# SECOND-ORDER DECISIONS IN RIGHTS CONFLICTS

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## INTRODUCTION

How should judges decide hard cases involving rights conflicts? Standard debates about how to answer this question are usually framed in jurisprudential terms. Legal positivists claim that the law is sufficiently "open textured" that it will not provide judges with guidance in some range of cases.[1] The law is said to "run out" or to be incomplete.[2] In such cases, legal sources—constitutions, statutes, executive orders, agency regulations, and so on—do not provide reasons that determine the legal question at issue. When the law runs out in this way, judges have no choice but to exercise discretion. They cannot reason within the limits of the law. They must reach beyond it by relying on policy considerations or judgments drawn from political morality. How often this happens is a matter of dispute among legal positivists and theorists who take a more critical stance toward the law.[3] But whether the law runs out only in some cases, or, more radically, in all of them, judges will face the question of how to adjudicate conflicts when they lack sufficient legal reasons.

The traditional competitor to both positivist and critical legal theories has been an anti-positivist view that rejects the possibility of judicial discretion in hard cases. Most famously, Ronald Dworkin defended a single-right-answer thesis, according to which every conflict of rights has a unique or determinate outcome.[4] That is because, on his view, the law never (or almost never) runs out. At least in complex and well-developed legal systems, there are always legal sources, as well as moral values and principles embedded within the law, that provide judges with reasons to favor one outcome over another.[5] Judges never have to reach beyond the law to adjudicate rights conflicts. The law, in this view, is a complete system. It will contain sufficient reasons for making legal decisions, and the job of judges, however difficult, is to discern them.

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[1] See H.L.A. Hart, The Concept of Law 127–29 (2d ed. 1994).

[2] Id. at 272 ("[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete.").

[3] See Brian Leiter, Legal Indeterminacy, 1 Legal Theory 481, 487–88 (1995) (distinguishing "global" from "local" indeterminacy and rejecting the former); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 470 (1987) (criticizing the "strong" indeterminacy thesis that all cases are "hard" cases).

[4] See Ronald Dworkin, Taking Rights Seriously 81–130, 279–90 (1977) [hereinafter Dworkin, Taking Rights Seriously]; Ronald Dworkin, No Right Answer?, 53 N.Y.U. L. Rev. 1, 32 (1978).

[5] See Dworkin, Taking Rights Seriously, supra note 4, at 286.

Attempting to sidestep this long-standing debate over whether—or to what extent—there are hard cases, some legal scholars have recently taken up the question of how to decide such cases if, or when, they do indeed exist. In a leading account offered by Charles Barzun and Michael Gilbert, when ordinary considerations of law and justice leave judges uncertain about how to adjudicate rights disputes, those judges should adopt a second-order decision-making procedure to determine the outcome.[6] More specifically, and by analogy to the idea of "least cost avoidance" familiar from the economic analysis of private law,[7] they argue for a conflict-avoidance principle, which holds that "courts should decide hard cases against the party who could have more easily avoided the constitutional conflict in the first place."[8] The promise of this principle is that, by following it, judges would resolve hard cases in a way that encourages the parties to avoid rights conflicts. If successful, this decision-making strategy would, in turn, reduce the incidence of hard cases. Judges would face fewer conflicts in which they are uncertain about how to apply the relevant first-order considerations of law and political morality.

The conflict-avoidance approach to adjudicating hard cases is both novel and ingenious. To our knowledge, and perhaps surprisingly, no one has previously proposed resolving legal indeterminacies by aiming to reduce cases that produce such indeterminacies. Of course, others have argued that their theories of adjudication would ameliorate trenchant political, social, and cultural controversies, including those involving constitutional rights.[9] But Barzun and Gilbert's proposal is distinctive in that it only applies in hard cases. Theirs is a "meta-principle"[10] of

[6] On the distinction between first- and second-order decisions, see Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, 110 Ethics 5, 6–7 (1999) [hereinafter Sunstein & Ullmann-Margalit, Second-Order Decisions]; Edna Ullmann-Margalit, Difficult Choices: To Agonize or Not to Agonize?, 74 Soc. Rsch. 51, 70–71 (2007) [hereinafter Ullmann-Margalit, Difficult Choices]; Edna Ullmann-Margalit & Sidney Morgenbesser, Picking and Choosing, 44 Soc. Rsch. 757, 775 (1977) [hereinafter Ullmann-Margalit & Morgenbesser, Picking and Choosing].

[7] See Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 140 (1970) (discussing the "cheapest cost avoider").

[8] Charles L. Barzun & Michael D. Gilbert, Conflict Avoidance in Constitutional Law, 107 Va. L. Rev. 1, 3 (2021) (emphasis omitted).

[9] See generally, e.g., Jamal Greene, How Rights Went Wrong (2021) (arguing that rights balancing can reduce social and political conflict); Robert L. Tsai, Practical Equality: Forging Justice in a Divided Nation (2019) (defending a pragmatic approach to achieving equality).

[10] Barzun & Gilbert, supra note 8, at 7 n.18.

adjudication, rather than a general approach applicable to all cases involving rights conflicts. In conflict avoidance, hard cases are resolved recursively for the purpose of preventing more hard cases.[11]

Despite its originality and prima facie appeal, we argue that there are several reasons to avoid adoption of the conflict-avoidance principle. The argument for that principle draws on an analogy to accidents in tort law. Both accidents and hard cases involve significant costs. Just as car accidents lead to physical injuries—as well as to the administrative costs of insurance, adjudication, and compensation—hard cases produce costs for the parties to litigation and for the courts that decide them. But this analogy is one-sided and potentially misleading. Whereas accidents only produce costs, hard cases may generate important epistemic and moral benefits by serving as vehicles for deliberation, social contestation, and political or legal reform. Thinking of hard cases as if they were accidents also contributes to a pessimistic conception of rights adjudication, one with a neoliberal or libertarian tilt that favors private ordering over public and democratic decision-making.

The case for conflict avoidance is also incomplete. Courts faced with hard cases have available to them a variety of second-order decision procedures, including deference to other (or future) decision-makers, defaults favoring political values of liberty or equality, interest balancing (including theories of proportionality review and harm avoidance), and the use of lotteries or other chance devices. Selecting among these second-order strategies requires justification. If judges adopt conflict avoidance, they must have reasons to reject the others. Surveying

[11] In recent work, Aaron Tang has proposed a "harm avoider" approach to constitutional adjudication. See Aaron Tang, Harm-Avoider Constitutionalism, 109 Calif. L. Rev. 1847, 1849 (2021). His theory bears some resemblance to Barzun and Gilbert's, but, for our purposes, there is a crucial difference. Barzun and Gilbert's theory of conflict avoidance adopts an ex ante perspective, which is focused on what parties to a conflict could have done in advance to avoid it. See Barzun & Gilbert, supra note 8, at 10, 28. Tang's theory considers both what measures parties could have taken "retrospectively" and what measures they might take "prospectively" to avoid the adverse consequences of a court decision. See Tang, supra, at 1885 n.265. But as Barzun and Gilbert point out, Tang's approach foregrounds the least cost bearer rather than the least cost avoider. See Barzun & Gilbert, supra note 8, at 16 n.46. His theory also raises the question of how courts should make decisions when the least cost avoider and the least cost bearer are different parties. The party that is best positioned to avoid harms ex ante might not be the party that is best positioned to bear those costs ex post. Here we focus mainly on the pure ex ante theory offered by Barzun and Gilbert to justify their conflict-avoidance principle, although we return briefly to Tang's view *infra* Subsection II.D.2 at note 135 to mark its possible distinctiveness from other proportionality or interest-balancing views.

alternatives can help clarify the values that support cost-avoidance as well as those that recommend against it.

Second-order decision-making strategies may have an important place in deciding hard cases. But in adopting them, we urge caution. The use of hypothetical examples as toy cases—to demonstrate how a theory works, rather than to recommend a particular application—may suggest that hard cases are far more prevalent in the legal system than in fact they are. Many cases that are described as "hard" may turn out to involve reasonable disagreements, rather than more intractable forms of legal incompleteness, such as indeterminacy or radical uncertainty about what the law or justice requires. And in those cases, judges may be able to proceed based on first-order reasons, without having to ascend to second-order theories of adjudication. Indeed, facing the prospect of applying second-order procedures may lead judges to conclude that law and morality do, after all, provide the right answers.

## I. HARD CASES AND LEGAL INCOMPLETENESS

Arguments for applying second-order decision rules, including the conflict-avoidance principle, may depend on the claim that the law is incomplete, that it "runs out," or that it fails to provide judges with guidance about how to resolve cases. But there are various ways in which this might happen, and different forms of incompleteness may call for different practical responses. As a preliminary matter, and to prevent confusion, it will be useful to distinguish three types of incompleteness, which we will refer to as inconclusiveness, indeterminacy, and uncertainty. It is also important to mark the scope, or subject matter, of incompleteness—whether it applies to law, or to political morality, or, if the two are inseparable, perhaps to both. Claims of incompleteness may be more or less controversial depending on both the type of incompleteness and the subject matter to which it applies.

### *A. Forms of Incompleteness*

Starting with the various types of incompleteness, there are different ways in which the law might produce "hard" cases. Most commonly, legal sources are inconclusive when competent and reasonable lawyers

disagree about what outcomes they justify.[12] Take a simple case in which *P* sues *D* for violating *P*'s rights. Judge Alf believes that the relevant legal sources justify a rule, $R_1$, that requires holding for *P*. But interpreting the same sources, Judge Betty believes they justify a competing rule, $R_2$, which requires holding for *D*. In this case, Alf and Betty both believe that the law provides sufficient justification for a particular rule and holding. But suppose that neither can show that their justification is conclusive, such that the other is rationally required to accept it. In these circumstances, we might say that the relevant legal sources have produced a "hard case," in which the rule in question is controversial and subject to reasonable or rational disagreement.

Note, however, that from the perspective of each judge, the law has not "run out" in the sense of failing to provide guidance. The judges each have what they believe are legal grounds for resolving the dispute before them. Indeed, Alf and Betty might both think that the case of *P v. D* is an easy one. They might each be quite certain that their respective interpretations of the law are correct. One might say, nonetheless, that the legal system is incomplete because it fails to generate interpersonal convergence on the justification for specific rules and holdings. When viewed externally, or from the outside, it may seem as if the law supports multiple reasonable answers and is therefore generating "hard" cases.[13] But from within the legal system, competent actors like Alf and Betty have sufficient grounds for justifying their legal conclusions. Legal cases marked by inconclusively justified legal rules or holdings may be "hard" interpersonally but "easy" from the perspective of actors working inside the system.

More commonly, when judges and scholars describe cases as "hard," they are not referring to cases that are merely controversial or that are the subject of reasonable disagreement between competent legal actors. They do not have in mind cases of what we are calling inconclusiveness. Instead, they describe cases in which the law "runs out" in the sense of not providing sufficient reasons for deciding in favor of one outcome over

[12] See Micah Schwartzman, The Completeness of Public Reason, 3 Pol., Phil. & Econ. 191, 194 (2004) [hereinafter Schwartzman, Completeness] (describing public reason as inconclusive when it "fails to generate convergence among reasonable people on a single political outcome"); Gerald F. Gaus, Justificatory Liberalism 152 (1996) [hereinafter Gaus, Justificatory Liberalism] ("Indeterminacy and inconclusiveness are distinct; a great deal of trouble is avoided if we see this clearly.").

[13] But cf. Dworkin, Taking Rights Seriously, supra note 4, at 279 (criticizing an external argument for the claim that "there is sometimes no single right answer, but only answers").

another. When the law is incomplete in this way, it is indeterminate. In our simple case of *P v. D*, suppose Alf examines the relevant legal materials, and he concludes that they do not give him any reason to favor the rule, $R_1$, over the competing rule, $R_2$, or vice versa. Maybe Alf thinks that the sources are simply silent on the question of which rule is preferable, or maybe the sources provide reasons of equal weight. Or perhaps the relevant sources point to values that are both incommensurable and incomparable, so that Alf has no rational basis for selecting between the two contradictory rules.[14] In this case, the relevant legal sources—which we can describe as providing first-order reasons—are indeterminate. They do not provide Alf with sufficient guidance to resolve the dispute between *P* and *D*. Adjudication of their case will require second-order reasons—given by some further rule or decision procedure—to move beyond this impasse, or incompleteness, in the law.

