (1987).

²⁶ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 471 (2013); see also Baude, *supra* note 24, at 2355 (discussing assigning weight given to constitutional sources and arguing that “the original meaning of the Constitution is the ultimate criterion for constitutional law . . . [J]udges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them”).

²⁷ Cf. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 *U. Chi. L. Rev.* 81, 90 (2017) (observing disagreement among Supreme Court Justices over the degree of ambiguity required to trigger the rule of lenity); Note, “How Clear Is Clear” in *Chevron’s*

We appreciate the challenge of making those judgments, but our project does not depend on them. Our argument just requires the existence of a class of cases in which application of *whatever criteria the interpreter thinks proper* produces a hard case, leaving the interpreter in a position of uncertainty. Courts could benefit from a tiebreaking rule in exactly that kind of case.

To make the point concrete, consider *Bostock v. Clayton County*.²⁸ The question was whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation or gender identity.²⁹ By a 6-3 vote, the Supreme Court answered in the affirmative.³⁰ Notwithstanding the political controversy surrounding the dispute, Justice Gorsuch wrote that “[t]he answer is clear.”³¹ For Justice Gorsuch, *Bostock* apparently was not a hard case, so he would have no need for the conflict-avoidance principle. For others who thought the case was hard—the word “sex” in the statute seems broader than the intent of the lawmakers who drafted it—the conflict-avoidance principle could apply and break the impasse.

II. LEAST COST AVOIDANCE IN PRIVATE LAW

Before developing the conflict-avoidance principle for constitutional law, we consider its twin, least cost avoidance (“LCA”) in private law. Our objective is not to analyze LCA in full, just to draw out ideas relevant to our project, including the distinction between *avoiding* costs ex ante and *bearing* costs ex post. This distinction clarifies some possible relationships between LCA and justice.

According to LCA, law should place liability on whichever party could have taken precautions to avoid the conflict or accident most cheaply.³² We illustrate with a humble (if much-discussed³³) dispute. A rancher’s cattle eat a farmer’s corn, creating a loss of \$100. Who should bear liability for the loss? Suppose the farmer could have fenced the cows out

Step One?, 118 Harv. L. Rev. 1687, 1691 (2005) (noting inconsistency among judges as to the level of clarity required not to invoke *Chevron*).

²⁸ 140 S. Ct. 1731 (2020).

²⁹ *Id.* at 1737.

³⁰ *Id.* at 1736–37.

³¹ *Id.* at 1737. We take Justice Gorsuch at his word, but of course he could be exaggerating.

³² See Calabresi, *supra* note 13, at 135–40 (describing a general deterrence approach through allocating costs to those who can mostly cheaply avoid them).

³³ See, e.g., R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2–8 (1960) (analyzing the dispute).

for \$25, whereas the rancher could have fenced them in for \$40. According to LCA, the farmer should be liable because she could have avoided the loss at a lower cost.³⁴

Applying LCA does not prevent the loss. No liability rule could, for the corn has already been eaten. The justification for LCA lies in its effects on future behavior. *Next time* the farmer will build the fence because she would rather spend \$25 than incur another \$100 loss. LCA promotes efficiency through this incentive. It leads people to prevent expensive accidents (\$100 in lost corn) with cheap precautions (a \$25 fence).³⁵

In our example, the farmer is the least cost *avoider*. However, she is not necessarily the least cost *bearer*. To see the difference, add some facts. Suppose that making the farmer liable would impoverish and demoralize her. Her loss in money would equal \$125 (destroyed corn, and she needs to build her \$25 fence). But her *total* loss (money, health, stress) would be much greater, some amount x . Making the rancher liable would have no such effects. His total loss would just be \$140 (paying for the corn and building his \$40 fence). Assuming we can compare money and other, intangible goods like health and stress, and assuming \$140 is less than x , the rancher is the least cost *bearer*. All things considered, it would be easier for him to bear liability. However, the farmer is the least cost *avoider*. *Ex ante*, before the cows ate the corn, she could have built the fence for less, so LCA would make her liable.³⁶

Examples like this might fuel opposition to LCA. Efficiency might require making the farmer liable, but surely *justice* requires making the rancher liable.³⁷ When LCA and justice conflict, many people (including

³⁴ If the transaction costs of bargaining between the farmer and rancher are zero, it does not matter for efficiency who bears liability. See generally id. (describing the interchangeable positions); Robert Cooter & Thomas Ulen, *Law & Economics* 82–85 (6th ed. 2012) (same).

³⁵ LCA reduces precaution costs, but it might not minimize them. Suppose the farmer and rancher have a new option for protecting the corn: the farmer can build a partial fence for \$10, and the rancher can install a cattle guard for \$5. The total cost is \$15, less than the alternatives. LCA would make the farmer liable and, assuming the parties cannot bargain, lead her to build a complete fence for \$25. This is more efficient than making the rancher build (cost of \$40) but less efficient than the new alternative (cost of \$15). To generalize, LCA (like strict liability) induces unilateral precautions by the farmer, but bilateral precautions might be optimal. See Cooter & Ulen, *supra* note 34, at 204–05 (explaining social cost functions).

³⁶ We assume that building the fence before the accident happened would not have imposed psychic or intangible costs on the farmer, only monetary costs.

³⁷ See, e.g., Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *Vand. L. Rev.* 1, 71–72 (1998) (“[J]ustice requires that a tortfeasor restore those whom his wrongdoing has injured . . . [T]he defendant should have to pay for the harm . . .”).

Calabresi, who developed and championed LCA) would argue that justice should prevail.³⁸ But they do not always conflict.

LCA can complement justice in at least two ways. First, if efficiency is relevant to justice, even barely, then least cost avoidance can become an input in the justice calculation. Second, when the demands of justice are inconclusive, LCA offers a plausible tiebreaker. To illustrate, suppose both the farmer and rancher are wealthy, and neither would suffer much from being held liable. The rancher could have controlled his cows, but the farmer knew the animals were nearby, and she could have protected her corn. If justice is inconclusive as to these parties, and given that society benefits from fewer accidents and lower costs, LCA offers a plausible method for resolving the dispute—one that the parties themselves, behind a veil of ignorance, might well prefer.

We will say more about cost avoidance and justice later. For now, consider a final, practical question: How does one identify the least cost avoider? The task may be easier than it seems. The judge need not know the value of the loss (\$100 in destroyed corn). The judge need not even know absolute costs—\$25 for the farmer to build, \$40 for the rancher to build. The judge just needs an intuition about fencing. If the perimeter of the farm is much shorter than the perimeter of the ranch, she can infer that the farmer can fence the cows out for less than the rancher can fence them in. Courts will occasionally make mistakes when applying LCA, but those mistakes may be infrequent or minor. Sound intuition is an imperfect, but often reasonable, substitute for missing facts.

We develop the conflict-avoidance principle in the same spirit as LCA in private law. The principle offers a beneficial, pragmatic default when the demands of justice are unclear.

III. CONFLICT AVOIDANCE IN CONSTITUTIONAL LAW

We are now in a position to apply least cost avoidance to constitutional adjudication. Our motivation stems from the dilemma explained in the Introduction. Courts have a duty to decide constitutional cases, but some

³⁸ See Calabresi, *supra* note 13, at 24–26 (emphasizing that liability regimes should serve justice); see also Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 16–21 (2001) (arguing that tort law should be understood in terms of corrective justice, not efficiency); Zipursky, *supra* note 37, at 4–5 (arguing tort law “is not just a system for the selective imposition of liability in ways that will maximize wealth or other social welfare goals”).

are inevitably hard, and deciding them imposes serious costs. Still, suggesting that least cost avoidance offers a sound basis for resolving the dilemma is controversial. First of all, other default rules might work better. Why not simply decide in favor of the poorer party,³⁹ decide in favor of liberty,⁴⁰ or simply flip a coin?⁴¹

More fundamentally, it is not obvious that the analysis fits constitutional adjudication at all. What “costs” are at issue in constitutional adjudication? What would it mean to take a “precaution”? And why do either costs or precautions have any legal or normative relevance in cases about constitutional rights? These are fair and hard questions, which indicates that translating an analysis designed for tort law to the constitutional context is no simple task.

The upshot of our translation project is a doctrinal test. To apply LCA in hard (“hard” in the sense described above) constitutional cases, courts must (1) identify the particularized interests of each party that the other party’s actions frustrated or threatened to frustrate. Courts must then (2) ask how costly it would have been for a reasonable person, in each party’s position, to secure those interests without making the specific demand on the counterparty that produced the legal conflict. Finally, courts (3) rule against the party that could have secured its interests more easily. Below, we examine each of these steps.

A. From Costs to Interests (Step 1)

Our first step requires identifying the particularized interests of each party that the other party frustrated or threatened to frustrate. Already this language may remind readers of standing doctrine. That similarity is illuminating, and we will explain why. First, however, we must clarify what we mean by a “legal conflict.” That term, which appears in the second step of the test, connects closely to the “particularized interests” in the first step.

³⁹ Richard M. Re, “Equal Right to the Poor,” 84 U. Chi. L. Rev. 1149, 1152–53 (2017) (endorsing a canon of construction that would construe ambiguous statutes to “promote the interests of ‘the poor’”).

⁴⁰ Gaus, *supra* note 23, at 240 (explaining that a “general bias against legislation can be justified to all”).

⁴¹ Micah Schwartzman, The Completeness of Public Reason, 3 Pol. Phil. & Econ. 191, 211–14 (2004) (discussing various forms of randomization, such as coin-flips and lotteries, as second-order decision procedures for resolving reasonable disagreements).

1. Claims as Conflicts

Calabresi promoted LCA as a method for reducing the cost of accidents, whether in factories, on farms, or on freeways. Our focus lies elsewhere. We study the avoidance of *legal conflicts* between one party's assertion of a right, privilege, immunity or power against another party's assertion of one of the same.⁴² The conflicts that arise in constitutional law are usually more abstract than the literal collisions in accident law.

The abstract quality of constitutional conflicts raises two questions not nearly as salient in the accident context. First, when exactly does the conflict occur? When the State enacts a law that a court will later declare unconstitutional? When the State, through an administrative agency, takes action to enforce the law? When the target of enforcement challenges the constitutionality of the law in court?

For our purposes, and for reasons that will become clearer below, the relevant conflict occurs when one specific party takes concrete action on the basis of a purported constitutional right or authority against another specific party. That could be when an employer denies its workers insurance coverage, when a school principal orders a student not to wear a Confederate flag t-shirt to class, or when a florist refuses to arrange flowers for a gay wedding. It is the first instance where one party makes a particular demand, grounded in legal authority, of another party. Identifying the moment that a conflict arose may in some cases pose a challenge, but for now we leave this aside.

The second question is whether the kinds of conflicts we focus on really produce costs (or more costs than benefits). Physical accidents cause harm to property and persons, so the impulse to use law, including the LCA approach, to reduce that harm is easy to understand. It is less obvious that constitutional conflicts produce costs. True, some constitutional conflicts lead to material harms. Likewise, they often lead to emotional, moral, or dignitary harms. The litigation itself may be costly

⁴² This differentiates us from Professor Tang. The principle we develop aims to minimize conflicts, whereas Professor Tang wants to minimize the costs of judicial decisions. See Tang, *Harm-Avoider*, supra note 15, at 47 (“[T]he groups that are best positioned to mitigate their own harms [from a loss in court] via public and private avoidance strategies will lose . . .”). Instead of asking “How can I discourage conflicts at lowest cost?”, a judge using his approach would ask, “Who will find it easier to get what they want if I rule against them?”

For the classic analysis of legal concepts like rights, privileges, and powers, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710 (1917). We will loosely refer to all of them as simply “rights.”

(as in tort). But constitutional conflicts generate litigation, and litigation can generate rules that promote justice.

In a typical case, the benefits of constitutional conflicts might well outweigh their costs. But in hard cases, we believe otherwise. Precisely because they are hard, judges are unsure how to resolve them, so justice might get set back. Meanwhile, the costs mount.

We assume that reducing the number of hard constitutional conflicts is desirable.⁴³ Because of this objective, we refashion least cost avoidance as the *conflict-avoidance principle*.

2. *Precautions and Interests*

The conflict-avoidance principle aims to reduce the number of conflicts that, if they matured to litigation, would produce a hard constitutional case. To achieve that, we would inquire into the parties' "interests" rather than their "precaution costs." This might seem puzzling since least cost avoidance, our conceptual bedrock, focuses on precaution costs.