Here, it is worth observing that a case might be "hard" in the sense of being indeterminate even if it is not controversial, at least among the adjudicators. Alf and Betty might agree that the law does not provide reasons for favoring $R_1$ over $R_2$ (or, again, vice versa). That judgment might be conclusive, so that no competent legal actor would have a rational basis for disagreeing with it. It is at least theoretically possible for legal sources to be conclusively indeterminate with respect to some outcome.

But note that the converse is also possible. The claim that a case is indeterminate might be inconclusive and subject to reasonable disagreement. Suppose Betty believes that the law supports $R_2$, even if she cannot demonstrate her view conclusively, while Alf believes that the law is indeterminate as between $R_1$ and $R_2$. If Alf's view is also inconclusively justified, then Alf and Betty will disagree about how to resolve the case. This will be an instance of inconclusiveness, where only one of the judges, Alf, faces the problem of first-order indeterminacy.

So far, we have described two forms of legal incompleteness—inconclusiveness and indeterminacy—neither of which requires epistemic uncertainty about what the law demands. Under inconclusiveness, judges can believe that legal sources provide reasons for unique outcomes, while reasonably disagreeing about which outcomes are correct. And, under

[14] On incommensurability and incomparability, see Joseph Raz, The Morality of Freedom 333–35 (1986); see also Ruth Chang, Introduction, *in* Incommensurability, Incomparability, and Practical Reason 1, 4–7 (Ruth Chang ed., 1997) (defining concepts of incommensurability and incomparability).

indeterminacy, judges may believe—with certainty—that the law does not select for unique outcomes.

In some cases, however, the law may be incomplete because judges are not certain about what the law requires. Barzun and Gilbert define "hard cases" as those "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."[15] This definition of hard cases is meant to be compatible with a Dworkinian view of law in which legal reasons never (or rarely) "run out." Even if legal reasons exist and point to a single right answer, such that there is no metaphysical indeterminacy, judges might not be able to figure out what that answer is. And if judges cannot know the correct answer, then the law has failed to provide them with practical guidance. In this way, uncertainty might generate epistemic indeterminacy and, therefore, legal incompleteness.[16]

We have belabored these distinctions between various types of incompleteness because of their importance in motivating different forms of second-order decision rules. When cases are inconclusive, judges may have sufficient reasons for reaching specific outcomes. They may need voting rules for resolving their disagreements,[17] but they do not need to go beyond first-order legal sources to arrive at their own legal conclusions. In cases of metaphysical or epistemic indeterminacy, however, judges cannot rely on first-order reasons. Yet, without such reasons, they have no grounds for rendering a decision, an intolerable and seemingly pathological state of affairs. Lurking here is Buridan's Ass—the fabled donkey who stands before two equal bales of hay and, with no

[15] Barzun & Gilbert, supra note 8, at 8.

[16] Here one might ask how uncertain judges must be before deciding that they have no reason to prefer one outcome over another. This is a difficult question that requires specifying an epistemic standard or threshold, and it is one that Barzun and Gilbert do not address. Whatever the answer, we assume that the degree of uncertainty would need to be significant. A judge might be 90% certain that the law supports *P* over *D*, which implies 10% uncertainty. But in that case, it would be odd to say that the judge is uncertain about the outcome. Above some credence threshold, it seems intuitive to describe a judge as reasonably or sufficiently certain. What exactly that threshold is or ought to be, and what implications its specification has for legal and moral decision-making, are questions that have been taken up recently in the burgeoning literature on decision-making under moral uncertainty, which we discuss in Subsection II.D.5 *infra*. See also Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 Harv. J.L. & Pub. Pol'y 411, 411 (1996) ("[O]ne needs to know *how much uncertainty* is enough to create *indeterminacy*.").

[17] See Schwartzman, Completeness, supra note 12, at 211.

reason to prefer one over the other, dies of starvation.[18] Judges faced with indeterminacy cannot succumb to decisional paralysis. Instead, they must respond by adopting some second-order rule or procedure to resolve these types of hard cases.

### *B. The Scope of Incompleteness*

In making claims of legal incompleteness, it is necessary to specify the type of incompleteness as well as its scope or subject matter. What, exactly, is claimed to be inconclusive, indeterminate, or uncertain? One way to answer this question might be to say that the scope of incompleteness is given by one's theory of law, whatever that happens to be. An account of hard cases might try to be agnostic across a wide range of jurisprudential views. For example, consider again Barzun and Gilbert's definition of hard cases, which refers to uncertainty "with respect to the proper application of the legal sources *and* with respect to the moral principles the relevant law may embody."[19] Here the scope of incompleteness includes both legal sources—whatever those might be—and any moral principles that might be incorporated within those sources. Including the latter leaves open the possibility of appealing to soft or inclusive positivist accounts, as well as Dworkinian or natural law theories.

There is, however, a potential difficulty here. As mentioned above, in standard accounts of legal positivism, the conventional view is that legal sources sometimes do run out, leaving judges with discretion to act on extra-legal moral or policy considerations. In such accounts, there is little concern about judges facing Buridanic choices. The implicit working assumption is that morality and social policy are sufficiently determinative that they will provide resolutions where the law does not. For legal positivists, judges may face legal indeterminacy, but that does not mean they lack grounds for decision-making. They can exercise their

[18] See, e.g., Eugene Chislenko, A Solution for Buridan's Ass, 126 Ethics 283, 284 (2016) ("The imagined ass, or donkey, finds itself hungry midway between two equally sized bundles of hay. Unable to choose, it dies of starvation."); Nicholas Rescher, Choice Without Preference: A Study of the History and of the Logic of the Problem of "Buridan's Ass," 51 Kant-Studien 142, 154 (1960) ("Buridan gives the example of a dog (!)—not an ass!—dying of hunger between two equal portions of food. It is clear, however, that this transposed example . . . could scarcely have been the direct origin . . . . It is highly probable that the example was given by Buridan (in its henceforth traditional description of an ass placed between equally appetizing heaps of hay) . . . .").

[19] Barzun & Gilbert, supra note 8, at 8.

legal discretion by acting on determinate moral reasons. In effect, positivist judges already have a second-order decision procedure. When the law is indeterminate or uncertain, they rely on morality (or policy).

At this point, proponents of an alternative second-order decision rule may widen the scope of incompleteness. Cases may be hard when both the law and political morality—or justice—are incomplete, even if the two are separable in the way that some positivists imagine. Barzun and Gilbert take this approach when they identify hard cases as those "where the demands of law and justice are unclear."[20]

The problem with widening the scope of incompleteness to include justice or political morality is that some types of incompleteness may be either nonexistent or exceedingly rare. Few would contest the claim that law and political morality are both marked by pervasive inconclusiveness and reasonable disagreement. But to the extent incompleteness takes the form of indeterminacy, whether metaphysical or epistemic, it is significantly more controversial to claim that political morality is limited in that way.[21] Legal positivists are not committed to a wider moral indeterminacy thesis, and that view is obviously rejected by Dworkinians and by many natural law theorists. It is one thing to claim that positive legal sources run out in controversial cases involving rights conflicts, but it is another to assume that theories of justice, or of political morality more generally, are similarly incomplete.[22]

A final preliminary observation about the scope of legal incompleteness involves the distinction between first- and second-order reasoning. When a conflict is described as presenting a hard case, it may not be clear whether certain forms of decision-making are covered by the description. For proponents of a particular second-order decision rule, it might be tempting to pack competing rules into the category of indeterminate first-order sources.[23] At the extreme, if all the existing decision rules and procedures are covered, and are therefore assumed to be indeterminate, then the only way forward would be to adopt a novel

[20] Id.

[21] See, e.g., Gaus, supra note 12, at 155–56; Schwartzman, Completeness, supra note 12, at 203–08.

[22] We return to this point in discussing the suggestive use of hypothetical legal examples in Section III.A *infra*.

[23] Barzun and Gilbert sometimes seem inclined in this direction. See Barzun & Gilbert, supra note 8, at 52 ("Of course, law might provide default rules for resolving such cases of uncertainty. But if it does, then those cases are not hard; the existing default rule provides a solution.").

rule, one that has not previously been applied. But this would be a highly artificial result, effectively eliminating comparisons between alternative decision-making strategies. In evaluating second-order proposals, including the conflict-avoidance principle, we assume that some range of them might generate determinate outcomes in cases involving rights conflicts. Strategies cannot be rejected in advance, or by fiat, by stipulating that they are part of an incomplete set of legal and moral sources. As we discuss in Section II.D, judges will always have a diversity of second-order options available to them for determining how best to proceed in hard cases.

## II. THE COSTS OF CONFLICT AVOIDANCE

With these preliminaries in place, we can return to the question of how judges should decide hard cases. Supposing, however controversially, that ordinary legal and moral sources are indeterminate or uncertain in a given case, judges may turn to second-order decision-making strategies as "tiebreakers," so to speak. These strategies sometimes work by introducing alternative normative considerations or by restricting the kinds of facts that count as relevant for making decisions under those considerations. In this Part, we focus on least cost avoidance as a second-order strategy that uses both tactics to generate determinacy. We begin by rehearsing the main features of this approach, as developed by Barzun and Gilbert, before offering several objections to it in Sections B through D.

### *A. The Conflict-Avoidance Principle*

If judges are uncertain about how to resolve a rights conflict, the conflict-avoidance principle tells them to assign liability to whichever party could have avoided the conflict at the least cost. This principle borrows the idea of "cheapest" or "least cost avoidance" ("LCA") from the economic analysis of tort law, developed initially and most systematically by Guido Calabresi in his famous book, *The Costs of Accidents*.[24] Calabresi argued that the most efficient way to reduce the costs of accidents is to give parties incentives to take the least expensive precautions necessary to avoid them. To take a simple example, suppose an automobile accident between Alf and Betty causes $100 worth of damage. Alf could have avoided the accident by taking a precaution that

[24] Calabresi, supra note 7, at 135–36.

cost $20, whereas it would have cost Betty $30 to avoid the accident. In this case, Alf is the least cost avoider. A rule that assigns liability to him, and that requires him to pay the cost of this accident ($100), will give him—and others similarly situated—an incentive of $80 to avoid this type of accident in the future. If the court's aim is to reduce the overall costs of accidents, the most efficient way to accomplish that goal is to make Alf pay. The result will be fewer accidents in the future, and the costs of avoiding them will be lower than with a rule that assigns liability to Betty or to no one at all.

As Barzun and Gilbert emphasize, following Calabresi, the justification for LCA is forward-looking.[25] The principle is designed to avoid costs in the future. It is not meant to minimize harms in the present case or to assign liability to the party that can most easily bear costs that have already occurred.[26] To see this, suppose that in the accident between Alf and Betty, Alf suffered most of the damage, $90 worth, whereas Betty's costs were limited to $10. If a court aimed to issue a ruling that minimized harm to the parties in the case before it, it might spread the losses by assigning at least partial liability to Betty. All else equal, she has suffered less harm and is in a better position to bear the losses of the accident.[27] But a court following LCA would ignore these distributive concerns. The parties' relative positions with respect to costs ex post—after that accident has occurred—are irrelevant. All that matters is their ex ante costs of avoidance, that is, what it would have cost each of them to avoid the accident in the first place.

In formulating their conflict-avoidance principle, Barzun and Gilbert's insight is that LCA can be adapted from the law of accidents and applied to hard constitutional cases, or those in which the demands of law and justice are uncertain or epistemically indeterminate. This "translation project,"[28] as they describe it, requires several theoretical changes to the LCA framework. For starters, whereas the justification for LCA is to promote economic efficiency, Barzun and Gilbert eschew reliance on social welfare maximization in favor of a broader and perhaps more pluralistic appeal to promoting the "general welfare," a goal they tie to constitutional text.[29]

[25] Barzun & Gilbert, supra note 8, at 11.
[26] Id.
[27] See Tang, supra note 11, at 1895.
[28] Barzun & Gilbert, supra note 8, at 13.
[29] Id. at 53.

This shift from efficiency to general welfare tracks differences in the types of costs considered within LCA and cost-avoidance, respectively. Most obviously, in tort law, accidents cause physical and emotional harm, which can sometimes be quantified in financial terms. Accidents also generate social costs by necessitating systems of compensation, insurance, and the administration or litigation of disputes about liability.[30] Some of these costs may hold for legal conflicts more generally. But unlike accidents, such conflicts may involve a wider range of interests, including claims grounded in values and principles protected by constitutional rights and duties. Of course, like accidents, hard cases impose the costs of litigation and judicial administration, and they may increase the likelihood of judicial error.[31] Barzun and Gilbert further claim that attempting to resolve highly salient legal conflicts, or at least those that lead to hard cases, may undermine the legitimacy of courts.[32] They also suggest that reducing such conflicts might be justified as a means of ameliorating "social unrest."[33]

To achieve these more capacious normative ambitions—by reducing legal conflicts, rather than accidents—courts applying the conflict-avoidance approach would ask whether the parties had alternative courses of action available to them that would have secured their constitutional interests without initiating litigation.[34] Courts would then evaluate the costs of those alternatives and rule against the party with the least expensive means of avoiding the conflict. To guide this inquiry, Barzun and Gilbert propose a three-step process in which courts would "(1) identify the particularized interests of each party that the other party's actions frustrated or threatened to frustrate"; "(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

[30] See Calabresi, supra note 7, at 26–28.

[31] Barzun & Gilbert, supra note 8, at 5.

[32] Id. Barzun and Gilbert seem to have in mind "sociological" legitimacy, which refers to popular support for the authority of courts, rather than moral legitimacy, which refers to whether courts have legitimate moral authority. See Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 22–23 (2018) (distinguishing between these two concepts of legitimacy).

[33] Barzun & Gilbert, supra note 8, at 47.

[34] Id. at 26 ("Roughly stated, the question is: 'How hard would it have been to get what you wanted without disturbing the other party?'").

produced the legal conflict"; and "(3) rule against the party that could have secured its interests more easily."[35]

In the first and second steps, Barzun and Gilbert introduce several important distinctions that shape their conception of conflict avoidance and that are crucial for understanding their view. At step one, courts are tasked with identifying the constitutional interests that each party is trying to secure. Barzun and Gilbert argue that, in hard cases, courts should constrain the range of interests that count for purposes of determining how costly it would be for the parties to avoid the conflict. Drawing analogies to federal standing doctrine and to the elements of causation and harm in tort law,[36] they claim that courts should only consider what it would cost parties to secure interests that are "particularized" and "frustrated," while bracketing interests that are "abstract,"[37] "general,"[38] "broad,"[39] and "remote."[40]

To illustrate this distinction between particular and general interests, Barzun and Gilbert offer the example of a wedding florist who objects on religious grounds to providing flowers to a couple celebrating their same-sex marriage. The couple has a particular material interest in obtaining flowers for their wedding. But their interest in being treated as equal citizens in the market is "abstract" and "general"—an interest shared by many others. The result, according to Barzun and Gilbert, is that courts should ignore that equality-based interest and consider only the couple's particularized interest in getting flowers for their wedding.[41] The same reason would hold for the florist in the other direction. Her interest in protecting religious liberty is general, and so courts should set it aside. Her remaining particularized interest is in not providing flowers to this couple.[42]

Barzun and Gilbert anticipate the objection that their view does not account for the interests that the parties in this example might have in avoiding both expressive wrongs and psychological harms. With respect to expressive wrongs, which occur when a person speaks or acts in a

[35] Id. at 13, 26.
[36] Id. at 20.
[37] Id. at 19–21, 42.
[38] Id. at 18–19, 21, 23, 36, 42.
[39] Id. at 22.
[40] Id. at 20.
[41] Id. at 19–20.
[42] Id. at 20.

manner that demeans or degrades another,[43] Barzun and Gilbert argue that courts will always be uncertain about them in hard cases. If a court found that a gay couple had suffered such an expressive wrong, that finding would be tantamount to deciding that the florist was liable. And if a court found that requiring the florist to provide service amounted to infringing her dignity as a religious believer, that, too, would be dispositive. And so, while these claims are particularized, Barzun and Gilbert set them aside on the grounds that courts must already find the law and political morality to be indeterminate with respect to them.

A similar conclusion holds for psychological and emotional harms. Barzun and Gilbert deny that the gay couple in their example has a particularized interest in avoiding the psychological harm of being demeaned at the point of service.[44] Instead, they claim that psychological harms should be factored in as avoidance costs. When the gay couple considers where to shop in order to avoid discrimination, they might suffer psychological harms when they choose not to shop at places that will treat them as less than equal citizens.[45] But Barzun and Gilbert argue that these harms are difficult to measure and that, anyway, the florist is likely to have similar emotional burdens, which will mean that the parties' psychological claims, like their expressive or dignitary interests, will "more-or-less cancel each other out."[46]

Once courts have identified each party's particularized interests, their job at step two is to determine which party can secure their interests at the lowest cost. Here, Barzun and Gilbert argue that courts should apply a reasonableness standard by asking: how much would it cost a reasonable person to pursue an alternative course of conduct that would allow them to avoid having their interest frustrated by the other party?[47] Perhaps the gay couple can easily get flowers from another florist, or maybe the florist has an employee who has no religious objection to providing the flowers. Courts must demand that the parties produce factual evidence about the costs of such alternatives, and they must evaluate those costs according to how a reasonable person would have responded to them. Barzun and

[43] See Richard C. Schragger, Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech, 63 Ariz. L. Rev. 45, 57–61 (2021); Deborah Hellman, When Is Discrimination Wrong? 13, 34–35 (2008).

[44] Barzun & Gilbert, supra note 8, at 25.

[45] Id. at 28.

[46] Id. at 29.

[47] Id.

Gilbert recognize that the reasonableness standard is controversial,[48] but they justify it as a sensible way of proceeding in hard cases.[49]

After identifying the parties' particularized interests and comparing their avoidance costs, at step three, courts would then rule against the party with lower costs. That would complete the three-part process for determining the least cost conflict avoider. But a final point is important to mention in this rehearsal of Barzun and Gilbert's account. In rights conflicts involving the government, they claim that courts should "look[] beyond the State to the real party in interest."[50] Where the government's purported interests are raised on behalf of some other parties, Barzun and Gilbert claim that conflict avoidance requires focusing on the "actual people (or entities) whose particularized interests are at stake."[51] In hard cases, the government cannot rely on "general" or "abstract" interests.[52] To the extent its interests are reducible to the particularized interests of other parties—the "real parties in interest"[53]—courts must compare their avoidance costs to determine who is the least cost avoider.

In developing and defending the cost-avoidance principle, Barzun and Gilbert apply their approach to several notable cases involving religious exemptions from federal contraceptive coverage requirements (*Burwell v. Hobby Lobby, Inc.*),[54] state public accommodations laws (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*),[55] and federal employment discrimination law (*Our Lady of Guadalupe School v. Morrissey-Berru*);[56] compelled support for union speech (*Janus v. American Federation of State, County & Municipal Employees, Council*

[48] Indeed, although Barzun and Gilbert resist the point, id. at 40 n.120, applying a reasonableness standard to religious beliefs in the free exercise context is probably unconstitutional under existing doctrine. See United States v. Ballard, 322 U.S. 78, 86, 88 (1944) (holding that a court may not permit a jury to test the truth of a religious belief); see also W. Jackson Vallar, Note, Can the Reasonable Person Be Religious?: Accommodation and the Common Law, 107 Va. L. Rev. 189, 193 (2021) ("[T]he Supreme Court's First Amendment jurisprudence after *Smith* not only allows, but requires, religious accommodation where application of the reasonable person standard burdens sincerely held religious belief.").

[49] Barzun & Gilbert, supra note 8, at 29.

[50] Id. at 33.

[51] Id. at 34.

[52] Id. at 42.

[53] Id. at 34.

[54] Id. at 32–34 (discussing *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014)).

[55] Id. at 38–41 (discussing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)).

[56] Id. at 37 (discussing *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)).

*31 ("AFSCME")*);[57] and affirmative action in higher education (*Fisher v. University of Texas at Austin*).[58] They do not claim that any of these are actually hard cases. Instead, Barzun and Gilbert argue that, if they were hard cases, the conflict-avoidance principle could be applied to reach sensible results. Across these and other examples, they claim that their approach "proceeds in a 'bottom-up,' context-sensitive fashion,"[59] which follows the common law in focusing on the facts rather than amorphous claims of value.[60] Barzun and Gilbert emphasize that their view "privileges social and political stability, conflict reduction, and the satisfaction of particularized interests."[61] And they also observe a deeper connection between conflict avoidance and private markets by anticipating that where markets offer adequate alternatives for satisfying particularized interests, parties asserting general interests that depend on government regulation are likely to lose. At least when it comes to hard cases, conflict avoidance is a theory that favors private ordering in functioning markets and disfavors democratic interventions, especially at the national level, that make it more expensive for individuals to secure their interests without generating legal conflicts.[62]

### *B. The Benefits of Hard Cases*

Having described the main features of the conflict-avoidance approach, we now offer several objections to it. Our first focuses on the comparison of legal conflicts to accidents in tort law. Accidents are obviously bad. They result in significant costs and produce no benefits. But is the same true for legal conflicts? Barzun and Gilbert recognize this question,[63] and they seem to give two responses. One is to ask readers to go along with their intuition that such conflicts are costly,[64] and, as mentioned above, another is to claim that hard cases impose costs in terms of increased litigation, judicial error, and the subversion of judicial legitimacy.[65] These

[57] Id. at 35–36 (discussing *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)).
[58] Id. at 41–44 (discussing *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016)).
[59] Id. at 6.
[60] Id. at 41.
[61] Id. at 47.
[62] See id. at 55–56.
[63] See id. at 14.
[64] See id. at 15 ("We assume that reducing the number of hard constitutional conflicts is desirable.").
[65] See id. at 5 ("[Hard] cases can undercut the legitimacy of courts as judicial institutions, especially when the political stakes are high."). Barzun and Gilbert do not offer an argument

responses rely on a conception of legal conflict that strikes us as unduly anxious and pessimistic about challenges to the legal order. Rather than see legal conflicts as pathological, we might instead understand them as opportunities for the development and improvement of social norms. In support of this alternative view, we sketch two arguments—one based on the epistemic value of confronting hard cases and another on the role of constitutional litigation in social contestation by groups subordinated within democratic politics.

*1. Epistemic Value*

The first argument from norm development is that confronting difficult moral and legal questions has epistemic value. Such confrontation may not be easy or pleasant. When cases appear to be indeterminate, judges may struggle to find sufficient justifications for their decisions. But working through complex and important social problems can be generative. Hard cases force judges to give reasons publicly and to articulate their values,[66] even when they would prefer not to be explicit about their commitments.[67] The need to articulate reasons for making hard decisions may induce deliberation, which can be epistemically beneficial, both in eliciting legal justifications and in subjecting them to private and public scrutiny.[68] In the long run, confronting hard cases,

for why hard cases undermine judicial legitimacy, and it is hard to see how they could without a substantive account of which conflicts make hard cases. Perhaps they mean to channel the idea that widespread moral and political disagreement is a sign that the law and political morality are indeterminate. And so, if courts resolve such cases, they must be doing so without legal or moral grounds and in the face of significant public opposition, which might well lead to the erosion of support for judicial institutions. But if this is their view, it conflates inconclusiveness (reasonable disagreement) and indeterminacy in the definition of what counts as a hard case. It should also be obvious that, for many highly salient issues, the fact of public disagreement provides no evidence that the law or political morality is indeterminate.

[66] See Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 652–54 (1995).

[67] See Ullmann-Margalit, Difficult Choices, supra note 6, at 65.