To explain this shift, we start by considering the accident context. Suppose a company seeks to dynamite an old building to make space for a new one. The company wants to reduce the possibility of injury. There are two sorts of "precautions" it could take. First, it could post signs to warn of the blasting or ensure that everyone nearby wears a hard hat. In other words, it could use a *protective device* that reduces the likelihood of an accident or the severity of harm. Second, the company could use a different method to achieve its goal. Instead of using dynamite, it could destroy the building with a wrecking ball that produces less debris.⁴⁴ Or it could drop its plan to raze the building and renovate instead. That is, it could pursue some *alternative* course of action.

The former sort of "precaution" usually has no analogue in constitutional law. What would it mean to use a device that protects oneself from a constitutional conflict? In general, courts in constitutional cases can only focus on the other kind of precaution—what we call alternatives.⁴⁵ But to call alternatives "precautions" seems to strain

⁴³ We relax this assumption in Part V.

⁴⁴ See *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (Posner, J.) ("Explosives are dangerous even when handled carefully, and we therefore want blasters to choose the location of the activity with care and also to explore the feasibility of using safer substitutes (such as a wrecking ball) . . .").

⁴⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (explaining that the narrow-tailoring prong of the Court's equal-protection analysis in the context of university admissions

ordinary meaning. And that leads to a second point: whereas it is often possible to measure the cost of a protective device (e.g., the price of 100 hard hats), assessing the cost of alternatives requires making a judgment about the *interest* that the party seeks to secure. Using a wrecking ball is only an alternative to blasting because it offers another means of securing the same interest, putting a new building in place. Once we know the interest, we can think concretely about alternatives (in this case, the wrecking ball) and their costs (the price difference between the ball and dynamite).

Combining these two points, we can now conceptualize “precaution costs” in the constitutional context. If people and governments assert constitutional rights and powers to secure *interests*, we can ask how they might have secured those interests in other ways—ways that would have prevented the conflict.⁴⁶ To return to our earlier example, if a student is disciplined for wearing a Confederate flag on her t-shirt at school, she may assert her interest in expressing her heritage. The school may assert its interest in fostering an atmosphere conducive to learning. Just as we can ask about alternatives to dynamiting the building, we can ask the student and the school about alternatives for securing their interests. Perhaps the student could have expressed her heritage in a way that did not violate the dress code, and perhaps the school could have ensured a conducive atmosphere without banning the Confederate flag.

One may object that our analysis depends on a controversial claim about the nature of rights. We seem to assume that rights are best understood instrumentally, as a means to secure “interests.”⁴⁷ But such an instrumental or interest-based conception of rights is controversial and is

practices requires that the university consider in good faith “workable race-neutral alternatives that will achieve the diversity the university seeks”).

⁴⁶ This marks another departure from Professor Tang. As with LCA in private law, our focus is retrospective. We ask only what the parties could have done, before the conflict occurred, to prevent it. In contrast, Professor Tang’s application of LCA to constitutional law is slightly retroactive but mostly prospective. See, e.g., Tang, Harm-Avoider, *supra* note 15, at 38 (“[T]he notion of harm avoidance is both retrospective and prospective. That is, the losing side in a Supreme Court case could have acted differently to avoid the Court’s intervention in the first place. . . . But the losing side can also avoid the harm of an adverse ruling after the Court decides . . .”). Much of what Professor Tang calls “avoidance” costs we would characterize as “covering” or “mitigation” costs. Instead of the least cost *avoider*, his approach emphasizes the least cost *bearer*. *Id.* at 44.

⁴⁷ By “interest” we mean some goal or end. Cf. Richard H. Fallon, Jr., The Nature of Constitutional Rights 69 (2019) (“[T]he concept of ‘interests’ is itself a vague one. It refers to goods, protections, and opportunities that we as citizens under the Constitution, like other reasonable and rational beings, have good reason to care about securing . . .”).

rejected by those who endorse “will” or “choice” theories of rights.⁴⁸ Must we take sides in this philosophical debate?

Yes and no. The answer is yes in that we assume that the rights claims that litigants advance can be interpreted as a means to secure certain interests. Otherwise, we could not sensibly ask about what “alternatives” the litigants have to avoid the conflict. Take the Confederate-flag-wearing student. If her rights claim is understood as serving only to protect her *choice* to display the flag in school, then there are no “alternatives”; the right either protects that choice or it does not. We can only make sense of the idea of “avoiding a conflict through alternative means” by seeing rights claims as one possible means to achieve a separate end.

But the answer is no in the sense that conflict avoidance *only applies in hard cases*. Before reaching the conclusion that a case is hard, i.e., when trying to decide questions on the merits, courts may rely on expressive or non-instrumental interpretations of the relevant constitutional provisions.⁴⁹ Indeed, this may be the best or most plausible way to understand certain provisions, like the Equal Protection Clause.⁵⁰ We express no objections to non-instrumental analysis in general.

Finally, to the limited extent that our analysis requires committing to an instrumental conception of rights,⁵¹ we note that this view has deep

⁴⁸ See generally Matthew H. Kramer, N.E. Simmonds & Hillel Steiner, *A Debate over Rights* (1998) (outlining the contours of the debate).

⁴⁹ Insofar as we suggest that judges first engage with arguments “internal” to conventional constitutional argument and then, if those arguments do not yield a clear outcome, stand back and try to analyze the parties’ conduct in instrumentalist terms from an “external” perspective, we could be accused of committing the “inside/outside fallacy.” Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. Chi. L. Rev. 1743, 1745 (2013) (explaining that such a fallacy is committed when “the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge”). But we think, for reasons one of us has elaborated elsewhere, that the internal/external distinction on which such an attack is premised is ambiguous, question-begging, and an obstacle to creative and clear thinking about law and adjudication. Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 Va. L. Rev. 1203, 1233, 1284–86 (2015).

⁵⁰ For a discussion of “expressive” theories of constitutional provisions, see *infra* Subsection III.A.4.

⁵¹ In fact, our argument works with an even weaker commitment to instrumentalism than expressed in the text. In hard cases, for our principle to operate one need only take an instrumental view of the suits brought to enforce those rights (i.e., the remedy sought), not the rights themselves—assuming there even is any meaningful distinction between the two (which we do not). See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 857, 861 (1999) (arguing that there is “no such thing as a constitutional right” separable from the available remedies).

roots in Anglo-American law and jurisprudence.⁵² And Supreme Court doctrine already treats many constitutional rights and powers in just this way.⁵³

The bottom line is that what in the domain of accident law has been styled a party's "precaution costs" becomes, in the constitutional context, the cost of the alternative means of securing the party's interest.

3. Why "Particularized" and "Frustrated" Interests?

Our analysis so far invites an objection. If one can only determine the "cost" of avoiding a conflict by reference to the interests for which the right has been asserted, then the task seems impossible. In constitutional law, there are often many interests at stake, not just one, and some of the interests, though important, seem nebulous. Constitutional conflicts differ significantly from the accident context, where interests are easier to identify and measure.

To illustrate, suppose a gay couple goes to a florist for their wedding arrangement, but the florist refuses to serve them because of her religious objection to same-sex marriage.⁵⁴ In the ensuing dispute, the men in the couple have many interests at stake. They have an interest in getting flowers for their wedding, they have an interest in living in a society where gay men and women are recognized as full and equal members, and so on. The florist, too, has multiple interests. To mention two, she has an interest in not arranging flowers for this particular couple's wedding, and she has a general interest in conforming her professional conduct to her religious scruples.

⁵² See Robert Samuel Summers, *Instrumentalism and American Legal Theory* 22–26 (1982); Frederick Schauer, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909, 1927 (2004) (referring to the "pragmatic and instrumentalist core of twentieth-century American legal thought"). For classic sources in this tradition, see Rudolf von Ihering, *Law as a Means to an End* (Isaac Husik trans., 1913); John Chipman Gray, *The Nature and Sources of the Law* (1909); Roscoe Pound, *Interests of Personality*, 28 Harv. L. Rev. 343 (1915); see also Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957–58 (1919) (presenting a well-known, early application of interest-analysis in constitutional law); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431, 443 (1930) (discussing the "interests-rights-remedies" analysis); Joseph Raz, *The Morality of Freedom* 166 (1986) (offering an interest conception of rights).

⁵³ See Fallon, *supra* note 47, at 68 ("In constitutional law as in moral theory, rights are constructs, designed to reflect and protect interests . . .").

⁵⁴ See *Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019), petition for cert. filed, No. 19-333 (U.S. Sept. 11, 2019).

How can one compare, let alone measure, the “cost” of securing such interests through alternative means? Doing so would certainly be difficult. Thankfully, it is not necessary.

To see why, return to the torts context. Even in our simple blasting case, multiple interests are at stake. Suppose the company dynamites the building, and a pedestrian is injured. When the pedestrian sues the company, she does so mainly to remedy the violation of her interest in her own bodily integrity. But she might also have an interest in ensuring that other people who are unfairly injured get compensated. Furthermore, she might have a general interest in living in a society not beset by exposure to undue risks. Meanwhile, the blasting company has an interest not only in razing this particular building without threat of liability, but also in facilitating economic and commercial development and protecting property rights.⁵⁵

Imagine a common-law court applying least cost avoidance to this dispute. The court would never ask how the plaintiff could have secured, other than by filing suit, her general interest in letting people live without undue risk of harm. Nor would it ask how the company could have, other than by blasting and imposing risk on the plaintiff, secured its general interests in development and property rights. Instead, the court would ask how each party could have avoided the *particular* accident that produced the *particular* injury.⁵⁶ This is tantamount to asking how each party could have secured in some other way (1) its own *particular* interests (i.e., the plaintiff’s interest in not getting hurt, the defendant’s interest in getting a new building) (2) that the other party’s actions frustrated or threatened to frustrate (the blasting has already frustrated the plaintiff’s interest, and her suit threatens to frustrate the defendant’s).

We can conduct the same analysis in the constitutional context. Return to our florist example. If we focus only on the *particularized* interests whose satisfaction the other party frustrated, then the analysis comes into focus. Although the couple has an abstract interest in equality for same-sex couples (and although the florist did frustrate that interest), that kind

⁵⁵ Cf. *Losee v. Buchanan*, 51 N.Y. 476, 484–85 (1873) (denying recovery to a plaintiff and explaining that “[w]e must have factories, machinery, dams, canals and railroads” because “[t]hey are demanded by the manifold wants of mankind, and lay at the basis of all our civilization”).

⁵⁶ See, e.g., *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1180–81 (7th Cir. 1990) (“It is easy to see how *the accident in this case* might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile.” (emphasis added)).

of interest is not particular to them. Many people have that interest. They had it before this florist ever opened her shop, and they will continue to have it irrespective of how this florist treats this couple. So, we set that aside and focus on the gay couple's more particularized interest that the florist frustrated: getting a flower arrangement for their wedding.

Now ask the same questions of the florist. She has an abstract interest in protecting religious liberty, for her and for others, today and in the future. The couple frustrated (or threatened to frustrate) that interest by asking her to perform a service that she understands to violate her religious principles. But that kind of interest is abstract and remote for the same reasons described above. Many other people have an interest in religious liberty, and they will continue to do so whether this couple asks for flowers, and whether this florist arranges them, or not. The florist's *particular interest* that the couple frustrated is much narrower. It lies in not arranging flowers for this particular wedding.

These conditions—"particularized" interests that the other party frustrated or threatened to frustrate—might seem familiar. They are akin to the causation and harm elements of a tort.⁵⁷ And in the constitutional context, they resemble the conditions that federal courts require for parties to have "standing" to sue. The plaintiff must show that she suffered an "injury in fact," which means that she suffered "an invasion of a legally protected interest" that is "concrete and particularized."⁵⁸ She must then show that the harm is "fairly traceable to the challenged conduct of the defendant."⁵⁹

Rather than a strength, one might perceive the similarities to existing doctrine as a weakness. First, one might object that our effort to import the causation and harm requirements from torts is unmotivated. To have a legally protected right in tort is to have a cause of action *when someone wrongfully causes you harm*.⁶⁰ Cause and harm are constitutive of actions in tort. Constitutional rights are different; they protect different interests for different purposes. So, importing causation and harm seems arbitrary.

⁵⁷ Dan B. Dobbs, *The Law of Torts* § 166 (2000) ("The cause in fact rule requires the plaintiff to prove that the defendant's conduct caused legally recognized damages. . . . [In negligence actions,] the plaintiff must prove not merely that she suffered harm . . . but that the harm was caused in fact by the defendant's conduct.").

⁵⁸ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

⁵⁹ *Id.* at 1547. The third requirement is that the injury is "likely to be redressed by a favorable judicial decision." *Id.*

⁶⁰ See, e.g., Jules L. Coleman, *Risks and Wrongs* 325 (1992).