[68] See Micah Schwartzman, Judicial Sincerity, 94 Va. L. Rev. 987, 1008–10 (2008) (discussing the epistemic value of actual publicity in legal justification); David Estlund & Hélène Landemore, The Epistemic Value of Democratic Deliberation, *in* The Oxford Handbook of Deliberative Democracy 113 (Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren eds., 2018) [hereinafter Estlund & Landemore, Epistemic Value]; Hélène Landemore, Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many 97 (2013) [hereinafter Landemore, Democratic Reason]; Lisa Bortolotti, The Epistemic Benefits of Reason Giving, 19 Theory & Psych. 624, 624, 642 (2009).

rather than avoiding them, may be important in developing better and more systematic justifications for our constitutional practices.[69]

If hard cases induce judges to improve the justifications for their decisions, future judges may benefit from their epistemic labor. And with a more comprehensive set of reasons available to them, judges may be better positioned to decide later cases based on sufficient legal justifications—a result that might not have been possible in the absence of hard cases. Moreover, if deciding cases based on sufficient justifications promotes judicial legitimacy, then confronting hard cases may contribute over time to the credibility of courts that claim to resolve disputes based on reasoned decision-making.

The conflict-avoidance principle, by contrast, threatens to short-circuit this epistemic process of norm development. Working through difficult decisions can be taxing, intensive, and even agonizing.[70] And judges, like everyone else,[71] may be attracted to strategies that avoid it. If there is an easier, more tractable tiebreaker available, judges might succumb to the temptation to declare that the law is uncertain or indeterminate and end their deliberations early.[72] But if that deliberation has epistemic value, then there will be corresponding costs if judges adopt second-order procedures that prematurely narrow the scope of relevant normative considerations.

At this point, Barzun and Gilbert might respond that they have their own account of norm development. Their idea is that repeated application of the conflict-avoidance principle will give judges information about what frustrates particularized interests. By turning "abstract questions about values into more concrete questions about facts,"[73] judges can measure avoidance costs so that their judgements come to approximate

[69] See Gaus, supra note 12, at 148 ("[T]he evidence strongly suggests that the generation of challenges and replies is a scarce social resource."); see also Jeremy Waldron, Mill and the Value of Moral Distress, *in* Liberal Rights: Collected Papers 1981–1991, at 115, 129 (1993) (developing and defending John Stuart Mill's view that conflicts involving "moral distress" have epistemic and social value).

[70] See Ullmann-Margalit, Difficult Choices, supra note 6, at 53.

[71] Although maybe not some legal academics. Cf. Richard A. Posner, How Judges Think 206 (2008) ("Lack of time and lack of specialization are not problems for the law professor.").

[72] See Schwartzman, Completeness, supra note 12, at 207 ("Working on the assumption that public reasons rarely run out is a way of countering the tendency to find more indeterminacy than is actually out there.").

[73] Barzun & Gilbert, supra note 8, at 37.

the "real interests"[74] at stake in larger social conflicts.[75] But this response assumes away the possibility of making epistemic progress on questions of value. And, further, if judges are mistaken in their judgments of uncertainty or indeterminacy, then engaging in an iterative factual inquiry based on a restrictive set of values may only compound that initial error.[76]

*2. Social Contestation*

In addition to spurring norm development through deliberation, legal conflicts may also serve as catalysts for social movements. This contention is supported by recent work on the role of litigation involving reproductive and LGBTQ rights. As Reva Siegel and Douglas NeJaime have argued, courts have played a role in promoting democratic politics by providing "alternative fora" in which marginalized and subordinated groups can articulate the grounds for rights that sound in both liberty and equality.[77] Groups that have faced historical stigmatization and exclusion from the political process may engage in legal conflicts, in part to gain access to institutions that elicit reason-giving and fact-finding in a structured, adversarial process. And even when courts do not recognize the rights of subordinated groups, litigation may have salutary effects—raising the profile of social issues, providing focal points for legislative attention, and mobilizing popular support. As part of a more general effort to challenge existing social and legal norms, legal conflicts can open up space for political argument, not only in courts, but also in other "arenas of contestation."[78]

The LGBTQ movement provides an example. After decades of subordination, gay rights activists initiated a successful legal campaign to decriminalize same-sex and queer relationships. That effort, in turn,

[74] Id. at 32.

[75] Id. at 21 (arguing that the conflict-avoidance principle allows courts to "collect information relevant to the broader, longer-term question of how to balance constitutional values").

[76] Cf. Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 906 (2006) [hereinafter Schauer, Do Cases Make Bad Law?] (discussing pathologies in common-law rulemaking).

[77] Douglas NeJaime & Reva Siegel, Answering the *Lochner* Objection: Substantive Due Process and the Role of Courts in a Democracy, 96 N.Y.U. L. Rev. 1902, 1911 (2021).

[78] Id. at 1958; see also Seana Valentine Shiffrin, Democratic Law 63 (2021) ("[O]ur precedential, adversarial judiciary entertains arguments by the parties' own representatives, typically offers reasons for its decisions that guide future cases, and engages in an ongoing dialogue of reasons with the public and other reason-giving officials.").

diminished the stigma associated with LGBTQ status, allowing the movement for LGBTQ rights to expand, both internally and in terms of public support.[79] By engaging in further legal conflicts, some of which might well have been perceived at the time as presenting hard cases, activists maintained the presence of the LGBTQ community in the courts but also in legislative politics, where their claims gained attention and, in some cases, recognition.[80] That the movement suffered numerous losses and setbacks in the courts is consistent with the broader claim that legal conflicts provided a venue for ongoing social contestation. The important point here is not that courts correctly (or incorrectly) adjudicated those conflicts, but that they allowed competing groups to participate in a process of communicating justifications for their conflicting claims. That legal process draws in subordinated groups and allows them to voice their grievances and to offer alternative accounts of how social norms and the laws that instantiate them might be transformed. As Siegel and NeJaime put it, "Court decisions do not always or even generally settle conflict and emancipate subordinated groups. Rather, they provoke and escalate conflict and in this way enable political integration of subordinated groups."[81]

In this account of legal conflict, rights claims are merely one aspect of a larger participatory and democratic process. Within that process, conflicts are not seen as accidents or as costly failures to be avoided. Rather, they are a means by which moral challenges to long-standing and entrenched social norms can be articulated and tested. And, far from a sign of institutional pathology, the emergence of such conflicts may be a signal that there is sufficient flexibility and openness within a legal system to permit such challenges and to consider the demands of groups that have otherwise failed to achieve success in the political process. Legal conflicts can be understood in this way as a form of democratic participation. The opportunity to assert legal claims may ameliorate alienation by providing

[79] NeJaime & Siegel, supra note 77, at 1956.

[80] Id. at 1955; Reva B. Siegel, Community in Conflict: Same-Sex Marriage and Backlash, 64 UCLA L. Rev. 1728, 1748–49 (2017); Douglas NeJaime, Constitutional Change, Courts, and Social Movements, 111 Mich. L. Rev. 877, 879 (2013); Douglas NeJaime, Winning Through Losing, 96 Iowa L. Rev. 941, 968–69 (2011); Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. Rev. 1235, 1312–18 (2010).

[81] NeJaime & Siegel, supra note 77, at 1957.

litigants with a forum for airing their grievances and for having them fairly adjudicated.[82]

The conflict-avoidance principle may trade on an unattractive picture of those who stand on their rights. Their intransigence is said to create conflicts, which leads to rancor, polarization, and loss of faith in the courts. But an account of legal conflict that emphasizes the participatory value of social contestation provides a useful corrective. Rights conflicts may generate some hard cases,[83] but those cases may be beneficial within broader democratic politics. To see legal conflicts mainly in terms of their costs—as accidents—risks missing their significance as sources and sites of mobilization and social change.

In response, Barzun and Gilbert might argue that their account does not denigrate legal conflicts or view them all as if they were accidents. They recognize that "[i]n a typical case, the benefits of constitutional conflicts might well outweigh their costs."[84] Conflict avoidance aims only at reducing hard cases—not at reducing all cases. And so, the only conflicts it seeks to prevent are those that produce indeterminacy, in the sense that judges do not have enough certainty about how to resolve them. To which our reply is: without a theory of hard cases, there is no way to distinguish easy legal conflicts from hard ones. And, perhaps more importantly, even with such a theory, cases do not come prepackaged as easy or hard. Judges will have to make those determinations, and conflict avoidance tells them that hard cases are pathological—accidents to be avoided—rather than valuable instances of norm contestation in which litigants have an opportunity to justify their moral and legal commitments and, in that way, to participate within a broader democratic and deliberative process. Lastly, even if hard cases are wrongly decided, their value may extend beyond the merits of adjudication. Some hard cases might make bad law, but that may not be sufficient reason to avoid them.

### *C. The Politics of Conflict Avoidance*

Another set of objections to the conflict-avoidance principle focuses on its market politics. Barzun and Gilbert disclaim political commitments to

[82] Id.; see also Shiffrin, supra note 78, at 84 ("Any party who may allege a prima facie cause of action may present arguments, have them heard, and elicit a reasoned response. This process contrasts favorably in many respects with the current state of legislative access which is highly and disproportionately responsive to organized lobbying and donors.").

[83] We will raise some doubts about whether, or how often, they do this in Part III *infra*.

[84] Barzun & Gilbert, supra note 8, at 15.

deregulation or to wealth-maximization[85]—two charges likely to be levied at proponents of importing economic analysis from private law into constitutional law. But despite their efforts to show that conflict avoidance is not libertarian or guilty of "free-market idolatry,"[86] their principle exhibits a significant tilt toward private ordering over democratic decision-making. Conflict avoidance prioritizes individual interests over collective goods, privileges entrenched social hierarchies, and risks trivializing expressive and deontic rights.

*1. Neoliberalism*

Recent histories of political economy have drawn an important distinction between deregulation and state promotion of market ordering.[87] Deregulatory efforts aim to roll back state interference with the market. But market ordering can be, and often is, promoted, privileged, and propped up by the state. While Barzun and Gilbert's cost-avoidance principle is not libertarian in the sense of trying to scale back state power, it would enlist judges in a project of bolstering and prioritizing markets over democratic politics. Under their approach, at least with respect to adjudicating hard cases, markets are primary, preferable, and, when they work properly, deserve strong deference.

Consider, for example, their insistence that courts should only account for the "real parties in interest" when deciding hard cases.[88] Using this distinction between "general" or "abstract" government interests and the particularized interests of "real parties," or individuals, Barzun and Gilbert sweep away collective goals reached through legislative and democratic decision-making.[89] In *Hobby Lobby*, applying the conflict-avoidance principle would require setting aside state interests in promoting public health and women's equality. Instead, only the "actual people (or entities)" whose interests are at stake—Hobby Lobby and its

[85] Id. at 54–56.

[86] Id. at 54.

[87] For leading work on this topic, see, e.g., Elizabeth Popp Berman, Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy (2022); Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism (2018); Daniel Stedman Jones, Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics (2012); Angus Burgin, The Great Persuasion: Reinventing Free Markets Since the Depression (2012); David Harvey, A Brief History of Neoliberalism (2005); The Road From Mont Pèlerin: The Making of the Neoliberal Thought Collective (Philip Mirowski & Dieter Plehwe eds., 2009).

[88] Barzun & Gilbert, supra note 8, at 34.

[89] Id. at 32–34.

employees who would like to obtain contraceptives—are deemed relevant.[90] Courts would ignore public interests that are said to be "broad and sometimes nebulous" and account only for individual interests that are "concrete and manageable."[91] In *Hobby Lobby*, the democratic aim of promoting women's social and political equality would be replaced by and subordinated to an analysis that favors market outcomes. In this analysis, interests that can be quantified and satisfied in the market are "real" and measurable, while the government's interest in remedying pervasive inequalities between women and men in the workforce is the sort of amorphous and unquantifiable end that must be rejected in hard cases.

The demotion of democratic interests is also apparent in Barzun and Gilbert's treatment of *Janus v. AFSCME*, which involved a free speech challenge to compelled support for collective bargaining by public unions.[92] As in *Hobby Lobby*, the conflict-avoidance principle would direct judges to ignore state interests and focus on the "real parties in interest," namely, the union and the objecting employee (Janus).[93] What courts must set aside here, however, is a complex system of industrial government and the social values that it was designed to promote.[94] Moreover, by narrowing the conflict to the marginal case of a single union objector[95]—rather than considering all the employees who faced the same circumstances—a court applying conflict avoidance would put pressure on the union to raise fees on other members, who will now have escalating reasons to object themselves, with predictable consequences for unravelling collective action. This approach ignores that the "agency shop" system was designed to address real social problems in fostering industrial peace. Focusing on particularized interests—by zooming in on Janus and his union—misses the larger picture of a carefully constructed arrangement in which labor and management can bargain with each other on more egalitarian and democratic terms.