But that is only one interpretation of causation in tort law. Another, more instrumental, interpretation sees causation as serving an epistemic function by communicating information to courts about conduct that imposes risks on society.⁶¹ If courts impose liability for behavior that ends up actually harming people, that liability will probably track risk creation generally, even if not all risky behavior gets detected. In short, the causation requirement can be justified as a workable way for courts to get information about risks that actors impose on society.

We think something similar operates in the constitutional context. Just as causation serves as a proxy for risk creation in tort, inquiring into the frustration of particularized interests might reveal, in a rough and ready way, impediments to the satisfaction of the general and abstract interests at stake in constitutional litigation. By inquiring into particularized interests, courts collect information relevant to the broader, longer-term question of how to balance constitutional values.⁶²

The similarity to standing doctrine prompts a different objection, namely that the courts lack the authority to constrain the relevant interests as we have suggested. The information-based rationale for causation in tort matches one of the main (if implicit) rationales the Supreme Court has given for imposing the “injury in fact” and “fairly traceable” requirements as a matter of standing.⁶³ But the Court’s standing doctrine has been criticized for weakening the enforcement of public law by unduly imposing common-law limitations on statutory and constitutional causes of action.⁶⁴

⁶¹ See, e.g., Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 85–87 (1975) (arguing that the but-for causation requirement offers “a useful way of toting up some of the costs the cheapest cost avoider should face in deciding whether avoidance is worthwhile”).

⁶² For more on this, see *infra* Section IV.C (discussing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1719, 1724–27, 1732 (2018)).

⁶³ *Spokeo*, 136 S. Ct. at 1547; see also William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 222 (1988) (explaining that standing doctrine helps ensure “that a concrete case informs the court of the consequences of its decisions”).

⁶⁴ See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1433 (1988) (“[I]nnovations in the law of standing have started to push legal doctrine in the direction of what we may call a private-law model of standing. Under this model, a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent.”); Fletcher, *supra* note 63, at 233 (arguing that “superimposing an ‘injury in fact’ test upon an inquiry into the meaning of a statute is a way for the Court to enlarge its powers at the expense of Congress”); cf. William Baude, *Standing in the Shadow of Congress*, 6 Sup. Ct. Rev. 197, 224, 226 (2016) (comparing the evolution of standing doctrine to that of

Nothing we say is inconsistent with this criticism of standing. Our test is not a jurisdictional one. It instructs courts how, in hard cases, to exercise that jurisdiction once granted. So, although our approach is perfectly consistent with current standing doctrine, it would also work if that doctrine changed. To see how, suppose a new standing doctrine were to permit Congress to create a cause of action for a class of plaintiffs that the old standing doctrine would have forbidden under Article III.⁶⁵ Now imagine a member of that class brings suit and the court takes jurisdiction over the case. Having done so, the court may properly consider all sorts of interests—from general social interests to more particularized individual interests, from expressive and dignitary interests to material ones. Sometimes those factors are and should be decisive in adjudication, and we do not claim otherwise.

Our position is much narrower. We argue only that *in hard cases*—including cases where judges account for all of those interests, but after doing so still find themselves uncertain—courts should apply the conflict-avoidance principle, set broad interests aside, and focus on the particularized interests whose satisfaction the other party frustrated or threatened to frustrate.

“substantive due process” and observing that it is easy “to slip from formal procedural rules to quite substantive judge-made ones”); see also Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1144 (1993) (“These harsh sorts of injury and redressability determinations . . . are debilitating to much public law litigation . . .” (footnote omitted)); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170, 1179 (1993) (arguing that under the *Lujan* framework, “standing creates a judicially enforceable limit on congressional discretion, rather than a prudential limit on judicial discretion”). The motivation for these criticisms is often the conviction that whether a plaintiff has “standing” properly depends on whether the relevant substantive law, constitutional or statutory, provides the plaintiff with a cause of action. Fletcher, *supra* note 63, at 239 (“The essence of a standing inquiry is thus the meaning of the specific statutory or constitutional provision upon which the plaintiff relies . . .”); Sunstein, *supra*, at 1433 (“For purposes of standing, the principal question should be whether Congress has created a cause of action, . . . not whether the plaintiff is able to invoke a nineteenth century private right.”); David P. Currie, Misunderstanding Standing, 2 Sup. Ct. Rev. 41, 43 (1981) (“[T]he question is whether the statute or Constitution implicitly authorizes the plaintiff to sue.”).

⁶⁵ Of course, how “new” such a change would be is itself a matter of debate. See, e.g., Baude, *supra* note 64, at 199–203 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)) (surveying past cases that seem to stand for the proposition that “Congress may enact statutes creating legal rights, the invasion of which creates standing”); *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (Kennedy, J., concurring)) (acknowledging Justice Kennedy’s concurrence in *Lujan* to the effect that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before”).

4. *Particularity and Dignity*

Can particularized interests be dignitary in nature? In the florist example, we explained that the couple's particularized interest was in getting flowers for their wedding. But one might reject this characterization for being purely material and unduly narrow. Their actual interest, one might argue, is in getting flowers for their wedding *while being treated on equal terms as straight couples*. That interest is not abstract. It refers not to their general interest in having all gay people be treated equally by all service providers. It refers to that particular couple's interest in not being demeaned and insulted. That particularized interest was frustrated when the florist refused to do the arrangement. The florist has an analogous dignitary interest in not violating her religious principles. Can the conflict-avoidance principle accommodate such dignitary interests?

The answer is yes, but explaining how requires care. When a dignitary interest is frustrated, "dignitary harm" results. However, we must distinguish between two different ways of understanding "dignitary harm." Sometimes that phrase refers to the harm suffered when an action fails to treat someone or some group with the dignity or respect they deserve. This is often called "expressive harm," though expressive "wrong" may be a better description because it is really a moral judgment, rather than a factual one.⁶⁶ Other times, dignitary harm refers to the emotional pain or anguish that an action actually causes someone, irrespective of what that person deserves, legally or morally.⁶⁷ We will

⁶⁶ Deborah Hellman, *When Is Discrimination Wrong?* 8 (2008) [hereinafter Hellman, *Discrimination*] (arguing that what grounds the "moral impermissibility" of demeaning classifications is the "wrong[s]" they entail, rather than psychological "harm[s]" they cause); see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 *Minn. L. Rev.* 1, 2 (2000) (arguing that "state action violates Equal Protection if its *meaning* conflicts with the government's obligation to treat each person with equal concern"); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503, 1504 (2000) ("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.").

⁶⁷ See Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 *Brook. L. Rev.* 1555, 1565, 1572 (2016) (characterizing "stigmatic or dignitary injury" as a similar, but distinct form of intangible harm from psychological harm, but defining psychological harm as "mental or emotional suffering or distress" (emphasis omitted)); see also Anderson & Pildes, *supra* note 66, at 1530 (observing that "people can also suffer nonexpressive harms to their material and liberty interests, their psyches," but emphasizing that "these types of harm are not significant for the evaluation of action in the same way" as expressive harms). Sometimes

call this “psychological” harm. The two kinds of harm are related but distinguishable.⁶⁸

Our analysis cannot include expressive harms that the parties to the case impose upon one another. The judgment that a party has had that kind of dignitary interest frustrated by the counterparty is tantamount to a judgment that the party was denied something to which they were legally or morally entitled. But in hard cases, whether a party was entitled to that something is uncertain. To credit this kind of dignitary interest would be to answer a question that, by assumption, we do not know how to answer.⁶⁹

dignitary harms are characterized as “stigmatic” harms, a term which does not make entirely clear whether it’s primarily a normative or psychological concept. See, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L.J.* 2516, 2522 (2015) (defining dignitary harms as “the social meaning, including stigma, which may result from accommodating complicity-based objections”); Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 *Const. Comment.* 171, 176 (2019) (equating “dignitary” harms with “stigmatic” harms and observing that in *Masterpiece Cakeshop*, the Court recognized that the subordination of groups is an “objective social wrong, not merely an injury to the feelings of the affected group”); Hellman, *Discrimination*, *supra* note 66, at 26 (acknowledging that “the notion of stigma is important” but explaining that she avoids the term in her analysis because it is ambiguous as to whether it refers to psychological harms or expressive wrongs).

⁶⁸ They are related because often the reason an action is understood to constitute an expressive harm is because of the recognition that it is likely to produce (psychological, emotional) anguish or pain in the person to whom the action is directed. But a person might suffer psychological harm as a result of conduct that was morally and legally justified. At the same time, a person might suffer an expressive harm without being psychologically harmed. When that happens, some might say that the person suffers a form of “false consciousness.” Cf. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 *S. Cal. L. Rev.* 1699, 1711 (1990) (“One important problem of transition [of an oppressed group into an empowered one] is false consciousness. If the perspective of the oppressed includes significant portions of the dominant conception of the world, and of the role of the oppressed group in it, then the oppressed perspective may well be incoherent . . .”).

⁶⁹ Again, standing doctrine, and criticisms of it, are instructive here. See, e.g., Bayefsky, *supra* note 67, at 1592 (arguing that psychological harm should qualify as an “injury-in-fact” for the purposes of standing, but only if such harm flows from the violation of an alleged “legally protected interest” and there is a “sufficient nexus between the alleged violation of this interest and the plaintiff’s particular circumstances”). One can, in theory, separate the legal and moral questions here. Many actions that are perfectly legal may nonetheless impose expressive dignitary harms on a person. Insulting a person on the street for no good reason is one example. So, some cases may be legally hard but nonetheless involve clear expressive harms in only one direction. In such cases, the dignitary harms could in theory be factored into the “costs” of avoidance though it would be hard to know how to weigh them against other, more material forms of costs. See Anderson & Pildes, *supra* note 66, at 1530 (explaining that material and psychological harms are “incommensurable” with expressive harms, such that “one cannot add up the expressive and the nonexpressive harms on the same scale and then

The same is not true of dignitary harm in the psychological sense. We can acknowledge such harm without making any legal or moral judgments; its existence is a question of fact.⁷⁰ And for that reason one might argue that this form of dignitary interest should be included in the analysis. We can capture the idea with yet another restatement of the couple's interest: *they want to get flowers for their wedding without suffering the psychological harm of discrimination, i.e., without feeling dehumanized and demeaned.*

We agree that this kind of psychological harm matters, and we do include it in our analysis, as we will soon show. But it does not fit here. For us, the italicized text does not represent a particularized interest. The couple did not go to the florist in order *not* to feel the sting of discrimination. They went to the florist in order to get flowers, and they hoped (naturally and understandably) to get them without discrimination. "Getting flowers" is the particularized interest, and "not suffering psychological harm" is a condition under which the couple would hope and expect to secure it.

This distinction might be easier to appreciate in another setting. Reconsider the blasting case. We might say that the company's particularized interest is in demolishing the old building. But the company might object, claiming an interest in demolishing the building *without the threat of liability*. Likewise, we might say that the pedestrian struck by debris had a particularized interest in not suffering an injury while walking to work. But she might object, claiming that her real interest was in not suffering an injury *without being forced to take the long way*. In both cases, we would distinguish the parties' interests (demolishing the building, not suffering an injury) from the conditions under which they would prefer to secure them (without liability, without changing her route). The same distinction applies in the example of the gay couple, the only difference being that the nature of the condition is psychological rather than monetary. All of these parties have a particularized interest, and all would like to secure it at low "cost."

choose the action that minimizes total harm"). Such incommensurability, combined with the fact that expressive harm analysis is typically treated as part of the underlying legal and constitutional inquiry, see Sager & Tebbe, *supra* note 67, at 176, leads us to think that, as a practical matter, this would not prove to be a significant factor in the analysis.

⁷⁰ See, e.g., NeJaime & Siegel, *supra* note 67, at 2577 ("A bakery customer planning a same-sex wedding reported that she had 'never felt so low in [her] life' as when the owner terminated the cake tasting upon finding out that the woman was a lesbian." (citation omitted)).

To summarize, the conflict-avoidance principle cannot accommodate dignitary harms between the parties in the expressive sense, because that requires answering the very question at issue in the case. The principle can and does accommodate dignity in the psychological sense, but not by baking it into particularized interests. This form of dignity gets incorporated into avoidance costs, our next topic.

B. Identifying Avoidance Costs (Step 2)

Return to the first two steps of our formulation: To apply conflict avoidance, courts must (1) identify the particularized interests of each party that the other party's actions frustrated or threatened to frustrate. The court must then (2) ask how costly it would have been for a reasonable person, in each party's position, to secure those interests without making the specific demand on the counterparty that produced the legal conflict. We have explored the first step, and now we focus on the second.