[90] Id. at 33–34.

[91] Id. at 33.

[92] 138 S. Ct. 2448, 2448 (2018).

[93] See Barzun & Gilbert, supra note 8, at 35.

[94] See Cynthia Estlund, Are Unions a Constitutional Anomaly?, 114 Mich. L. Rev. 169, 171–78 (2015); James D. Nelson, Corporations, Unions, and the Illusion of Symmetry, 102 Va. L. Rev. 1969, 2021–22 (2016).

[95] See Barzun & Gilbert, supra note 8, at 36 (asking "what could a reasonable union have done . . . to prevent one 'defection' from unraveling the union").

By particularizing interests in the labor context, conflict avoidance would lead to results that are systematically pro-management, which is perhaps unsurprising given its pro-market tilt. At the heart of New Deal developments in labor law was the idea that many labor markets were untenable and unfair.[96] The labor movement therefore sought ways to counteract managerial power by facilitating collective action among workers. And the social arrangement that emerged was one in which conflict between capital and labor was expected and managed—not avoided. American labor law is a story of attempting to forge collective solutions to social problems. But conflict avoidance gives priority to disaggregated and particularized interests over the "general" and "nebulous" interests that justify the larger regulatory and structural frameworks within which individual interests are situated. The result is the replacement of political and social management of conflicts with judicially managed, market-based solutions.

This result bears the hallmarks of neoliberalism.[97] It displaces public norms with private ordering. It expands and elevates the use of markets, casting doubt on the possibility or attractiveness of collective action aimed at solving complex social problems. It insulates markets from the demands of democratic politics, privileging narrow notions of individualized cost over broader concerns for achieving fair terms of social cooperation. And it suppresses disagreement over competing social values, shrinking the spaces available for public experimentation and contestation.

### *2. Conservatism*

Having argued that legal conflicts can promote valuable forms of social contestation, here we make the corresponding observation that avoiding

[96] See, e.g., National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2018); see also Sophia Z. Lee, The Workplace Constitution: From the New Deal to the New Right (2014) (discussing New Deal developments in labor law).

[97] For elaboration of core concepts and critiques of neoliberalism, see Nelson Tebbe, A Democratic Political Economy for the First Amendment, 105 Cornell L. Rev. 959, 1001–02 (2020) ("While [neoliberalism] carries several meanings, I take it to designate active government facilitation of market ordering not only in the economy as such, but also in areas of politics and civil society (to the degree these domains can meaningfully be distinguished)."). See generally David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs. 1 (2014); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784 (2020).

those conflicts preserves the status quo. Barzun and Gilbert emphasize that the conflict-avoidance principle applies only in hard cases. But if there are an appreciable number of such cases[98] (or perhaps if there are an appreciable number of judges who think there are such cases), conflict avoidance will tend to generate conservative outcomes, in the sense of preventing significant social change, or at least changes that are not driven by market forces.

Conflict avoidance will tend to have conservative effects because it is designed to avoid future challenges to existing distributions of rights and benefits. This approach is generally insensitive to the circumstances that produced those distributions, and it favors prioritizing stable social relations.[99] But, of course, existing social patterns are a product of particular historical developments, many of which were plainly unjust.[100] And by providing incentives to avoid legal conflicts, Barzun and Gilbert's principle works to entrench those patterns. The way things are now sets the baseline, and disruption is disfavored.[101]

In addition to preserving the status quo, repeatedly applying the conflict-avoidance principle might induce a politically conservative drift. Consider, for example, the wedding vendor cases. Suppose that *Masterpiece Cakeshop* comes out the way Barzun and Gilbert suggest. Relying on conflict avoidance, the Court determines that there were plenty of other vendors who would have served the gay couple, but the Christian baker did not have any non-objecting employees. And so the couple loses. What happens in future cases? A likely outcome is that gay couples will face increased discrimination in public accommodations.[102]

[98] An assumption we question below.

[99] See Barzun & Gilbert, supra note 8, at 47.

[100] See A. John Simmons, Historical Rights and Fair Shares, 14 Law & Phil. 149, 173–74 (1995).

[101] But disruption is favored where private markets provide alternatives to secure individual interests. So perhaps it is more accurate to say that conflict avoidance is conservative with a neoliberal tilt.

[102] See Netta Barak-Corren, Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from *Masterpiece Cakeshop*, 50 J. Leg. Stud. 75, 78 (2021). According to Barak-Corren, the Court's decision in *Masterpiece Cakeshop* significantly increased the incidence of discrimination against LGBTQ couples by wedding vendors. Id. at 77–78, 98–99. Although the *Masterpiece Cakeshop* Court did not apply the conflict-avoidance principle, it did issue a fact-specific ruling in favor of the Christian baker. See Leslie Kendrick & Micah Schwartzman, The Etiquette of Animus, 132 Harv. L. Rev. 133, 134 (2018) ("*Masterpiece* is a heavily fact-bound case about religious animus."). By sending a signal to vendors in thicker markets that it is permissible to discriminate, it seems likely that the conflict-avoidance

The first case (or set of cases) to apply the principle may have an anchoring effect on future cases. That is, if the Court assigns a low estimate to the costs that the gay couple faces in avoiding this conflict, courts may be more likely to lowball cost-estimates for gay couples in the future.[103] As Fred Schauer has explained, focusing on the facts of particular cases can have "distorting effects as well as illuminating ones."[104]

Moreover, the legal doctrine that would emerge from this drifting pattern of cases would be skewed against antidiscrimination rules. Suppose, again as Barzun and Gilbert suggest, that gay couples repeatedly lose cases on the grounds that it would have been easy for them to obtain services from other vendors. And suppose further that gay couples win some cases because the vendors from whom they sought services had something like monopoly power in their markets. Drawing together the rules from these cases leads to a doctrine under which gay couples have a right to be served on equal terms but only when vendors are market monopolists. To be sure, this is one vision of antidiscrimination law.[105] But it is also a deeply contested view, which tracks libertarian and socially conservative approaches that eviscerate protections for equal citizenship and participation in social and economic institutions.[106]

principle would have similar social effects that degrade markets for LGBTQ couples incrementally.

[103] See Schauer, Do Cases Make Bad Law?, supra note 76, at 906–11 (discussing anchoring and other sources of distortion in common law decision-making).

[104] Id. at 918.

[105] For an analogous argument in the context of race discrimination, see Richard A. Epstein, Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right, 66 Stan. L. Rev. 1241, 1253–54 (2014) ("The simple point here is that the nondiscrimination provision [of Title II of the Civil Rights Act of 1964] should only apply to those cases where firms exert monopoly power over certain markets . . . ."). For criticism of this view, see Joseph William Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B.U. L. Rev. 929, 938–41 (2015) ("[T]hat interpretation of public accommodations law as combating monopoly does not accord with its historic origins, which were based on the moral obligation of businesses that were open to the public to serve the public without discrimination.").

[106] See generally Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents, Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (discussing egalitarian and dignitary interests in public accommodations laws).

*3. Rights Trivialization*

Barzun and Gilbert argue that conflict-avoidance is a "bottom-up" and "fact-sensitive" approach.[107] But their principle is very much top-down in specifying which kinds of facts matter. Recognizing this point, Barzun and Gilbert claim that conflict avoidance is a "meta-principle that directs courts to focus on the sort of factual nuances that bottom-up approaches consider critical."[108] This claim, however, is questionable. Unlike some other minimalist or "bottom-up" approaches, conflict avoidance takes a highly reductive and market-oriented view of which interests are relevant in adjudicating hard cases. This approach leads Barzun and Gilbert to some morally dubious lines of reasoning that trivialize expressive and dignitary interests.

Consider their analysis of *Brown v. Board of Education*. Barzun and Gilbert say that *Brown* was not a hard case and that courts should not apply the conflict-avoidance principle to it.[109] But anticipating the objection that many judges and commentators viewed *Brown* as difficult when it was decided, they argue that the conflict-avoidance principle would have resolved the case in favor of desegregation.[110] To reach that conclusion, Barzun and Gilbert argue that schools were not materially equal. But that claim alone would not suffice to justify the holding in *Brown*, because it leaves open the possibility of separate but equal. And so Barzun and Gilbert turn to the psychological harms that segregation imposed on Black students. Here, however, their method also requires courts to account for the psychological burdens alleged by white students who resisted integration.[111] To break this purported impasse between conflicting psychological claims, Barzun and Gilbert argue that white students could have secured their particularized interests by attending "all-white private schools."[112] Because white students had some available alternatives, and Black students had none, a Court applying conflict avoidance would have held that the white students were least cost avoiders and therefore ruled against them.

But this conclusion, while theoretically tidy, is not persuasive. As Barzun and Gilbert apply it, the conflict-avoidance principle focuses on

[107] See Barzun & Gilbert, supra note 8, at 6, 41.
[108] Id. at 7 n.18.
[109] Id. at 49.
[110] Id. at 50.
[111] Id.
[112] Id. at 51.

the specific parties in litigation (or on the "real parties in interest"). Many white students—perhaps millions of them—would have been too poor to afford private schools. Barzun and Gilbert casually claim that it would have been "not very" costly for white students to pay for private schools, and certainly less costly than Black students relocating to integrated states. But Barzun and Gilbert provide no support for these claims, and, in some range of cases, they might well have been false. If many white students had no financial means and no "real" alternative to public schools, then the conflict-avoidance principle might well have produced its own legal indeterminacy, providing courts with no resolution to the conflict over desegregation.

The deeper problem here is that conflict avoidance would have made the outcome of *Brown* turn on the wrong sorts of considerations. Applying their principle, Barzun and Gilbert are forced to ignore the pervasive dignitary wrongs committed against Black students as well as the stigma and psychological harms of segregation. What ultimately determines the case is none of those considerations but rather a factual determination about whether white students could afford to attend private schools. Under cost-avoidance reasoning, the question whether Black students have a moral right against an apartheid system of public education is turned into a question about the sufficiency of market alternatives for families who otherwise support a racially oppressive regime.

One could proliferate this type of example. Consider *Newman v. Piggie Park*, which involved a restaurant owner in the 1960s who objected on religious grounds to serving African Americans.[113] Presumably, Barzun and Gilbert would say this is an easy case, and so conflict avoidance does not apply. But if it were hard, a court would have to ask how costly it would have been for Anne Newman to find another restaurant. Or consider *Browder v. Gayle*, in which the NAACP challenged racial segregation on buses in Montgomery, Alabama, following Rosa Parks's famous protest in 1955.[114] Suppose a court had found that to be a hard case. Parks was required to sit at the back of the bus, but she was not denied transportation. Does that mean she had no remaining particularized interest, other than her psychological harms, which would have been offset by those of white passengers? And even if she did have some cognizable interest under conflict avoidance, the analysis would

[113] 390 U.S. 400, 400 (1968).

[114] 142 F. Supp. 707, 717 (M.D. Ala. 1956) (holding that state statutes requiring segregation violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

then have turned on market alternatives available to her as compared with those of (some? all?) white bus passengers.

The conflict-avoidance analysis of examples like *Brown*, *Piggie Park*, and *Browder* verges on a caricature of liberal political morality in which the most profound ethical and moral issues are reduced to matters of economic efficiency. Antiliberal thinkers have long criticized liberals (and neoliberals) for attempting to eliminate moral conflict from their theories of politics, either through deliberation or by reducing public moral relationships to private economic transactions.[115] This objection is often mistaken,[116] but the conflict-avoidance principle invites it. Some moral and political disagreements cannot be swept away or resolved through private ordering. And when confronted with disagreements of this kind—as exemplified by the matter of racial apartheid—it is a mistake to pretend otherwise. Rather than attempt to save conflict avoidance by showing that it would reach the right outcomes in these cases, it would be better to concede that these questions are not morally hard and simply to stop there. Carrying on with the economic analysis trivializes the underlying injustices and pretends, counterfactually, that responses to them might have turned on a subset of economic considerations that were—and that remain—morally irrelevant.