This step requires the court to identify each party's costs of avoiding the conflict.⁷¹ Roughly stated, the question is: "How hard would it have been to get what you wanted without disturbing the other party?" This inquiry divides into parts: First, how can a court identify the parties' alternatives for avoiding the conflict? In other words, what options did each party have? Second, how can the court assess the costs of exercising those options?

To unpack these questions, return to the florist example. As explained, the florist has multiple interests at stake, but we would narrow the focus to the particularized interest that the gay couple frustrated: *not* arranging

⁷¹ This marks another departure from Professor Tang. We would compare the avoidance costs of the parties to the case (or, more specifically, reasonable people in their shoes). Professor Tang would compare the costs not just of the parties, but of the groups they represent. See Tang, *Cost-Avoider*, *supra* note 15, at 37 ("[I]n a case like *Brown v. Board of Education*, the question is not whether the parents of Linda Brown would be able to avoid the costs of a Supreme Court loss more easily than would the Topeka Board of Education. . . . [T]he relevant comparators must be broadened. . . . [W]e care not only about the consequences suffered by named parties, but by all similarly situated people: we care about how difficult it would be for *all* affected black students (and their parents) to avoid the harms of segregation were the practice to be upheld."); *id.* at 38 (explaining that, in a desegregation case, the focus on the defendant's side is on all "white parents who oppose school integration"). Focusing on groups—including potentially large, heterogenous groups, like all employers facing an increase in the minimum wage, see *id.* at 32–33—would place onerous information demands on courts. By focusing only on the parties to the case, the information demands of conflict avoidance are lighter.

flowers for this wedding. Under the second step in our inquiry, the court should ask: How could the florist have satisfied that interest (not arranging the flowers) without making the specific demand that she made of the other party (that the men accept her refusal to serve them and go elsewhere)? There are different possible answers. Perhaps the florist could ask a non-objecting subordinate or co-worker to make the arrangement. She would satisfy her relevant interest (she does not arrange the flowers) without asking the men to take “no” for an answer. Here her costs of avoidance seem quite low. If the florist does not have a co-worker, perhaps she could pass the job on to a subcontractor, like a florist at another shop. Again, she would satisfy her relevant interest without making the particular demand of the couple. Presumably sub-contracting would be harder than delegating to a co-worker (since she would have to find and then negotiate with another party), so the florist’s avoidance costs would be higher.

Now consider the couple. Their particularized interest is in getting a flower arrangement for their wedding. The court should ask: How could the couple have satisfied that interest (getting flowers) without making the particular demand of the florist (that she arrange them)? Could they have gone around the corner to another comparable florist? If so, their costs of avoiding the conflict are low because their interest is easily satisfied through others means. If there is no florist willing to serve them around the corner, in the city, or in the state, then their costs of avoidance are increasingly high.

So far, we have discussed the parties’ avoidance costs in strictly material terms. For the couple, the questions are something like: How much longer would it have taken you to travel to a different florist instead of the (discriminatory) one you chose? How do the prices and quality of the two florists compare? And so on. But as we have discussed, there is more at stake in such a case than time and money. When the couple must seek out a second florist because the first one discriminated against them, they may feel a powerful, dignitary harm from the rejection. Does this count as a “cost”?

Yes, and this is where dignity enters the analysis. But to explain how this works, some details are in order. First, recall that “dignitary harm” can take two distinct forms. It can express a normative judgment (*expressive* wrongs) or it can describe an empirical phenomenon

(*psychological harms*).⁷² We necessarily exclude expressive harms that each party may impose on the counterparty. As explained above, the principle only applies in cases where we are unsure of each party's entitlements vis-à-vis one another and therefore unsure about expressive harms.

In contrast to expressive harm, we can include the psychological form of dignitary harm. Before clarifying how, we must address a second detail involving timing. Like LCA in private law, conflict avoidance takes the *ex ante* perspective. When we ask how costly it would have been to secure one's interest through other channels, we mean how costly would it have been before the conflict at issue took place. Thus, we do not ask how hard it would have been for the gay couple, after a demoralizing exchange with the discriminating florist, to then seek out a second florist. That would be akin to mitigating the conflict after the fact, like "covering" in contract law.⁷³ Instead, we ask how hard it would have been to secure the flowers through another channel in the first instance. That is consistent with conflict avoidance.

Taking the *ex ante* perspective might affect the extent of psychological harm, but it certainly does not eliminate it. Merely knowing that the florist would discriminate against them might cause the couple to suffer emotionally, even if they never enter her shop. Conflict avoidance incorporates such psychological harm by treating it as an avoidance cost. In determining how costly it would have been to secure the flowers through other means, we would inquire not only into the availability of alternative florists but also into the psychological harms associated with patronizing them to avoid discrimination.

We could account for the same factor on the other side of the dispute. The florist's particularized interest is in not arranging the flowers. In determining how costly it would have been to secure that interest without refusing the men service, we would inquire into the availability of non-

⁷² Of course, the two types of harm are not unconnected for reasons already stated. See discussion, *supra* note 69. Part of the reason an action is understood to constitute an expressive harm is because of the recognition that it is likely to produce (psychological, emotional) anguish or pain in the person to whom the action is directed.

⁷³ See discussion, *supra* notes 15 and 46 (contrasting Professor Tang's theory and its similarity to "covering" in contract law with our conflict-avoidance principle, in that his seeks to mitigate damages after the fact and ours seeks to avoid costs); cf. U.C.C. § 2-712 (Am. L. Inst. & Unif. L. Comm'n 2017) ("After a breach . . . the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." (emphasis added)).

discriminating employees and subcontractors. *And* we would inquire into the psychological harms to the florist associated with condoning, even in this limited way, a gay wedding.

Just how “costly” are these anticipated psychological harms? The answer is elusive because emotional sensitivities vary considerably. But law has a long history of dealing with this problem. It invokes a reasonableness standard.⁷⁴ We would ask how hard it would have been for a *reasonable person* in the couple’s position to go elsewhere for flowers, including in that calculation the sting from knowing that the original florist would discriminate. This solution is not ideal. In a perfect world, we would know the true extent of psychological anguish (or lack thereof) for all relevant parties. But short of that, we resort to how a reasonable person—not an unduly sensitive one, nor an unusually hard-hearted one—would likely experience the emotional harms.⁷⁵

We have explained that conflict avoidance can incorporate the psychological form of dignitary harm by treating it as an avoidance cost. Now we offer a prediction: though real and strongly felt, such harms usually will do little work in the analysis. The reason is that they will generally cut both ways. To avoid a conflict with the discriminating florist, the couple could have shopped elsewhere, suffering emotional anguish in the process. To avoid a conflict with the couple, the florist could have assigned their arrangement to a subordinate, suffering anguish from participating, even in this limited way, in a gay union. If we apply the reasonableness standard to both, we might well conclude that their psychological harms more-or-less cancel each other out. Indeed, if they did not do so—if one side’s psychological harms seemed clearly to

⁷⁴ See, e.g., *Dillon v. Legg*, 441 P.2d 912, 921 (Cal. 1968) (“In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen.”).

⁷⁵ We do so while recognizing that the reasonableness standard is deeply controversial, in theory and in practice. As a theoretical matter, it is ambiguous as to whether it should be understood as a normative or positive standard. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 324 (2012). And because for centuries judges and juries have been almost exclusively white men, the meaning and application of the reasonable person standard may well reflect such systematic racial and gender bias. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a “reasonable woman” standard for adjudicating sexual harassment claims under Title VII because “we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women”).

outpace the other's—then the case probably is not hard and not a candidate for conflict avoidance.⁷⁶ If the psychological harms seem to cancel, then the question of who could have avoided the conflict more easily is likely to turn on other, more material factors, like whether the florist had a non-objecting co-worker.⁷⁷

We have discussed possible, hypothetical answers to the question of what alternatives the couple and the florist had available to them for avoiding the conflict and how costly it would have been to exercise them. What were the parties' actual alternatives? What could these specific parties have done—not in the abstract but in reality—to avoid their dispute? To answer that question, the court must demand evidence. The couple can strengthen their case by showing that no comparable, non-discriminating florists operated nearby. The florist can present evidence to the contrary, assuming there is any. Likewise, the florist could strengthen her case by showing that she had no subordinates, co-workers, or potential subcontractors to perform the work. This approach would move courts and litigants away from a free-form policy analysis and towards a narrower, fact-specific inquiry.

C. Comparing Avoidance Costs (Step 3)

Finally, in step three, the court compares the parties' avoidance costs. Returning to our example, suppose the parties' psychological costs of avoidance seem about the same. If the florist has no subordinate who could do the arrangement, and the couple could go to a non-discriminating florist across the street, then the couple could have more easily avoided

⁷⁶ It may seem like there would be many examples where it's not hard at all. The white student's anguish over attending an integrated school does not seem comparable to the Black student's psychological harm from attending a segregated school. But what is really doing the work in that example is the difference in *expressive* harm: segregation communicates a message of inferiority in a way that integration does not. Of course, for just this reason, and as we explain further below, *Brown* is an easy case along the constitutional and moral dimension, rendering conflict-avoidance analysis unnecessary. See *infra* Section V.C.

⁷⁷ Note that it is possible for dignitary harms to originate from third parties. To illustrate, suppose that instead of going to a discriminating florist A, the gay couple could have gone to B, a florist next door. B offers the same flowers at the same price and serves gay couples. But there is one catch. Before arranging flowers for anybody, B demands that customers parade naked through her store, pledge allegiance to fascism, or (say) denounce homosexuality. B's behavior would increase significantly the couple's costs of avoidance (assuming B is the only other florist around). Of course, the members of the couple are themselves "third parties" in the case that technically the legal suit is between the State and the florist. We explain why we treat the couple as one of the "real parties in interest" below. See *infra* Section IV.A.

the conflict, so the florist should win. Conversely, if the florist owns the only flower shop in town and she could have a subordinate do the arrangement, then she could have more easily avoided the conflict, so the couple should win.

We recognize that courts will not always be able to quantify the precise costs of each party's alternative courses of action, making comparisons difficult. The same issue arises in torts. It is hard to figure out and compare the costs of, on the one hand, using a wrecking ball to demolish the building instead of dynamite and, on the other hand, relocating a bunch of pedestrians to a different location. Often judges must rely on their intuitions.⁷⁸ We take up this issue, along with other complexities, in the next Part, where we apply our test to some actual cases.

IV. CONSTITUTIONAL ROOTS AND APPLICATIONS

The conflict-avoidance principle we have described has roots in existing law. As we've seen, it resembles those private law doctrines that embody LCA, like the rule that when trains and cars meet at a crossing, trains, which are much harder to stop, have the right of way.⁷⁹ But it also resembles some constitutional doctrines. The First Amendment permits some restrictions on speech if, among other things, there are "ample alternative channels for communication,"⁸⁰ and it protects offensive

⁷⁸ For a classic statement of this difficulty, see *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949) (Hand, J.) ("The difficulties are in applying [cost-benefit analysis] . . . they arise from the necessity of applying a quantitative test to an incommensurable subject-matter; and the same difficulties inhere in the concept of 'ordinary' negligence. . . . The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries.").

⁷⁹ See, e.g., *Railroad Crossing Tips*, Ind. Dep't of Transp., <https://www.in.gov/indot/2610.htm> [<https://perma.cc/UA89-4A9K>] (last visited Feb. 2, 2020) ("The average freight train . . . takes over a mile to stop in emergency braking. . . . Always yield the right of way to the train. The train cannot yield to you."). For a discussion of the law and its connection to LCA, see, for example, William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 85–88 (1987). An example of LCA in private law includes strict liability for blasting, the theory being that blasting companies are better positioned to minimize harm. See, e.g., Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20(a), ch. 4 (Am. L. Inst. 2010); *Spano v. Perini Corp.*, 250 N.E.2d 31, 33–34 (N.Y. 1969). Professor Tang reviews other examples of LCA in private law, such as *contra proferentem*, the contract doctrine whereby ambiguous terms are construed against the drafter. See Tang, *Cost-Avoider*, *supra* note 15, at 27–28.

⁸⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

writing when unwitting viewers could “avoid . . . bombardment of their sensibilities simply by averting their eyes.”⁸¹ The narrow tailoring requirement of strict scrutiny analysis asks if the government could have achieved its objectives in a less burdensome way, meaning in a way that causes fewer conflicts with people’s rights and interests.⁸² Across areas, constitutional doctrine already incorporates something like the conflict-avoidance principle, though only sporadically.⁸³

Here we demonstrate how the test just developed works in practice by applying it to some controversial cases. Doing so reveals key points of divergence from existing doctrine. Specifically, the principle (A) looks beyond generic assertions of “governmental interest” to the real parties in interest; (B) applies to both sides of the dispute; (C) develops the law in a piecemeal fashion, with narrow precedents; and (D) makes use of, and relies upon, reasonableness judgments. We conclude by discussing (E) the principle’s limits. In some cases, it simply does not help.

A. Hobby Lobby—and Real Parties in Interest

Our approach looks beyond broad assertions of “government interest” to the real interests at hand. Consider *Burwell v. Hobby Lobby*.⁸⁴ Three closely-held, for-profit corporations challenged the Department of Health and Human Services’ mandate that, pursuant to the Affordable Care Act, employers provide coverage for contraceptive methods in their healthcare plans.⁸⁵ The corporations did not object to the provision of all contraception, just to certain forms that could prevent a pregnancy after fertilization.⁸⁶ The corporations claimed that providing such contraception violated their religious beliefs.⁸⁷ The Court concluded with

⁸¹ *Cohen v. California*, 403 U.S. 15, 21–22 (1971).

⁸² See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (explaining narrow tailoring requirement under strict scrutiny of racial classifications).

⁸³ One example is the “undue burden” standard in abortion doctrine. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313, 2315–16 (2016) (invalidating a law regulating abortion providers on the ground that the State could achieve its (ostensible) interest in protecting women’s health through other means that, unlike the regulation at hand, did not have the effect of restricting access to abortion services).

⁸⁴ 573 U.S. 682 (2014); see also *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381–86 (2020) (upholding agency rules providing religious exemption to the contraception mandate created under the Affordable Care Act).

⁸⁵ *Hobby Lobby*, 573 U.S. at 696–704.

⁸⁶ *Id.* at 701 (describing the challengers’ opposition to “four FDA-approved contraceptives that may operate after the fertilization of an egg”).

⁸⁷ *Id.* at 701–03.

“little trouble” that the mandate imposed a substantial burden on the challengers’ exercise of religion.⁸⁸

The Court then turned to the government, asking if the contraception mandate offered the least restrictive means of furthering a compelling interest.⁸⁹ The Court assumed that the government had a compelling interest in “guaranteeing cost-free access to the four challenged contraceptive methods.”⁹⁰ Then the Court analyzed tailoring. The majority reasoned that when employers like Hobby Lobby have a religious objection to providing coverage, the government could step in and provide the coverage itself. The government would achieve its interest—female employees would have cost-free access to the contraceptives—without burdening the employers’ religion.⁹¹ Indeed, the government already had a similar program for non-profit organizations and their employees.⁹²

The conflict-avoidance principle would work differently. Suppose *Hobby Lobby* is a hard case, so it becomes a candidate for conflict avoidance. Whereas the Court asked if the *State* could achieve its interest in ensuring coverage for contraception through another channel, one that would not burden the employers’ religion, conflict avoidance looks beyond the State to the real party in interest. It would ask if *that* party could achieve its interest through other means. That would mean asking if the employees to whom Hobby Lobby sought to deny coverage could achieve their interest through other means.

To explain and justify this move, recall the motivation for the conflict-avoidance principle. In hard cases, existing doctrine does not resolve the legal question. Consequently, we need to reframe the inquiry, replacing an unresolvable question with something more concrete and manageable. To achieve that, we would not consider the State’s broad and sometimes nebulous interests; nor would we inquire into the “goodness of fit”

⁸⁸ Id. at 719. *Hobby Lobby* involved a challenge under the Religious Freedom Restoration Act (“RFRA”), but the issues and analysis closely resemble constitutional law. This is because the purpose of RFRA was to restore via statute a particular constitutional standard (strict scrutiny for neutral, generally applicable laws that substantially burden religious exercise) that was altered by the Supreme Court in *Employment Division v. Smith*. Emp. Div., Dep’t of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990); see also 42 U.S.C. § 2000bb(b) (articulating RFRA’s official statement of purpose). For the purposes of illustration, thus, we use *Hobby Lobby* to elucidate how conflict avoidance might work in constitutional cases.

⁸⁹ *Hobby Lobby*, 573 U.S. at 726.

⁹⁰ Id. at 728.

⁹¹ Id.

⁹² Id. at 730–31.

between those interests and the State's action. Instead, we would focus exclusively on the real parties in interest, meaning the actual people (or entities) whose particularized interests are at stake. In the case, that would mean ignoring the State's broad, social interest in ensuring that more-or-less all women have access to contraception and focusing only on the interests of the particular employees that Hobby Lobby's policy frustrated. We would ask if they could have satisfied their interest in another way, and, if so, how hard it would have been for them to do so.

This shift has real implications. In *Hobby Lobby*, the Court held that the contraception mandate was not narrowly tailored.⁹³ The State could achieve its coverage objective without burdening religion by covering the employees itself. In other words, the government could *change and extend its insurance program*.⁹⁴ Conflict avoidance would not entertain this possibility. It would ask: when the employers sought an exemption from the mandate (i.e., when the conflict crystallized), how hard would it have been for the employees to obtain coverage through other means? The focus is on then-existing options, not hypothetical options like a future, possible extension of government-supplied coverage.

To be clear, conflict avoidance does not eliminate the usual tailoring analysis. Recall that we limit the domain of conflict avoidance to hard cases. To say a case is hard is to say that existing doctrine, which often inquires into State interests and tailoring, has already been applied, and yet the legal question remains unresolved. Only after reaching this point would we set the doctrine aside and shift focus to the real parties in interest.

We have not provided a full application of conflict avoidance to *Hobby Lobby*, just a partial one to make the point about real parties. We will return to this case below.

⁹³ *Id.* at 730.

⁹⁴ *Id.* at 728 (“[The government could] assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”). Note that the effect of our analysis is essentially to drop the State as a real party in a hard case like *Hobby Lobby*, and instead consider the employees—formally third parties in an exemption case like *Hobby Lobby*, see *id.* at 729 n.37 (discussing the employees seeking contraceptive coverage as third parties)—as the *real parties* in dispute with their employer.

B. Janus, Guadalupe—and Application to Both Parties

Current doctrine often inquires into the avoidance costs of one party, usually the State. Under conflict avoidance, courts would inquire into the avoidance costs of both parties and compare them.

Consider *Janus v. AFSCME*.⁹⁵ Illinois law required public employees to pay fees to the union that represented them, even if they were not members of the union, and even if they disagreed with the union's activities.⁹⁶ Mark Janus, an employee, challenged the law.⁹⁷ He claimed that by forcing him to pay the fees, the State forced him to subsidize and associate with the union's speech, including speech he opposed, in violation of the First Amendment.⁹⁸ The Supreme Court subjected the law to "exacting scrutiny."⁹⁹ To survive, the law had to "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."¹⁰⁰ The State asserted various interests, but, to simplify, we will focus on one: avoiding free riding.¹⁰¹ Without the fee requirement, the argument went, each public employee would wait for another to make voluntary contributions to the union.¹⁰² With everyone waiting, the union would be penniless, harming public employees. The Court rejected this, stating that preventing free-riding is not a compelling interest.¹⁰³

Now analyze *Janus* using conflict avoidance. We assume the case is hard and therefore a candidate for conflict avoidance. Now turn to step one, which requires us to identify the particularized interests of each party that the other party either frustrated or threatened to frustrate. As discussed, we would concentrate on the real parties in interest, meaning the union and Janus.¹⁰⁴ The union likely had broad interests at stake, such as the maintenance of strong unions in the state. But we focus on its particular interests in the case: (1) the value of the fee itself and (2)

⁹⁵ 138 S. Ct. 2448 (2018).

⁹⁶ *Id.* at 2460–61.

⁹⁷ *Id.* at 2461–62.

⁹⁸ *Id.* at 2462.

⁹⁹ *Id.* at 2464–65 (internal quotation marks omitted).

¹⁰⁰ *Id.* at 2465 (internal quotation marks omitted) (quoting *Knox v. Serv. Emps. Int'l Union*, Loc. 1000, 567 U.S. 298, 310 (2012)).

¹⁰¹ *Id.* at 2466.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The union collected the fees, including from objecting employees like Janus, pursuant to state law. See *id.* at 2460–61 (explaining the union's authority under state law).

preventing free riding (or more precisely, preventing Janus's individual contribution to free riding). On the other side, Janus had broad interests at stake, including an interest in protecting and advancing rights of free speech generally. But we look only to his narrow, particularized interest that the union frustrated, which was his interest in not supporting the union for speech he opposed.

Now turn to step two. Unlike current doctrine, the avoidance principle would inquire into the costs of avoidance for both sides. It asks, "How costly would it have been for a reasonable person in each party's position to secure those interests without making the specific demand on the counterparty that produced the legal conflict?" Start with the union. How hard would it have been for the union to prevent Janus's contribution to free-riding without demanding that Janus pay his fee? The fee itself was not large, about \$535 per year,¹⁰⁵ so the union should have no trouble collecting the money through other means, perhaps by slightly increasing its fees on others. On the other hand, preventing Janus's contribution to free riding is harder to assess. But not impossible. The question is, what could a reasonable union have done (1) to prevent one "defection" from unraveling the union (2) without insisting that Janus pay the fee? Here a court could (as the Supreme Court sort of did¹⁰⁶) look to other unions in states without mandatory fees and consider what steps they have taken, and at what cost, to prevent free riding.

Now consider Mark Janus. How hard would it have been for him (or more precisely, a reasonable person in his position) to secure his interest (in not having his money support speech he opposes) without making the particular demand on the union (that it not charge him a fee)? He could work to change the union's message, but this seems very difficult. One oar usually cannot change a ship's course. Alternatively, he could change jobs. Janus could seek employment at a place that does not require union fees, or at a place that requires fees but puts them towards speech that he supports. We are thinking of positions in the private sector, the federal government, or even another state government. The difficulty of changing jobs would depend on various factors, like whether there is demand for Janus's skill set (e.g., he is a programmer) or not (he lights gas streetlamps, or he winds the capitol building's mechanical clock).

¹⁰⁵ Id. at 2461.

¹⁰⁶ Id. at 2467–69 (discussing the endurance of unions in jurisdictions without mandatory fees).

Consider another case that demonstrates these ideas. Agnes Morrissey-Berru was fired from her teaching job at a religious school.¹⁰⁷ According to her, the school fired her because of her age in violation of the Age Discrimination in Employment Act.¹⁰⁸ According to the school, the firing resulted from her “difficulty in administering a new reading and writing program.”¹⁰⁹ In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court ruled in favor of the school.¹¹⁰ The Court resolved the case by clarifying (and perhaps extending) the “ministerial exception,” which exempts religious organizations from some discrimination suits.¹¹¹ But for the sake of example, set that aside. Assume the case is hard, meaning the applicability and reach of the ministerial exception is unclear. Applying conflict avoidance, the court would concentrate on the real parties in interest (Morrissey-Berru and the school) and ask how each could have secured its interest without making the particular demand of the counterparty. How hard would it have been for Morrissey-Berru to secure her interest in a teaching job without asking Our Lady of Guadalupe School to provide it? The answer depends on whether comparable teaching jobs were available to her. How hard would it have been for the school to secure its interest in “administering a new reading and writing program” without firing Morrissey-Berru? The answer depends on whether Morrissey-Berru could have been trained to administer the program, whether she could have been moved to a different teaching position that did not involve the program, and so on.

Under conflict avoidance, judges would inquire into, and so lawyers would provide evidence on, the kinds of questions raised above. We think this is a virtue. It would help to convert abstract questions about values into more concrete questions about facts. Of course, a court’s decision under step three—ruling against the party that could have secured its interests more easily—would require some judgment about reasonableness, but this might often seem easy compared to the usual balancing approach. Returning to *Janus*, if the union could have taken simple steps to retain members’ support, while changing jobs would have been difficult because of Janus’s unique skill set, then Janus would win.

¹⁰⁷ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2057–58 (2020).

¹⁰⁸ *Id.* at 2058.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2055, 2069.

¹¹¹ *Id.* at 2055 (holding that the “ministerial exception” also applies to teachers at private religious schools).

Asking about the avoidance costs of both sides has an important implication for broad or contrived constitutional challenges: they will tend to fail. “Test” cases will fare poorly under conflict avoidance. To illustrate, suppose a lawyer, knowing the union’s speech, finds a willing person who opposes that speech to apply for and accept a job with the State of Illinois. When the union charges its fee, the new employee promptly objects, and the lawyer promptly sues. Assuming the case is hard, and so the conflict-avoidance principle applies, the plaintiff-employee will almost certainly lose. But for the lawyer, she would never have been at odds with the union and its speech. Anyone who manufactures a dispute could have easily avoided it.