### *D. Alternative Second-Order Decision Rules*

Even if hard cases are costly in the way that the conflict-avoidance theory supposes, and even if the theory did not face the epistemic and moral objections mentioned above, the case for adopting a least cost avoider principle to resolve indeterminate legal conflicts would still be incomplete. There are other second-order decision rules that courts might use to resolve such cases,[117] and it would be necessary to show that conflict avoidance is preferable to all of them. In this Section, we describe some of these alternative rules or procedures. Our aim is not to defend one or another, but rather to show that courts will face decisions about which second-order rules to adopt. And those decisions are value-laden,

[115] See, e.g., Alasdair MacIntyre, After Virtue (3d ed. 2007); Carl Schmitt, The Concept of the Political (George Schwab trans., U. Chi. Press Expanded ed. 2007).

[116] See Stephen Holmes, The Anatomy of Antiliberalism 206–23 (1993).

[117] Barzun and Gilbert recognize this point. As they note: "[O]ther default rules might work better. Why not simply decide in favor of the poorer party, decide in favor of liberty, or simply flip a coin?" Barzun & Gilbert, supra note 8, at 13. That is a good question, but having raised it, Barzun and Gilbert do not provide an answer.

such that preferring one rule over another will have the effect of advancing a moral view about how to adjudicate hard cases.

Here, then, are five alternative second-order decision rules or procedures. This list is not intended to be exhaustive. Within each of them, there might also be any number of variations or refinements. But we take these rules to reflect reasonably well-known decision-making strategies that would compete with conflict avoidance.

*1. Deference to Democracy*

The most obvious alternative is deference to democratic or legislative decisions. When courts confront cases of epistemic uncertainty or indeterminacy—when they have, or know of, no reason to prefer one outcome over another—they can affirm the decision authorized by the democratic process. This would be a form of constrained Thayerism, which holds that courts exercising judicial review should not invalidate a law on constitutional grounds unless the law is "unconstitutional beyond a reasonable doubt."[118] This rule requires that courts apply a law unless a constitutional violation is "so clear that it is not open to rational question."[119] Under this rule, courts should simply defer in cases of indeterminacy, which, by definition, involve conflicts in which neither side has shown that its view is rationally required.

Thayerism is sometimes described as a full-blown theory of constitutional adjudication—a competitor to originalism, minimalism, pragmatism, and other accounts.[120] Much of its attraction stems from the view that constitutional conflicts are often the subject of reasonable disagreement and that courts should allow those disagreements to play out through ordinary politics, except when constitutional violations are "plain and clear."[121] But whatever its merits as a general theory of adjudication, a rule of deference might seem particularly plausible in cases of indeterminacy. The rule would be: tie goes to the legislature. In cases involving constitutional challenges to laws, judges who find themselves

[118] See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893); see also Richard Posner, The Rise and Fall of Judicial Self-Restraint, 100 Calif. L. Rev. 519, 522–23 (2012) (describing Thayer's theory of judicial deference).

[119] Thayer, supra note 118, at 144.

[120] Cass R. Sunstein, Second-Order Perfectionism, 75 Fordham L. Rev. 2867, 2869 (2007).

[121] Thayer, supra note 118, at 151.

uncertain or indeterminate would resolve against the party whose rights require rejecting application of the law.

As a second-order decision rule, democratic deference would be easier to administer than the conflict-avoidance principle. Once courts decide that a case is indeterminate, they would not engage in another wave of adjudication, requiring the identification and comparison of avoidance costs, which might be difficult and costly in some cases. They would simply reject the legal challenge and allow the underlying law to stand. For example, most of the cases that Barzun and Gilbert consider involve free exercise (*Hobby Lobby*, *Masterpiece Cakeshop*, *Our Lady of Guadalupe*), free speech (*Janus*), or equal protection (*Fisher*) challenges to federal or state law. If these cases involve indeterminacy, as Barzun and Gilbert suppose, then the challengers would lose in all of them.[122] The result would be to uphold the outcomes of the democratic process, rather than favor the private-ordering tilt of the cost-avoidance principle.

There are many reasons that might ground a principle of democratic deference. These reasons will be connected to underlying theories about the value of democratic decision-making. Without surveying all the possibilities, we can mention a few here. First, as Jeremy Waldron has argued, when citizens reasonably disagree about how to weigh conflicting rights claims, majoritarianism offers a fair decision procedure, one that assigns equal weight to those with competing views.[123] Second, epistemic theories hold that democratic procedures yield better decisions either because they incorporate moral and political deliberation,[124] as suggested above, or because aggregation based on large numbers and cognitive diversity generates epistemically superior outcomes.[125] Third, for

[122] An exception might be *Hobby Lobby*, which involved a statutory free exercise challenge based on the Religious Freedom Restoration Act ("RFRA"). In applying a rule of deference, there might be a question about which statute is controlling when there is a conflict between RFRA and another law. One answer might be that RFRA is a quasi-constitutional statute that attempts to reinstate an interpretation of the Free Exercise Clause that the Court had applied prior to its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). See Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J.L. & Gender 36, 54–56 (2015) (discussing the post-*Smith* legislative history of RFRA). And if that interpretation of free exercise does not generate a determinate result, then the Court should treat challenges arising from it as it would constitutional claims under the same interpretation, which would mean deferring to whatever legislation has been challenged.

[123] Jeremy Waldron, The Core of the Case against Judicial Review, 115 Yale L.J. 1346, 1388 (2006); Jeremy Waldron, Law and Disagreement 108–16 (1999).

[124] See Estlund & Landemore, Epistemic Value, supra note 68, at 122–23.

[125] Landemore, Democratic Reason, supra note 68, at 145–47.

relational democratic theories, the results of the legislative process may have communicative or expressive value. Democratic law can be understood as the means by which citizens convey mutual recognition and respect for one another as political equals.[126] Fourth, across various democratic theories, there might be reasons of institutional design to favor deference. For example, when courts decide hard cases, they may give legislators reasons to avoid confronting and resolving the underlying conflicts.[127] And if those legislators are better positioned, for any of the reasons above, then courts have additional reason to defer.

For reasons of fairness, epistemic value, political equality, and institutional design—and no doubt additional reasons could be mustered based on other democratic theories—courts have powerful reasons to respect legislative decisions. At this point, however, a proponent of conflict avoidance might object that all these reasons must already be factored into a court's decision when it decides that a conflict is indeterminate. After all, in many cases—including those featured by Barzun and Gilbert—one of the parties will be claiming that it has a right to some legislatively enacted benefit.

But as noted above,[128] this response to competing second-order decision rules, including democratic deference, would eliminate competitors by fiat, claiming that courts have already taken into consideration the values that motivate other rules. First, that seems unlikely as a phenomenological matter. In the conflicts that Barzun and Gilbert discuss, courts are focused on competing first-order values—for example, whether the owner of a business has a free exercise right that defeats an employee's interest in obtaining contraception or a customer's interest in being treated as an equal citizen in the market. In these cases, courts are not yet addressing second-order questions about how to resolve cases of indeterminacy. They are not asking which institution is better positioned to resolve such cases or whether there are higher-order values that might apply when first-order reasons are indeterminate. And if they were evaluating such reasons, then there is no reason to exclude the values

[126] Shiffrin, supra note 78, at 59.

[127] Thayer, supra note 118, at 155–56 ("No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.").

[128] See supra Section I.B at text accompanying note 23.

that support conflict avoidance from being among them. Conflict avoidance would preclude itself as a second-order decision rule. But if that conclusion is absurd, then there is no reason to knock out other second-order rules by building them in as first-order considerations. It makes more sense to see them as competing decision rules justified by different, and perhaps conflicting, values.

### *2. Proportionality*

Around the world, outside the United States, the dominant approach to adjudicating conflicts between constitutional rights is some form of proportionality review.[129] Although there is no canonical formulation of what proportionality entails, the basic framework is familiar enough and widely accepted.[130] Courts determine whether (1) there is a rational relationship between the government's policy and a legitimate governmental purpose, (2) the government has adopted means that minimize impairment of the right in question, and (3) the burdens imposed by the right are proportional to the benefits achieved by the government's policy.[131] The last step, which requires courts to engage in explicit balancing of interests, is sometimes referred to as "proportionality as such" or "proportionality stricto sensu."[132]

Proportionality might serve as a second-order decision rule for courts that reject balancing as a matter of first-order decision-making. There is a lively debate about whether, or to what extent, American courts engage in interest balancing.[133] But for courts that favor formalist modes of interpretation and that explicitly reject balancing rights, proportionality review—or at least the *stricto sensu* aspect of it—might serve as a second-

[129] See Proportionality: New Frontiers, New Challenges 1 (Vicki C. Jackson & Mark Tushnet eds., 2017); Kai Möller, The Global Model of Constitutional Rights 1–2 (2012).

[130] See Greene, supra note 9, at 110; Jamal Greene, The Supreme Court, 2017 Term—Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 58–59 (2018); Proportionality and the Rule of Law 2 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014).

[131] See Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3099 (2015).

[132] Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 340–45 (Doron Kalir trans., 2012).

[133] See Moshe Cohen-Eliya & Iddo Porat, Proportionality and Constitutional Culture 52–63 (2013) (arguing that American constitutional culture is inconsistent with central aspects of proportionality review); see also Frederick Schauer, Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture, *in* European and US Constitutionalism 49, 54–55 (Georg Nolte ed., 2005) (discussing the comparative debate about balancing in the context of free speech doctrine).

order rule. If the legal sources that formalists rely upon are indeterminate, or leave them with discretion, then they might adopt a balancing approach to complete their adjudication. Proportionality review would not substitute for formalism. It would be a gap-filling mechanism, used as a last resort to generate determinacy.

As a second-order rule, proportionality presents an important contrast with the cost-avoidance principle. Whereas cost avoidance adopts an ex ante perspective, which asks how much it would have cost the parties to avoid the conflict in the first place, proportionality focuses on the ex post benefits and burdens that the conflict has generated for the parties. In applying "proportionality as such," courts must determine whether the benefits of a government policy outweigh the harms caused by it.[134] Although this type of balancing raises numerous methodological questions, this much is clear: the inquiry is limited to weighing the benefits and harms that have already occurred and that might occur in the future. It does not consider the avoidance costs that each party would have faced in trying to secure its own interests without generating a rights conflict.

To see the contrast between proportionality and the conflict-avoidance principle, consider a simple (though presumably hard) case, in which *P* sues *D* for asserting a government policy that violates *P*'s constitutional rights. Suppose *P*'s avoidance costs are $100, whereas *D*'s are $150. Under the conflict-avoidance principle, *P* is the least cost avoider, so *P* would lose. Now suppose a court applies proportionality *stricto sensu* to resolve this conflict. Suppose further that the court can quantify the benefits and harms of applying the government policy. The benefit to *D* is $175 and the harm to *P* is $200. Under proportionality, *D* would lose, because the policy's harms exceed its benefits. In this example, the conflict-avoidance principle and proportionality point in conflicting directions. The choice between them will yield different outcomes.[135]

[134] Barak, supra note 132, at 343 ("The limitation on a constitutional right is not proportional stricto sensu if the harm caused to the right by the law exceeds the benefit gained by it.").

[135] One might object that considerations of cost avoidance would be taken into account during the second stage of proportionality review, in which courts determine whether the government's policy is "necessary" or whether it could have adopted a "less restrictive means." See id. at 320–21. If an alternative policy that imposes less harm is available, then *D* would lose, even before courts consider proportionality *stricto sensu*. But note that while the costs of alternatives may be considered at the second stage of proportionality review, that inquiry focuses only on whether the government had available alternatives. It does not compare the costs of those alternatives to those of other parties.

*3. Presumptions*

Another way to resolve indeterminacies is to adopt a presumption, or default rule, in favor of a specific moral or political value. Here we mention two possibilities. The first, favored by libertarians and sometimes by liberals, is to resolve hard cases against the application of coercive power by the state. The rule would be: when in doubt, favor negative liberty, or freedom from state coercion.[136] A presumption in favor of liberty is often justified by the claim that coercion is, at least *pro tanto*, morally wrong.[137] It always requires justification. And if there is no sufficient justification for coercion, then courts should err on the side of personal freedom by limiting state power. Applying this presumption in hard cases, courts would side with litigants asserting negative liberty rights, such as free exercise and free speech rights. Yet, other cases might be less straightforward. For example, equal protection challenges to affirmative action do not involve state interference with negative liberties.