Like test cases, facial challenges will fare poorly. Such challenges allege that every possible application of the statute at issue violates the Constitution. Suppose the case is hard, so conflict avoidance applies. The challenger’s burden would be to show that in every case, including hypothetical cases that have not yet arisen, the real parties in interest on the other side are, or will be, the least cost avoider. Usually this will be impossible. Facial challenges will wither under the contextual, factual demands of conflict avoidance.

These implications may discomfit some readers, and we sympathize with that reaction. Test cases and facial challenges compose part of the civil rights edifice.¹¹² They validate rights, protect people, and check the State. We favor all of those things—when law is more-or-less clear. But in hard cases, law is not clear, and courts are adrift.

C. Masterpiece—and the Scope of Precedent

The precedents produced by conflict avoidance would be narrow in scope. To see why, consider *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.¹¹³ The facts resemble those in our fictional dispute involving a florist. Jack Phillips, the owner of a cake shop, refused to make a wedding cake for a gay couple, Charlie Craig and David Mullins, on the grounds that doing so would violate his religious beliefs.¹¹⁴ Craig and Mullins then filed a complaint with the Colorado Civil Rights Division, arguing that Phillips had violated Colorado’s anti-

¹¹² *Brown v. Board* was, after all, a facial challenge. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

¹¹³ 138 S. Ct. 1719 (2018).

¹¹⁴ *Id.* at 1724.

discrimination statute, which treats sexual orientation as a protected class.¹¹⁵ Phillips argued in response that forcing him to bake a cake for their wedding would violate his free exercise of religion and amount to compelling his speech, both in violation of the First Amendment.¹¹⁶ The Supreme Court decided the case for Phillips on unusual, narrow grounds.¹¹⁷ But the court below applied the doctrine in the traditional way, concluding that because the anti-discrimination law was one of general applicability, it need only be rationally related to a legitimate State interest, which it was.¹¹⁸

We can reconsider *Masterpiece* using conflict avoidance. We assume the case is hard and so a candidate for our analysis. Now turn to step one, which requires identifying each party's particularized interests that the other party frustrated or threatened to frustrate. Again, we would look past the State (in this case, the Civil Rights Commission) and concentrate on the real parties in interest, meaning the couple and the baker. The gay couple had many interests at stake, including a dignitary interest in being treated the same as heterosexual couples in the marketplace. But the particularized interest that Phillips frustrated was in getting a cake for their wedding. Likewise, Phillips had many interests at stake, including a dignitary interest in following his faith without interference from the State. But the particular interest that the gay couple threatened to frustrate was his interest in not baking a cake for their wedding. If he did not bake their cake, he would not suffer an affront to his religious beliefs.

Now turn to step two: how costly would it have been for a reasonable person in each party's position to secure their interests without making the particular demand on the counterparty that produced the legal conflict? Start with the couple. How hard would it have been for them (or more precisely, reasonable people in their position) to get a cake elsewhere?¹¹⁹ If they could have gotten a cake of comparable quality at

¹¹⁵ Id. at 1725.

¹¹⁶ Id. at 1726.

¹¹⁷ The Court ruled that the State displayed impermissible hostility to Phillips's religion. Id. at 1732.

¹¹⁸ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 289–92 (Colo. App. 2015).

¹¹⁹ Some lawyers have argued against the couple on the grounds that they could have shopped elsewhere. See, e.g., Petition for Writ of Certiorari at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (“Although Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery, they filed a charge of sexual orientation discrimination . . .” (citation omitted)); Laycock, *supra* note 15, at 168 (reiterating his view that religious service providers like Jack Phillips should be exempt from participating in same-sex weddings “so long as other providers of the same goods or services are readily

another bakery nearby, then their costs would have been low. If getting a comparable cake would have required a four-hour drive, then their costs would have been higher. On the baker's side, did he have a non-objecting employee to whom he could have delegated the work?¹²⁰ If so, his costs would have been low, and otherwise his costs would have been higher.

At step three, the court rules against the party that could have secured its interests more easily. In reality, the couple had no trouble securing a cake from another bakery, which suggests that their costs were low.¹²¹ The baker, meanwhile, seems to have treated wedding cakes as a task not easily delegated, suggesting that his costs may have been relatively high.¹²² Under least cost avoidance, the couple would lose the case.

Our conclusion runs contrary to the lower court's, and, although it matches the Supreme Court's, our rationale is quite different. Suppose, though, that the Court had applied conflict avoidance and, having found the facts above, ruled for the baker. The precedent would be a very narrow one. The holding of our hypothetical version of *Masterpiece* would be something like, "When the discriminated-against party can procure a comparable product nearby, and the objecting service provider has no subordinates to whom he or she can delegate the work, the service provider wins." If the next, similar case arose in a different location, the costs may be reversed—no comparable bakers nearby, plenty of non-objecting subordinates. If so, the case would come out the opposite way.

available"). This supports our claim that least cost avoidance already resonates in constitutional law. We simply take the idea further.

¹²⁰ Some may argue that having an employee bake the cake does not avoid a free exercise violation. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153–54 (10th Cir. 2013) (Gorsuch, J., concurring) (arguing that "it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct" on the ground that "[w]hether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of faith we must respect"). In a hard case, that is not necessarily correct, for the boundaries of free exercise in hard cases are often unclear. Likewise, some may argue that the baker's particularized interest is not having *anyone* associated with his bakery make the cake. This could be true, but the baker would have to prove it. See *infra* Section IV.E.

¹²¹ Petition for Writ of Certiorari, *supra* note 119, at 6 ("Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery . . .").

¹²² See *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (stating that Phillips "owned and operated the shop for 24 years"); *id.* at 1742–43 (Thomas, J., concurring) (stating that "Phillips is an active participant in the wedding celebration" and that he "sits down with each couple" to discuss "their preferences, their personalities, and the details of their wedding" before "creating and delivering the cake" to the wedding ceremony himself).

This is true even though the values and principles at stake (discrimination, equality, religion) are the same. Conflict avoidance would generate narrow, fact-sensitive precedents.

But that does not mean that applying the conflict-avoidance principle does not develop the law over time. It does so in a way faithful to the spirit of Oliver Wendell Holmes's famous observation, already noted, that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards."¹²³ Courts decide cases looking mainly to the facts before them, but, over time, as they begin to see connections among different parties, such parties may settle into identifiable classes. And if one class systematically has a harder time avoiding conflicts and securing its interests than does the opposing class, that fact provides a reasonable basis for delineating rights to protect the former. The Black plaintiffs who challenged segregated facilities in the south offer a paradigmatic example: there were no alternatives available to them.¹²⁴

D. Fisher, Interests, and Reasonableness

Our final case makes some important points about interests and shows how conflict avoidance requires judgments of reasonableness. The issue in *Fisher v. University of Texas at Austin* was whether the University's policy of allowing an applicant's race to be considered in admissions decisions violated the Equal Protection Clause.¹²⁵ The Supreme Court asked whether the admissions process (1) served a compelling government interest and (2) was narrowly tailored to achieve that interest.¹²⁶ A central issue was whether the University could achieve its goal of student-body diversity without using a race-conscious admissions policy.¹²⁷ The parties debated, and offered evidence on, the following: whether the University's "Top Ten Percent Plan," in which the top ten percent of Texas high school students are automatically admitted, made the more discretionary, race-conscious procedures unnecessary;¹²⁸ whether considering race had more than a "minimal impact" on student

¹²³ Codes, and the Arrangement of the Law, *supra* note 10, at 1. But see Schauer, *supra* note 9, at 890–901 (arguing that judges err when making policy based on concrete cases).

¹²⁴ We discuss this example more below. See *infra* Section V.C.

¹²⁵ 136 S. Ct. 2198, 2205 (2016).

¹²⁶ *Id.* at 2210.

¹²⁷ *Id.* at 2209–14.

¹²⁸ *Id.* at 2211–12.

diversity;¹²⁹ and whether there were “race-neutral” alternatives, such as aggressive recruiting efforts.¹³⁰

These considerations bear on our test. Assuming the case is hard, and thus a candidate for conflict avoidance, we would inquire under step one into each party’s particularized interests. The University’s interest lay in a diverse student body.¹³¹ The question is whether the University could have secured that interest without using race as a consideration for admission (the use of race was the source of the conflict with Fisher). This mirrors the Court’s actual analysis: Was there a race-neutral way for the University to secure diversity?

As in *Janus*, though, the Court did not ask a comparable question of the other party. Under the conflict-avoidance test, the Court would also inquire into how Abigail Fisher could have secured her interests. She might have had many interests at stake. In order from broadest to narrowest, her interests might have included: (1) achieving a race-blind society, (2) eliminating affirmative action in education, (3) receiving a high-quality college education, and (4) gaining admission to the University of Texas. The first two are abstract and general and thus excluded from the analysis. Thus, we limit the inquiry to (3) and (4) and ask, “Were there alternative ways Fisher could have secured those interests?”

If Fisher’s interest is best described by (3), receiving a quality college education, then she could have secured that interest by applying and being admitted to a comparable school. Her position would thus look analogous to the gay couple’s position in *Masterpiece*. Just as they could get another cake elsewhere, she could apply to other schools that would admit her and that are comparable in terms of quality to UT Austin. Assuming there are such schools, her costs are low, and at step three the University should win. Its affirmative action program would be upheld.

One implication of this analysis is that the fewer “comparable” schools there are, the harder it would be for Fisher to secure her interest through other means—and, therefore, the stronger her case under the conflict-avoidance principle. To generalize, although many universities could use race-conscious admissions criteria, the most competitive (or distinctive) universities could not, or at least might not be able to. The legal challenges to their criteria would be stronger. Exactly the same idea applies to

¹²⁹ Id. at 2212 (citation omitted).

¹³⁰ Id. at 2212–13 (citation omitted).

¹³¹ Id. at 2210–11.

bakeries and the like. A baker with unique talents might not have the same flexibility to discriminate based on sexual orientation as a baker with many equals.

What if Fisher has an interest in attending *only* the University of Texas, perhaps because her family has strong ties there?¹³² In this case, it seems impossible for her to secure her interest through some alternative means. Her only option is to demand that the University change its admissions policies. Her avoidance costs thus look high, not low, and what looked like a clear win for the University suddenly becomes a close call.

This leads to a dilemma. We have two plausible ways of framing Fisher's interests, and they might produce different outcomes. How do we choose between them?

Before answering, note that this problem is not limited to *Fisher*. Suppose the couple in *Masterpiece* claimed that their interest was not in getting a cake, but in getting a cake *from this particular baker*. Or suppose Janus claimed that his interest was not in working without supporting the union, but in working *only for the State of Illinois* without supporting the union. Given these interests, the couple and Janus, like our hypothetical Fisher, could not get what they want by going elsewhere. That makes their avoidance costs high, increasing the likelihood they will win.

We can bet that parties will strategically frame their interests narrowly to take advantage of this dynamic. Fisher will *claim* that she only wants to go to the University of Texas, and the gay couple will *claim* that they only want a cake from this baker, even if those claims are not true. They will make these claims to inflate their avoidance costs and strengthen their hand. If all parties do this, all avoidance costs will look high, and conflict avoidance will fail. Courts cannot assign liability to the least cost avoider when all parties' costs look equal and high.

Though thorny, this problem is not fatal. The same problem arises in private-law disputes. A party might argue that it could not have taken a particular precaution—stopping the car at the train tracks, clarifying the contract—because of this or that personal idiosyncrasy (e.g., “I get

¹³² If Fisher would not have gained admission to the University of Texas even if it did not consider race in admissions, then the University's use of race did not “frustrate” her particularized interest. In other words, she would fail the causal inquiry. We ignore this possibility and frame the issue as her having a greater *chance* at admissions. Cf. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (stating that the injury-in-fact requirement for Article III standing in a case challenging affirmative action in contracting “is the inability to compete on an equal footing in the bidding process, not the loss of a contract”).

nervous stopping near tracks,” “I find editing extremely taxing”). In general, courts sweep these arguments aside and draw on the reasonable-person standard. We would do the same. Step two in our test asks: How costly would it have been *for a reasonable person* in the party’s position to secure the interests without making the specific demand on the counterparty?