Here, it also may be helpful to contrast Tang's recently proposed "harm avoider" theory, according to which "the Supreme Court decides *hard* constitutional cases against the *group* that can *best* avoid the *harm* it would suffer from an adverse decision using public and private avoidance techniques." Tang, supra note 11, at 1886. Tang emphasizes that his theory is meant to apply prospectively. Id. at 1885 n.265. In other words, the Court would ask which party is in the best position to avoid the harms that would result from an adverse decision by the Court. That inquiry is comparative, which distinguishes it from the second stage of proportionality review. Tang also claims that ex post harm avoidance is distinct from interest balancing, or what we have been calling proportionality *stricto sensu*, because it focuses on the parties' relative costs of avoiding harms, rather than on a balance of benefits and burdens. Suppose *P* faces significant harms ($1 million) but can take inexpensive actions to mitigate them ($100); whereas *D* faces less severe harms ($500,000) but has higher mitigation costs ($1.5 million). Under a narrow conception of interest balancing, a court would only weigh the harms, and *P* would win. But under Tang's "harm avoider" theory, *P* has lower prospective costs and so would lose. We agree with Barzun and Gilbert that ex post avoidance costs are better described in terms of "mitigation" or "covering" of losses. See Barzun & Gilbert, supra note 8, at 5 n.15. But we would recognize that Tang's theory, at least to the extent it focuses on the costs of ex post mitigation, provides a distinct second-order decision rule, one that would yield different outcomes as compared with interest balancing and conflict avoidance.

[136] See, e.g., Gerald Gaus, The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World 482–83 (2011); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 260 (2004); Thomas Nagel, Moral Conflict and Political Legitimacy, 16 Phil. & Pub. Affs. 215, 223 (1987). For criticism of a moral presumption against state coercion, see Jonathan Quong, On the Idea of Public Reason, *in* A Companion to Rawls 265, 272 (Jon Mandle & David Reidy eds., 2014); Colin Bird, Coercion and Public Justification, 13 Pol., Phil. & Econ. 189, 190–91 (2014); Andrew Lister, Public Justification and the Limits of State Action, 9 Pol., Phil. & Econ. 151, 164–65 (2010).

[137] See Andrew Lister, Public Reason and Political Community 67–70 (2013) (discussing the "*pro tanto* badness of coercion").

A court would need additional default rules to address cases in which neither party asserts liberty-based rights.

Another value-based presumption would be a rule that gives priority to the interests of whichever party is least well off. This *prioritarian* rule could be specified in various ways, depending on the desiderata used to determine the parties' relative positions. But in hard cases, courts might adopt a rough approximation by adopting a rule that favors the interests of those who are economically disadvantaged. For example, Richard Re has argued that federal judges are obligated by statutory oath to "do equal right to the poor and to the rich,"[138] and that this principle could be interpreted to require "some measure of substantive economic equality."[139] Especially when judges are uncertain about how to resolve a case, considerations of economic justice point toward decisions that reduce inequalities. As Re argues, "the equal right principle could resolve under-determinacy in other legal principles, or assist in their implementation."[140] For example, in *Hobby Lobby*, if the Court had found that the corporate owners' religious liberty claims were indeterminate, it might have decided against the corporation and its billionaire owners, who are among the wealthiest people in the world,[141] and in favor of its employees, thousands of whom are paid the company's minimum wage as full-time or seasonal workers.[142] Similarly, in *St. James School v. Biel* (a case consolidated with *Our Lady of Guadalupe*[143]), in which a religious school fired an elementary-school teacher suffering from breast cancer,[144] a court finding that case to be indeterminate could have applied a prioritarian or equal right principle favoring the rights of a disabled employee over those of her employer. Of course, in some cases, it might be more difficult to determine which party is the worst off. But, as Barzun and Gilbert recognize, that problem can hold for conflict avoidance as

[138] Richard Re, Equal Right to the Poor, 84 U. Chi. L. Rev. 1149, 1151 (2017) (quoting Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (1789)).

[139] Id. at 1153.

[140] Id. at 1174.

[141] Candida R. Moss & Joel S. Baden, Bible Nation: The United States of Hobby Lobby 3 (2017).

[142] Kelly Tyko, Hobby Lobby Raises Minimum Wage to $18.50 an Hour for Full-Time Workers Starting Jan. 1, USA Today (Dec. 15, 2021, 1:58 PM), https://www.usatoday.com/story/money/shopping/2021/12/14/hobby-lobby-minimum-wage-increase/8897355002/ [https://perma.cc/SA4R-8MPY].

[143] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2049 n.* (2020).

[144] Id. at 2078 (Sotomayor, J., dissenting, joined by Ginsburg, J.).

well.[145] If a second-order rule can operate easily and effectively across a broad range of cases, courts will face a question of whether to adopt that rule or to prefer some other.

*4. Passive Virtues*

Another response to indeterminacy might be for courts to avoid hard cases. Courts might rely on various legal devices—denials of certiorari, abstention and standing doctrines, ripeness, etc.—to forgo taking jurisdiction over conflicts that they do not know how to resolve. In exercising the "passive virtues,"[146] courts can be criticized for unprincipled abdication of their adjudicative responsibilities.[147] But when cases are indeterminate, one option might be to postpone decision-making. If there are reasons to think that changes in legal or political circumstances will lead to greater clarity in the future, courts might decide to withhold judgment entirely, or perhaps as much as possible. When exercised in this way, the passive virtues become a form of *intra*personal delegation.[148] We often think of delegation as *inter*personal—where one agent transfers decision-making power to another. But here, a court—especially a highest court—might delegate that power to its future self. A court might do this to avoid making decisions that would threaten its legitimacy, as when it has reached a principled determination but knows that it would face serious backlash. A notorious example is *Naim v. Naim*, in which the Supreme Court dodged a constitutional challenge to a state law prohibiting interracial marriage.[149] But in the type of case we are considering, the Court would not set aside constitutional principles to preserve its own legitimacy. These are cases in which, *ex hypothesi*, there is no clearly controlling constitutional principle. And if the Court has reason to think that such a principle might emerge over time, or if it thinks that the factual circumstances surrounding a conflict may develop in ways

[145] Barzun & Gilbert, supra note 8, at 44–46.

[146] See Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 40–42 (1961).

[147] See Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 25 (1964); see also Barzun & Gilbert, supra note 8, at 3 ("[C]ourts are constitutionally charged with deciding such cases. A refusal to decide them amounts to shirking that responsibility.").

[148] See Sunstein & Ullmann-Margalit, Second-Order Decisions, supra note 6, at 20; see also Schwartzman, Completeness, supra note 12, at 209.

[149] 350 U.S. 891 (1955) (per curiam).

that will eventually generate determinacy, then it might decide to defer judgment into the future.

*5. Hedging*

Not all cases of legal indeterminacy involve uncertainty. Sometimes judges may think that the values supporting legal rules are in equipoise or that they are incomparable. But when judges have difficulty deciding cases because they are uncertain about which legal rules to apply, they might adopt a second-order strategy designed to "hedge" against the risk of error in making decisions under uncertainty.[150] These strategies "hedge" in the sense that they attempt to protect against the risk of large errors or losses by incorporating contrary positions in the decision-making procedure.

The idea of hedging is based on developments in decision theory focused on making optimal decisions under factual or "empirical" uncertainty.[151] In recent years, some moral philosophers have built on those developments to propose strategies for responding to uncertainty about which moral theory (utilitarianism, Kantianism, virtue ethics, etc.) to apply.[152] And now legal scholars are considering how to apply these approaches to "moral uncertainty" in the context of uncertainty about theories of adjudication (originalism, common law constitutionalism, pragmatism, etc.).[153]

These hedging strategies could be applied in hard cases involving uncertainty about how to resolve conflicts over constitutional rights. In these circumstances, a judge hedges by first assigning credence values to the different legal rules under consideration. These values would represent the judge's level of confidence that each rule correctly resolves a dispute.[154] In hard cases, the credence values assigned to alternative rules are likely to be similar, reflecting the judge's assessment that first-order considerations cannot be resolved in one direction or the other.

[150] See Courtney M. Cox, The Uncertain Judge, 90 U. Chi. L. Rev. 739, 745–46 (2023); Evan D. Bernick, Hedging Constitutional Bets 1–3 (Feb. 10, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783472 [https://perma.cc/D54T-W7BD].

[151] See Cox, supra note 150, at 746.

[152] See, e.g., William MacAskill, Krister Bykvist & Toby Ord, Moral Uncertainty (2020); Ted Lockhart, Moral Uncertainty and Its Consequences (2000).

[153] Cox, supra note 150, at 741, 755–65; see Bernick, supra note 150, at 1–2.

[154] See MacAskill et al., supra note 152, at 3–5 (discussing credence values).

Next, the judge would assess the costs of error. How bad would it be to decide incorrectly by adopting a rule that supports the plaintiff? How bad would it be to rule incorrectly for the defendant? To reach an ultimate decision, the judge would then adopt a decision-making strategy that takes account of both credence values and error costs. Here a judge might opt for a maximizing strategy that tracks expected utility theory.[155] Alternatively, the judge might select from other available strategies for making optimal decisions under uncertainty, such as a ranked-choice scoring system.[156]

When the risks of error are comparable across different legal options, a hedging strategy may not help to decide hard cases. But when a judge assigns relatively similar credence values to alternative rules, and when the error costs of those rules are both asymmetrical and comparable, hedging might allow a judge to reach an optimal decision.[157]

*6. Chance*

In cases of indeterminacy, judges have no first-order reasons to prefer one outcome over another. When reasons run out, one way to generate a decision is to make an arbitrary choice. Judges could use a randomizing device, such as a lottery or coin toss, to pick an outcome.[158] Although this suggestion might seem quixotic or absurd, proponents of lotteries and other arbitrary decision procedures have emphasized that they are both fair and efficient.[159] Provided everyone has an equal chance, no one can object that their interests have been subordinated.[160] And a coin toss, for example, is both easy to administer and produces an immediate and definitive result.

[155] See Cox, supra note 150, at 790 (discussing the "maximize expected judicial rightness" approach, which says that "[w]here a judge is uncertain of the degrees of judicial rightness of some of the alternative judicial acts under consideration, a choice of action is rational if and only if the action's expected judicial rightness (EJR) is at least as great as that of any other alternative" (adapting text from Lockhart, supra note 152, at 82)).

[156] See Bernick, supra note 150, at 3 ("[The Borda rule] ranks options on the basis of (1) whether an option is better or worse by each plausible theory's lights and (2) by how much, as well [as] (3) the decisionmaker's level of confidence in each theory.").

[157] See Cox, supra note 150, at 803 (distinguishing judicial exercise of practical rationality under uncertainty from making the correct decision all things considered).

[158] See Schwartzman, Completeness, supra note 12, at 211–12; Andrew Williams, The Alleged Incompleteness of Public Reason, 6 Res Publica 199, 210 (2000).

[159] Jon Elster, Solomonic Judgements 170–72 (1989).

[160] Id. at 171.

If relying on chance to resolve rights conflicts is absurd, that is because chance is not responsive to reasons. And our working assumption is that rights conflicts ought to be resolved in a way that is rationally determined, that is, through the weighing of all the relevant considerations. If those reasons really are indeterminate—if they fail to provide any ground for selecting one outcome over another—then any basis for a decision, even an arbitrary one, should suffice, provided that some outcome is required. (Buridan's Ass does not need a reason to prefer one bale of hay over the other. The Ass just needs to pick one.[161]) And if an arbitrary procedure preserves fairness between the parties and can be performed expediently, it is difficult to see how anyone could complain.

Yet, the sense that relying on chance is absurd will persist, perhaps for the same reason that flipping a coin is often useful in eliciting one's actual preferences. If you have reasons to favor one outcome over another, and if you then decide to flip a coin to determine the result, you are likely to resist an arbitrary outcome contrary to your judgment about the balance of reasons. That phenomenon can be generalized. That the prospect of using chance to resolve rights conflicts will strike many as ridiculous suggests an underlying rejection of legal and moral indeterminacy. Chance is offensive because it does not track reasons, and there will always (or almost always) be reasons that demand some decision-making process that is responsive to them.

* * *

In surveying these alternative second-order decision rules—democratic deference, proportionality, presumptions, passive virtues, hedging, and chance—our aim has not been to provide an exhaustive list, to defend any of them, or even to suggest circumstances that might provide reasons for selecting one rule over another. Our claim is a modest one, namely, that the choice of a second-order decision rule must be defended against any number of alternatives that may be supported by weighty moral and political values. There might be moral considerations of stability and legitimacy that favor conflict avoidance, for example, but those considerations must be measured against the values that support competing rules. If cases are indeterminate, then identifying a broader

[161] See Ullmann-Margalit & Morgenbesser, Picking and Choosing, supra note 6, at 757–59 (distinguishing between "picking" between two options, where an agent is indifferent between them, and "choosing," where an agent selects an option based on a preference for one over the other).

range of second-order rules and their underlying values may be a prelude to more comprehensive or systematic analysis of the reasons for choosing among them.

## III. ARE THERE HARD CASES?

The argument for conflict avoidance relies on the premise that there are hard cases. The problem is not that litigants and judges will reasonably disagree about the law. Legal sources may be *inconclusive* in the sense that good faith and competent legal actors cannot give others decisive reasons for their views—or at least reasons that others must regard as decisive from their own legal perspectives. Such disagreements are pervasive in the law and pose no special problems that would require second-order decision rules. Only cases of indeterminacy create this kind of need. But claims of indeterminacy require motivation, and here we offer a few further observations, and perhaps a caution, about assuming the prevalence of such cases.

### *A. Toy Cases*

In justifying the conflict-avoidance principle, Barzun and Gilbert claim that "[h]ard cases are inevitable, especially in constitutional law."[162] But they offer no argument for the inevitability of hard cases. And given that they define hard cases in terms of epistemic uncertainty about both legal sources *and* political morality, the claim is controversial. Even if one accepted a standard positivist view that legal sources run out, making the law incomplete, one might expect that reasons of political morality would be sufficiently determinate to fill the gap. If hard cases are inevitable, then that expectation must be false in some range of cases, though, again, Barzun and Gilbert give no argument for that conclusion.

Without an account of why the law and political morality are uncertain or indeterminate, there also is no basis for claims about how prevalent hard cases will be. Even if hard cases are inevitable, they might be extremely rare, perhaps once in a generation, or they might be quite common, with multiple cases in the Supreme Court each term. That is quite a range, and it might be difficult to evaluate the merits of a second-order decision rule like the conflict-avoidance principle without specifying how often courts would be expected to apply it.

[162] Barzun & Gilbert, supra note 8, at 53.

Here is where Barzun and Gilbert's use of examples might be suggestive. In presenting the conflict-avoidance principle, they work through several recent and important Supreme Court decisions involving rights conflicts. Most of these cases have some political salience or at least attracted attention as part of ongoing culture wars. Consider *Burwell v. Hobby Lobby, Inc.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, *Janus v. AFSCME*, and *Fisher v. University of Texas at Austin*.[163] All of these cases involved hot button issues: free exercise challenges to contraceptive mandates and to public accommodations laws, a free speech objection to compelled support for unions, and an equal protection claim against affirmative action, respectively. Barzun and Gilbert analyze all these cases under the conflict-avoidance principle, but they are careful in each instance to indicate that they take no position on whether the case is, in fact, a hard one. As they put it, repeatedly, conflict avoidance only applies "if the case is hard,"[164] and, with one exception, Barzun and Gilbert are agnostic about whether a given case is hard or not.[165]

These are *toy* cases. Just as a toy model might be used to demonstrate how a mathematical or scientific theory works,[166] these cases are used for demonstration. The point of discussing them is only to show how an analysis might proceed under conflict avoidance. Barzun and Gilbert have no stake in the outcomes of that analysis. They can always grant that the starting assumption—that the case is hard—is false, in which case nothing follows from their reasoning. And, likewise, a reader can deny the assumption for a given case, which would mean that, at least for the reader, the case would no longer be a candidate for conflict avoidance.

Yet, in presenting numerous constitutional conflicts *as if* they were hard, Barzun and Gilbert suggest, at least implicitly, that a wide range of cases might be candidates for analysis under their principle. They invite

[163] See supra notes 54–58.

[164] Barzun & Gilbert, supra note 8, at 52, 56 ("Remember, the principle only applies in hard cases.").

[165] See id. at 33 ("Suppose *Hobby Lobby* is a hard case, so it becomes a candidate for conflict avoidance."); id. at 35 ("We assume the case [*Janus*] is hard and therefore a candidate for conflict avoidance."); id. at 37 ("Assume the case [*Morrisey-Berru*] is hard . . . ."); id. at 39 ("We assume the case [*Masterpiece Cakeshop*] is hard and so a candidate for our analysis."); id. at 42 ("Assum[e] the case [*Fisher*] is hard . . . .").

[166] See Alexander Reutlinger, Dominik Hangleiter & Stephan Hartmann, Understanding (with) Toy Models, 69 Brit. J. for Phil. Sci. 1069, 1070–72 (2018) (discussing recent accounts of toy modeling in philosophy of science).

readers to imagine a legal and moral world in which the most difficult cases are decided using their method, even though they express no moral commitment to the adoption of conflict avoidance in any of those cases. At most, they might be interpreted as claiming that conflict avoidance would produce plausible outcomes in the cases they analyze. But, strictly speaking, even attributing that conclusion is mistaken. The outcomes would only be plausible if the cases are hard, and about that, Barzun and Gilbert are noncommittal.

The selection of toy cases might nevertheless imply some moral or political commitments. Most of Barzun and Gilbert's cases involved conservative majorities of the Supreme Court invalidating progressive legislation.[167] But Barzun and Gilbert have no trouble assuming that all those cases are legally and morally uncertain. That view, at least implicitly, is taken to be a reasonable one. But there is an outer limit to that reasonableness and to Barzun and Gilbert's agnosticism about hard cases. The one case that cannot be treated as a toy is *Brown v. Board of Education*. As noted above,[168] Barzun and Gilbert make clear that, in their view, *Brown* was not a hard case.[169] But treating *Brown* as a limit case only reinforces the sense that anything short of dismantling racial apartheid might be sufficiently uncertain as a matter of law or justice to warrant the use of conflict avoidance.

### *B. Second-Order Decisions in Reflective Equilibrium*

The use of actual decisions as toy cases can be misleading unless readers are careful to observe the constrained role that those cases play in explicating a second-order procedure like conflict avoidance. It would be easy to take for granted the assumption that a case is hard, when in fact that assumption is not merely controversial but also unsupported by an account of what makes cases uncertain or indeterminate.

When determining whether to apply a second-order decision procedure, including conflict avoidance, judges must make a threshold determination about whether a case is sufficiently uncertain or indeterminate. But that decision is not irrevocable. Judges confronting real cases, rather than toy ones, can always revisit the question of whether

[167] See supra note 163 and accompanying text. The exception is *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2210 (2016), in which the Court narrowed but did not eliminate the possibility of affirmative action in higher education.

[168] See supra Subsection II.C.3 at note 109 and accompanying text.

[169] Barzun & Gilbert, supra note 8, at 49.

the law and political morality are as uncertain or indeterminate as they might initially have seemed. If the results of applying a second-order decision rule seem fanciful or absurd, that might be some indication that the judge has made a mistake earlier in the analysis, including in determining whether the case is a hard one. Just as with a coin toss, the prospect of implementing a second-order rule might reveal more information about what judges believe and lead them to revise their views in reflective equilibrium.[170] Considering second-order rules might be beneficial not only as a means of adjudicating hard cases, but as an epistemic check on the conclusion that they are indeed uncertain or indeterminate. Judges may go back and forth between the application of second-order rules and first-order judgments about uncertainty. The adjudicative process need not proceed in lockstep. After considering a rule like conflict avoidance, or any of the others surveyed above, cases that seem hard might turn out not to be.

### *C. The Anxiety of Avoidance*

The assumption that hard cases are inevitable might be motivated by the limits of a jurisprudential theory, such as legal positivism, but it might also reflect a more general social or political anxiety about the harms of rights conflicts. Several scholars and jurists have recently proposed theories of adjudication that aim to ameliorate such conflicts and lessen polarization.[171] Although they vary in their details, these theories tend to emphasize the virtues of compromise, moderation, and practicality. They recommend incremental decisions, proceeding one case at a time, and approaching disputes from the "bottom up," with an emphasis on fact-specific judgments.[172] The conflict-avoidance principle fits into this broader genre of adjudicative theories, which includes judicial minimalism, proportionality review, and other interest-balancing and harm-avoidance theories.

[170] For the concept of reflective equilibrium, see John Rawls, A Theory of Justice 48–49 (1971); Norman Daniels, Wide Reflective Equilibrium and Theory Acceptance in Ethics, 76 J. Phil. 256, 258 (1979).

[171] See, e.g., Stephen Breyer, The Authority of the Court and the Peril of Politics (2021); Greene, supra note 9; Tang, supra note 11.

[172] See, e.g., Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 10–13 (1999).

Yet, as one of us has argued elsewhere, attempting to avoid conflicts can sometimes be self-defeating.[173] When decision-makers aim at conciliation and seek to placate others, they sometimes embolden adversaries to make even stronger or more aggressive claims. Efforts to compromise can also lead to shifts in the range of constitutional possibilities that are considered feasible and may confer legitimacy on outcomes that might otherwise have warranted protest or dissent.[174] As a general strategy, seeking peace through compromise is often considered a noble undertaking,[175] but it can have considerable costs, including exacerbating the conditions of social divisiveness that motivated adoption of the strategy in the first place.[176]

These costs might be limited when conflict-avoidance strategies are pursued as second-order rules in hard cases. But the category of hard cases can be slippery. Defined broadly, it might apply whenever there is reasonable disagreement about law or political morality. This kind of *inconclusiveness* is indeed both inevitable and pervasive under conditions of modern pluralism.[177] But it does not follow that stronger forms of indeterminacy or uncertainty will characterize legal and moral conflicts. Even if those conflicts are unsettling, and even if they produce instability and contestation of existing institutions, the questions they raise may nevertheless have right answers. From the fact of conflict, we should not assume that legal and moral reasons have run out. That there is no peace does not mean there is no justice.

## CONCLUSION

It may be tempting to think of legal conflicts like accidents. Accidents are costly, and rights conflicts that produce legal and moral uncertainty

[173] See Micah Schwartzman & Nelson Tebbe, Establishment Clause Appeasement, 2019 Sup. Ct. Rev. 271, 301–04 [hereinafter Schwartzman & Tebbe, Establishment Clause Appeasement]; Nelson Tebbe & Micah Schwartzman, The Politics of Proportionality, 120 Mich. L. Rev. 1307, 1334 (2022) [hereinafter Tebbe & Schwartzman, The Politics of Proportionality].

[174] See Schwartzman & Tebbe, Establishment Clause Appeasement, supra note 173, at 302–03.

[175] See Avishai Margalit, On Compromise and Rotten Compromises 16 (2010); Amy Gutmann & Dennis Thompson, The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It 25–29 (2012).

[176] See Tebbe & Schwartzman, The Politics of Proportionality, supra note 173, at 1334.

[177] See Gaus, Justificatory Liberalism, supra note 12, at 155–56, 278; Schwartzman, Completeness, supra note 12, at 208.

may be, too. If courts are faced with such conflicts, they may have no choice but to rely on second-order rules to resolve them. Up to this point, however, there has been relatively little work on second-order decision-making in theories of adjudication. Barzun and Gilbert's insight is that a conflict-avoidance approach could be used both to adjudicate hard cases and to reduce the incidence of legal conflicts in the future. That is a novel and important contribution to the understanding of second-order rules. But it should be tempered by a more comprehensive view of both the costs and benefits of hard cases. Legal conflicts are not like accidents, or at least not only like them. They can prompt moral deliberation, social contestation, and legal reform. Avoiding hard cases through a tilt toward private ordering also requires justification. There may be powerful reasons to prefer collective decision-making over markets. And there are alternative second-order rules that can facilitate democratic deliberation and participation. Even if some cases are uncertain or indeterminate—a claim that should be met with caution and perhaps skepticism—courts always have available to them a range of second-order rules or procedures. Conflict avoidance might be one option, but there will be others, which suggests the need for further and more systematic analysis of second-order rules, their justifications, and the conditions under which they are appropriately applied.