The reasonable person approach renders some claims implausible on their face. For example, suppose the female employees in *Hobby Lobby* claimed that their interest was not in getting coverage for contraceptives but in getting coverage *from their employer* for contraceptives. Or suppose the couple in *Masterpiece* claimed that their interest was not in getting a cake but in getting a cake *from this particular baker*. Holding price, coverage (in the case of insurance), and quality (in the case of the cake) more-or-less the same, a reasonable person simply would not take these positions. Consequently, the court would not recognize these interests.

To be clear, the reasonable person approach does not eliminate claims to a narrow interest. It could be that a reasonable person in Fisher’s position really would apply only to the University of Texas. But such narrow interests are likely to be rare, and critically, they must be factually proven. A court applying conflict avoidance would want to know exactly why applying elsewhere would not satisfy a reasonable person in Fisher’s shoes, and the lawyers should present evidence on this score (Does the school really have a unique program in, say, ornithology? What in Fisher’s background reflects a commitment to ornithology?).

In sum, properly identifying interests can be challenging, but coupling the reasonable person standard with insistence on a fact-based inquiry will help. No doubt some difficult questions will arise, but this is inevitable in hard cases whatever one’s jurisprudential approach—a point we underscore in the next Section.

E. The Limits of Conflict Avoidance

We believe conflict avoidance has promise in constitutional law, but it is not a magic bullet. The most straightforward limitation arises when the parties’ relative costs of avoidance seem the same. Returning to *Masterpiece*,¹³³ suppose there were a non-discriminating baker of equal quality next door, and suppose the baker had a non-discriminating

¹³³ See *supra* Section IV.C.

subordinate who would happily bake the cake. Both parties' costs of avoidance seem very low—so who should win? Or take the opposite case. The conflict in *Hobby Lobby* crystallized when the employers sought to deny coverage for certain contraceptives.¹³⁴ At that time, the employers could not easily provide the coverage without violating their religious principles, and the employees could not easily secure coverage from another source (no government option existed for them at that time).¹³⁵ Both parties' costs of avoidance seem high—so who should win?

The principle also founders when the *existence* of an interest is the central question at issue. Take abortion. Statutes that regulate, and effectively attempt to limit, abortion aim in part to protect the interests of fetuses.¹³⁶ As bizarre as it sounds, one could attempt to apply our analysis to such statutes. We would look beyond the generic “governmental interest” in the life of the fetus to the particular interests of the fetuses themselves. Among other things, the court would have to ask how hard it would be for those fetuses to secure their interest (being born) without making the particular demand (do not have an abortion) on the other party (pregnant women). Presumably the women would be the least cost avoiders because, unlike the fetuses, they have at least some *partial* alternatives available to them.¹³⁷ They can at least secure their interest in avoiding the costs of child *rearing* (through adoption), even if not the considerable costs of carrying and giving birth to a child. Fetuses, however, will cease to exist at all unless they make their particular demand against the pregnant women.

This analysis has a whiff of the absurd. Abortion, and states' efforts to regulate it, are controversial in part because people disagree on the fundamental question of whether fetuses are the sort of beings that have interests deserving protection—or at least deserving protection in the way that children and adults do.¹³⁸ Those who are pro-choice generally do *not*

¹³⁴ See *supra* Section IV.A.

¹³⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (observing that “[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections”).

¹³⁶ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he State has legitimate interests . . . in protecting the health of the woman and the life of the fetus . . .”).

¹³⁷ It is only partial because it does not avoid the costs of pregnancy, labor, and childbirth.

¹³⁸ In the Supreme Court’s most recent abortion case, the State only asserted an interest in protecting women’s health. See *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2112–13, 2121

think fetuses have a moral status equivalent to adults, children, or infants; those who are pro-life generally do.¹³⁹ To conduct our analysis would thus be to beg the central issue in dispute, which is whether fetuses have interests protected by rights in the first place. The conflict-avoidance principle fares better when there is agreement on the existence and legitimacy of the particular interests driving both parties' rights claims, but disagreement as to whose claim must give when they conflict.

Of all the hard cases, we do not know how many fit the two categories just mentioned or other categories (surely there are others) where the conflict-avoidance principle would seem to fail.¹⁴⁰ Whatever their number, their existence does not condemn the principle. They simply reveal its limitations. They remind us that some cases involve an unavoidable clash of interests or, even more deeply, unavoidable disagreement over whether and when such clashes of interests even exist.

V. OBJECTIONS AND RESPONSES

We have translated least cost avoidance in private law to a principle for resolving hard constitutional cases, and we have operationalized the principle with a doctrinal test. Both the principle and the test rest on various assumptions and arguments. Specifically, we assume that constitutional conflicts are costly, so encouraging parties to avoid them is good policy; that when hard constitutional cases arise, judges should, for reasons of competency and legitimacy, analyze the legal issues at a low level of generality, replacing free-form policy analysis with a more fact-specific inquiry; and that deciding cases in this piecemeal, case-by-case

(2020) (finding that the burden imposed by Louisiana on women's health via laws that imposed restrictive regulations on abortion clinics far outweighed any benefits).

¹³⁹ The Human Life Bill: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 97th Cong. 76 (1981) (statement of Dr. Clifford Grobstein, Professor of Biological Science and Public Policy, University of California, San Diego) (reporting that "[t]he early embryo is in fact an aggregate of cells which have not yet formed a distinct collective in the sense of an individual organism"); cf. Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 *Yale L.J.* 599, 611–12 (1986) (noting that some anti-abortion activists are "motivated by a sincere belief that a fetus is the moral equivalent of a born person").

¹⁴⁰ Another area in which it is not likely to work well is Establishment Clause jurisprudence since there the main interests at stake are both expressive and general, rather than particularized. Cf. Anderson & Pildes, *supra* note 66, at 1547 ("The [Court's] 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.").

manner might well, over the long run, produce an assignment of rights that approximates the proper balance. Each of these positions are familiar ones, particularly associated with the common-law tradition. But each also renders conflict avoidance vulnerable to objections. Here, we take up some of the most important ones.

A. On Value Neutrality

Under current doctrine, in hard cases judges make decisions with little to guide them. Whether one understands judges in such cases to be making good faith efforts to interpret the case law or to be using indeterminate legal materials to serve their personal ideological goals, one might argue that the conflict-avoidance principle is vulnerable to the same kind of problem. How a court characterizes a party's "particularized interest," how it assesses the "cost" of securing it through other means, and whether a case is "hard" in the first place are all questions whose answers require making potentially controversial judgments. In practice, conflict avoidance cannot provide a "neutral" basis for resolving hard cases.

This objection cuts too deep. There is no value-free way to make practical decisions, in law or elsewhere. Values come in at the wholesale level when justifying the conflict-avoidance principle and at the retail level when applying it.

At the wholesale level, the principle privileges social and political stability, conflict reduction, and the satisfaction of particularized interests. It would encourage courts to vindicate the claims of those most in need, in the sense that they had fewer or worse options available when the conflict arose, and to do so in a way that dampens social unrest.

Of course, any finding as to a party's "need" requires a value judgment, which is how values come in at the retail level. As elsewhere in the law, conflict avoidance relies on the concept of reasonableness, both with respect to interests sought and alternatives for securing them.¹⁴¹ Judgments of reasonableness are sometimes uniform, but often not. Different judges have different intuitions, and variations can emerge on lines like education, class, sex, race, and age. We do not deny any of this.

¹⁴¹ See Brandon L. Garrett, *Constitutional Reasonableness*, 102 *Minn. L. Rev.* 61, 61 (2017) (documenting the use of reasonableness standards, which "pervade[] constitutional doctrine").

Nor do we argue that reasonableness should be understood narrowly in terms of economic rationality.¹⁴²

Is conflict avoidance susceptible to abuse by results-driven judges? Will even well-meaning judges sometimes diverge on questions of reasonableness? Of course. But if this dooms the principle, then it dooms much of the rest of constitutional law too.

B. On Reducing Costs and Conflicts

Would conflict avoidance actually deliver the benefits we suggest? Even if courts apply the principle in good faith, deciding cases in the contextual, piecemeal fashion we described, one might have doubts. Two specific objections could be raised. First, because the approach demands a context-sensitive inquiry, it will require expensive fact-finding, thereby driving up the cost of each case. This objection misunderstands the goal of the principle (and LCA generally), which is to reduce *conflicts*, not adjudication costs. Even if the cost-per-case increases, the number of conflicts, and therefore the number of cases, may decrease. And if the second effect dominates, total adjudication costs will decrease as well. But it is not even obvious that costs-per-case will increase. Conflict avoidance may reduce the pressure on courts and advocates to pursue other forms of legal argumentation, either in the form of adding further theoretical or doctrinal support to a particular reading of the case law or, when originalist methods seem called for, in the form of extensive historical inquiry.

The second objection would argue that legal *conflicts* (not just costs) are likely to increase. If courts produce narrow holdings, then they reduce predictability in the law, which will lead to more conflicts and cases overall. That may be true, but again there are countervailing considerations. For instance, although narrow holdings reduce the amount of guidance courts offer, they also reduce the incentive, especially for impact-litigation firms, to sue in the first place, since every victory is a relatively limited one.

Both objections addressed here are fair, but they depend on empirical claims, the accuracy of which one cannot know in advance, prior to trying the method out.

¹⁴² See Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 *Stan. L. Rev.* 311, 312–13, 326–27 (1996) (distinguishing the two concepts and arguing that tort embraces reasonableness, not rationality).

C. On Social Progress

A deeper objection to conflict avoidance challenges its core normative assumption, namely that constitutional conflicts should be avoided where possible. Such conflicts, one might argue, are necessary for social progress. Consider the rapid advances in equal rights for the LGBTQ community. That progress was aided considerably by the Supreme Court, which decided in their favor from *Romer v. Evans* in 1996 through *Obergefell v. Hodges* in 2015.¹⁴³ If the Court were to apply conflict avoidance, that progress might stall. In cases like *Masterpiece Cakeshop*, the principle might permit some service providers to discriminate.¹⁴⁴

To see the problem even more starkly, one might level an objection along the following lines: Under our approach, the *Brown* plaintiffs should have lost if they could have easily gone to a segregated school that really was “equal” in physical or material respects.¹⁴⁵ Under these facts, the plaintiffs’ avoidance costs were low, so they would lose under our approach.

This objection misses the mark for several reasons. First, in our view (and in the views of many others), *Brown* is not a “hard case,” and so not a candidate for conflict avoidance. Invidious racial discrimination is paradigmatically a violation of the Equal Protection Clause.¹⁴⁶ Since it is not a hard case, courts would not invoke the conflict-avoidance principle.

But that response may be too quick. *Brown*, despite its unanimity, was arguably not so easy at the time.¹⁴⁷ Had the Court found it a hard case and

¹⁴³ *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (striking down an amendment to Colorado’s state Constitution that prohibited government protection against discrimination on the basis of sexual orientation because the amendment violated the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas statute that criminalized same-sex sexual conduct on Due Process grounds); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (striking down the Federal Defense of Marriage Act for violating the Fifth Amendment); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that the right to marry is a fundamental right, and that states cannot deprive same-sex couples of that right).

¹⁴⁴ See discussion, *supra* Section IV.C.

¹⁴⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁴⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 421 (1960) (arguing that, because the Jim Crow legal regime amounted to a “massive intentional disadvantaging of the Negro race,” *Brown* and other segregation cases were “rightly decided, by overwhelming weight of reason”).

¹⁴⁷ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 34 (1959) (doubting whether there is a “basis in neutral principles” that can explain *Brown*); see also Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 293 (2004) (“*Brown*’s unanimity can be misleading. Some scholars have concluded that the justices easily invalidated school segregation and that a

applied the conflict-avoidance principle, would the decision have come out the other way?

We believe the answer is no, for a few reasons. First, segregated Black schools in the 1950s were *not* equal to white schools.¹⁴⁸ Consequently, African Americans faced severe obstacles to securing their particularized interests (in the education itself and the opportunities it provides) through other means. But since the Court accepted the lower-court findings that the schools were equal (or on their way to being made equal) according to “tangible factors,” we will set this aside.¹⁴⁹ Even so, the plaintiffs had dignitary interests of the psychological sort at stake—namely their interest in being educated in a school system that did not make them feel like second-class citizens, thereby inhibiting their ability to learn. (Indeed, that was precisely the ground on which the *Brown* Court rested its decision.¹⁵⁰) Every alternative to integration would seem to perpetuate these psychological harms, making the *Brown* plaintiffs’ avoidance costs high.

But the analysis is comparative, and one might point out that the white students, too, had psychological interests at stake—ones that were alleged to have been frustrated by the mere presence of Black students in their

contrary ruling in *Brown* was ‘scarcely imaginable’ by 1954. This view is mistaken; the justices were deeply conflicted.”). But see Black, *supra* note 146, at 424 (“[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here I must confess to a tendency to start laughing all over again.”).

¹⁴⁸ Klarman, *supra* note 147, at 146–47 (explaining that “school segregation was nearly universal in the postbellum South,” and that, “[i]n practice, black schools never received adequate funding,” and “separation connoted black inferiority and thus was stigmatic”).

¹⁴⁹ *Brown*, 347 U.S. at 492.

¹⁵⁰ See *id.* at 494 n.11 (citing psychological studies that purported to demonstrate the harm to Black children’s development caused by segregation). The Court’s reliance on social-science evidence of such harm has been criticized. See, e.g., Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 *J.L. & Educ.* 3, 5 (1977). We now see clearly (as some did at the time, see Black, *supra* note 147, at 424) that segregation entailed an expressive wrong, not merely a psychological harm. But for those judges who find such moral questions unclear, taking cues from actual harm, whether physical or psychological, might point them in the right direction. It is sometimes easier to find evidence of empirical facts before they are transformed into what Dworkin calls “interpretive judgments.” Dworkin, *Social Science and Constitutional Rights*, *supra*, at 6.

school.¹⁵¹ Given those interests, how costly would it have been for white students to avoid the conflict? The answer is not very. Rather than resisting integration, white students could have attended all-white private schools. True, private schools cost money, raising whites' avoidance costs. But short of relocating to an integrated state, the Black plaintiffs had no alternatives at all.

Suppose the Court in *Brown* applied the conflict-avoidance principle and reached the conclusion that the African American students had no alternatives. Instead of ordering integration, could the Court (contrary to the facts stipulated in the case) have ordered equalized funding for Black schools? Would conflict avoidance permit that outcome? No, it would not. To prevent conflicts from arising in the first place, the principle focuses exclusively on ex ante precautions—what the real parties could have done, before the conflict crystallized, to avoid it. Ordering more funding would not be an ex ante precaution. It would be ex post “covering,” an after-the-fact effort to mitigate the conflict’s harm.

The gay couple from *Masterpiece Cakeshop* faced a situation in 2012 quite different from the ones African Americans faced in the 1950s.¹⁵² Given the widespread acceptance of homosexuality in Colorado at that time, they easily secured a wedding cake from another shop.¹⁵³ Had that not been true—had they been akin to African Americans in the 1950s—they would likely win under the conflict-avoidance principle. (We should emphasize again: the principle we explore offers a default method for resolving hard cases. We use *Masterpiece Cakeshop* for the sake of example. For those who find *Masterpiece Cakeshop* an easy case, conflict avoidance would not apply.)

Finally, as this discussion shows, the conflict-avoidance principle would not necessarily hinder social progress. It could even promote

¹⁵¹ See Wechsler, *supra* note 147, at 34 (“But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.”).

¹⁵² Laycock, *supra* note 15, at 190–92 (distinguishing the status of gay people today with that of Black people in the Jim Crow south in part on the grounds that “[i]n Census Bureau data, same-sex couples report higher educational achievement, higher rates of employment, and higher median incomes than opposite-sex couples,” that “[t]he LGBT community votes without hindrance and is an important part of the working coalition of one of our two major political parties; it is guaranteed strong political support from that party,” and that “Gallup reports that 67% of Americans believe that same-sex marriages should be valid and with the same rights as traditional marriages”).

¹⁵³ Petition for Writ of Certiorari, *supra* note 119, at 6 (“Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery . . .”).

progress. To illustrate, courts strictly interpreting equal protection doctrine currently reject claims of discrimination brought by some groups, including the poor, on the ground that no suspect classification is involved.¹⁵⁴ Under conflict avoidance, however, if the case is hard, a plaintiff could win by showing that they would have had a harder time securing their interests than the counterparty. Indeed, in the case of poor people, that will likely be true.

D. Is Conflict Avoidance Misconceived?

A final objection goes to the foundation of our project. Any proposal to guide adjudication must be one grounded in law or principle, not some free-floating goal of reducing the number of hard cases.

This objection could take different forms. One version might insist that courts look to positive law for methodological guidance.¹⁵⁵ But in hard cases, we do not know what positive law requires. Of course, law might provide default rules for resolving such cases of uncertainty.¹⁵⁶ But if it does, then those cases are not hard; the existing default rule provides a solution. Furthermore, maintaining fidelity to such default rules would require normative justification—and then we are back to engaging in normative arguments about how judges should decide cases.¹⁵⁷

That leads to the next (more Dworkinian) version of the objection. One might assert that the Constitution does not serve outcome-oriented goals like efficiency or welfare because it protects rights and powers that are deontic, not consequentialist, in structure. Or, alternatively, even if the Constitution does aim to secure such goals, it does not pursue them in a way that allows for comparisons of the “costs” of securing various interests. That is because the activities and actions involved are

¹⁵⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (concluding that a Texas system of school funding based on property taxes “does not operate to the peculiar disadvantage of any suspect class”).

¹⁵⁵ Cf. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 817, 819 (2015) (“This inquiry points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”); Baude, *supra* note 24, at 2351–52 (arguing that originalism is embodied in positive law).

¹⁵⁶ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1111–12 (2017) (explaining that the law offers various “closure rules” that instruct courts on what to do when they are uncertain).

¹⁵⁷ See Charles L. Barzun, *The Positive U-Turn*, 69 *Stan. L. Rev.* 1323, 1387 (2017) (arguing that even “positive” defenses of constitutional theory depend on normative commitments).

incommensurable, so the sort of comparison implicit in the concept of “lesser cost” has no place in such judgments. In either case, our approach would result in judgments that bear only an arbitrary relation to the underlying constitutional rights, principles, or values.

This objection misunderstands the scope and nature of conflict avoidance. First, even if the Constitution’s rights, duties, immunities, and powers are deontic in structure, the conflict-avoidance principle is not inconsistent with that structure since *it only applies when it is unclear what those particular rights and duties require*. The Preamble states that the Constitution was established in order to “promote the general welfare.”¹⁵⁸ Deciding hard cases in a way that prioritizes the rights of those who have the fewest alternatives, while simultaneously reducing conflicts, seems to us a plausible way of promoting the general welfare.

The second point is that the principle does not task judges with maximizing utility or advancing social welfare. It does not call for a court to decide, for instance, whether striking down or upholding a university’s affirmative action program would do more to promote welfare. Rather, the principle demands that in hard cases, where the doctrine does not point to a clear result, courts compare the avoidance costs of the parties themselves. The hope is that in the long run, this approach “promotes the general welfare” by encouraging those who can more easily secure their interests to do just that.

CONCLUSION: ON MARKETS AND RIGHTS

Hard cases are inevitable, especially in constitutional law, and they present a seemingly tragic choice. Courts can dodge and deflect, abandoning their interpretive tasks and leaving rights claims to founder. Or they can decide on the merits, choosing among values with little guidance. The conflict-avoidance principle might offer an escape from this trap. The principle directs courts to rule against the party who could have more readily secured its interests through other means. Adopting the principle could reduce the conflicts that give rise to hard cases in the first place.

Conflict avoidance demands particular, case-by-case adjudication, making disputes turn on facts. However, we predict that patterns will

¹⁵⁸ U.S. Const. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare . . .”).

emerge as courts discover that some litigants, whether they be gay wedding shoppers or religious service providers, consistently prevail. Those patterns might coalesce into workable rules that, in the best scenario, track the “correct” underlying assignment of rights. The particular shape that such rules take can only emerge *ex post*, after courts deploy conflict avoidance and learn from experience. Nevertheless, one generalization can be drawn *ex ante*. It involves a connection between rights and markets.

Under conflict avoidance, individual rights are more likely to prevail in shallow markets than in deep ones. To clarify and support this claim, return to our focus on alternatives. Our doctrinal test inquires into the difficulty each party would have faced securing its interest through other means. That difficulty—or in our language, the “cost”—depends critically on the availability of alternatives. If the gay couple denied service by the religious florist could have bought flowers at many other, non-discriminating shops, then their costs were low. In other words, gay couples will tend to lose in *deep* markets. If there were no comparable florists nearby, the couple would have few alternatives (the market is *shallow*), and they would tend to win. The logic works on the other side too. If the florist had many non-discriminating subordinates who would have arranged the flowers (i.e., the relevant market for florists was deep), then her costs were low, and she would tend to lose.

These ideas lead to simple, sharp predictions. Anti-discrimination laws will likely have more force in places like Montana, where many markets are shallow, than in Manhattan, where many markets are deep. People like Mark Janus will fare better in small markets where they cannot easily change jobs than in large markets where they can. Religious sole proprietors will get more exceptions (to anti-discrimination laws, to contraception mandates, and so on) than large corporations.

To some, these predictions might smack of free-market idolatry. By discouraging people from bringing rights claims to secure interests they could have secured in other ways, conflict avoidance privileges private ordering.¹⁵⁹

¹⁵⁹ The ideas presented here resonate with much libertarian and market-oriented thought, including the invisible hand, “foot” voting, government competition, selecting between “exit” and “voice,” and the power to choose one’s polity. For germinal works, see generally Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., U. Chi. Press 1976) (1776) (on the invisible hand); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956) (on mobility and government competition);

But this is not quite right. The principle does not systematically cut in favor of free markets and private ordering. The principle cuts the other way too, empowering states and encouraging policy experimentation. To see why, consider the connection between alternatives and government reach. Because federal laws apply to everyone, the federal government is analogous to a monopolist. Unlike in a locality such as metropolitan New York City and the tri-state region, where a gay couple might easily opt for a different baker and a different set of laws by crossing state lines, parties subject to national laws cannot opt for a different set of laws—not without leaving the country, anyway, which is usually costly. With fewer options, litigants challenging the federal government will tend to have stronger claims under conflict avoidance.

States, though, are not (or not always) like monopolists. Many of New York's laws apply only to New Yorkers. To avoid a conflict with those laws, one could move to Connecticut or New Jersey. There is a *market* for state law.¹⁶⁰ Moving is not feasible for everyone—it can be prohibitively expensive¹⁶¹—but it is feasible for some. With more options for avoiding the conflict, more mobile litigants challenging state laws will have weaker claims under conflict avoidance.¹⁶² This logic operates with even more force at the local level. To avoid a conflict with the city, move across the street to where the county has jurisdiction. The effect will be to give state and local governments more flexibility to pursue policies

Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970) (on the choice between leaving and reforming an organization); Robert Nozick, *Anarchy, State, and Utopia* (1974) (on choosing the rules of one's society). We note that Calabresi characterized the application of least cost avoidance to accident law as a market-oriented approach. See Calabresi, *supra* note 13, at 135.

¹⁶⁰ This point is well understood in corporate law. See, e.g., Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251, 255 (1977) (examining state competition in corporate law).

¹⁶¹ See, e.g., Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 *Va. L. Rev.* 1537, 1548–57 (2019) (arguing that agglomeration economies raise mobility costs).

¹⁶² Scholars debate whether the strength of rights should depend on mobility. See, e.g., Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 *Harv. J.L. & Pub. Pol'y* 29, 35 (2009) (rejecting the argument); Richard C. Schragger, *The Limits of Localism*, 100 *Mich. L. Rev.* 371, 416–17 (2001) (expressing doubts about the argument); Richard Schragger, *Consuming Government*, 101 *Mich. L. Rev.* 1824, 1824–26 (2003) (book review) (discussing limits of the Tiebout model); Ilya Somin, *Free To Move: Foot Voting, Migration, and Political Freedom* (2020) (arguing that mobility promotes freedom). The argument for connecting the strength of a rights claim to mobility seems stronger in hard cases, that is, where the existence and scope of the right is contested.

consistent with their vision of the common good. In sum, under conflict avoidance, rights claims will have the most force against national laws and the least force against local laws.¹⁶³

Our project is to develop least cost avoidance in the constitutional context. This project is neither libertarian nor communitarian in motivation or character. We have nothing to say about legally authorized uses of government power, including national power that constrains individual choice. (Remember, the principle only applies in hard cases.) Nor does conflict avoidance demand a commitment to individualism. One can prioritize the community over the person and positive rights over negative liberty. Still, conflict avoidance has normative appeal. Deeper markets and local power imply fewer conflicts, greater stability, and less strain on courts. Those values should resonate with lawyers, whatever their other ideological commitments.

¹⁶³ Robert Cooter reaches a similar conclusion, albeit with different premises and objectives. See Cooter, *supra* note 15, at 130–32 (“In general, parochial rights fit mobile societies and universal rights fit immobile societies.” (emphasis omitted)).